

**SUPREME COURT OF NIGERIA**  
FRIDAY 22ND FEBRUARY, 2002. SC. 143/1998  
**CORAM:- M. E. OGUNDARE, U. MOHAMMED,**  
**S. U. ONU, S. O. UWAIFO, E. O. AYoola, JJSC**

SHITTU ONIGBEDE & 8 ORS ..... APPELLANTS  
AND  
1. SAMUEL BALOGUN  
2. AYODELE OLOWOLEYE ..... RESPONDENTS

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LAND LAW - Family land - Failure to prove partition by plaintiff - Will not be fatal - As other branches of the family - Are not contesting his claim (H1)

JUDGMENTS - Slip - Effect - Court of Appeal's reference to defendants as trespassers - Is a slip which has not occasioned miscarriage of justice (H2)

LAND LAW - Visit to locus in quo - The visit is irrelevant - Since both parties filed identical plans - And there was no invitation to the judge - To conduct same (H3)

LAND LAW - Courts - Findings of fact - Findings made by trial judge - And affirmed by Court of Appeal - Have not been shown to be perverse (H4)

LAND LAW - Title - Proof - Burden on defendant - Since defendants claimed joint ownership of the land with plaintiffs - The burden of proving same has shifted to defendants (H5)

JUDGMENTS - Appeals - Misdirection - Effect - Since trial judge thoroughly evaluated evidence - Any misdirection by Court of Appeal - Will not affect judgment of trial court (H6)

APPEALS - Concurrent findings - Supreme Court will not interfere - Since lower courts rightly made findings - On traditional evidence of parties (H7)

FAIR HEARING - Breach - Allegation of - The complaint is unmeritorious - As Court of Appeal properly considered arguments of parties - And evidence before its conclusion (H8)

JUDICIAL PRECEDENTS - Authorities - Distinction - Anosike v. Igbeke - Since facts in the case law are different from that of present case - The same cannot be applied in this case (H9)

FAIR HEARING - Courts - Bias - Issue of bias cannot be raised - Simply because Akintan JCA had participated in earlier case between the parties - On a different issue (H10)

FAIR HEARING - Breach - Allegation of - Proof - For the allegation to succeed - Defendants must prove real likelihood of bias (H11)

### **FACTS**

Before the High Court of Edo State, plaintiffs/respondents sued defendants/appellants claiming a declaration of statutory right of occupancy to the land in dispute, forfeiture of rights and interest of appellants as customary tenants on the portion of land in dispute granted to them by respondents' family. They also sought for perpetual injunction restraining appellants from the land. At the trial, respondents contended that they are the owners of the disputed land and that appellants are their customary tenants.

Appellants on the other hand, claimed to be joint owners of the land with respondents. Previous litigations existed between the parties as a result of claim of appellants to be members of the same family with respondents. The Court of Appeal, Benin City had in Suit No. CA/B/131/88 decided in favour of respondents. At the conclusion of present suit, the court granted the claims of respondents. Appellants were not happy. Hence, they filed appeal at the Court of Appeal, Benin City. The court dismissed the appeal. Aggrieved further, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*2. Whether the Justices of Appeal were right in affirming the declaratory order that the land belong to the Respondents' Odoso family when the Respondent's case was that Urere the original settler on the land was survived by four children of which Odoso family is*

*only one but without any evidence of the partition of the land in dispute to the Odoso family?*

*3. Whether the lower court was not in error to have affirmed that the appellants are customary tenants of the respondents and order forfeiture against the main view of that Court's finding of trespass against the appellants and whether forfeiture was rightly granted against them?*

*4. Whether the Justices of Appeal were right to have waived the need for a visit to locus-in-quo by the trial Judge and the making of a findings of fact in respect of the features on the land.*

*5. Whether the Court of Appeal was right in deciding this case against the appellants on the ground that they did not prove where Urere settled on, the land when they are only defendants in the suit?*

*6. Whether their Lordships of the Appeal were not in error to affirm that Exhibit 'L' constituted estoppel against the Appellants in this case?*

*7. Whether their Lordships of Appeal were right in their conclusion that the trial High Court rightly decided the case on traditional evidence alone?*

*8. Whether the Appellants were given fair hearing and had their case properly considered by their Lordships of the appeal.*

*9. Whether the judgment delivered by the Appeal Court was not a nullity?*

**HELD** (Unanimously dismissing the appeal per **OGUNDARE JSC**)

*Family land - Failure to prove partition by plaintiff*

**1. However, will failure to prove partition be fatal to Plaintiffs' case? I rather think not. The Defendant's family is not one of the other three branches that descend from Urere. These other branches are not quarreling with the Plaintiffs in this action. I don't think it lies in the mouth of the Defendants to complain that Plaintiffs did not prove partition. As found by the two Courts below, Defendants are strangers to Urere and are not claiming entitlement to the land in dispute through any of the**

**other three branches of Urere family. I think Defendants are just busy-bodies in this respect. The evidence of PW3, Chief Thomas Aliu Bada of the Okereo branch of Urere family shows that the other branches are not disputing Plaintiffs' ownership of the land in dispute. This witness testified to the fact that his branch had boundary with the plaintiffs and that the land in dispute belonged to the latter. (p. 348 E)**

*JUDGMENTS - Slip - Effect*

**2. I think the Defendants took the two passages out of context. Plaintiffs' case is to the effect that Defendants were their customary tenants on the land in dispute. They led copious evidence in proof of this fact. The learned trial judge so found. The Court below affirmed his finding, and quite right too, in my respectful view. If the Court below referred to the Defendants as trespassers on the land it is obviously a slip which has not occasioned any miscarriage of justice in that the Plaintiffs did not claim, and were not awarded damages for trespass. They claimed forfeiture. (p. 349 A)**

*LAND LAW - Visit to locus in quo*

**3. I think this Issue is rather frivolous. The Defendants' complaint is that the learned trial Judge did not visit the locus in quo. It is not their complaint that they invited the learned judge to visit the locus in quo and he wrongfully declined. Both parties filed plans which, PW1 testified, are identical. No case has been made why the trial Judge must consider it judicious to visit the land in dispute. This issue is not worth further consideration. I resolve it against the Defendants. (p. 349 D)**

*Courts - Findings of fact*

**4. On the over-whelming evidence before him, the learned trial Judge found, and quite rightly too, that Igbede was not a son to Urere but Odoso (Plaintiffs' ancestor) was and that it was Urere who first settled on the land in dispute. On these findings the learned Judge accepted Plaintiffs' traditional history and found their claim to title proved on traditional evidence. The Court below affirmed the trial Court's findings. And their**

**conclusions have not been shown in this appeal to be perverse.** (p. 349 G)

*Title - Proof - Burden on defendant*

**5. It will not be correct to say that Defendants had no burden to prove anything. It must be remembered that by their pleadings they claim to be joint-owners of the land with the Plaintiffs. They, thereby, admitted Plaintiffs' ownership of the land. In the circumstance, the onus shifted on the Defendants to prove their co-ownership of the land with the Plaintiffs. This they failed to do. The Court below is, therefore, right when per Rowland JCA, it held that: "I hold the view that since the appellants as manifest from the record, gave evidence contrary to their pleading that Urere settled on the land in dispute on page 96 lines 32-33 of the record, which of course, supports the respondents' case, they have failed to discharge that burden which they have to discharge in order to succeed, that they are co-owners of the land in dispute with the respondent." I can find no such misdirection in the observation of the Court below to justify my interfering with its judgment. Issue 5 is resolved against the Defendants.** (p. 351 D)

*JUDGMENTS - Appeals - Misdirection - Effect*

**6. The learned Judge considered the evidence before him on traditional history, acts of ownership and conflicts in the evidence and came to the conclusion that the traditional evidence for the Plaintiffs was more plausible. He accepted it and found for the Plaintiffs. Whatever misdirection there may be in the judgment of the Court below on Exhibit L will not, in my respectful view, affect the soundness of the judgment of the learned trial Judge. The learned Judge found:**

**"I believe that Igbede was a total stranger to Urere and Urere's descendants. No blood relationship between them. In contrast, the Odoso was a son of Urere and the plaintiffs in my firm belief are, through trace of blood, members of Urere's family or Odoso's family. This conclusion of mine reduces to a mere farce defendants' claim that they and the plaintiffs originated from a common progenitor."**

**This conclusion he arrived at without reference to Exhibit L. And on the evidence before him, one cannot fault this finding.** (p. 352 H)

*APPEALS - Concurrent findings*

**B 7. I can find no reason to interfere with the concurrent findings of the two Courts below on traditional evidence of the parties. The rule in KOJO v. BONSIE (1957) 1 WLR 1223 at p. 1226 is not applicable where, as in this case, the traditional evidence led by one of the parties is so self-contradictory that no reasonable tribunal will act on it. Defendant's traditional evidence was rightly rejected and that of the Plaintiffs' was more acceptable and conclusive in establishing plaintiffs' claim to title to the land in dispute.** (p. 353 D)

*FAIR HEARING - Breach - Allegation of*

**E 8. I think this accusation of lack of fair hearing is unmeritorious. The learned Justice of the Court of Appeal began his judgment on page 222 of the record and made the above remark on page 229 after he had set out the arguments of the parties and was, in fact, considering Issue 1 in the appeal before him which read:**

**F "Whether or not considering the circumstance of this case the learned trial judge was right in ordering the forfeiture of all interests of the Appellants on the land in dispute."**

**After making the remark that is under attack, the learned Justice went on to consider pieces of evidence on the record and came to the conclusion that -**

**G "In other words the defendants' forebears were customary tenants, whilst the Odoso were the over-lords."**

**The case of OSHIYEMI v. AKINBE (1995) 2 NWLR 556, 568 is just not apt here. I can find no lack of fair hearing in the proceedings in the Court below.** (p. 354 A)

*JUDICIAL PRECEDENTS - Authorities - Distinction*

**H 9. I have read the cases cited to us by Mr. Okunloye, I do not find them to be on all four with the case on hand.**

**It cannot be disputed that the facts in the present case are**

**different to the facts in ERIOBUNA. The facts in ANOSIKE & ORS v. IGBEKE (supra) are similar to the facts in ERIOBUNA and it involved the same Judge. The Court of Appeal reached the same conclusion and nullified the proceedings of the Tribunal in that case too. These two cases are quite different to the case on hand. And much as I agree with the principles of law on fair hearing and ‘real likelihood of bias’ enunciated in the two cases, I do not necessarily agree that they apply to the case on hand. The facts in that case are quite different to the facts in the present case.** (pp. 356 E/357 E)

*FAIR HEARING - Courts - Bias*

**10. I cannot see how Akintan JCA’s participation in it at the Court of**

**Appeal, or at any level for that matter, can be said to raise a real likelihood of bias simply because he had participated in an earlier case between the parties on a different issue. Mr. Okunloye argues that the two actions are intractably interwoven. He appears to be blowing hot and cold. For in his argument on the issue dealing with Exhibit L (the earlier issue), he has submitted that Exhibit L is irrelevant to the present action that it did not decide what their Lordships of the Court below said it decided. Perhaps I may repeat the question Belgore JSC asked in ADEFULU & ORS. v. OKULAJA & ORS;**

**“Had the decision been in their favour would they have raised this big storm in a teacup?”** (p. 364 B)

*FAIR HEARING - Breach - Allegation of - Proof*

**11. It has not been suggested that Akintan JCA breached any of the principles enunciated by Belgore JSC in ADEFULU or by Lord Denning in LANNON’S case. All that the Defendants appear to be raising in this case is nothing but mere surmise or conjecture. That is not enough. There must appear to be a real likelihood of bias and that has not been shown in this case.**

**The conclusion I reach is that I can find no breach of any rule of fair hearing in this case.** (p. 364 E)

## NOTABLE POINT OF INTEREST

### **OGUNDARE JSC**

#### ***1. High court has jurisdiction to try land matters in urban or rural areas.***

B Learned counsel took this course in the light of the decision of this Court in ADISA v. OYINWOLA (2000) 10 NWLR 116, 178-179 which had held that the High Court had jurisdiction to try land matters whether situated in urban or rural area. Both issue 1 and Ground 1 are, accordingly, struck out by me. (p. 347 B)

C

### **REPRESENTATION**

O. Okunloye with Miss O. Awe, for the Appellants  
J. O. A. Ajakaiye for the Respondents

### **D CASES REFERRED TO**

Adisa v. Oyinwola (2000) 10 NWLR 116  
Efetoroje v. His Highness Okpalefe II (1991) 7 SCNJ 85  
Akinola v. Oluwo (1962) 1 All NLR 224  
Pepple v. Green (1990) 4 NWLR (Pt. 142) 108  
E Dime v. Grand Junction Canal (1852) 3 HLC 759  
Omoniyi v. Central School Board (1988) 4 NWLR 448  
Metropolitan Properties v. Lannon (1969) 1 Q.B 577  
Eriobuna v. Obiorah (1999) 8 NWLR 622  
F Anosike v. Igbeke (1999) 8 NWLR 686  
Kojo v. Bonsie (1957) 1 WLR 1223  
Adefulu & Ors v. Oyesile & Ors (1989) 5 NWLR (Pt. 122) 377  
Adefulu Ors v. Okulaja & Ors (1998) 5 NWLR 435  
Oshiyemi v. Akinbe (1995) 2 NWLR 556

G

### **STATUTE & RULES REFERRED TO**

National Assembly (Basic Constitutional and Transitional Provisions)  
Decree No. 5 1999 s. 26  
Federal High Court Rules, O. 22

H

### **LEAD JUDGMENT BY OGUNDARE JSC**

The Plaintiffs who are Respondents in this appeal sued the Defendants, now Appellants, claiming as per paragraph 38 of their



amended statement of claim-

*“(a) Declaration of Statutory right of occupancy to all that piece and parcel of land known as Odoso Family land situate, lying and being along Ikare-Owo Road, Ikare-Akoko, delineated on plan to be filed hereafter.*

*(b) Forfeiture of all the rights and interests whatsoever of the defendants as customary tenants on the portion of the aforesaid land granted to them by the Plaintiff’s family.*

*(c) Perpetual Injunction restraining the defendants, their servants, agents privies and all persons claiming by and through them from further entry on the said portion of Plaintiffs’ family land aforesaid.”*

Pleadings were filed and exchanged and, with leave of Court, amended. The Plaintiffs filed a reply to the Defendants’ amended statement of defence. The action proceeded to trial at which both sides led evidence in support of their respective case. At the conclusion of trial, and after addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found for the Plaintiffs and adjudged as hereunder:

*“Consequently, plaintiffs are awarded judgment for (a) a declaration of statutory right of occupancy to all that piece and parcel of land known as Odoso family land situate, lying and being along Ikare-Owo Road, Ikare-Akoko, delineated and edged ‘Red’ on the plan marked ‘A’ in these proceedings.*

*Forfeiture of all the rights and interests whatsoever of the defendants as plaintiffs customary tenants on the land in dispute described thus in paragraph 3 of plaintiffs’ amended statement of claim:*

*‘The land which is the subject matter of this suit is situate, lying and being along Ikare-Akoko which is within 5 miles of the township of Ikare, as shown on Survey Plan No FD/914 made by A. O. Adebogun, licensed Surveyor ciled with this State of Claim and thereon edged ‘RED’ is also ordered.*

*Plaintiffs are entitled to perpetual injunction and the same is accordingly granted.”*

The Defendants were displeased with this judgment and appealed to the Court of Appeal (Benin Division). That Court dismissed the appeal. They have further appealed to this Court. Their notice of appeal filed on 6/2/98 contained 16 grounds of appeal while the

notice of appeal filed on 16/2/98 contained 5 grounds of appeal. It is, however, the first notice of appeal that was exhibited to the motion papers brought before the Court below praying for a stay of execution of the judgment of that Court and for leave to appeal to the Supreme Court on grounds of facts and mixed law and fact, which prayers that Court granted on 5<sup>th</sup> March 1998. I shall, therefore, consider the notice of appeal filed on 6/2/98 and which the Court below, by order made on 5/3/98, deemed as properly filed and served, as the notice of appeal upon which this appeal is predicated.

Pursuant to the rules of this Court the parties filed and exchanged their respective briefs of argument. The Appellant's brief raised 9 issues as calling for determination in this appeal. The Plaintiffs, in their Respondents' brief, adopted the 9 issues. The issues are:

*"1. Whether the lower court was right in dismissing the appeal, when the trial High Court had no jurisdiction to try the case? Ground 1*

*2. Whether the Justices of Appeal were right in affirming the declaratory order that the land belong to the Respondents' Odoso family when the Respondent's case was that Urere the original settler on the land was survived by four children of which Odoso family is only one but without any evidence of the partition of the land in dispute to the Odoso family? Ground 2*

*3. Whether the lower court was not in error to have affirmed that the appellants are customary tenants of the respondents and order forfeiture against the main view of that Court's finding of trespass against the appellants and whether forfeiture was rightly granted against them? Grounds 3, 4, 5, 6, 10 and 11.*

*4. Whether the Justices of Appeal were right to have waived the need for a visit to locus-in-quo by the trial Judge and the making of a findings of fact in respect of the features on the land. Ground 7*

*5. Whether the Court of Appeal was right in deciding this case against the appellants on the ground that they did not prove where Urere settled on the land when they are only defendants in the suit? Ground 6.*

*6. Whether their Lordships of the Appeal were not in error to affirm that Exhibit 'L' constituted estoppel against the Appellants in this case? Ground 9*

*7. Whether their Lordships of Appeal were right in their conclusion that the trial High Court rightly decided the case on traditional evidence alone? Ground 12*

*8. Whether the Appellants were given fair hearing and had their case properly considered by their Lordships of the appeal.*

*9. Whether the judgment delivered by the Appeal Court was not a nullity? Ground 15'*

At the oral hearing of the appeal, Mr. Okunloye, learned counsel for the Defendants abandoned Issue 1 predicated on Ground 1 of the grounds of Appeal. Learned counsel took this course in the light of the decision of this Court in ADISA v. OYINWOLA (2000) 10 NWLR 116, 178-179 which had held that the High Court had jurisdiction to try land matters whether situated in urban or rural area. Both issue 1 and Ground 1 are, accordingly, struck out by me.

Before resolving the remaining issues placed before us, I need to give a resume of the facts in this case. The case of the Plaintiffs, in a nutshell, is that they are the owners of a large tract of land in Ikare area and that Defendants are their customary tenants over a portion of their land shown on their plan, Exhibit A. The defendants, on the other hand, claim that they are joint owners with the Plaintiffs of the land. There were previous litigations between the parties over the claim of the Defendants that they were members of the same family with the Plaintiffs, which the latter denied. The litigations eventually resulted in Plaintiffs' favour in Suit No. CA/B/131/88 where the Court of Appeal decided that the Defendants are not members of the Plaintiffs' family. I shall now proceed to consider issues 2-9.

Issues 2 - It is contended on behalf of the Defendants that the Court below was in error to affirm the declaration of statutory right of occupancy in the Plaintiffs in that they as Odoso family are not, by their pleadings, the sole owners of the land. It is argued that Plaintiffs claimed ownership through Urere, the first settler on the land who had four children, to wit, Ishakumi, Ehor, Okereo and Odoso. As there was no evidence of partition of Urere's land among his four children, it was wrong, so contended the Defendants, to grant declaration in favour of Odoso branch alone.

Mr. Ajakaiye, for the Plaintiffs, has argued in Respondents' brief that partition was pleaded by the Plaintiffs and was not specifically traversed by the Defendants, who must be taken as having ad-

mitted it. Learned counsel further argued that 1<sup>st</sup> Plaintiff gave evidence of partition. He also relied on the evidence of PW3 from Okereo branch and that of PW8, the Eledo.

The Plaintiffs, in the amended statement of claim, pleaded, inter alia:

B “4. *The land in dispute was settled upon by the ancestor of Odoso family, Urere from time immemorial.*

5. *After the partition of Urere family land amongst the children of Urere the land in dispute devolved on Odoso section of Urere family under native law and custom.*”

C The Defendants, in paragraph 2 of their amended statement of defence pleaded thus:

D “2. *The defendants deny paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25(i), (ii), (iii) & (v), 27, 34, & 36 and put plaintiffs to the strictest proof thereof.*”

It is true that the Defendants denied Plaintiffs’ averment that there was a partition of the land of Urere among his four children. Plaintiffs were thus under a duty to prove partition. I have considered the evidence led for the Plaintiffs; I cannot see where partition of Urere’s land was specifically proved. **However, will failure to prove partition be fatal to Plaintiffs’ case? I rather think not. The Defendant’s family is not one of the other three branches that descend from Urere. These other branches are not quarreling with the Plaintiffs in this action. I don’t think it lies in the mouth of the Defendants to complain that Plaintiffs did not prove partition. As found by the two Courts below, Defendants are strangers to Urere and are not claiming entitlement to the land in dispute through any of the other three branches of Urere family. I think Defendants are just busy-bodies in this respect. The evidence of PW3, Chief Thomas Aliu Bada of the Okereo branch of Urere family shows that the other branches are not disputing Plaintiffs’ ownership of the land in dispute. This witness testified to the fact that his branch had boundary with the plaintiffs and that the land in dispute belonged to the latter.**

H I resolve Issue 2 against the Defendants.

Issue 3 - Defendants’ complaint is that the Court below made two contradictory findings. In one breadth, it is argued, the Court found that Defendants were trespassers and in another breadth, it

found them to be customary tenants of the plaintiffs.

***I think the Defendants took the two passages out of context. Plaintiffs' case is to the effect that Defendants were their customary tenants on the land in dispute. They led copious evidence in proof of this fact. The learned trial judge so found. The Court below affirmed his finding, and quite rightly too, in my respectful view. If the Court below referred to the Defendants as trespassers on the land it is obviously a slip which has not occasioned any miscarriage of justice in that the Plaintiffs did not claim, and were not awarded damages for trespass. They claimed forfeiture.*** In my respectful view, Defendants are only looking for any straw to hang on to in order to have the judgments of the two Courts below upturned. I find no substance in grounds 3, 4, 5, 6, 10 & 11 of the grounds of appeal on which Issue 3 hangs.

Issue 4 - ***I think this Issue is rather frivolous. The Defendants' complaint is that the learned trial Judge did not visit the locus in quo. It is not their complaint that they invited the learned judge to visit the locus in quo and he wrongfully declined. Both parties filed plans which, PW1 testified, are identical. No case has been made why the trial Judge must consider it judicious to visit the land in dispute. This issue is not worth further consideration. I resolve it against the Defendants.*** Ground 7 fails.

Issue 5 - Plaintiffs' case is that their ancestor Urere was the first settler on the land in dispute on his migration from Ile-Ife. Defendants on the other hand, pleaded that Urere was Igbede's father but it was Igbede, their ancestor who first settled on the land in dispute. ***On the over-whelming evidence before him, the learned trial Judge found, and quite rightly too, that Igbede was not a son to Urere but Odoso (Plaintiffs' ancestor) was and that it was Urere who first settled on the land in dispute. On these findings, the learned Judge accepted Plaintiffs' traditional history and found their claim to title proved on traditional evidence. The Court below affirmed the trial Court's findings. And their conclusions have not been shown in this appeal to be perverse.***

Defendants' case on traditional history in a bundle of contra-

dictions. While they pleaded in paragraph 10 of their statement of defence that it was Igbede, their ancestor who settled on the land in dispute, 5<sup>th</sup> defendant, Chief Amos Akinsuru Olofin in his evidence testified thus:

B *“Igbede was not the only issue of Urere. Urere had two more  
namely (1) Ishakunmi (2) Eho. These three children were born at  
Ile-lfe before Urere left Ile-lfe. The three children of Urere had each  
attained puberty before they left Ile-lfe with their father. They came  
from Ile-lfe and settled at Ikare. When they got to Ikare, Igbede, one  
C of the three children of Urere, settled at the place name Sakunmi  
and Igbede settled at the place called Igbede and Eho settled at Eho.”*  
He was silent as to where Urere, the father settled. But under cross-examination, he deposed:

D *“Igbede first settled on the land in dispute. Urere settled at  
Edo, whilst Igbede settled on the land in dispute. The land in dispute  
is part of Edo. Urere brought Igbede, Sakunmi and Eho from Ile-lfe  
to Edo. Igbede settled on the land in dispute Sakunmi occupied part  
of Edo. Eho occupied another part of Edo. Igbede settled on an-  
other part of Edo which part is now in dispute. I agree that the por-  
E tion in dispute now formed part of the land settled upon by Urere.”*

It is in the light of the Defendants’ confused case that the Court below, per Rowland JCA, observed:

F *“It must be mentioned that the 7<sup>th</sup> appellant in his evidence,  
under cross-examination, agreed that Urere settled on the land in  
dispute, a fact they did not plead, which supports the respondents’  
case. At page 96 lines 32 to 33, the 7<sup>th</sup> appellant in answer to cross-  
examination said:-*

G *‘I agree that the portion in dispute now formed part of the  
land settled upon by Urere.’*

H *There is no doubt that the respondents are entitled to the  
benefit of the appellants’ case which supports their own case. See  
EFETOROJE v. HIS HIGHNESS OKPALEFE II (1991) 7 SCNJ. 85  
at 94; AKINOLA v. OLUWO (1962) 1 All NLR 224 at 225. The ap-  
pellants in paragraph 10 of their amended statement of defence,  
alleged that Igbede, their ancestor, settled on the land in dispute. But  
the same appellants in paragraph 7 of their amended statement of  
defence alleged that their ancestor was Urere and that Urere came  
down from Ife along with his children, Igbede, Ishakumi and Ehor*

and that each of the children settled in places which bear their names.

It, therefore, became necessary for the appellants to plead and prove where Urere, their ancestor settled upon on arrival from Ife. They carry the burden of pleading and proving that they are the owners of the land in dispute, since appellants in my view are estopped by the judgment in appeal No. CA/B/13/88, *BALOGUN & ANOR. v. SHITTU ONIGBEDE & ORS.* (Exhibit L) pleaded in paragraph 12 of the Reply to the Amended Statement of Defence from asserting their relationship with Urere.”

I think they are right in their observation. Defendants’ case in no small measure, assisted Plaintiffs’ case. It is little wonder that the learned trial Judge found:

“Couple that evidence of 7<sup>th</sup> defendant with his other testimony that the corpse of Urere was not buried under any part of the disputed parcel of land, but at Shakunmi, an averment which contradicts part of paragraph 20 of the amended statement of defence.

I can not but agree with the plaintiffs that Urere founded the parcel of land put in litigation now.”

**It will not be correct to say that Defendants had no burden to prove anything. It must be remembered that by their pleadings they claim to be joint-owners of the land with the Plaintiffs. They, thereby, admitted Plaintiffs’ ownership of the land. In the circumstance, the onus shifted on the Defendants to prove their co-ownership of the land with the Plaintiffs. This they failed to do. The Court below is, therefore, right when it, per Rowland JCA, held that -**

**“I hold the view that since the appellants as manifest from the record, gave evidence contrary to their pleading that Urere settled on the land in dispute on page 96 lines 32-33 of the record, which of course, supports the respondents’ case, they have failed to discharge that burden which they have to discharge in order to succeed, that they are co-owners of the land in dispute with the respondent.”**

**I can find no such misdirection in the observation of the Court below to justify my interfering with its judgment. Issue 5 is resolved against the Defendants.**

Issue 6 - The complaint here is that the Court below ascribed to Exhibit L, the judgment of the Court of Appeal in Suit No. CA/B/

131/88 between the Plaintiffs and the Defendants, what the Court of Appeal did not decide and thereby made wrong use of the judgment in finding against the Defendants. I have examined the complaint of the Defendants very carefully. I think their complaint is to some extent well founded. Exhibit L did not say directly that the Defendants  
 B have no blood relationship with Urere. What that case decided is that the Defendants” “*do not belong to and are not members of Odo-Oso family*” that is, the Plaintiffs. The judgment in Exhibit L was given on 11<sup>th</sup> January 1991. In spite of that decision, however, defendants were still, on 17<sup>th</sup> September 1991, pleading in paragraphs  
 C 6 and 8 thus:

“6. *Igbede Community consists of ten units or families reflecting the ten children of Igbede viz: Oka-Asa, Odalure, Odekolofoin, Ode-Asii, Ode-Alu, Odo-Oso (i.e. the plaintiffs) Odeolori, Odeagbari,*  
 D *Odeosoro and Odemoku.*

8. *The ten children of Igbede (including the plaintiffs) occupied and still occupy Igbede Quarter till today, with the descendants of each of the ten children occupying their own area of Igbede.”*

Exhibit L has, at least, put in doubt the correctness of the  
 E above averments. For the Court, per Omo JCA as he then was, observed:

“*It cannot therefore be said that the respondents (that is, Defendants) proved satisfactorily that Urere is their progenitor. In contrast, the appellants (that is, plaintiffs) on record established their direct connection with Urere. Although the claim here is not for a declaration of title, proof of genealogy is an important and crucial issue in this case. The principle that where a line of succession is not satisfactorily traced in an action for declaration of title because it has*  
 F *gaps or mysterious linkages or no nexus, it should be rejected, must be also applicable here.*” (Words in brackets are mine)  
 G

The learned trial Judge who made primary findings of fact in this case made limited, if at all, use of Exhibit L in coming to his conclusion. He said:

H “*I like to stop, meanwhile, my comments on Exhibit L and its bearing on the case before me. I should treat what I regard as my web of beliefs.*”

**The learned Judge considered the evidence before him on traditional history, acts of ownership and conflicts in the**



**evidence and came to the conclusion that the traditional evidence for the Plaintiffs was more plausible. He accepted it and found for the Plaintiffs. Whatever misdirection there may be in the judgment of the Court below on Exhibit L will not, in my respectful view, affect the soundness of the judgment of the learned trial Judge. The learned Judge found:** B

***“I believe that Igbede was a total stranger to Urere and Urere’s descendants. No blood relationship between them. In contrast, the Odoso was a son of Urere and the plaintiffs in my firm belief, are, through trace of blood, members of Urere’s family or Odoso’s family. This conclusion of mine reduces to a mere farce defendants’ claim that they and the plaintiffs originated from a common progenitor.”*** C

**This conclusion he arrived at without reference to Exhibit L. And on the evidence before him, one cannot fault this finding.** D

I resolve Issue 6 against the Defendants.

Issue 7 - I have considered the submissions in the Appellants’ brief on this Issue. I regret I find no substance in them. ***I can find no reason to interfere with the concurrent findings of the two Courts below on traditional evidence of the parties. The rule in KOJO v. BONSIÉ (1957) 1 WLR 1223 at p. 1226 is not applicable where, as in this case, the traditional evidence led by one of the parties is so self-contradictory that no reasonable tribunal will act on it. Defendant’s traditional evidence was rightly rejected and that of the Plaintiffs’ was more acceptable and conclusive in establishing plaintiffs’ claim to title to the land in dispute.*** E

Issue 7 is resolved against the Defendants.

Issue 8 - Rowland, JCA in his lead judgment in the Court below said: G

***“Without much ado, I venture to say that it is manifest from the record that the appellants are customary tenants of the respondents on the land in dispute.”***

This passage has come under attack in this appeal. It is argued that by this passage the Court below had determined the appeal before considering the complaints of the Defendants against the judgment of the trial court, thereby robbing them of the fair hearing of their appeal. It is argued that all issues placed before the Court below revolved on whether Defendant were customary tenants of H

the Plaintiffs and this issue was resolved ever before the Defendants' complaints in the appeal before that Court had been looked into.

***I think this accusation of lack of fair hearing is unmeritorious. The learned Justice of the Court of Appeal began his judgment on page 222 of the record and made the above remark on page 229 after he had set out the arguments of the parties and was, in fact, considering Issue 1 in the appeal before him which read:***

***"Whether or not considering the circumstance of this case the learned trial judge was right in ordering the forfeiture of all interests of the Appellants on the land in dispute."*** After making the remark that is under attack, the learned Justice went on to consider pieces of evidence on the record and came to the conclusion that -

***"In other words the defendants' forebears were customary tenants, whilst the Odoso were the over-lords."***

***The case of OSHIYEMI v. AKINBE (1995) 2 NWLR 556, 568 is just not apt here. I can find no lack of fair hearing in the proceedings in the Court below.*** I resolve Issue 8 against the Defendants.

Issue 9 - The thrust of the argument on this issue runs thus:

***"Honourable Justice S. A. Akintan who presided over the appeal in this case ought not to have sat in the appeal in that he had sat over and decided a part of this case herein before as a Judge of the High Court. Having done this, at a time past, his Lordship ought not to have sat in appeal over a case that was a continuation of the case he had previously decided."***

What are the facts relied on in support of this attack on the learned Justice of the Court below? In the action that went on appeal to the Court of Appeal in Suit No. CA/B/131/88 (Exhibit L), the present Plaintiffs had sued the present defendants in the Akoko North Grade 1 Customary Court claiming -

***"(1) a declaration that the defendants who belong to Igbede quarter of Ikare and have persistently claimed to be members of the plaintiffs' family and are pretending and parading themselves as such do not belong to the plaintiffs' said family known as Odo-Oso family; (2) a perpetual injunction restraining the defendants and their agents people of Igbede quarter of Ikare from claiming and pretend-***

*ing to be members of the said Odo-Oso family or parading themselves as such."*

The Plaintiffs lost and appealed to the high Court, Ikare, presided over by Akintan J, as he then was. Akintan J. heard the appeal and dismissed it. The Plaintiffs then appealed to the Court of Appeal where they succeeded. Plaintiffs commenced the present action in the High Court, Ikare in 1981. They won. The Defendants appealed to the Court of Appeal, Benin Division where Akintan JCA participated at the hearing of the appeal. The Plaintiffs again won. On further appeal to this Court, the Defendants are now complaining that in view of the fact that Akintan J. presided over the appeal in the High Court Ikare in the earlier suit, he should not have participated at the hearing of the appeal in the present matter at the Court of Appeal. By so doing, it is submitted, the later Court was not properly constituted when it heard and determined the appeal. It is argued that the issues in the two cases are "*intractably related and interwoven that it would be said to be one and the same thing.*" It is further argued that:

*"In that wise, justice requires that his Lordship who had sat in deciding the first case at one point or the other in the High Court, ought not to have sat in the appeal against the second case at the Court of Appeal. The thinking is simply this, could he be said to have been independent in the circumstance having taking (sic) a position in a judicial determination of the first issues? We think the answer is No. The requirement of justice does not require that it should be proved that his Lordship was actually bias (sic) in this case but that the ordinary man in the street should not go away thinking that the judgment (sic) may have been biased. See: PEPPLER v. GREEN (1990) 4 NWLR (Pt. 142) 108 DIME v. GRAND JUNCTION CANAL (1852) 3 HLC 759. It is not a case that his Lordship could not sit over difference cases instituted by or against the appellants, but that these two cases are construable as one and the same."*

And in oral submissions, Mr. Okunloye learned counsel for the Plaintiffs argued that by Akintan J.C.A. taking part in the appeal in the Court of Appeal, the stream of Justice was not clear. He further submitted that there was a real likelihood of bias against Akintan JCA. In the Reply Brief, it is disclosed that Akintan J. as he then was, when the present matter was before the high Court, revoked an injunction

placed on both sides from alienating the land in dispute. This disclosure is in an affidavit. There is nothing on record to support it. If Defendants had wanted to build their case on it they would have, with leave of Court, filed a supplementary record to show the circumstances leading to such alleged participation. I shall ignore the  
B allegation.

Finally, we are urged to follow OMONIYI v. CENTRAL SCHOOLS BOARD (1988) 4 NWLR 448, 464; where the dictum of Lord Denning MR in METROPOLITAN PROPERTIES v. LANNON  
C (1969) 1 Q.B 577, 599 was cited with approval; ERIOBUNA v. OBIORAH (1999) 8 NWLR 622 and ANOSIKE v. IGBEKE (1999) 8 NWLR 686

It is submitted in the Respondents' brief that as Akintan JCA did not sit on the present matter, at any level before the Court of  
D Appeal, he was not precluded from sitting on it in the Court of Appeal and that that Court was properly constituted. It is argued thus:

*"I humbly submit that on the facts as presented here it is the respondents that should raise objection to His Lordship sitting on the appeal because of His Lordship's view on Exhibit 'L' when it came on  
E appeal before him at the High Court. There cannot be said to be any miscarriage of justice in this present appeal proceedings, based on Exhibit 'L'."*

***I have read the cases cited to us by Mr. Okunloye. I do not find them to be on all fours with the case on hand.***  
F OMONIYI v. CENTRAL SCHOOL BOARD (supra), the conduct of the trial Judge in the course of the trial, his hostility to the plaintiff before him, all of which were apparent on the record, led the Court of Appeal to the conclusion that there had been no fair hearing.

G In ERIOBUNA & ORS v. OBIORAH (supra), the Appellant contested the 1999 senatorial election on the platform of the PDP and won. The respondent who felt aggrieved applied ex parte to the Federal High Court Abuja presided over by Auta J for a mandatory injunction directing the 2<sup>nd</sup> appellant (INEC) to accept him as the  
H PDP candidate for the said election in Anambra South Senatorial Constituency of Anambra State, pending the final determination of the motion on notice and an interim injunction restraining the INEC from holding out the 1<sup>st</sup> appellant as the senatorial candidate for the said election. Auta J made the orders as prayed. Subsequently how-

ever, the learned Judge declined jurisdiction in the case relying on section 26 of the National Assembly (Basic Constitutional and Transitional Provisions) Decree No. 5 of 1999, although he made far reaching remarks on the conduct of INEC. Invoking Order 22 of the Federal High Court Rules, the learned Judge transferred the case to the “*appropriate tribunal*” which was the National Assembly Election Tribunal, Awka. Auta J became the Chairman of the Tribunal and sat in that capacity to hear the matter. At the trial the case file in the earlier case on the matter in the Federal High Court was admitted in evidence. The respondent had petitioned challenging the election of the 1<sup>st</sup> appellant. On the matter coming before the Tribunal the 1<sup>st</sup> appellant filed a motion contesting the competence of the Chairman (Auta J) to hear the petition on the ground that he had earlier heard the matter at the Federal High Court and ruled on it. The motion was not taken by the Tribunal. The petition of the respondent proceeded to trial at the conclusion of which the Tribunal ruled in the petitioner/respondent’s favour. The appellants appealed to the Court of Appeal. The Appeal Court ruled that the trial was tainted with a real likelihood of bias and nullified the proceedings of the Tribunal.

***It cannot be disputed that the facts in the present case are different to the facts in ERIOBUNA. The facts in ANOSIKE & ORS. v. IGBEKE (supra) are similar to the facts in ERIOBUNA and involved the same Judge. The Court of Appeal reached the same conclusion and nullified the proceedings of the Tribunal in that case too. These two cases are quite different to the case on hand. And much as I agree with the principles of law on fair hearing and ‘real likelihood of bias’ enunciated in the two cases I do not necessarily agree that they apply to the case on hand.***

The last case I need consider is METROPOLITAN PROPERTIES CO. LTD. v. LANNON (*supra*). This is a case where the Chairman of a Rent Tribunal, a solicitor, was held on the facts either to have a direct pecuniary interest in the subject-matter or was biased in favour of one side or against the other. ***The facts in that case are quite different to the facts in the present case.*** But the principle of law enunciated by Lord Denning MR remains unimpeachable. The noble and learned Master of the Rolls declared:

“...considering whether there was a real likelihood of bias,

*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 he 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 REG v. HUGGINS (1895) 1 Q.B. 563; and REX v. SUNDERLAND JUSTICES, (1901) 2 K.B. 357, C.A. per Vaughan Williams L.J. Ibid 373. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see REG. v. CAMBORNE JUSTICES, EX PARTE PEARCE (1955) 1 Q.B... 41, 48-51; (1954) 3 W.L.R. 415; 2 All E.R. 850. D.C. and REG. v. NAILS WORTH LICENSING JUSTICES, EX PARTE BIRD. (1953) 1 W.L.R. 1046; (1953) 2 All E.R. 652, D.C. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side fairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'* (Underlining are mine)

I think that case that can be said to be on all fours with the present case is ADEFULU ORS v. OKULAJA & ORS. (1998) 5 NWLR 435. There was a vacancy in the Olofin of Ilisan Remo Chieftaincy and an attempt was made to fill it. In accordance with the Chiefs Law of Ogun state and the chieftaincy declaration relating to the title, the ruling house whose turn it was to present a candidate or candidates for consideration by the kingmakers was invited to do so by the Secretary of the Remo Local Government. The family met and considered 6 candidates. Four of the candidates each scored 82 votes with 15 against. Each of the remaining two candidates including Adefulu, scored 15 votes for and 82 against. Consequent on the voting pattern a certificate was prepared and signed by the head of family nominating the four candidates that had majority voting in their favour. The certificate and the minutes of the family meeting were forwarded

to the Kingmakers for their consideration. The king makers met and considered not only the four candidates whose names appeared on the certificate but also the other two candidates who failed to secure majority voting in favour of their nomination. At the end of their deliberation the kingmakers appointed Adefulu and forwarded his name to the Governor for approval. The Governor approved. B

The ruling family, being aggrieved, instituted an action in the High Court of Ogun state challenging both the appointment and approval of Adefulu as the Olofin of Ilishan Remo upon the grounds (a) that he was not a member of the ruling family and (b) that he was not nominated by the family for consideration by the kingmakers. C The trial court found against the plaintiffs and dismissed their action. The plaintiffs appealed to the Court of Appeal (Ibadan Division) which Court consisting of Omo, Ogundare and Onu JJCA (as they were then) found (1) that Adefulu was a member of the ruling family and D (2) that he was, however, not nominated by the ruling family as a candidate for consideration by the kingmakers and consequently, his appointment and the approval of that appointment were null and void. The Court allowed the appeal and set aside Adefulu's appointment. This was suit No. CA/I/122/85. There was an appeal to the E Supreme Court against the part of the judgment of the Court of Appeal nullifying the appointment of Adefulu. The plaintiffs in the case cross-appealed against that part of the judgment that found that Adefulu was a member of the ruling family - Agaigi ruling family. The F Supreme Court dismissed both the appeal and cross-appeal, thus affirming the judgment of the Court of Appeal.

Following the Supreme Court judgment, the Secretary to the Local Government in the belief that the whole exercise had to be commenced de novo, addressed a letter to the Agaigi ruling family G calling on it to present candidate or candidates for consideration by the Kingmakers. There was a split in the family. A splinter group nominated Adefulu and forwarded his name to the Kingmakers who appointed him the Olorin of Ilishan Remo and forwarded same to the Governor for approval. At this stage, the plaintiffs once again sued H Adefulu and the kingmakers, as defendants, claiming a declaration that the nomination of Adefulu and his appointment by the kingmakers were null and void and seeking an injunction. The action was heard by the High Court of Ogun State and dismissed. On appeal to the

Court of Appeal (Ibadan Division) in Suit No. CA/I/204/90 the court allowed the appeal holding that the exercise should not have been begun afresh but that the kingmakers should have met to consider the list of four candidates forwarded to them by the Agaigi ruling family in 1981. The Court consisting of Ogwuegbu JCA (as he then was), Salami and Danlami Muhammad JJCA nullified the nomination and appointment of Adefulu. The defendants in the case appealed to the Supreme Court against the decision. This Court consisting of Belgore, Kutigi, Ogundare, Mohammed and Onu JJSC by majority (Kutigi JSC dissenting) dismissed the appeal and affirmed the judgment of the Court of Appeal.

Subsequent to this judgment, Adefulu, as applicant, brought an application before the Supreme Court seeking to set aside and declare a nullity, the judgment of the Supreme Court given on 13<sup>th</sup> December 1996 on the ground that “there was a fundamental defect which goes to the issue of jurisdiction and competence of the court on the day when the appeal was heard and the said judgment was delivered.” The motion prayed as follows:

“1. An order setting aside the judgment of this Honourable Court delivered on the 13<sup>th</sup> day of December, 1996 as there was a fundamental defect which goes to the issue of jurisdiction and competence of the court on the day when the appeal was heard and the said judgment was delivered.

2. FURTHER, OR IN THE ALTERNATIVE, an order that the said judgment is a nullity by reason of the fact that the adjudicating tribunal was not constituted in such a manner as to secure its independence and impartiality in view of the subject matter and antecedents of the suit and the nature of the inquiry the Supreme Court was called upon to conduct.

3. FURTHER, AN ORDER that the said appeal be restored to the cause list and the appeal again set down and heard de novo before a panel of justices so constituted as to exclude the Justices (Ogundare and Onu, JJSC) whose participation has rendered the judgment complained of null and void.

4. SUCH FURTHER ORDER(S) as this Honourable Court may deem fit to make.

5. AND FURTHER TAKE NOTICE that at the hearing of this application the applicant will rely on the unreported judgment of the



Court of Appeal No. CA/1/122/85 dated 25 June, 1987 and that of the Supreme Court reported in (1989) 5 NWLR (Pt. 122) 377 as well as and in particular, the supporting affidavit to this application.’

The grounds for the application as stated in the motion paper are:

‘(i) That their Lordships Ogundare and Onu, JJSC. Who respectively read the lead and supporting judgments in this case also read the lead and supporting judgment in Appeal No. CA/1/122/85 which judgment was upheld by the Supreme Court in ADEFULU & ORS. v. OYESILE & ORS (1989) 5 NWLR (Pt. 122) 377 and the main burden of the judgement now sought to be set aside was to conduct an inquiry as to whether on the tenor of the ADEFULU v. OYESILE case the applicant is precluded from being subsequently presented for consideration as the Olofin of Ilishan-Remo; there was a likelihood of bias.

(ii) That the membership of the said 2 justices in the panel of Justices in Appeal No. CA/1/122/85 is a factor which was not visible in the split decision of the Supreme Court in Appeal No. SC. 56/93 or to those present in court when the said appeal to the Supreme Court was heard and determined.’

The motion further seeks a further and / or alternative order that the case be struck out because:

“The trial court, the Court of Appeal and the Supreme Court had no jurisdiction to have entertained the action which led to the judgment of the Supreme Court in this suit (Suit No. SC/56/96) on 13 December, 1996.’

The grounds for the alternative order, as stated in the motion paper, are:

‘(i) None of the courts in the hierarchy of courts above has jurisdiction to interpret the judgment of the Supreme Court in Suit No. SC.5/1988) delivered on 8 December, 1989.

(ii) None of the said courts, particularly the courts inferior to the Supreme Court has the competence to re-determine what has been determined by Supreme Court in Suit No SC/5/1988.

(iii) The Courts inferior to the Supreme Court only have jurisdiction to enforce the said judgment of the Supreme Court in Suit No. SC/5/1988.”

The motion was unanimously dismissed by the Court.

In the lead ruling of Belgore JSC., the learned Justice of the Supreme Court observed:

*“This now takes me to the question pertinent to this motion. When is a judge precluded from hearing a case? The answer to this is simple: it is when he has personal interest when he would seem to be a judge in his own matter; or when having dealt with the same issue and it comes or resurfaces when he is in a superior court and is being called upon to decide an appeal against his own decision; or because of some obvious or latent connection of his with either of the parties or all of them, it would not be conscionable of him to participate in hearing the case or generally his being a member of the tribunal would not appear to be in the interest of justice as he will not be seen to do justice.”*

The learned Justice of the Supreme Court went on to say:

*“As explained earlier, this motion is misconceived as the two cases exhibited are not in respect of the same suit that originated in the trial court- they are two separate cases each originated by a writ of summons followed by pleadings. One was not for interpretation of the other. The first case declared an appointment a nullity; the second also did the same but each was in respect of separate faulty nomination of Olofin of Ilishan-Remo. Several authorities were cited by all the parties - from IROEGBU v. URUM (1981) 4 SC 18; REX v. SUSSEX JUSTICES (1924) 1 KB 256, 257; ARIORI v. ELEMOT (1983) 1 SCNLR 1; (1983) 1 SC 13, 57; PETRO JESSICA ENTERPRISES LTD. v. LEVENTIS TECHNICAL CO. LTD (1992) 5 NWLR (Pt. 244) 675 to ADIO v. A-G OYO STATE (1990) 7 NWLR (Pt. 163) 448 by the applicants and MADUKOLU v. NKEMDILIM (1962) 2 SCNLR 341 and ABIOLA v. FEDERAL REPUBLIC OF NIGERIA (1995) 7 NWLR (Pt. 405) 1, 14, 15, 16 by the respondents - they are cases not nearly on all fours with the present application in that each concerned judge dealing with the same cases unlike this dealing with two distinct cases.”*

Kutigi JSC in his ruling explained -

*“It is true that Ogundare and Onu, JJSC., respectively read the lead and supporting judgments in this appeal (SC.56/1993) on 13<sup>th</sup> December, 1996, but none of them was involved in the case either in the trial High Court or in the Court of Appeal. It is again true*

that Ogundare and Onu, JJCA (as they then were) also read the lead and supporting judgments in Appeal No:CAI/122/85 which judgment was again confirmed by the Supreme Court on 8<sup>th</sup> December, 1989, (Appeal No. SC/5/1988), but again none of them was even a member of the Supreme Court then and therefore none of them could have sat in the panel which confirmed their judgments. B

In SC. 5/1988, this court confirmed the decision of the Court of Appeal to the effect amongst others, that the appointment, approval and installation of TIMOTHY ADEILO ADEFULU (APPLICANT HEREIN) as the Olofin of Ilshan-Remo was irregular, unlawful, null and void. In SC/56/1993, this court against upheld the decision of the Court of Appeal that the existing vacancy in the stool should be filled from the list of nominations made by Agaigi ruling house in 1981 and which the kingmakers brushed aside and proceeded to select the applicant herein who was not nominated by the ruling house. D  
The issues in each of the two cases that is SC.5/1988 and SC. 56/1993 are clearly different even if related. I am, therefore, unable to see any sin committed by any of the two Justices, Ogundare and Onu, JJ.SC., to warrant setting aside the judgment of this court delivered on 13/12/96 (SC.56/1993), or to declare the said judgment a nullity. I think their participation in the said appeal was quite proper.” E

In my ruling in that case I gave a similar explanation. I went on to consider a number of English authorities where judges have been known to sit on appeal when their judgments at the trial were being considered. I, however, observed: F

“While the practice in the English courts may not put into question their impartiality, it is important to mention that that practice is not followed in this country. It is not the practice here for a judge to sit in the appellate court when his judgment at the trial Court is being questioned on appeal. That, of course, is not the situation here. On the facts of this application, I can see no infringement of the provisions of section 33(1) of the Constitution.” G

I need point out that the English practice is not novel in this country either. For the Nigerian Law Reports are replete with cases where a judge who had sat on a case had been known to sit on the Full Court to review his decision. A few examples will suffice. In AMACHREE v. DANIEL KALIO & ORS 2 NLR 108; Webber J who tried the case in the Divisional Court was a member of the Full Court H

(coram: Speed CJ, Ross & Webber JJ) that sat on appeal against his judgment. In *AMODU TIJANI v. THE SECRETARY, SOUTHERN PROVINCES* 3 NLR 24 Speed CJ tried the case at the Divisional Court and later was a member of the Full Court (coram: Speed CJ, Ross, Webber & Pennington JJ) that heard the appeal in the matter.

B In the present case, the matter that came before Akintan J. on appeal in the High Court had to do with whether Defendants were, or were not, members of Odo-Oso family. The present action is a straight forward land case dealing with the competing titles of the parties. ***I cannot see how Akintan JCA's participation in it at the Court of Appeal, or at any level for that matter, can be said to raise a real likelihood of bias simply because he had participated in an earlier case between the parties on a different issue. Mr. Okunloye argues that the two actions are intractably interwoven. He appears to be blowing hot and cold. For in his argument on the issue dealing with Exhibit L (the earlier issue), he has submitted that Exhibit L is irrelevant to the present action and that it did not decide what their Lordships of the Court below said it decided. Perhaps I may repeat the question Belgore JSC asked in ADEFULU & ORS. v. OKULAJA & ORS.***

***"Had the decision been in their favour would they have raised this big storm in a teacup?"***

F ***It has not been suggested that Akintan JCA breached any of the principles enunciated by Belgore JSC in ADEFULU or by Lord Denning in LANNON'S case. All that the Defendants appear to be raising in this case is nothing but mere surmise or conjecture. That is not enough. There must appear to be a real likelihood of bias and that has not been shown in this case.***

***The conclusion I reach is that I can find no breach of any rule of fair hearing in this case.*** I resolve Issue 9 against the Defendants.

H All the issues canvassed having been resolved against the defendants, their appeal fails and it is hereby dismissed by me with N10,000.00 costs to the Plaintiff/Respondents.

**MOHAMMED JSC**

I will also dismiss the appeal for the reasons given in the lead judgment, the draft of which, my learned brother, Ogundare, J.S.C, permitted, me to read before now. I have nothing more to add as an additional opinion. The appeal is dismissed. I award N10,000.00 costs in favour of the respondents. B

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**ONU JSC**

I had the opportunity of reading before now the judgment of my learned brother Ogundare, JSC just delivered. I entirely agree with his reasoning and conclusion that the appeal lacks merit. Accordingly, I too dismiss it and make similar consequential orders inclusive of those as to costs contained therein. C

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**UWAIFO JSC**

I have had the privilege of reading in advance the judgment of my learned brother Ogundare JSC. I agree with it for the way he resolved the issues canvassed. I too dismiss the appeal and abide by the order for costs made by my learned brother Ogundare JSC. D

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**AYOOLA JSC**

I agree that this appeal should be dismissed for the reasons given in the judgment of my learned brother, Ogundare, JSC, which I have had the privilege of reading in advance. Accordingly, I too dismiss the appeal with costs as ordered by him. F

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