

**SUPREME COURT OF NIGERIA**  
FRIDAY 20TH SEPTEMBER, 2002. SC. 112/98  
**CORAM: M. E. OGUNDARE, U. MOHAMMED,**  
**S. O. UWAIFO, E. O. AYOOLA, N. TOBI, JJSC**

1. T. M. ORUGBO
  2. THOMPSON ADINI ..... APPELLANTS  
(For themselves and on behalf of)  
Ureju Community)
  - AND
  1. BULA RAUNA
  2. TAGHA NKOKO
  3. EYEWUOMA EGBEYIFO
  4. WILLIE PATAMINI
  5. GEORGE PATAMINI
  6. SHOEMAKER WILLIE ..... RESPONDENTS
  7. ANTHONY
  8. ADAM
  9. AMAKUROEBOSA
  10. ROBERT BRADUNU
  11. FREDRICK BULARA
- 

FAIR HEARING - Fundamentality of - Breach of fair hearing nullifies the whole proceedings - No matter how well conducted (H1)

FAIR HEARING - Principle - Test - The test is whether justice was done - From the impression of a reasonable person - Present at the trial (H2)

ACTIONS - Evidence - Number of witness - All parties to an action must not give evidence - As parties are free to pick witnesses - They think can give cogent evidence in proof of their case (H3)

CUSTOMARY LAW - Spokesman - Status - Spokesman is representative of community - And is usually appointed to present their case - Before customary court (H4)

LAND LAW - Visit to locus - Purpose - The visit is conducted to bring

to the fore - Evidence of both parties without bias - And it gives parties opportunity to show court important boundaries (H5)

APPEALS - Land law - Visit to locus - Findings - Where parties were given equal opportunity at the locus to prove their case - Appellate court will not interfere with findings arising therefrom (H6)

APPEALS - Record of appeal - Binding nature - Appellate court must read and interpret record in its exact form - As it has no jurisdiction to read same out of context (H7)

JUDGMENTS - Issues - Determination - Obiter dictum - Effect - Such dictum does not decide live issues in a matter - But it is ratio decidendi that decides (H8)

JUDGMENTS - Dissenting judgment - Status - Dissenting judgment however powerful - Is not the judgment of court - And is therefore not binding (H9)

COURTS - Case law - Citation - Court does not confine itself to authorities cited by parties - As it can in an effort to improve its judgment - Rely on authorities not cited by parties (H10)

PARTIES - Actions - Proof - Party can rely on relevant authorities to prove his case - And needs not wait to know how case of adverse party is proved (H11)

CUSTOMARY LAW - Customary courts - Proceedings - The courts are not bound to follow strict and technical rules of evidence (H12)

### **FACTS**

Plaintiffs/appellants commenced this suit at the Koko District Customary court, where they seek for inter alia, a declaration of title over ownership of some villages in Ureju Town of Delta State, general damages for trespass and order of perpetual injunction against defendants/respondents. Appellants' amended statement of claim was interpreted into Ijaw by one Jonah Bunuzor, appointed by the respondents. After hearing, the court gave judgment for appellants.

The matter went on appeal to Area Customary Court, Warri. The court affirmed the decision of the District customary court. On appeal at the Customary Court of Appeal, Asaba, the court reversed the decisions of both the District customary court and the Warri Area court. The court ruled that the matter be tried denovo by the Area Customary Court, Warri. On a further appeal to the Court of Appeal, Benin City, the court held that respondents were denied fair hearing at Koko District Customary Court. The court thus dismissed the appeal from the Customary Court of Appeal. Aggrieved, appellants filed appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(i) Whether the respondents were given a fair hearing at the trial.*

*(ii) Whether the composition of the Court constituted a bias against the respondents as held by the Court of Appeal.*

*(iii) Whether there was a failure of invitation to the respondents to take part at the inspection exercise at the locus in quo.*

*(iv) Whether the respondents were denied the opportunity to cross-examine the 1st plaintiff/Appellant and his 4 witnesses and to testify for themselves.*

*(v) Whether the use of historical books by the trial court constituted a breach of fair hearing.”*

**HELD** (Unanimously allowing the appeal per **TOBI JSC**)

*FAIR HEARING - Fundamentality of*

**1. The fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it will vitiate or nullify the whole proceedings, and a party cannot be heard to say that the proceedings were properly conducted and should be saved because of such proper conduction. Once an appellate court comes to the conclusion that there is a breach of the principle of fair hearing, the proceedings cannot be salvaged as they are null and void ab initio. After all, fair hearing lies in the procedure followed in the determination of the case, not in**

**the correctness of the decision. Accordingly, where a court arrives at a correct decision in breach of the principle of fair hearing, an appellate court will throw out the correct decision in favour of the breach of fair hearing.** (p. 2975 F)

**B FAIR HEARING - Principle - Test**

**2. The true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case.**

**C The reasonable man should be a man who keeps his mind and reasoning within the bounds of reason and not extreme. And so if in the view of a reasonable man who watched the proceedings, the principle of fair hearing was not breached, an appellate court will not nullify the proceedings.** (p. 2976 B)

**D Evidence - Number of witness**

**3. There is no law known to me that all parties to an action must give evidence at the trial. Parties are free to pick witnesses they think can give cogent evidence in proof of their case. If the law had required all parties to give evidence, the court will be exposed, in some cases, to a village or community of witnesses and that will protract the litigation. It appears from the list of the witnesses that the parties used old age as the criterion and not necessarily the parties in the case.**

**F I say this because all the witnesses who gave evidence for the appellants fell within the age range or age bracket of 60 to 84 years. The only party to the action who gave evidence for the appellants was the 1st appellant. The only party to the action who gave evidence for the respondents was the 3rd respondent. All the other witnesses who gave evidence on both sides were not parties to the case.** (p. 2978 B)

**CUSTOMARY LAW - Spokesman - Status**

**H 4. That takes me to the spokesman issue. In traditional African societies, a spokesman is normally or usually appointed to present the case of the people or community. He plays a leadership role in the matter. He is usually the mouth-piece of the people or community. He speaks for them. He is their rep-**

**resentative. There is merit in such traditional arrangement. First, it provides less room for contradictions. Second, it saves so much of litigation time. Although the procedure of spokesman is strange to the common law, it is not strange to customary law and the trial was by a Customary Court where the applicable law is customary law. Accordingly, I do not share the view of learned Counsel for the respondents on the issue. There is nothing in the Record I to show that the court forced the spokesman on the respondents. It appears to me from the Record that the respondents freely chose their spokesman. It was when the spokesman complained that he could not speak the Itsekiri language fluently that an interpreter in the person of Jonah Bunuzor was appointed to do the interpretation, and that is correct procedure. (p. 2978 G)**

*LAND LAW - Visit to locus - Purpose*

**5. The major essence of inspection of locus is to bring to the fore the evidence of both parties without bias. It is a forum to allow parties show the court important boundaries and landmarks to enable the court decide the issue or issues in dispute. (p. 2982 E)**

*Land law - Visit to locus - Findings*

**6. Where parties are given equal opportunity at the locus to step boundaries and landmarks, show other evidence in their favour, an appellate court will not throw out the findings of the trial court, particularly of a Customary Court, merely because it failed to comply with technicalities here and there relating to the inspection of the locus. An appellate court will however interfere where the parties are not given opportunity to exhibit or showcase their matter by way of evidence as pleaded by them. In that regard, the principles of fair hearing will be hurt and an appellate court will nullify the proceedings. On inspection of locus in quo. (p. 2982 F)**

*Record of appeal - Binding nature*

**7. The Record shows at page 9 and 10 that Exhibits "A to J 1 and 2" were admitted in evidence. There is nothing in the**

**Record to show that the exhibits admitted were not shown to the respondents. And so I ask: where did the court below get that evidence? An appellate court has no jurisdiction to read into the Record what is not there and it equally has no jurisdiction to read out of the Record what is there. Both are forbidden areas of an appellate court, if one may use that expression. An appellate court must read the Record in its exact content and interpret it. Of course it has the jurisdiction to decide whether on the face of the Record and on the cold facts the decision was proper or not.** (p. 2983 D)

*JUDGMENTS - Issues - Determination - Obiter dictum - Effect*  
**8. The issue of the constitutionality of the composition of the Tribunal was an obiter dictum and an obiter dictum of a court does not have the status of a ratio decidendi. An obiter dictum does not decide the live issues in the matter; a ratio decidendi does.** (p. 2984 E)

*Dissenting judgment - Status*  
**9. And what is more the issue was raised in a dissenting judgment. A dissenting Judgment, however powerful, learned and articulate, is not the judgment of the court and therefore not binding. The judgment of the court is the majority judgment, which is the binding judgment.** (p. 2984 F)

*COURTS - Case laws - Citation*  
**10. A court of law has no legal duty to confine itself only to authorities cited by the parties. It can, in an effort to improve its judgment, rely on authorities not cited by the parties. Historical books or whatever books are authorities and the Koko District Customary Court was free to make use of them in its judgment. That per se is not breach of fair hearing; not even the twin rules of natural justice.** (p. 2986 G)

*PARTIES - Actions - Proof*  
**11. A party has a legal duty to prove his case relying on all relevant legal authorities. He need not wait for the adverse party on how he (the adverse party) proves his case before he**

**embarks on proving his. And so the contention of the court below that “if the Ijaws had heard of these books earlier, perhaps they might have been able to bring their historical books”, with the greatest respect, is neither here nor there. As indicated above, a party must prove his case to the best of his ability. He should not wait or rely on how the opponent proves his case.** (p. 2987 A) B

*Customary courts - Proceedings*

**12. It is the law that the Customary Courts by the nature of their constitution or composition are not bound to follow strict and technical rules of evidence. They need not comply with the provisions of the Evidence Act in the judicial process. See S. 1(4) of the Evidence Act, Cap. 62. Once an appellate court comes to the conclusion that from the totality of the procedure adopted, substantial justice was done; the court must uphold the proceedings.** (p. 2988 B) C  
D

## NOTABLE POINTS OF INTEREST E

### **TOBI JSC**

#### **1. Plea in criminal and civil proceedings - Difference**

The above rule certainly deals with criminal trials or criminal proceedings where plea is fundamental to such trials or proceedings. It is the law that where the plea of an accused person is not taken and recorded, the trial is a nullity. That is very strict law, but we are not concerned here with a criminal trial but with a civil matter. Therefore, the rule does not apply. The Court below held the view that since the respondents did not plead individually to the amended claim, they were denied fair hearing. The plea decision taken in a criminal matter is quite different from a civil matter where the defendant pleads either liable or not liable to the claim before the court. In a civil trial, once the defendant gives evidence in defence of the claim, it is presumed that he has joined issues with the plaintiff and a failure on the part of the court to ask the defendant to formally plead to the claim does not vitiate or nullify the trial. It is only in criminal proceedings that failure on the part of the court to ask the accused to take a plea that vitiates or nullifies the proceedings. Courts of law and parties will F  
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not like to mix up the two separate procedures as they give rise to two separate and distinct results in our adjectival law. (p. 2977 A)

***2. Tribal composition of the bench is not basis for likelihood of bias***

- <sup>B</sup> The constitutional provision of fair hearing has no tribal insinuation of the composition of the bench vis-a-vis the tribes of the parties. A party should not be heard to complain that because he is not of the same tribe with member of the bench he cannot have a fair hearing.
- <sup>C</sup> That in my humble view, is the most invidious and incongruous approach to this very important legal principle. If the contention is correct, then most, if not all trials in our judicial system, must be faulted because the composition of most courts may not agree with the tribes of the litigants. Perhaps an example will make the point clearer. No
- <sup>D</sup> Asian, American, German or any other foreigner would submit to the jurisdiction of any Nigerian court because virtually all courts in Nigeria are constituted by Nigerians. Was Section 33 of the 1979 Constitution, which is now Section 36 of the 1999 Constitution, designed to cure such a crude situation? No, not at all. Tribal composition of the bench per se cannot be basis for the charge of bias or likelihood of bias, unless the aggrieved party shows by the conduct of the bench such bias or likelihood of bias. The constitutional provision of fair hearing is already large and omnibus and I am not prepared to expand the frontiers beyond its onerous content or ambit.
- <sup>F</sup> (p. 2985 F)

***3. Application of fair hearing is dependent on facts of a case***

- It has become a fashion for litigants to resort to their right to fair
- <sup>G</sup> hearing on appeal as if it is a magic wand to cure all their inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation and the court as the umpire, so to say, has a legal duty to apply it in the litigation, in the interest of fair play and justice. The
- <sup>H</sup> courts must not give a burden to the provision which it cannot carry or shoulder. I see that in this appeal. Fair hearing is not a cut-and-dry principle which parties can, in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the

ease can influence and determine the application or applicability of the principle. The principle of fair hearing is helpless, or completely dead outside the facts of the case. (p. 2988 F)

**REPRESENTATION**

Chief Debo Akande, SAN with O. M. Odje, for the Appellants  
D.O. Okoh with R. E. O. Esite, for the Respondents

B

**CASES REFERRED TO**

Funduk Engineering Ltd v. Mcarthur (1995) 4 NWLR (Pt. 392) 640  
Col. Yakubu (Rtd.) v. The Governor of Kogi State (1995) 8 NWLR  
(Pt. 414) 386

C

Ejidike v. Obiora (1951) 13 WACA 270

Nwizuke v. Eyeyok (1953) 14 WACA 345

Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410

D

Adio v. A-G Oyo State (1990) 7 NWLR (Pt. 163) 448

Abiola v. FRN (1995) 7 NWLR (Pt. 405) 1

Deduwa v. Okorodudu (1976) 1 NMLR 236

Suberu v. Sunmonu (1957) 2 FSC 33

Oyekan v. Adele (1957) 1 WLR 876

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Balogun v. Oshodi (1929) 10 NLR 50

Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599

Otakpo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587

R.N.H.W. v. Sama (1991) 2 NWLR (Pt. 171) 64

Egwu v. University of Port Harcourt (1995) 8 NWLR (Pt. 414) 419

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**STATUTES & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria 1979, s. 33

Constitution of Federal Republic of Nigeria 1999, s. 36

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Customary Court Rules 1978, O. 9, O. 10 rr. 3(1) and 4

Evidence Act Cap. 62 LFN 1958, s. 58

Evidence Act Cap. 68, s. 73(1)(2)

**LEAD JUDGMENT BY TOBI JSC**

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This case has passed through four courts: Koko District Customary Court, Warri Area Customary Court, Customary Court of Appeal, Asaba and the Court of Appeal, Benin Division. This is the fifth court.

The plaintiffs, who are now the appellants in this court, in their Amended Claim, sought against the defendants/respondents jointly and severally for (1) a declaration of title of ownership of Olumagada, Uton-Ugboro, Ukpamaje and Abarumeji Villages in Ureju Town, (2) N100.00 general damages for trespass on the Ukpamaje land, and  
 B (3) perpetual injunction restraining the defendants, their servants and or agents from further acts of trespass upon the plaintiff's land.

The Koko District Customary Court gave judgment for the appellants. The Warri Area Customary Court, in a majority decision,  
 C dismissed the appeal from the Koko District Customary Court. In other words, that court affirmed the decision of the Koko District Customary Court. The Customary Court of Appeal, Asaba allowed the appeal of the appellants/defendants in that court, thereby reversing the decisions of both the Koko district Customary Court and the  
 D Warri Area Customary Court. That court ordered a trial de novo by the Warri Area Customary Court.

The Court of appeal dismissed the appeal from the Customary Court of Appeal, Asaba. Akpabio, JCA., coram Nsofor and Ige, JJCA., held that the respondents were denied fair hearing at the Koko District Customary Court. Akpabio, JCA., said at page 203 of the Record:  
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*"From all that have been said above, there can be no doubt that the defendants/respondents did not receive a fair trial at the Koko District Customary Court. Not only was the trial Court not constituted in such a way as to ensure its impartiality as required under  
 F Section 33(1) of our Constitution of 1979, there were several breaches of the rules of natural justice of audi alteram partem, nemo judex, etc. In view of the foregoing, I am of the firm view that the Customary Court of Appeal was right in setting aside the judgment of the trial  
 G court on ground of unfair hearing, and ordering a trial de novo before the Warri Area Customary Court."*

Dissatisfied with the judgment of the court below, the appellants appealed to this court. As usual, briefs were filed and duly exchanged. The Appellants formulated five issues for determination:

H *"(i) Whether the respondents were given a fair hearing at the trial.*

*(ii) Whether the composition of the Court constituted a bias against the respondents as held by the Court of Appeal.*

*(iii) Whether there was a failure of invitation to the respon-*

*dents to take part at the inspection exercise at the locus in quo.*

*(iv) Whether the respondents were denied the opportunity to cross-examine the 1st plaintiff/Appellant and his 4 witnesses and to testify for themselves.*

*(v) Whether the use of historical books by the trial court constituted a breach of fair hearing.”* B

The respondents adopted the above five issues formulated by the appellants, although they contended in another breath that the main issue for consideration in this appeal is whether the respondents were given a fair hearing at the trial.

Learned Senior Advocate for the appellants, Chief Debo Akande, in arguing Issue Nos. 1, 3 and 4 together, submitted that since the trial Court was a Customary Court, rules of evidence are not strictly adhered to and that Court proceedings are conducted in an, informal way as legal practitioners do not appear there. C

Learned Senior Advocate referred to page 16 of the Record where the Amended Claim was duly considered by the trial Court in the presence of the respondents and interpreted into Ijaw by one Jonah Bunuzor, appointed by the respondents. Counsel pointed out that the respondents did not raise any objection to the motion, which was admitted as Exhibit A. D

Still on page 16, learned Senior Advocate contended that all the parties were present at the inspection of the locus. He went further and referred the court to pages 20 and 21 where the inspection report of the locus is given. Learned Counsel submitted that in the light of the above, the judgment of the court below which was based on lack of fair hearing cannot be sustained. E

Learned Senior Advocate called the attention of the court to four decisions cited by the court below on fair hearing and argued that since all the cases are criminal cases, where the standard in favour of the accused is higher than in civil courts, they are not relevant. He also pointed out that the cases dealt with situations where the accused persons were not given a chance to have counsel or chance to conduct their defence, which was not the situation in this appeal. F

It was the contention of learned Senior Advocate that although the respondents were not sued in a representative capacity, they were sued jointly and severally and that the respondents agreed and nominated a spokesman who had the benefit of an interpreter. Counsel G

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did not see the applicability of the principle of *audi alteram partem*. In this regard, he referred to page 8 of the i Record where the respondents pleaded to the motion.

On the issue of denial of cross-examination, Learned Senior Advocate referred to page 10 of the Record where the conclusion of the evidence-in-chief is shown and was followed by what was a cross-examination by the defence and the court.

Learned Senior Advocate argued that since the respondents seemed to have conducted their cases in a representative capacity through a spokesman who appeared to have cross-examined the witnesses of the appellants, no injustice was done to them; and this is more so when no other respondent indicated his wish to do his case outside what the spokesman did for them.

On Issue No. 2, Learned Senior Advocate raised the following points: (1) There is nowhere in the Record where the respondents raised any objection to the panelists to the effect that they were all Itsekiris. (2) There is no affidavit evidence after the trial Court to actually show that the panelists were all Itsekiris. (3) The judgment of the Customary Court of Appeal did not make any finding on the issue. (4) The issue raised by the respondents in their brief before the Court of Appeal did not cover the issue. (5) The Court of Appeal in making/raising the issue did not show on which evidence it is based. (6) The cases cited by the Court of Appeal show that there was an objection at the start of the trial, while one of the cases is totally inapplicable. Learned Senior Advocate urged the court to allow the appeal.

Learned Counsel for the respondents, Mr. D. O. Okoh, arguing Issues No. 1, 3 and 4 together, submitted that the Court of Appeal rightly held that the respondents were never given opportunity to reply to any of the allegations made against them by the appellants. He argued that although the cases used by the Court of Appeal are criminal cases, the principles enunciated and adumbrated are of universal application. He examined each of the cases.

Learned Counsel contended that the trial from which the appeal emanated is a civil trial in a Customary Court which is bound to comply with the fundamental doctrines of fair hearing. He relied on Order IX of the Customary Court Rules, 1978, which deals with a charge and the taking of plea by an accused person. Counsel also

relied on Order X Rules 3(1) and 4 and submitted that a trial Court which is enjoined to follow the above mandatory Rules cannot be heard to conduct its proceedings in an informal way.

Learned Counsel made specific references to pages 8, 10 and 21 and argued that the principle of fair hearing was breached. He condemned the procedure of using a spokesman as unknown to law. B

On Issue No. 2, Learned Counsel submitted that an observer knowing and watching the calibre of the panelists will certainly go away with the impression that the court was not constituted in a manner as to secure its independence and impartiality. He maintained that the common law doctrine found in Constitutions and rules which forbids a judge to adjudicate over a matter in which he has a pecuniary, proprietary or filial interest is not only a good doctrine but it is also in accord with common sense. C

On Issue No. 5, Learned Counsel submitted that the Court of Appeal rightly considered the use of the history books in deciding the question as whether there was any likelihood of bias resulting in a denial of a fair trial. He urged the court to dismiss the appeal and confirm the judgment of the Court of Appeal. D

The main focus of this appeal is on breach or otherwise of the fair hearing principle entrenched in the Constitution. The provision which was in operation when the case was heard is Section 33 of the Constitution of the Federal Republic of Nigeria, 1979. The provision which is in operation now is Section 36 of the Constitution of the federal Republic of Nigeria, 1999. Although the two Sections are similar, it is the provision of the 1979 Constitution that court must turn to in this appeal. E F

***The fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it will vitiate or nullify the whole proceedings, and a party cannot be heard to say that the proceedings were properly conducted and should be saved because of such proper conduction. Once an appellate court comes to the conclusion that there is a breach of the principle of fair hearing, the proceedings cannot be salvaged as they are null and void ab initio. After all, fair hearing lies in the procedure followed in the determination of the case, not in the correctness of the decision. Accordingly, where a court*** G H

**arrives at a correct decision in breach of the principle of fair hearing, an appellate court will throw out the correct decision in favour of the breach of fair hearing.** See generally Ceekay

Traders Ltd. v. General Motors Co. Ltd. (1992) 2 NWLR (Pt. 222) 132; University of Nigeria Teaching Hospital Management Board v. B Nnoli (1994) 8 NWLR (Pt. 363) 376.

***The true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case.*** See Mohammed

v. Kano Native Authority ((1969) 1 All NLR 428; Funduk Engineering Limited v. Mcarthur (1995) 4 NWLR (Pt. 392) 640; Col. Yakubu (Rtd.) v. The Governor of Kogi State (1995) 8 NWLR (Pt. 414) 386.

***The reasonable man should be a man who keeps his mind and reasoning within the bounds of reason and not extreme.***

***And so if in the view of a reasonable man who watched the proceedings, the principle of fair hearing was not breached, an appellate court will not nullify the proceedings.***

Fair hearing, which is entrenched in the Constitution, is based on determining or testing the constitutionality of a trial in terms of procedure. It is a very fundamental principle of law which the parties and the courts are free to apply in relevant situations in relation to the facts of the case and not in a vacuum. Accordingly, where the facts of the case reject the principle, the court will have no competence to force the principle of law on the case.

I should now take the specific aspects of the breach as held by the court below. Dealing with the issue of the amended claim, the court below said:

*“Also, there was an amended claim but the court proceeded to taking plaintiff’s evidence after granting the amendment sought in breach of Order IX rule 1(1) of the Customary Court Edict, 1978, the Defendants were not made to plead individually to the amended claim.”*

Learned Counsel for the respondents, as indicated above, cited order IX of the Customary Courts Rules, 1978, at page vi of the respondents brief as follows:

*“The subject of a charge shall be read out by a clerk to the Defendant who shall be asked how he pleads to it and his answer shall be recorded.”*

The above rule certainly deals with criminal trials or criminal proceedings where plea is fundamental to such trials or proceedings. It is the law that where the plea of an accused person is not taken and recorded, the trial is a nullity. That is very strict law, but we are not concerned here with a criminal trial but with a civil matter. Therefore, the rule does not apply. The Court below held the view that since the respondents did not plead individually to the amended claim, they were denied fair hearing. The plea decision taken in a criminal matter is quite different from a civil matter where the defendant pleads either liable or not liable to the claim before the court. In a civil trial, once the defendant gives evidence in defence of the claim, it is presumed that he has joined issues with the plaintiff and a failure on the part of the court to ask the defendant to formally plead to the claim does not vitiate or nullify the trial. It is only in criminal proceedings that failure on the part of the court to ask the accused to take a plea that vitiates or nullifies the proceedings. Courts of law and parties will not like to mix up the two separate procedures as they give rise to two separate and distinct results in our adjectival law.

Let me take here the issue of whether the amended claim was read, interpreted and explained in Ijaw to the respondents. Contrary to the submission of the learned Counsel for the respondents, the following is at page 8 of the Record:

*“The motion supported by 3 paragraphs affidavit was read and explained to the defendants whereby the defendants appeared perfectly to have understood same. The spokesman of the defendants explained that he could not speak Itsekiri language perfectly well. He then appointed an interpreter, one Jonah Bunuzor, who was duly sworn as an interpreter to the defendants. I heard the motion read and explained to them, I raise no objection.”*

Where lies the claim of learned Counsel for the respondent? I do not see it. I therefore dismiss it. The court below was in error to rely on the above in its finding that there was no fair hearing at the trial. The Court below said at page 195 of the Record:

*“Although Respondents were sued individually, in their personal capacities yet only one out of the eleven Respondents testified.”*

By the above, the court held the view that the other persons who did not give evidence at the trial were denied fair hearing. I

think it is convenient to take this issue with that of nomination of the spokesman, a procedure learned Counsel for the respondents described as unknown to law.

It is on record that two persons gave evidence in favour of the respondents. They are Eyewuoma Gbanyinfo and Raymond Labra, B 60 years and 65 years respectively. Four persons gave evidence in favour of the appellants. They are T.M. Orugbo (the 1st appellant), Eden Kpenosen, Omatie Ogbosamine and Chief Otikere. They were 73, 84, 63 and 74 years respectively.

C ***There is no law known to me that all parties to an action must give evidence at the trial. Parties are free to pick witnesses they think can give cogent evidence in proof of their case. If the law had required all parties to give evidence, the court will be exposed, in some cases, to a village or community of witnesses and that will protract the litigation. It appears from the list of the witnesses that the parties used old age as the criterion and not necessarily the parties in the case. I say this because all the witnesses who gave evidence for the appellants fell within the age range or age bracket of 60 to 84***  
 E ***years. The only party to the action who gave evidence for the appellants was the 1st appellant. The only party to the action who gave evidence for the respondents was the 3rd respondent. All the other witnesses who gave evidence on both sides were not parties to the case.***  
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Above all, there is nothing on the Record to show that the trial Koko District Customary Court refused an application by the respondents that all the other ten parties wanted to give evidence. Where then lies the breach of fair hearing? I do not see it. I therefore find G that the court below was in error in holding that there was a breach of the fair hearing principle.

H ***That takes me to the spokesman issue. In traditional African societies, a spokesman is normally or usually appointed to present the case of the people or community. He plays a leadership role in the matter. He is usually the mouthpiece of the people or community. He speaks for them. He is their representative. There is merit in such traditional arrangement. First, it provides less room for contradictions. Second, it saves so much of litigation time. Although the procedure of***

**spokesman is strange to the common law, it is not strange to customary law and the trial was by a Customary Court where the applicable law is customary law. Accordingly, I do not share the view of learned Counsel for the respondents on the issue. There is nothing in the Record I to show that the court forced the spokesman on the respondents. It appears to me from the Record that the respondents freely chose their spokesman. It was when the spokesman complained that he could not speak the Itsekiri language fluently that an interpreter in the person of Jonah Bunuzor was appointed to do the interpretation, and that is correct procedure.**

Learned Counsel for the respondents contended that there is nothing on the Record to show that the claim and the entire proceedings were interpreted and explained to the respondents in Ijaw. To learned Counsel, it was only the motion that was explained to the respondents. With respect, he missed the point. The amended claim was attached to the motion and the second prayer of the motion was "leave of court to amend the filed claim". That was not all. Paragraph 2 of the affidavit in support deposed as follows:

*"That at a community meeting held on the 25th day of May, 1998 in my house at Koko presided over by one Esu the family head the following resolutions were taken: (a) That the filed claim be amended and the amended claim is herewith attached and marked as Exhibit A."*

And so the amended claim is an integral part of the motion. Therefore the distinction learned Counsel tried to make is neither here nor there. I therefore reject it.

Let me quote again part of the Record at page 8 on the issue of interpreter:

*"The spokesman of the defendants explained that he could not speak the Itsekiri language perfectly well. He then appointed an interpreter, one Jonah Bunuzor, who was duly sworn as an interpreter to the defendants. I heard the motion read and explained to them. I raise no objection to Thomas Adini being substituted instead of Ademayigbo Atsedagho, the second plaintiff who was reported sick. I also did not oppose the N100.00 general damages as amended on the final determination of the case. In totality I did not oppose the motion."* (Underlined portion for emphasis only).

The words, “*who was duly sworn as an interpreter to the defendants*” provide an adequate answer to learned Counsel for the respondents who contended that the explanation of the motion did not cover the entire proceedings. Although I have made the point above, the underlined portion clearly shows that the interpreter was appointed and sworn for the defendants. This means that the interpreter, Jonah Bunuzor, interpreted the entire proceedings to the respondents.

It is clear from the above that the respondents did not oppose the motion. They did not object to the substitution of Thomas Adini for Ademayibo Atsedagho who was reported sick. They did not oppose the N100.00 general damages. Is learned Counsel telling this court that the respondents responded to a motion and claim they did not understand? Initially the spokesman made the point that he could not speak Itsekiri perfectly and an interpreter was provided. There was no further complaint. The respondents responded to the motion by pleading to the amended claim.

And so the court ruled at page 8:

“*Since the defendants did not oppose the motion, the court gave the following ruling according to the Customary Court Rule, Vol. 15 published in Benin City on August 23rd, 1978 by the Authority page B.64/7(1) granted the motion vide Amended Claim, a document referred to as Exhibit A. The court then proceeded with the substantive case.*”

In my humble view, the Koko District Customary Court clearly complied with the principles of fair hearing in respect of the motion and the amended claim. With respect, their Lordships of the court below are in error to hold to the contrary.

That takes me to the issue of cross-examination. After the evidence-in-chief of the 1st plaintiff the Record stated at page 10 as follows:

“*Cross-examination of the witness by Defendant -NIL.*”

After the evidence-in-chief of P.W.2, page 10 recorded the answer from the cross-examination as follows:

“*Ureju community came first and they met no Ijaws along the Benin River when they came.*”

Similarly, after the evidence-in-chief of P.W.3, page 11 recorded the answer from the cross-examination as follows:

*“The Ijaws were not at all along the Benin River where Ureju is situated. I do not know where the Ijaws were at the material time.”*

Finally on this issue, after the evidence-in-chief of P.W.4, page 13 recorded the following answer from the cross-examination:

*“I know the boundary between Benin and Warn. Those who with permission of my father, Otipere, settled at Abiala were Fefuru, B Ilalaho and Bula and their followers.”*

It is clear from the above that the defendants were given opportunity by the trial court to cross-examine the witnesses of the appellants and they took the opportunity to cross-examine P.W.2, P.W.3 and P.W.4. There was however no cross-examination in respect of P.W.1, apparently because there was no question from the respondents. Where lies the breach of the principle of fair hearing? C

The next issue I should take is the inspection of the locus. The main complaint in the court below is that “the records did not show D which of the appellants showed what, nor the fact that any of the respondents participated in the inspection exercise.” The court below did not specifically take this issue. I expected the court to take it in the light of its importance to the fair hearing principle. I will take it.

The Record contains evidence of inspection of the locus. Page E 15 of the Record reads:

*“As scheduled the court moved on Wednesday, June 29, 1988, to the site of the disputed land. The Plaintiffs took the court to a point on the left bank of Gwoto Creek where the inspection progresses F into the Arun-Guro (Ossiomo River) to Abiala Uton on the north of the disputed land. At the completion of the inspection we returned to the court. The case was then adjourned to Thursday July 21, 1988, for judgment to be delivered.”*

In the judgment at pages 20 and 21, trial court said, and I will G quote the court extensively:

*“Inspection Report: June 29, 1988, saw the court on an inspection journey to the site in dispute between the plaintiffs and the defendants. Precisely at 8.25 a.m., the journey started from Koko H with both parties and their witnesses in attendance, along the right bank of Benin River into Gwoto Creek to a point on the left bank, where the Abiala-Uton discharges its water into Gwoto Creek, which the plaintiff claim as their boundary with Ovia Local Government Area in Benin, Bendel State ..... Other places of importance within*

their land as shown by the Plaintiffs are (1) Uton-Ifiafia, (2) Uton-Shagara, (3) Uba-Ejatsuli, (4) Uton-Garafa, (5) Uba-Olotso, (6) Uba-Abilogun, (7) Uba-Omaterinmi (8) Uba-Uduakpemi and (9) Uba-Timy.... The defendants during the journey maintained that they have no boundary with Ureju at the point shown by the plaintiffs on the left bank of Gwoto Creek. They said all that parcel of land in dispute is in Gilli-Gilli Forest Reserve in Ovia Local Government Area in Benin, Bendel State, where they live. Along the Benin River the defendants showed us (1) Ajotolo, which the Plaintiffs call Ukpomaje, where the defendants cleared and put up a Church building, which forms the kernel of this case. (2) Sabotie, which the Plaintiffs call Olumagada. At this place the defendants took us in a small canoe to a place in the bush where there is an iron standing on a pillar. They said that this pillar bears the number FD109 but this number we did not see. (3) Bobiraki, where they said Ewuru lived, which -the plaintiffs call Uton-Egbenemeji. Here the defendants took us in a small canoe as far inland as about four kilometres from the Benin River to an iron post with Number FD108. (4) Abuwaya, which the plaintiffs call Uton-Gboro. We travelled in a small canoe to see an iron post with Number FD107. We also saw at Abiala-Uton, FD104.”

**The major essence of inspection of locus is to bring to the fore the evidence of both parties without bias. It is a forum to allow parties show the court important boundaries and landmarks to enable the court decide the issue or issues in dispute. Where parties are given equal opportunity at the locus to step boundaries and landmarks, show other evidence in their favour, an appellate court will not throw out the findings of the trial court, particularly of a Customary Court, merely because it failed to comply with technicalities here and there relating to the inspection of the locus. An appellate court will however interfere where the parties are not given opportunity to exhibit or showcase their matter by way of evidence as pleaded by them. In that regard, the principles of fair hearing will be hurt and an appellate court will nullify the proceedings. On inspection of locus in quo.** See generally Ejidike v. Obiora (1951) 13 WACA 270; Chief Nwizuke v. Chief Eyeyok (1953) 14 WACA 345.

In this matter, the Koko District Customary Court gave the

parties equal opportunity to state their case at the locus and the parties made adequate use of the opportunity. This is clear at pages 20 to 22 of the Record. Both the appellants and the respondents took the court to inspect important features to lure or allure the court to their story of ownership. In my view, the court could not have done better in protecting the principle of fair hearing during the inspection of the locus. I do not think I should have done better too. B

The court below came to the conclusion that the exhibits admitted by the Customary Court were not shown to the respondents. The court said:

*“The 1st plaintiff gave evidence-in-chief and tendered many exhibits which were not shown to the defendants...”* C

This issue was not raised by the respondents by way of cross appeal. It is therefore not available to the court below to raise it suo motu. In the most unlikely event that I am wrong, I deal with the merits of the issue. D

***The Record shows at page 9 and 10 that Exhibits “A to J 1 and 2” were admitted in evidence. There is nothing in the Record to show that the exhibits admitted were not shown to the respondents. And so I ask: where did the court below get that evidence? An appellate court has no jurisdiction to read into the Record what is not there and it equally has no jurisdiction to read out of the Record what is there. Both are forbidden areas of an appellate court, if one may use that expression. An appellate court must read the Record in its exact content and interpret it. Of course it has the jurisdiction to decide whether on the face of the Record and on the cold facts the decision was proper or not.*** E F

Did the court below come to the conclusion that the exhibits tendered were not shown to the respondents merely because the Koko District Customary Court did not indicate in the Record that the respondents did not object to the exhibits? If so, is that enough for the court to come to that conclusion? I think not. From the Record, this court can presume the regularity of the procedure of tendering documents as evidence, particularly when the respondents did not raise any objection on the matter. G H

Let me now deal with the constitution of the bench of the Koko District Customary Court. The court below took time to deal

with the issue. The court said at page 202 of the Record:

“Finally, I must refer to the basic complaint of the respondents that both the plaintiffs/appellants and all the Judges of the Koko District Customary Court were Itsekiris while only the defendants/ respondents were Ijaws. There was thus a real likelihood of bias against the respondents. This allegation was not denied. In fact it was confirmed by the learned counsel for the plaintiffs/appellants at the Customary Court of Appeal. In view of this, it is my respectful view that regardless of whether the said Itsekiri Judges were actually biased or not, they ought not to have taken part in the trial. At best the trial court have been conducted by a mixed panel of both Ijaw and Itsekiri members if a neutral panel could not be set up to ensure its impartiality.

The Court cited the following cases in support of its view: Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410; Adio v. Attorney-General of Oyo State (1990) 7 NWLR (Pt. 163) 448 and Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt. 405) 1.

With the greatest respect, the cases cited by the Court below are inapposite. In Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410, the main issue before the Court of Appeal by way of preliminary objection was that the decision appealed against being an interlocutory one, leave was necessary but that leave was not obtained before the filing of the appeal in consonance with Section 15 of the Court of Appeal Act, 1976. **The issue of the constitutionality of the composition of the Tribunal was an obiter dictum and an obiter dictum of a court does not have the status of a ratio decidendi. An obiter dictum does not decide the live issues in the matter; a ratio decidendi does. And what is more the issue was raised in a dissenting judgment. A dissenting Judgment, however powerful, learned and articulate, is not the judgment of the court and therefore not binding. The judgment of the court is the majority judgment, which is the binding judgment.**

In Adio v. Attorney-General of Oyo State (1990) 7 NWLR (Pt. 163) 448, the matter had to do with a relationship of husband and wife. It was a relationship between the late Chief Bola Ige, who was the Governor of Oyo State, and the wife, Hon. Justice Tinuke Ige, then a Judge of the High Court of Justice, Oyo State. There is no

such relationship in this matter. The only relationship here is that both the members of the court and the appellants are Itsekiris; not husbands and wives.

In *Abiola v. Federal Republic of Nigeria* (1995) 7 NWLR (Pt. 405) 1, the issue that arose for determination in respect of likelihood of bias was that the Justices mentioned in the motion at page 4 of the Law report be excluded from hearing the matter on the ground that they instituted an action for libel against the Weekend Concord, the respondent, Chief Abiola, being the Chairman and Publisher and controlled majority shareholding interest in the Concord Press Nigeria Newspaper known as Weekend Concord, It was in the peculiar circumstances of the case that Bello, CJN., granted the application. Again there is no like situation here. The situation here, if I may repeat for emphasis, is that of the members of the court belonging to the same tribe as the appellants.

In *Deduwa v. Okorodudu* (1976) 1 NMLR 236, the Supreme Court held that the mere fact that a judge's mother is an Itsekiri (i.e. of 'the same ethnic group as the respondents) and live in an itsekiri community at the material time is not sufficient to disqualify him from adjudicating on the matter on the ground that he had an interest in the subject matter of the suit

In *Cottle v. Cottle* (1939) 8 All ER 535, the editorial note reads:

*"It is said to be one of the features of the administration of justice by local judges that they receive help in their work from their knowledge of the local conditions and of the history of the people who come before them, and that this can form no foundation for a suggestion of bias."*

The constitutional provision of fair hearing has no tribal insinuation of the composition of the bench vis-a-vis the tribes of the parties. A party should not be heard to complain that because he is not of the same tribe with member of the bench he cannot have a fair hearing. That in my humble view, is the most invidious and incongruous approach to this very important legal principle. If the contention is correct, then most, if not all trials in our judicial system, must be faulted because the composition of most courts may not agree with the tribes of the litigants. Perhaps an example will make the point clearer. No Asian, American, German or any other foreigner would submit to the jurisdiction of any Nigerian court because virtu-

ally all courts in Nigeria are constituted by Nigerians. Was Section 33 of the 1979 Constitution, which is now Section 36 of the 1999 Constitution, designed to cure such a crude situation? No, not at all. Tribal composition of the bench per se cannot be basis for the charge of bias or likelihood of bias, unless the aggrieved party shows by the conduct of the bench such bias or likelihood of bias. The constitutional provision of fair hearing is already large and omnibus and I am not prepared to expand the frontiers beyond its onerous content or ambit.

The court below also held that the trial court was in breach of the principle of fair hearing when it relied on historical books not mentioned by any of the parties. The court said at page 201:

*"Before concluding, I must comment briefly on the fact that the Judges of the Koko District Court relied heavily on historical books not mentioned by any of the parties. To me, this appears to have been prejudicial to the Defendants/Respondents, who lost the case, and were hearing of these Historical books for the first time in the judgment. If they had heard of these books earlier, perhaps they might have been able to bring their own Historical books (may be those written by Ijaw Authors) to show that Ijaws were the first to be on the land. For this principle see the case of Ajuwon v. Akanni (1993) 9 NWLR (Pt. 316) 182."*

With respect, the case cited by the Court below is not relevant. In Ajuwon, the Court of Appeal raised for the first time the issue of doctrine of lis pendens suo motu in its judgment on which no issue was found by the parties either in their pleadings or in their brief of argument. This is a totally different matter from the one we have in this appeal. There is a world of difference in our adjectival law between the court citing an authority to buttress or back up its arguments in the judgment and the court raising an issue suo motu which was not raised by the parties.

***A court of law has no legal duty to confine itself only to authorities cited by the parties. It can, in an effort to improve its judgment, rely on authorities not cited by the parties. Historical books or whatever books are authorities and the Koko District Customary Court was free to make use of them in its judgment. That per se is not breach of fair hearing; not even the twin rules of natural justice.***

***A party has a legal duty to prove his case relying on all relevant legal authorities. He need not wait for the adverse party on how he (the adverse party) proves his case before he embarks on proving his. And so the contention of the court below that “if the Ijaws had heard of these books earlier, perhaps they might have been able to bring their historical books”, with the greatest respect, is neither here nor there. As indicated above, a party must prove his case to the best of his ability. He should not wait or rely on how the opponent proves his case.*** Section 58 of the Evidence Act, Cap. 62, Laws of the Federation, 1958, the statute which was applicable when the case was heard provided as follows:

*“In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by natives as a legal authority are relevant.”*

Section 73(1) of the Evidence Act, Cap. 68, provided for instances where the court can take judicial notice of facts. Section 73(2) provided that in all cases referred to in Section 73(1) and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. The subsection empowers the court to unilaterally seek aid from appropriate books or documents. The court is under no duty to give notice to the parties that it intends to use a particular book, that will be a ridiculous situation. See generally *Suberu v. Sunmonu* (1957) 2 FSC 33; *Oyekan v. Adele* (1957) 1 WLR 876; *Balogun v. Oshodi* (1929) 10 NLR 50.

The Court below relied on the natural justice principles of *audi alteram partem* and *nemo iudex in causa sua*. The Court said at page 203:

*“Not only was the trial court constituted in such a way as to ensure its impartiality as required under, S. 33(1) of our Constitution of 1979, there was several breaches of the rules of natural justice of audi alteram partem, nemo iudex etc.”*

The natural justice rule of *audi alteram partem* simply means “hear the other side.” See *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt. 9) 599; *Otakpo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587. On the other hand, the natural justice rule of *nemo iudex in*

causa sua simply means “a person should not be a judge in his own cause”. See *R.N.H.W. v. Sama* (1991) 2 NWLR (Pt. 171) 64; *Egwu v. University of Port Harcourt* (1995) 8 NWLR (Pt. 414) 419.

I do not agree with the court below that the two rules of natural justice are applicable in this matter. As I have said, the respondents were heard or given an opportunity to be heard at the trial court. The members of the Koko District Customary Court had no cause of their own to be heard. The cause was between the appellants and the respondents and so the rule is inappropriate.

***It is the law that the Customary Courts by the nature of their constitution or composition are not bound to follow strict and technical rules of evidence. They need not comply with the provisions of the Evidence Act in the judicial process. See S. 1(4) of the Evidence Act, Cap. 62. Once an appellate court comes to the conclusion that from the totality of the procedure adopted, substantial justice was done; the court must uphold the proceedings.***

There is need for caution in the application of the fair hearing provision in the Constitution. Where the facts of the case, as in this appeal, do not support the application of the provision, parties should not urge the court to invoke the provision, and even if so urged, the court should not succumb to the pressure. Both the respondents and the court below saw breach of fair hearing principle by the Koko District Customary Court. I do not see any breach. The court did a very good job and I commend it.

It has become a fashion for litigants to resort to their right to fair hearing on appeal as if it is a magic wand to cure all their inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation and the court as the umpire, so to say, has a legal duty to apply it in the litigation, in the interest of fair play and justice. The courts must not give a burden to the provision which it cannot carry or shoulder. I see that in this appeal. Fair hearing is not a cut-and-dry principle which parties can, in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair hearing is helpless, or completely

dead outside the facts of the case.

Learned Counsel for the respondents made some material concessions during the hearing of the appeal and I thought he would throw in the towel midstream. He did not. In the light of the concessions he made, it will be a contradiction to dismiss this appeal.

I allow the appeal. I set aside the judgment of the Court below. I affirm the judgment of the Koko District Customary Court. I award N10,000.00 costs in favour of the appellants as costs of this appeal and N2,500 costs as costs in the Court of Appeal.

### OGUNDARE JSC

I have read in advance the judgment of my learned brother, Niki Tobi, JSC. I agree with him that there is merit in this appeal. I too allows the appeal and set aside the judgment of the Court of Appeal which affirmed the judgment of the Customary Court of Appeal of Delta State. I restore the judgment of the Koko District Customary Court which judgment was affirmed by majority decision of the Warn Area Customary Court.

This case commenced in the Koko District Customary Court of the former Bendel State where in Suit No. KDCC/73/87 the Appellants now before us as Plaintiffs, had sued the Respondents, as Defendants, claiming as hereunder:

*“The Plaintiffs’ claim against the Defendants severally and jointly is for a declaration of title of ownership for Orumagada, Uton-Ugboro, Ikpamaje and Abarumeji Villages which the Defendants trespassed into and built their Church in one of the aforementioned villages without the consent of Ureju Community.*

*The Defendants refused to remove their Church or quit the said villages despite repeated demands by the Plaintiffs to do so, hence this action.”*

The parties led evidence in support of their respective cases and after a visit to the land in dispute the trial Customary Court in a reserved judgment found in favour of the Plaintiffs and adjudged as follows:

“In our opinion, we enter judgment for Plaintiffs and grant them an injunction restraining the defendants thus: -

1. From putting tenants on the said parcel of land or granting

fishing tenancies or right and collecting fishing rents or granting rights to fell timber or felling timber for sale.

2. The Defendants should not interfere with Plaintiffs' rights of fishing in the creeks within the said parcel of land.

3. The defendants should not in any form prevent the Plaintiffs from collection of rents from tenants using the land both new tenants and including the defendants.

4. For the safe guard of the liberty of the Defendants the Plaintiffs shall not so exercise their rights to affect the livelihood of the defendants.

By judgment order the Defendants, Customary tenants to the Plaintiffs, shall keep strictly to the traditional religious rites observances of the Plaintiffs observing all traditional taboos of the Plaintiffs but shall not take part in their traditional religious worships or any attempt be made to force them as they claim to be Christians. For freedom of worship which is the practice in this country (Nigeria) must be observed. The Defendants shall pay rents as Customary tenants, to the Plaintiffs either annually or otherwise as the Plaintiffs please but shall be a token but of very exorbitant subject to the dictate of the Plaintiffs. The Plaintiffs shall not in anyway attempt to eject the defendants, who are their customary tenants of long standing, from their place of dwelling.

The Plaintiffs shall not attempt to destroy the church building put up at Ukpomaje and any other buildings put up there, which form the kernel of this case. The Plaintiffs shall not in any way interfere with the religion and doctrine of the defendants. The Plaintiffs shall give the defendants freedom in the practice of their religion unless where it is repugnant. The Defendants should refrain from any further act of trespass on the Plaintiffs' land.

The Court awards to the Plaintiff N60.00 as damages for trespass into the land and a cost assessed at N22.00 to be paid to the Plaintiffs by the Defendants."

The Defendants appealed to the Warri Area Customary Court which Court, by majority decision, dismissed the appeal and affirmed the judgment of the trial Koko District Customary Court. The Defendants further appealed to the Customary Court of Appeal of Delta State. That Court allowed the appeal for the principal reason that the Defendants did not have fair hearing at the trial. Consequently the

Court set aside the judgment of the two Courts below and ordered that the case be heard and determined de novo by another Warri Area Customary Court. It was the Plaintiffs this time that became aggrieved and appealed to the Court of Appeal holden at Benin City. The Court of Appeal agreed with the Customary Court of Appeal that the Defendants did not have fair hearing at the trial and so dismissed the Plaintiffs' appeal and affirmed the order for retrial made by the Customary Court of appeal. It is against the decision of the Court of Appeal that the Plaintiffs have further appealed to this Court. B

Five issues are set out in the Appellant's brief and adopted in the Respondents' brief although the Respondents, in their brief, contended that the main issue for determination in the appeal was as to whether the Defendants were given a fair hearing at the trial. I agree with the Defendants that this indeed is the principal issue arising in this appeal. C

The Court of Appeal, like the Customary Court of Appeal of Delta State, came to the conclusion that the Defendants did not have fair hearing at the trial for the reasons (1) that the trial Court failed to call on each Defendant to plead on the amended claim of the Plaintiff; (2) failure to provide an interpreter; (3) denial of opportunity to the Defendant to cross-examine the 1st plaintiff and his 4 witnesses; (4) failure to call on each of the Defendants to testify for themselves; (5) failure to be invited to take part at the inspection exercise at the locus in quo and (6) the fact that all the judges of the Koko District Customary Court are of the same ethnic group as the Plaintiffs; that is, Itsekiris, while the Defendants are Ijaws. The Court of Appeal per Akpabio, JCA., was of the view that- D

*"...there can be no doubt that the Defendants/Respondents did not receive a fair trial at the Koko District Customary Court. Not only was the trial court not constituted in such a way as to ensure its impartiality as required under S. 33(1) of our Constitution of 1979, there were several breaches of the rules of natural justice of 'audi alteram partem,' 'Nemo judex' etc. In view of the foregoing, I am of the firm view that the Customary Court of Appeal was right in setting aside the judgment of the trial Court on ground of unfair hearing, and ordering of trial de novo before the Warri Area Customary Court."* E

I have examined the record, particularly the proceedings in the Koko District Customary Court. With the utmost respect to their F

Lordships of the Court below, the conclusions reached in the lead judgment of Akpabio, JCA., with which Nsofor and Ige, JJCA., agreed are not supported by the facts disclosed on the record. Their Lordships with respect appeared to have forgotten that this case is a civil case and that the consequence or failure to plead to a charge in a criminal case would not apply in a civil case. There is no rule of law which says that the Defendants must be present let alone plead in a civil matter, It is enough that he is served with the writ of summons and is given an opportunity to present his defence. That was done in this case. From the records it would appear that the Plaintiffs' claimed to be the owners of the lands in dispute and that the Defendants, who are Ijaws, are their customary tenants. From the record also it would appear that the Defendants, members of a religious group, had one of themselves to champion their cause. Their champion gave evidence at the trial and witnesses were also called to testify for the defence. There is nothing on record to justify the conclusion that any of the Defendants, other than their champion, applied to give evidence but was refused by the Court. On the face of the writ the Defendants were sued jointly and severally but in reality they defended as a body. If the Court of Appeal considered the proceedings of the Koko District Customary Court with the proper approach, it would not have come to the conclusion that the Defendants did not have fair hearing at the trial.

On the question of interpreter, I am startled by the conclusion of the Court below on this issue. The Defendants procured one Jonah Bunuzor to interpret to them from Itsekiri to Ijaw language. Bunuzor was sworn in and he did interpret accordingly. When it was the turn of the Defendants to present their case the Plaintiffs, in turn, nominated their own interpreter who interpreted from Ijaw to Itsekiri language. That interpreter too was sworn in. I do not see how anyone could have come to the conclusion that the Defendants were denied an interpreter.

Perhaps the most frivolous of the complaints of the Defendants on the issue of fair hearing which, regrettably, the Court of Appeal accepted was the question of the inspection of the land in dispute by the trial court. The inspection report embodied in the judgment reads as follows:-

*"Inspection Report: June 29, 1988 saw the Court on an in-*

*spection journey to the site in dispute between the plaintiffs and the defendants.*

*Precisely at 8.25 a.m., the journey started from Koko with both parties and their witnesses in attendance, along the right bank of Benin River into Gwoto Creek to a point on the left bank, where the Abiala-Uton discharges its water into Gwoto Creek, which the plaintiffs claim as their boundary with Ovia Local Government Area in Benin, Bendel State. Here the inspection proceeds under the directives of Plaintiffs claiming all lands on the left bank into Benin River...*

*The defendants during the journey maintained that they have no boundary with Ureju at the point shown by the plaintiffs on the left bank of Gwoto Creek...*

*Here the defendants took us in a small canoe as far inland as about four kilometres from the Benin River to an iron post with Number FD108. (4) Abuwaya, which the plaintiffs call Uton-Gboro. We travelled in a small canoe to see an iron post with Number FD107. We also saw at Abiala-Uton, FD104. ”*

The correctness of the inspection report has not been challenged at any stage by the Defendants. The report shows clearly that not only were the Defendants, like the Plaintiffs, present at the inspection but took active part in showing the Court various features of the land in favour of their own case. With profound respect to their Lordships of the Court of Appeal, if they had read the judgment of the trial Court and particularly the inspection report, they would not have upheld Defendants' complaint on the question of inspection.

The last issue I need to touch upon is that concerning lack of fair hearing as a result of the ethnic affinity of the judges of the Koko District Customary Court to the Plaintiffs. This complaint was raised before the Warn Area Customary Court and this is what the majority of that Court had to say:

*“Also in Deduwa v. Okorodudu above, the Supreme Court held that the mere fact that trial Judge’s mother is an Itsekiri (i.e. of the same ethnic group as the respondents) and lived in an Iteskiri Community at the material time is not sufficient to qualify (sic) him from adjudicating on the matter on the ground that he had an interest in the subject v matter of the suit.*

*In the light of the above, we hold that there was no real likelihood of bias on the part of the trial court. These two grounds are*

*misconceived and , they also fail.”*

Their Lordships of the Court of Appeal, per Akpabio, JCA., decided to the contrary. Akpabio, JCA., said:

*“Finally, I must refer to the basic complaint of the respondents that both the Plaintiffs/Appellants and all the Judges of the Koko District Customary Court were Itsekiris while only the Defendants/ Respondents were Ijaws. There was thus a real likelihood of bias against the respondents. This allegation was not denied. In fact it was confirmed by the learned counsel for the Plaintiffs/Appellants at the Customary Court of Appeal. In view of this, it is my respectful view that regardless of whether the said Itsekiri Judges were actually biased or not, they ought not to have taken part in the trial. At best the trial could have been conducted by a mixed panel of both Ijaw and Itsekiri members if a neutral panel could not be set up to ensure its impartiality.”*

He cited in support the cases of Lekwot v. Judicial Tribunal (1993) 2 NWLR 410. Adio v. Attorney-General, Oyo State (1990) 7 NWLR 448 and Abiola v. Federal Republic of Nigeria (1995) 7 NWLR 1. My learned brother, Niki Tobi, JSC., has observed, and quite rightly too in my humble view, that these cases are irrelevant to the judgment before the Court of Appeal. Strangely enough the decision of this Court which the Warri Area Customary Court cited and applied, eluded the attention of their Lordships of the Court of Appeal. The issue raised in the present appeal was also raised in Deduwa & Ors. v. Okorodudu & Ors. (1976) NSCC 499 (Vol. 10). This Court held that the trial Judge’s ethnic affinity to any of the parties was irrelevant and as it was not disputed that the learned trial Judge in the ease had no pecuniary or proprietary interest in the subject matter of the action he was not disqualified on that ground from hearing the action. In the present case there is no allegation that the Judges of the Koko District Customary Court had any pecuniary or proprietary interest in the lands in dispute between the parties. The fact, therefore, that they were Itsekiri like the Plaintiffs would not, per se, disqualify them on ground of real likelihood of bias. To hold to the contrary would only put the entire judicial system into chaos for no judge would be qualified to sit on a case where any of the parties is of the same ethnic group as himself. I think this is carrying the doctrine of bias to extreme ridicule.

Fair hearing is not only a common law right but also a constitutional right. Fort Section 33(1) of the 1979 Constitution, (now Section 36(1) of the 1999 Constitution), provided:

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

Fairness of proceedings, therefore, requires that a judge “tainted by actual bias, (or even a real likelihood of bias), should not participate in the decision making process as the adjudicator is under a duty to act fairly. This requirement of the rule of fair hearing is summed up in the Latin maxim: *nemo iudex in causa sua*, that is, no one should be a judge in his own cause. That is why the Constitution requires that the Court or other tribunal be constituted in such manner as to secure its independence and impartiality.

In addition to this requirement is the requirement that the person whose conduct is the subject matter of inquiry should have an opportunity of knowing what evidence has been given against him and to challenge hostile evidence. In effect both parties must be heard. This is the second pillar of the rule of natural justice on which fair hearing is based and it is summed up in the Latin maxim: *audi alteram partem* that is, hear the other side.

An allegation of bias or real likelihood of bias is not to be based on mere conjecture or speculation. It is not enough, as alleged in this case, that the trial Judge is of the same ethnic group as one of the parties; he must be shown to have pecuniary or proprietary interest in the subject-matter of the dispute or that by his conduct of the proceedings, he has demonstrated favouritism to the party that is of the same ethnic group as his or hostility to the other party. None of these has been shown to exist in this case. The independence and impartiality of a court or tribunal is not taken away merely, and without more, by the ethnic affinity of the Judge(s) of the court or tribunal with any of the parties - *Deduwa v. Okorodudu* (supra).

The complaints that the Defendants were not given the opportunity of cross-examining the Plaintiffs and their witnesses is not borne out by the record. My learned brother, Niki Tobi, JSC., has cited

instances from the record of cross-examination of these witnesses. I need say no more on it.

It is my conclusion that there is no basis whatsoever for the conclusion of the Court below that the Defendants had no fair hearing at the trial. From the record of appeal before us, the proceedings of the Koko District Customary Court were conducted in an exemplary manner and this is to the great credit of the judges of that Court bearing in mind that they were laymen with no legal training of any kind. The record shows that they were conscious throughout the proceedings of the need to do justice to both parties and this they did admirably.

It is for the reasons herein and the reasons contained in the judgment of my learned brother, Niki Tobi, JSC., that I unhesitatingly allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Warn Area Customary Court which upheld that of the Koko District Customary Court with costs as assessed by my learned brother.

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**MOHAMMED JSC**

I entirely agree with the opinion of my learned brother, Niki Tobi, JSC., in the judgment just read. I have had the advantage of reading the judgment in draft before now. My learned brother has made a substantial finding on the issue of fair hearing which is the main issue in this appeal and I agreed with this conclusion. I therefore find merit in this appeal and it is allowed. The judgment of the Court of Appeal is set aside. I restore the judgment of Koko District Customary Court which was in favour of the appellants. I award N2,000.00 in favour of the plaintiffs/appellants as costs assessed by the Court of Appeal and N10,000.00 being costs of this appeal.

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**UWAIFO JSC**

H I had the opportunity to read in advance the judgment of my learned brother, Tobi, JSC. I am in agreement with him that this appeal has merit for the reasons he has given.

The Koko District Customary Court was very fair in the manner it conducted the hearing of the case brought by the plaintiffs/

appellants to claim title to the parcel of land in Ukpomaje village on which the defendants/respondents built a Church without their consent. The court visited the locus in quo, and conducted extensive inspection to adjoining villages of Orumagada, Uton-Ugboro and Abarumeji constituting Ureju land to which the plaintiffs laid claim of ownership. At the inspection both parties and their witnesses were present. The plaintiffs showed the court important landmarks. The defendants did the same. B

In its judgment, the District Customary Court held as follows:

*"From the evidence before us and our personal observations during the inspection journey of the land in dispute, the Plaintiffs' testimony in support of their claim, the evidence of their witnesses and their answers to cross-examination by the defendants and the Court, the Plaintiffs have been able to establish and prove satisfactorily before the Court that Ureju land is their home land and the ancient property of their immigrant founding ancestors. The evidence of the plaintiffs and their witnesses as to the founding of Ureju and the ownership of all that parcel of land in dispute before us in this case is more credible than the evidence of the defendants and their witnesses and leads us to conclude that Ureju was founded by the Plaintiffs' ancestors and own practically all that parcel of land in dispute under the overlordship rights of the Olu of Warri in Warri Kingdom. That the Ijaws, defendants in this case, mere nomadic fisher folks, settled on the land with the permission of the Plaintiffs' ancestors as their Customary tenants. This we so conclude and believe."* C D E F

Judgment was then entered for the plaintiffs, and an order of injunction was made restraining the defendants.

*"1. From putting tenants on the said parcel of land or granting fishing tenancies or right and collecting fishing rents or granting rights to fell timber or felling timber for sale. G*

*2. The defendants should not interfere with Plaintiffs rights of fishing in the creeks within the said parcel of land.*

*3. The defendants should not in any form prevent the Plaintiffs from collection of rents from tenants using the land both new tenants and including the defendants."* H

In addition, the Court decreed inter alia that (a) the plaintiffs shall not exercise their rights of ownership to affect the livelihood of the defendants, (b) the plaintiffs shall not eject the defendants from

their places of abode, (c) the plaintiffs shall not destroy the church building the defendants put up at Ukpomaje and any other buildings they have erected there which are the cause of action, and (d) the defendants shall refrain from any further act of trespass upon the plaintiffs land. The appeal by the defendants against that decision  
 B was scrupulously considered by the Warri Area Customary Court. In a reserved judgment delivered on 5 October, 1989, that appellate court by majority confirmed the decision of the District Customary Court. But the Customary Court of Appeal, Delta State, on 2 June,  
 C 1994, held that there was no fair hearing. This was on the erroneous finding that the defendants were not present during the inspection at the locus in quo.

The Court observed and found thus:

*"The question now is where were the defendants when the  
 D plaintiffs took the court out for inspection? There is no answer to these questions from the record. Since there is no answer from the record, we hold that at one stage or the other the defendants were not present during the inspection.*

In our view, they did not have a fair hearing. It seems that  
 E Court overlooked the contents of the printed record on what transpired at the locus in quo. Having thus observed and found as it did, it set aside the judgment of the Warri Area Customary Court and ordered that the case be heard de novo.

On appeal to the Court of Appeal, Benin Division, the main  
 F issues for determination were (a) whether the defendants were given a fair hearing; (b) whether on the strength of the evidence and the inspection carried out at the locus in quo the judgment of the trial court was correct or that a retrial was appropriate; (c) whether the  
 G Customary Court of Appeal justifiably substituted its views for those of the two native courts below which had decided the case. The Court of Appeal upheld the judgment of the Customary Court of Appeal that there was no fair hearing. It went further than that in the leading judgment of Akpabio JCA. There was the complaint that the plaintiffs  
 H and all the judges of the Koko District Customary Court were Itsekiris while the defendants were Ijaws. The court below reasoned that this amounted to the judges presiding over their own cause.

In this Court, the main consideration is whether the fact that the plaintiffs and the trial Judge belong to the same ethnic group was

such in the circumstances of this case to affect either the competence of the judges to hear the case, or the justice of the case. The other minor point is whether indeed the defendants were not given a fair hearing at the locus in quo. As regards this I will simply say the record shows that the defendants fully participated at the locus in quo. I think my learned brother, Tobi, JSC., has adequately dealt with these matter in his judgment. B

In respect of the other issue, I have to say that it is to suggest that simply because a judge and a party to a case belong to the same ethnic group, there is a case of likelihood of bias based on nemo iudex C sua as the court below did. That fact does not per se raise any such case of bias or the likelihood of it. It is the attitude displayed by the judge, if that is apparent, that may be examined as to whether he was biased. Again, if the judge is shown to derive any pecuniary or substantial benefit from the subject-matter of litigation in such a situation, the issue of likelihood of bias. Okorodudu (1976) NSCC (Vol. 19) 499 at 505-50. I can find no basis for the conclusion reached by the Customary Court of Appeal and the Court of Appeal that the defendants were not given a fair hearing; nor of the unsupported view of the Court of Appeal that the Koko District Customary Court E sat on its own case simply because the members and the plaintiffs belong to the same ethnic group. The way that Court conducted the proceedings and the orders made to protect the rights of the defendants as already pointed out in this judgment testify to the fairness F and lack of bias.

I am satisfied that there is merit in this appeal and accordingly, I too allow it I set aside the judgment of the court below and restore that of the Warri Area Customary Court which upheld the judgment of the Koko District Customary Court with costs as assessed by my learned brother, Tobi, JSC. G

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### **AYOOLA JSC**

I agree that this appeal should be allowed for the reasons given H in the judgment just delivered by my learned brother, Tobi, JSC. I too award N10,000 costs to the appellants.