

SUPREME COURT OF NIGERIA
FRIDAY 25TH APRIL, 2003. SC. 51/1997
CORAM:- S. M. A. BELGORE, S. U. ONU, U. A. KALGO,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC

1. PRINCE OLUFEMI FASADE
2. CHIEF ADEGBITE
3. CHIEF OGUNRINDE APPELLANTS
4. CHIEF ADESHINA
5. CHIEF OLALEYE
6. CHIEF FAYESE
AND
1. PRINCE IYIOLA BABALOLA
2. ATTORNEY-GENERAL
OF OSUN STATE RESPONDENTS

APPEALS - Courts - Judgments - Binding nature of - If judgment is not appealed - It remains binding (H1)

CHIEFTAINCY MATTERS - Registered declaration - Validity - Where such declaration is validly made - It represents the applicable customary law regulating appointment to vacant chieftaincy (H2)

EVIDENCE - Improper admission - Portion of evidence of PW3 which was improperly admitted - Must be discountenanced even in Supreme Court - So as to resolve the case on legally admitted evidence (H3)

PARTIES - Courts - Actions - Pleadings - Need for consistency - Party must be consistent in his pleadings and evidence in support - And also on appeal (H4)

PARTIES - Rights - Waiver - Meaning - Waiver is voluntary surrender of known right by a party entitled to same - Which at his option he could have insisted upon (H5)

CHIEFTAINCY MATTERS - Chieftaincy declaration - Amendment - Powers - Amendment of the declaration is not within jurisdiction of

FACTS

Prince Iyiola Babalola (1st plaintiff/respondent) at the High Court of Osun State claimed inter alia, for a declaration that the selection of 1st defendant/appellant as the Owa of Igbajo elect is contrary to procedure of nomination contained in chieftaincy declaration of Aringbajo of Igbajo and an injunction restraining appellants from further recognizing 1st appellant as Owa of Igbajo elect.

Appellants filed counter-claim to the effect that the selection of 1st appellant was in accordance with the law. In his judgment, the learned trial Judge dismissed 1st respondent's claim and granted the counter-claim by appellants. Consequently, respondents filed appeal in the Court of Appeal Ibadan Division. Appellants cross-appealed. The court allowed the main appeal and dismissed the cross-appeal. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

Whether having resolved issue No.3 against the respondent (consequent upon which grounds 4, 6, 7,8, 9, 16 and 17 of their grounds of appeal were dismissed) the Court of Appeal was right in granting to the respondents reliefs 2 and 3 based on those grounds and the said issue No.3 and whether the three declaratory reliefs ought to have been granted

Whether the respondents were not estopped from instituting the action and whether having regard to the conduct of the 1st plaintiff the declaration sought ought not to have been refused?

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

Judgments - Binding nature of

1. With due respect, I am unable to agree with Mr. Ogunwole. The court below clearly awarded the three declarations sought. Whether this was done out of forgetfulness or inadvertence, it remains the judgment of that court. If the judgment is not appealed, it binds the present appellants. Obviously the court below was in error to have made that sweeping statement

covering all the declarations sought, and in this appeal the error must be corrected. I therefore answer issue 2 in the negative. This means that only the first declaration sought was regularly granted by the judgment of the court below which is now for consideration in this appeal. (p. 1073 G)

CHIEFTAINCY MATTERS - Registered declaration - Validity

2. The first question under issue 4 having regard to the portion of exhibit B quoted above, is whether the multiple nominations made did not conflict with what exhibit B specifies. The second question is whether that specific condition declared in exhibit B can be waived. As to the first question, it cannot be argued to the contrary that where a declaration has been validly made in respect of a recognized chieftaincy and registered, it represents the applicable customary law regulating the selection and appointment of a candidate to a vacant chieftaincy; and the provisions of such a registered declaration should prevail until amended. The registered declaration is the admissible evidence of the customary law and is conclusive so long as it remains the subsisting declaration.

(p. 1075 D)

EVIDENCE - Improper admission

3. That portion of evidence of PW3 was improperly received in evidence and must be discountenanced even at this stage of the proceedings on appeal so as to resolve the case on properly and legally admitted evidence. (p. 1076 F)

Pleadings - Need for consistency

4. This vital evidence together with the finding thereon as to waiver was not contested by the 1st respondent on appeal to the court of Appeal. But before this court he is contesting waiver. That is improper. A party must be consistent in the case he presents before the court both in the pleading and the evidence in support, and on appeal. If he fails in this regard, it is bound to weaken his case. That could be disastrous for a plaintiff. (p. 1077 B)

PARTIES - Rights - Waiver - Meaning

5. What must be decided is whether this is an appropriate occasion for applying the doctrine of waiver. It is said that waiver is the intentional and voluntary surrender or relinquishment of a known privilege or right by a party entitled to the same which, at his option, he could have insisted upon.
(p. 1077 E)

Chieftaincy declaration - Amendment - Powers

6. The amendment of chieftaincy declaration is not a judicial function. It is not within the jurisdiction of the court to make such a declaration or to be involved in any way even to suggest amendment to it. In my view, it is the authorities given power under the law who can alter a declaration when a proper and convincing representation is made for a suitable amendment. (p. 1080 H)

NOTABLE POINT OF INTEREST

UWAIFO JSC

1. Waiver – Instances of

Waiver is a curious phenomenon. It can in certain circumstances be available to a plaintiff. It is also available to a defendant. When available to a plaintiff, it is not always that he needs to plead it as such. He can simply rely on the failure of the defendant to insist on a right to which he is entitled. An example is where a plaintiff failed to fulfill a condition precedent before bringing his action, such as where a defendant is entitled to a pre-action notice. It is for him to raise objection at the earliest opportunity. If pleadings have been filed it is for the defendant to plead the fact of non-service of the pre-action notice and raise the question of the competence of the action as a result of the failure to comply with the condition precedent. When he overlooks the non-service, that could amount to waiver of his entitlement to the pre-action notice. (p. 1077 F)

REPRESENTATION

Chief Afe Babalola, SAN with Olaseni Okunloye, Esq.
and Adebayo Adenipekun, Esq., for the Appellants

R. A. Ogunwole, Esq. with M. A. Numghe, Esq., for the 1st Respondents

CASES REFERRED TO:

- Ademola II v. Thomas (1946) 12 WACA 81
- Katsina Local Authority v. Makudawa (1971) 7 NSCC 119 B
- Eze v. Okechukwu (2003) 18 NWLR (Pt. 799) 348
- A-G Bendel State v. A-G Federation (1981) 10 SC 1
- Ariori v. Elemo (1983) 1 SCNLR 1
- Ezomo v. Oyakhire (1985) 1 NWLR (Pt. 2) 195 C
- Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619
- Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Pt. 109) 250
- Ogbonna v. A-G., Imo State (1992) 1 NWLR (Pt. 220) 647
- Menakaya v. Menakaya (2001) 16 NWLR (Pt. 738) 203
- Shanu v. Afribank Nig. Plc. (2002) 17 NWLR (Pt. 795) 185 D
- Adigun v. A.-G. Oyo State (1987) 1 NWLR (Pt. 53) 678
- Oladele v. Aromolaran II (1996) 6 NWLR (Pt. 453) 180
- Ajayi v. Fisher (1956) SCNLR 279
- Owonyin v. Omotosho (1961) 2 SCNLR 57 E

LEAD JUDGMENT BY UWAIFO JSC

This case concerns the Owa of Igbajo Chieftaincy. Igbajo is located in Ifelodun District Council Area. It was formerly in Oyo State but now in Osun State following the creation of the latter as a new State from the former. The last Owa of Igbajo, Oba Famodun II, died in 1988. The vacancy thus created was due to be filled by Owa-Iloro Ruling House producing a candidate. Prince Olufemi Fasade (1st appellant) emerged as the candidate by the decision of the kingmakers. His name was submitted to the Secretary, Ifelodun Local Government Council. The Secretary forwarded the same to the Oyo State Government for approval. This was accordingly given. F

This suit was thereafter brought by four plaintiffs. The 1st and 3rd of them have since died. The 2nd was on 2 May, 1990 withdrawn from the case at the trial court on the application of plaintiffs' counsel. His name was consequently struck out. The only plaintiff/respondent is now Prince Iyiola Babalola. The claim pursued at the trial was stated as follows: H

“(a) A declaration that the nomination and/or selection of the

1st defendant as the Owa of Igbajo elect is contrary to the procedure of nomination and selection contained in the chieftaincy declaration of Aringbajo of Igbajo and is therefore null and void.

(b) *A declaration that (under) the customary law prevailing in Igbajo both the Odofin Iloro and the Owa of Igbajo cannot be selected, nominated and/or appointed from the same section and/or branch of a ruling house.*

(c) *A declaration that the nomination and/or selection of the 1st defendant from Akeran section and/or branch of Owa Iloro Ruling House as the Owa of Igbajo elect is contrary to the customary law and/or tradition for the appointment of Owa of Igbajo.*

(d) *An injunction restraining the defendants by themselves, their servants, officers, agents or privies or howsoever from taking any steps or action based on or pursuant to the decision of the 4th-9th defendants (The Kingmakers) in their meeting held on the 8th day of March, 1989 wherein the 1st defendant was selected to fill the vacant stool of Owa of Igbajo."*

There was also a counterclaim as follows:

"(1) Declaration that the Aringbajo of Igbajo (now known as Owa of Igbajo) Chieftaincy Declaration declared by the Ifelodun District Council on the 17th day of October, 1955 and passed by the Council on the 16/11/56, approved at Ibadan on 28/1/57 and registered on 8/2/57 is null, void and of no effect in as much as it contains the provision that whenever a vacancy occurs (in the Aringbajo Chieftaincy title), the kingmakers shall require the Head-Omoba of the ruling house who is the person holding the title of Olori-Omoba in that house to present a candidate from the house whose turn it is to produce a candidate which provision is not in accordance with the customary law and practice governing the selection of and presentation of candidates to the kingmakers whenever a vacancy occurs.

(2) Declaration that the nomination and presentation of the 1st defendant and other candidates considered suitable to fill the vacancy in Owa of Igbajo Chieftaincy title to the kingmakers by Owa of Iloro Ruling House acting through the family head and the selection to the 1st defendant among the list by the kingmakers as Owa elect is in accordance with the customary law and practice governing appointment, nomination, presentation and selection of candidate to fill a vacancy in Owa of Igbajo Chieftaincy title and is therefore

proper and valid.”

In the course of the judgment given on 2nd August, 1990 at the High Court sitting at Oshogbo, Kolawole, J dealt with a number of issues which he considered arose from the case. The learned trial Judge was rather painstaking in his consideration of the evidence and in the resolution of the said issues. He dismissed the claim and granted the counterclaim. B

The plaintiffs appealed to the court of Appeal, Ibadan Division, while the 2nd and 3rd defendants cross-appealed. The 2nd and 3rd defendants were the Military Governor of Oyo State (later Military Administrator of Osun State) and the Attorney-General of Osun State respectively. In the appeal five issues were canvassed as follows: C

“1 Whether the 1st defendant has been validly appointed as the Owa of Igbajo in accordance with the provision of the registered chieftaincy declaration of Aringbajo of Igbajo (exhibit ‘B’).

2. Whether the declaration sought and granted to the defendants/respondents in paragraph 34(ii) of the statement of defence and counter-claim of 1st, 4th-8th defendants/respondents is not contrary to the Registered Declaration of Aringbajo of Igbajo (exhibit ‘B’). E

3. Whether the 1st defendant is entitled to be appointed as the Owa of Igbajo being member of Odofin family whose head is one of the Kingmakers.

4. Whether the learned trial Judge properly applied the principles of law in Kajo v. Bonsie (1957) 1 WLR 1223. F

5. Whether the learned trial Judge has properly taken the advantage of having seen and heard the witnesses (sic) evidence.”

In the cross-appeal, the issues which the Court of Appeal was asked to resolve were: G

(i) Whether the word “candidate” in paragraph (e) of exhibit B (the chieftaincy declaration) does not in law admit of a plural connotation.

(ii) Whether parties are obliged to plead the legal interpretation a word should bear in their pleadings. H

The Court of Appeal on 15 July, 1996 per the leading judgment of Mukhtar, JCA allowed the appeal, concluding, “I hereby make the declarations sought by the appellants in the court below.” It

is not clear whether this was meant to exclude the injunction which was also sought. But, obviously, no order was made in regard to that injunction. As for the cross-appeal, the court below held that the provision in the chieftaincy declaration that one candidate is to be presented by the ruling house should have been complied with and that “a deviation from it amounted to a contravention which cannot be tolerated.” The cross-appeal was held to have failed in its entirety.

However, the learned Justice of Court of Appeal resolved issue 3 in the affirmative thus agreeing with the learned trial Judge that the 1st defendant (now 1st appellant) is not disqualified or disentitled from being appointed the Owa of Igbajo just because he is a member of Odofin family. The case that had been made against him was that the Odofin family of Owa-Iloro Ruling House had been bestowed with the title of Odofin Ilaro exclusively as one of the kingmakers. As a consequence of that it was alleged that by tradition both the Owa of Igbajo and Odofin Ilaro could not be produced by the same ruling house, and that accordingly the 1st appellant could not be selected as the Owa of Igbajo. The learned trial Judge saw no merit in that and found against it. The court below upheld that finding. There is no appeal against that finding. But the effect of it as it affected the 2nd and 3rd reliefs claimed in this case has been argued in the present appeal brought before this court.

Seven issues for determination have been set down by the appellants in this appeal. There are as follows:

“1. Whether having regard to the claims and the parties before the High Court, the High Court and consequently the Court of Appeal had competence and for jurisdiction to entertain same? Grounds 1, 2, 10 and 12.

2. Whether having resolved issue No. 3 against the respondent (consequent upon which grounds 4, 6, 7, 8, 9, 16 and 17 of their grounds of appeal were dismissed) the Court of Appeal was right in granting to the respondents reliefs 2 and 3 based on those grounds and the said issue No. 3 and whether the three declaratory reliefs ought to have been granted? Grounds 9 and 13.

3. Whether on the peculiar facts and circumstances of this case, the strict interpretation placed upon the RELEVANT PROVISIONS of exhibit B (the Aringbajo of Igbajo Registered Declaration) was correct? Grounds 3, 4, 5, and 8.

4. *Whether the respondents were not estopped from instituting the action and whether having regard to the conduct of the 1st plaintiff the declaration sought ought not to have been refused?* Ground 6.

5. *Whether the lower court did not, in dealing with the case on appeal violate its role as an appellate court to the detriment of the appellants' case?* Grounds 9 and 14.

6. *Whether it was right for the lower court to make exhibit 'B' the basis of its judgment in the face of the strong evidence on record that exhibit 'B' did not represent the customary law of Igbajo and was therefore not the registered declaration contemplated by the Chiefs Law, and therefore invalid?* Ground 16.

7. *Whether the dismissal of the appellants' counterclaim by the Court of Appeal was justified in the circumstances. Ground 11."*

Let me consider issue 2 first. Reliefs 2 and 3 were sought on the basis that the 1st appellant was disentitled from being made the Owa of Igbajo because his family was bestowed with the title of Odofin Ilaro, which is a section of Owa Ilaro Ruling House. The contention was that under the customary law of Igbajo both the Owa of Igbajo and Odofin Ilaro could not be held by the same ruling house. The learned Senior Advocate, Chief Babalola, has argued that since that contention which was issue 3 before the court below was found by that court to be without merit, just as the trial court did, it was wrong for the court below to have granted the declarations 2 and 3 sought at the trial.

But Mr. Ogunwole, learned counsel for the 1st respondent while acknowledging that (1) his client failed in that contention as held by the two courts below and (2) the Court of Appeal per Mukhtar, JCA gave judgment by saying "I hereby make the declarations sought by the appellants in the court below", nevertheless has argued that court's judgment does not imply that the 2nd and 3rd reliefs were granted.

With due respect, I am unable to agree with Mr. Ogunwole. The court below clearly awarded the three declarations sought. Whether this was done out of forgetfulness or inadvertence, it remains the judgment of that court. If the judgment is not appealed, it binds the present appellants. Obviously the court below was in error to have made that sweeping statement covering all the declarations sought, and in this

appeal the error must be corrected. I therefore answer issue 2 in the negative. This means that only the first declaration sought was regularly granted by the judgment of the court below which is now for consideration in this appeal.

I will add here that the trial court refused the orders of injunction. The court below made no order in respect thereof. It was silent on it. The court below reversed the judgment of the trial court having earlier set aside some of the findings of that court when it said:

"In the final analysis, the end result is that the appeal but for some grounds succeeds. The judgment of the lower court in as far as all the findings with the exception of the ones upheld in the judgment are set aside. I hereby make the declarations sought by the appellants in the court below."

What then happened to the injunction sought? This may have been another error but the dismissal of the claim by the trial court as regards the injunction sought was not pronounced upon by the court below; or, put in another way, the Claim for injunction so dismissed by, the trial court was not reversed and thereafter awarded by the court below. In effect, therefore, the further consideration of this appeal by me shall be only with the first relief granted in mind.

This takes me to issue 4, which is, whether the respondents were not estopped from instituting the action and whether having regard to the conduct of the 1st plaintiff (i.e. 1st respondent) the declaration sought ought not to have been refused. This issue is relevant to the first relief already reproduced in this judgment. I shall have to recite it again as follows:

"A declaration that the nomination and/or selection of the 1st defendant as the Owa of Igbajo elect is contrary to the procedure of nomination and selection contained in the Chieftaincy Declaration of Aringbajo of Igbajo and is therefore null and void."

I can find nothing on record to show why the chieftaincy in question which was up to 1988 known as Aringbajo of Igbajo when the last incumbent, Famodun II, died is now referred to as Owa of Igbajo. But there is no dispute that exhibit B which contains the chieftaincy declaration of Aringbajo of Igbajo, is the one applicable to this case. The relevant portion of the declaration [para. (e)] reads:

"(e) Whenever a vacancy occurs, the kingmakers shall require the Head-Omoba of the ruling house who is the person holding the

title of Olori-Omoba in that house to present a candidate from the house whose turn it is to produce a candidate.

The family concerned selects a candidate and present him to the Head-Omoba who in turn presents him to the kingmakers. The kingmakers can reject an unsuitable candidate. In that event the Olori-Omoba selects another candidate from the same ruling house.” ^B

It is common ground that at the meeting of members of the family concerned, six candidates were nominated and presented to the kingmakers for one out of them to be selected and his name forwarded for the approval of Government. The six nominated were:

(1) Adewale Adeyeye; (2) Olufemi Fasade -1st appellant; (3) Deacon Adewuyi Faminu; (4) Iyiola Babalola - 1st respondent; (5) Akande Gbadebo and (6) Tewogbade Latilo. It was Olufemi Fasade the kingmakers selected as the suitable candidate out of the six nominated. ^C

The first question under issue 4 having regard to the portion of exhibit B quoted above, is whether the multiple nominations made did not conflict with what exhibit B specifies. The second question is whether that specific condition declared in exhibit B can be waived. As to the first question, it cannot be argued to the contrary that where a declaration has been validly made in respect of a recognized chieftaincy and registered, it represents the applicable customary law regulating the selection and appointment of a candidate to a vacant chieftaincy; and the provisions of such a registered declaration should prevail until amended. See *Ogundare v. Ogunlowo* (1997) 6 NWLR (Pt. 509) 360. ***The registered declaration is the admissible evidence of the customary law and is conclusive so long as it remains the subsisting declaration.*** See *Adigun v. A.-G. Oyo State* (1987) 1 NWLR (Pt. 53) 678; (1987) 3 SC 250; *Oladele v. Aromolaran II* (1996) 6 NWLR (Pt. 453) 180. Such a declaration having derived its existence from the relevant Chiefs Law has statutory force: see *Ayoade v. Military Governor, Ogun State* (1993) 8 NWLR (Pt. 309) 111. It is only left for me to say on this first question that the learned trial Judge erred in taking oral evidence of the customary law applicable to this case other than as stated in the declaration, exhibit B. He was bound to be content with the evidence provided in exhibit B as to the custom in question. ^D ^E ^F ^G ^H

The second question raises the issue of waiver. The appellants pleaded in paragraphs 15, 16 and 18 of their statement of defence facts in support of waiver. Indeed in paragraph 16, the 1st respondent was, at the conclusion for the meeting where six candidates were nominated, alleged to have “pledged on behalf of himself and other candidates nominated that whoever was selected by the kingmakers would receive full cooperation of all other nominated candidates and the entire ruling house.” When the 1st plaintiff, Prince Akande Tanimomo Gbadebo, testified as PW3, he said in examination-in chief,

“It is true that we promised to cooperate with whoever was chosen among the six candidates. We said so because of the hostile atmosphere. Had we not said so that day, our lives would have been endangered.”

The aspect of this evidence which says the plaintiffs promised to cooperate with whoever was chosen among the six candidates supports paragraph 16 of the statement of defence. The other aspect of the hostile atmosphere in which the promise was made is inadmissible because it is at variance with the substance of paragraph 25 of the statement of claim which reads:

“When the list of six contestants was to be sent to the kingmakers the Secretary of Olori Omo Owa of Iloro Ruling House did not consult with Agbon ruling house and the objection raised to the inclusion of the names of some candidates from Odofin Iloro family and the need to present ONLY one candidate in accordance with the Chieftaincy Declaration was not reflected in the letter sent to the kingmakers.”

That portion of evidence of PW3 was improperly received in evidence and must be discountenanced even at this stage of the proceedings on appeal so as to resolve the case on properly and legally admitted evidence. See *Ajayi v. Fisher* (1956) SCNLR 279; *Owonyin v. Omotosho* (1961) 2 SCNLR 57; *Agbaje v. Adigun* (1993) 1 NWLR (Pt. 269) 261; *Chigbu v. Tonimas* (Nig.) Ltd.. (1999) 3 NWLR (Pt. 593) 115; *Shanu v. Afribank Nigeria Plc.* (2002) 17 NWLR (Pt. 795) 185; (2003) FWLR (Pt. 136) 823.

Even so, the learned trial Judge rejected that aspect of the evidence of PW3 in which he said the purpose of saying he would cooperate with whoever was chosen from among the six names sent

was merely to save himself from harm. The learned trial Judge said:

"I do not accept his explanation that he said so only because of the hostile atmosphere and that had he not said so that day, his life and those of some others would have been in danger. He was reported to have said so after the nomination that is after the business of the meeting was concluded and concluded peacefully. I do not see how his life or anybody else's could have been endangered at that stage."

This vital evidence together with the finding thereon as to waiver was not contested by the 1st respondent on appeal to the court of Appeal. But before this court he is contesting waiver. That is improper. A party must be consistent in the case he presents before the court both in the pleading and the evidence in support, and on appeal. If he fails in this regard, it is bound to weaken his case. That could be disastrous for a plaintiff.

The question is, did the plaintiffs by their conduct waive the requirement in the declaration, exhibit B, that one candidate be nominated? Waiver was pleaded. Evidence was led on it. The learned trial Judge made a finding thereon as to what the plaintiffs did to compromise that aspect of the chieftaincy declaration. ***What must be decided is whether this is an appropriate occasion for applying the doctrine of waiver. It is said that waiver is the intentional and voluntary surrender or relinquishment of a known privilege or right by a party entitled to the same which, at his option, he could have insisted upon.*** Waiver is a curious phenomenon. It can in certain circumstances be available to a plaintiff. It is also available to a defendant. When available to a plaintiff, it is not always that he needs to plead it as such. He can simply rely on the failure of the defendant to insist on a right to which he is entitled. An example is where a plaintiff failed to fulfill a condition precedent before bringing his action, such as where a defendant is entitled to a pre-action notice. It is for him to raise objection at the earliest opportunity. See *Eze v. Okechukwu* (2003) 18 NWLR (Pt. 799) 348; (2003) FWLR (Pt. 140) 1710 at 1729. If pleadings have been filed it is for the defendant to plead the fact of non-service of the pre-action notice and raise the question of the competence of the action as a result of the failure to comply with the condition precedent. See *Ademola*

II v. Thomas (1946) 12 WACA 81 at 89. When he overlooks the non-service, that could amount to waiver of his entitlement to the pre-action notice. In *Katsina Local Authority v. Makudawa* (1971) 7 NSCC 119 at p. 124, this court observed inter alia:

B *“It has long been settled in the High Court, or indeed in any court where pleadings are filed, that where it is intended to rely on a condition precedent then that condition precedent must be pleaded... If such condition precedent is not so pleaded the defendant would by the simple rules of pleadings be taken to have waived whatever rights he possesses in the subject-matter.”*

C This is where a plaintiff successfully relies on waiver without having himself to plead the facts in support thereof. See also *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Production Agency* (2002) 18 NWLR (Pt. 798) 1 at 29-30. But ordinarily, D where a defendant intends to establish waiver in a civil case, it goes without saying that he must, first, plead the facts relied on for that defence: see *Caribbean Trading & Fidelity Corp v. N.N.P.C* (1992) 7 NWLR (Pt. 252) 161. Second, the party against whom the doctrine is raised must not be under a legal disability that contradicts voluntary E abandonment of a right or privilege in question. Third, the said party must have knowledge or be aware of the act or omission which constitutes the waiver. Fourth, he must have done some unequivocal act to adopt or recognise the act or omission. Fifth, the waiver must F be in respect of a private right for the benefit of a particular person or party in contradistinction to a public right intended for the public good or affairs: see *A-G. Bendel State v. A-G., Federation* (1981) 10 SC 1 at 54; *Ariori v. Elemo* (1983) 1 SCNLR 1 at 13; *Ezomo v. Oyakhire* (1985) 1 NWLR (Pt. 2) 195 at 208; *Noibi v. Fikolati* (1987) G 1 NWLR (Pt. 52) 619 at 632; *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt. 109) 250 at 292; *Ogbonna v. A-G., Imo State* (1992) 1 NWLR (Pt. 220) 647 at 691, 695-696; *Menakaya v. Menakaya* (2001) 16 NWLR (Pt. 738) 203 at 263; *Shanu v. Afribank Nig. Plc.* (2002) 17 NWLR (Pt. 795) 185.

H The position was stated explicitly by this court in *Ariori v. Elemo* (supra) and I intend to quote two passages from the leading judgment of Eso, JSC at page 13. In the first passage the learned Justice talked about the concept of waiver thus:

“The concept of waiver must be one that presupposes that the

person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both... The exercise has to be a voluntary act. There is little doubt that, a man who is not under any legal disability, should be the best Judge of his own interest. If therefore, having full knowledge of the rights, interests, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these, or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waived those rights. He is, to put it in another way, estopped from raising the issue.”

He then went on to discuss to what extent a right conferred by statute can be waived as follows:

“The next enquiry is the extent to which a person could waive rights conferred upon him by law. When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such right. The right is for his benefit. He is sui juris. He is under no legal disability. He should be able to forgo the right or in other words waive it either completely or partially, depending on his free choice. The extent to which he has forgone his right would be a matter of fact and each case will depend on its peculiar facts. A beneficiary under statute should have full competence to waive those rights once the rights are solely for his benefit. The only exception I can think of is where the statute itself forbids waiver of its statutory provisions.”

It seems to me that the procedure for the selection and appointment of the Owa of Igbajo as contained in the declaration in exhibit B is solely for the benefit of any of the ruling houses whose turn it is to fill a vacant chieftaincy. The said declaration provides the necessary evidence to facilitate the choice of a candidate: see *Adigun v. A.-G., Oyo State* (1987) 1 NWLR (Pt. 53) 678 at 682. The second observation of Eso, JSC covers it. In other words, it is my view that, that procedure can be waived by those concerned as it was done in the present case. Having thus been waived it creates an estoppel against those who did so or acquiesced in it. The 1st respondent was one of those who actively waived it. He cannot therefore be heard to

complain later that the procedure was improper or that it worked injustice against him. On this basis alone which is arrived at on the resolution of issue 4, this appeal must succeed upon the only surviving claim from the decision of the court below, namely the first relief.

The appellants drew our attention in their brief of argument to B Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377 and Odeneye v. Efunuga (1990) 7 NWLR (Pt. 164) 618 in which this court decided that failure to comply with the chieftaincy declaration similar to the one in the present case would render the nomination exercise invalid. Chief Babalola made two submissions in this regard. The learned C Senior Advocate argued that those decisions were reached on facts different to the facts of the present case in that the issue of waiver did not arise in them. He therefore submitted that this case is distinguishable from those cases. In the alternative, the learned Senior Advocate proposed an invitation to this court to depart from its decision in D Adefulu v. Oyesile as well as Odeneye v. Efunuga. I am confident that there is absolutely no cause to arrange to consider an invitation for departing from or overruling those decisions. They have correctly interpreted the effect of the relevant chieftaincy a declaration.

E But I have shown that in appropriate circumstances a particular procedure in such a chieftaincy declaration can be waived. I therefore prefer the submission of the learned Senior Advocate as to distinguishing those cases from the present one to any idea of inviting this court to depart from them.

F I find no practical purpose of deciding the remaining issues 1, 3, 5, 6 and 7. But in view of the contention of the appellants against the correctness of the declaration in exhibit B, for instance, that the provision which says, "The family concerned selects a candidate and G presents him to the Head-Omoba who in turn presents him to the kingmakers" does not represent the customary law which allows for multiple candidates to be presented, I can only draw attention to the pronouncement of this court in Afolabi v. Governor of Oyo State (1985) 2 NWLR (Pt. 9) 734 at 738. There it was observed:

H "A Chieftaincy Declaration made under the Chiefs' Law, 1978 is the customary law in force in the area which it covers. By section 11 (2) of the Chiefs' Law, 1978 such declaration continues to have effect until it is amended and the amended Declaration is registered."

The amendment of chieftaincy declaration is not a judi-

cial function. It is not within the jurisdiction of the court to make such a declaration or to be involved in any way even to suggest amendment to it. In my view, it is the authorities given power under the law who can alter a declaration when a proper and convincing representation is made for a suitable amendment.

I have come to the conclusion that there is merit in this appeal. The judgment of the Court of Appeal, Ibadan Division, delivered on 5 July, 1996 is hereby set aside as it relates to the main appeal brought before that court. I restore the judgment of the trial court which dismissed the plaintiffs' claim in its entirety. I award the sum of N5,000.00 as costs in the court below and N10,000.00 as costs in this court to the appellants against the 1st respondent.

BELGORE JSC

The cardinal principle of a waiver in law is that the person in whose favour a benefit or right exists and he is aware of those rights or benefits but he decides not to take advantage of them. He must be sui juris, and under no disability, physical or mental, to take advantage of those rights, but none the less decides not to exercise his right, or gives up his rights. Such a person, thus having failed to take the bull by the horns on those rights, cannot be heard to complain thereafter that he was denied the advantage of benefiting from those benefits and rights. That person is presumed to have waived those rights and he is estopped from later trying to take advantage of what he has voluntarily waived [Ariori v Elemo (1983) 1 SCNLR 13; Ogbonna v. A.-G., Imo State (1992) 1 NWLR (Pt. 220) 647, 691, 695, 696; Shanu v. Afribank Plc. (2002) 17 NWLR (Pt. 795) 185]. First respondent waived his right under the declaration and he is estopped at this stage from trying to revive what he has voluntarily waived as a right.

I therefore agree with the full reasons advanced in the judgment of my learned brother, Uwaifo, JSC, that this appeal on all the facts and law in support has great merit. I therefore set aside the judgment of Court of Appeal and restore that of the trial High Court. I make the same order as to costs.

ONU JSC

Having had a preview of the judgment of my learned brother, Uwaifo, JSC just delivered. I am in complete agreement with him that the appeal succeeds and it is allowed by me. I make similar consequential orders inclusive of those as to costs therein in appellants' favour.

KALGO JSC

I have had the privilege of a preview of the judgment just read by my learned brother, Uwaifo, JSC in this appeal. In my respectful view the judgment covers all the issues raised in the appeal and I have decided to add nothing further to it. I entirely agree with the reasoning and conclusions reached including all the orders contained therein. I accordingly allow the appeal.

EJIWUNMI JSC

The judgment just delivered by my learned brother, Uwaifo JSC was read by me before now in its draft form. As a result, I felt satisfied that the issues raised in the appeal, having regard to the facts and the judgment of the court below have been properly considered in the said judgment of my learned brother, Uwaifo, JSC. I will therefore also allow this appeal and abide with the other consequential orders made in the judgment. Appeal allowed.

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