

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 193/97
CORAM:- S. M. A. BELGORE, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, D. O. EDOZIE, JJSC

1. GODWIN SASI D. OGOLO & 15 ORS APPELLANTS
AND

1. CHIEF JOSEPH TUMINI
OGOLO & 5 ORS RESPONDENTS

(For themselves and on behalf of Ogolo
Main House, Opobo)

CUSTOMARY LAW - Actions - Issues - Where the reliefs claimed -
Are based on the custom of the parties - The customary law and
practices relating to those reliefs - Are in issue (H1)

ACTIONS - Counter claim - Failure to file - Defendants are not en-
titled to any declaration - Since they had no counter-claim (H2)

CHIEFTAINCY MATTERS - Nomination - Proof - Nomination of 1st
plaintiff was void - Since plaintiffs failed to show that same - Was in
accordance with custom (H3)

ORDERS OF COURT - Retrial order - Basis - Before retrial is made -
Appellate court must be satisfied that the other party - Is not being
wronged in such a manner - As to occasion miscarriage of justice
(H4)

FACTS

Plaintiffs/respondents sued defendants/appellants in the High
Court of Rivers State, holden at Bori claiming sundry reliefs by which
they asserted the validity of the nomination and installation of 1st
respondent as the chief of Ogolo Main House while challenging the
installation of the validity of the subsequent purported nomination
and installation of the 10th appellant as such. Respondents' case was
that 1st respondent was validly selected and installed in accordance
with the native law and custom. Appellants had instituted suit No.
BHC/66/85 to challenge the nomination and installation of 1st re-

spondent. During the pendency of that suit, 10th appellant was installed as the chief of Ogolo Main House. In reaction, respondents filed the present action.

After hearing, the learned trial judge dismissed respondents' claims as it found that 1st respondent was not validly nominated. Aggrieved, respondents appealed to Court of Appeal which court allowed the appeal and ordered a retrial before the High court. The court held that the trial High court had failed to make specific findings on the applicable customary law and practice as well as the validity of 10th appellant's and 1st respondent's installations. Dissatisfied, appellants filed appeal at Supreme Court contending that the trial court had made all necessary findings relevant to the adjudication of the matter.

ISSUES FOR DETERMINATION

"ISSUE NO. 1

Whether the learned Justices of the court below were correct in determining the appeal upon the footing that the essential elements of lawful installation of the Chief of the Ogolo Main House under the customary law and practice relating to such installation was a distinct issue placed before the lower court for adjudication."

"ISSUE NO. 2

Whether the court below acted arbitrarily in ordering a retrial having regard to the very substantial specific findings of fact by the trial court which were unreversed and also considering the issues resolved in favour of the Appellants by the lower court as well as the other surrounding circumstances of the case on appeal."

HELD (Allowing the appeal per **EDOZIE JSC**, Katsina-

Alu JSC Dissenting)

CUSTOMARY LAW - Actions - Issues

1. The reliefs sought by the plaintiffs at the trial court have already been set out but at the risk of repetition, the two principal reliefs are a declaration that the 10th defendant was not but the 1st Plaintiff was duly installed as the Chief of Ogolo Main House in accordance with the custom of Ogolo Main House of Opobo. A proper adjudication of such claims will

naturally entail the ascertainment of the customary law and practices relating to the installation of that chieftaincy stool.
(p. 2796 G)

ACTIONS - Counter-claim - Failure to file

2. The lower court held:-

“...it is clear from the claim before the court that among the disputes which the lower court was called upon to decide or pronounce upon are, inter alia, to declare whether or not the said installation of Levi Brown Ogolo (the 10th defendant) was lawful or not.

The court was also required to declare whether the installation of the 1st Plaintiff (Joseph T. Ogolo) as Chief of the same Ogolo Main House on 29/11/85 was lawful or not.”

With profound respect to the learned Justices of the Court of Appeal, I think each party pleaded and gave evidence as to what it conceived to be a valid selection and installation of the Chief of the Main House. The trial court for the various reasons it gave rejected the procedure outlined by the plaintiffs through which the 1st plaintiff underwent as conforming to the prevailing customary law of the people and by implication held that the installation of 1st plaintiff was not valid. As the trial court rightly pointed out, the defendants had no counter-claim and therefore were not entitled to any declaration in their favour. (p. 2801 D)

CHIEFTAINCY MATTERS - Nomination - Proof

3. The finding by the trial court to the effect that the 1st Plaintiff was not nominated by Warisenapu or a committee vested with power to do so has not been challenged either in the court below or in this court. As I had earlier observed that finding was crucial as it was fatal to the plaintiffs’ case whose principal claim is a declaratory relief.

The plaintiffs having failed to show that the nomination or selection of the 1st plaintiff was in accordance with custom, the purported nomination was void and a nullity and as such nothing can stand on it:

It follows, therefore, that any subsequent installation of the

1st plaintiff cannot be valid. It is against this background that there cannot be any justification for the order of retrial made by the court below. (p. 2802 D)

Retrial order - Basis

- B **4. Before an order of retrial can be properly made, an appellate court or tribunal ought to satisfy itself that the other party is not thereby being wronged in such a manner as to occasion a miscarriage of justice. A retrial is inappropriate where the plaintiff has failed to prove his case and no irregularity of a substantial nature is apparent on the record.**
 C **In the instant case the plaintiffs have failed to establish a valid nomination of the 1st plaintiff. Even if the question about the role of Five War Canoe Houses were resolved in their favour,**
 D **that would not have affected the verdict of the trial court.**
 (p. 2803 A)

NOTABLE POINT OF INTEREST

- E **KATSINA-ALU JSC** (Dissenting)
1. Conclusions are not findings of facts
 The learned trial Judge in the course of his judgment said:
 “*Besides the fact that the 1st Plaintiff was not selected by Warisenapu or a committee that has the power to select and install a chief, the houses in Diepiri Section*”
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The above quoted excerpt is a conclusion. It is established practice that conclusion arrived at in a judgment must be based on the findings of fact made by the trial Judge. This certainly was not the case here. This whole case hinges on the appropriate or relevant applicable customary law and practice relating to the selection and installation of the chief of the Ogolo Main House. Regrettably, no findings on the contentions of the parties were made. (p. 2812 E)

- G **REPRESENTATION**
 H Philip Umeadi (Junior) Esq., with Dr. D. Nwachukwu, for the Defendants/Appellants
 D. C. Denwigwe, Esq., with J. O. Asoluka, Esq., and K. C. Oparaku, Esq.), for the Plaintiffs/Respondents

CASES REFERRED TO

Mogaji v. Odofin (1978) 4 S.C. 91
 Woluchem v. Gudi (1981) 5 S.C. 291
 Balogun v. Agboola (1974) 10 S.C. 111
 Onowan v. Iserhien (1976) 9-10 S.C. 95
 Idundun v. Okumagba (1976) NMLR 200
 Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703
 Ezeoke & Ors v. Nwogbo & Ors 1 NWLR (Pt.72) 616
 Atanda v. Ajani (1989) 6 S.C. (Pt. II) 87
 Clay Industries (Nig.) Ltd. v. Aina (1997) 8 NWLR (Pt.516) 208
 Igwe v. Alvan Ikoku C of E Owerri (1994) 8 NWLR (Pt.363) 459
 Oni & Ors v. Arimoro (1973) 3 S.C. 165 (1973) 8 NSCC 108
 Anyaoku v. Adi (1986) 3 NWLR (Pt.31) 731

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STATUTE REFERRED TO

Evidence Act, ss. 14 & 73

LEAD JUDGMENT BY EDOZIE JSC

This appeal emanating from the judgment of the Court of Appeal Port Harcourt delivered on 15th April, 1997, arose from a chieftaincy dispute relating to the stool of Opobo Main House or Main Ogolo House of Opobo Town in Opobo Nkoro Local Government Area of Rivers State. Both parties are members of the Diepiri section of Opobo town within the ancient conglomerate of Opobo kingdom. The Diepiri section is made up of six War Canoe Houses, the head of which is the Ogolo Main House.

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By tradition from time immemorial the Chief of Ogolo Main House is the traditional Head of the Diepiri section. With the demise in 1981 of the then incumbent Chief of Ogolo Main House, Chief Raymond D. Ogolo, the chieftaincy stool became vacant and it was in the process of the selection and installation of a successor that dispute erupted.

G

The plaintiffs/respondents' case is that the 1st plaintiff/respondent was in accordance with native law and custom validly and duly selected and installed as the Chief of Ogolo Main House on 29th November, 1985, and therefore the Head of Diepiri section. Angered by this assertion, the defendants/appellants instituted suit No.

H

BHC/66/85 at the High Court of Bori to challenge the claim. During the pendency of that suit, the 10th defendant/appellant and his supporters underwent traditional ceremonies in April, 1986, in consequence of which the 10th defendant/appellant was said to have become duly installed as the Chief of Ogolo Main House. This gave rise to another suit No. BHC/16/86 instituted by the plaintiff/respondents wherein they sought two declaratory reliefs, i.e., a nullification of the installation of the 10th defendant/appellant and the recognition of the 1st plaintiff/respondent as the Chief of Ogolo Main House. They also claimed damages for trespass on the Palace of Ogolo Main House and injunctive reliefs restraining the defendants/appellants from holding out the 10th defendant as the Chief of Ogolo Main House. In the aforesaid suit No. BHC/16/86 which culminated in the present appeal, pleadings were duly filed, exchanged and subsequently amended with the Amended Statement of Claim, the Further Amended Statement of Defence and Reply to the Statement of Defence as the terminal pleadings upon which the case was contested. As formulated in paragraph 21 of the Amended Statement of Claim, the plaintiffs/respondents claimed jointly and severally against the defendants/appellants the following reliefs:-

“(1) A declaration that the purported and mock installation of the 10th Defendant (Levi Brown Ogolo) as the chief of Ogolo Main House on the 10th day of April, 1986, during the pendency of Suit No. BHC/66/85 is unlawful, null and void and of no legal effect whatsoever.”

“(2) A declaration that the installation of the 1st Plaintiff (Chief Joseph T. Ogolo) as the Chief of Ogolo Main House on the 29th November, 1985, is lawful and valid in accordance with the custom of Ogolo Main House of Ogolo town and that the palace of Chief Ogolo Diepiri in Ogolo Main House compound is customarily under the custody and control of the installed Chief of Ogolo Main House.”

“(3) N60.000.00 (Sixty Thousand Naira) being damages for trespass committed by the 11th -16th Defendants in that on or about the 10th day of April, 1986, and on divers days before and thereafter, the aforesaid Defendants by themselves, their agents and servants without the consent of the Plaintiffs broke and entered into Ogolo Main House Palace desecrated same as well as the shrines in Opumogu and “Ihu Esi” of Chief Ogolo’s compound which are in

peaceful possession of the Plaintiffs.

(4) Perpetual injunction restraining the Defendants, their agents and servants from holding out the 10th Defendant as Chief of Ogolo Main House in Opobo town.

(5) A perpetual injunction restraining the 10th Defendant by himself, servants, agents from holding himself out as or acting as the Chief of Ogolo Main House in Opobo town.”

At the trial, each party called witnesses and tendered several exhibit to substantiate its case. After the conclusion of the final addresses of learned counsel for both parties, the learned trial Judge, Opene, J., (as he then was), meticulously and painstakingly evaluated the evidence and in a well considered judgment delivered on 28th of July, 1993, dismissed the plaintiffs/respondents’ case. Thereafter, the plaintiffs/respondents lodged an appeal to the Court of Appeal, Port Harcourt Division, which court in a unanimous decision delivered on 15th April, 1987, allowed the appeal and ordered a retrial before the High Court. Against this decision of the Court of Appeal, the defendants/appellants have lodged the instant appeal with a notice of appeal containing only one ground of appeal which notice was subsequently amended with an additional ground of appeal.

Parties by their respective counsel filed and exchanged briefs of argument, which they adopted and relied upon with oral address in amplification of their briefs.

In the appellants’ brief, two issues were identified for the determination of the appeal, viz:-

“ISSUE NO. 1

Whether the learned Justices of the court below were correct in determining the appeal upon the footing that the essential elements of lawful installation of the Chief of the Ogolo Main House under the customary law and practice relating to such installation was a distinct issue placed before the lower court for adjudication.”

“ISSUE NO. 2

Whether the court below acted arbitrarily in ordering a retrial having regard to the very substantial specific findings of fact by the trial court which were unreversed and also considering the issues resolved in favour of the Appellants by the lower court as well as the other surrounding circumstances of the case on appeal.”

On their part, the respondents in their brief formulated two issues in the following terms:-

- “i. Whether the learned Justices of the court below were justified in holding that the applicable customary law and practice relating to the lawful installation of the Chief of the Ogolo Main House of Opobo was a crucial issue in dispute between the parties and that failure by the trial Judge to make a specific finding thereon was fatal.*
- ii. Whether the court below was wrong in ordering a retrial having regard to its holding that the Learned trial Judge failed to make a specific finding on the applicable customary law and practice relating to the lawful installation of the Chief of the Ogolo Main House of Opobo which was an issue in dispute between the parties.”*

It is contended in the appellants’ brief that the gravamen of the complaint in issue No. 1 is that no question as to the essential features or requirements of a valid selection, installation and presentation of the Chief of Ogolo Main House under the appropriate customary law arose for determination before the Court of Appeal as there was no specific ground or grounds of appeal giving rise to such a question or from which such a question could be distilled. Counsel referred to the 16 grounds of appeal at pages 267 and 275 of the record and pointed out that it was not the case of the plaintiffs/respondents as the appellants in lower court that the trial court failed to make specific findings of fact as to the conglomeration of the prescribed acts which constitute a valid installation of the Chief of Ogolo Main House. The cardinal issue in controversy before the lower court, it was stressed, was whether the lower court properly evaluated the evidence before it in line with the decision of this court in *Mogaji v. Odojin* (1978) 4 S.C. 91. It was therefore submitted that the court below was in error to have upturned the decision of the learned trial Judge on the ground that it made no finding on what would amount to the essential requirements or ingredients of a valid installation of the Chief of Ogolo Main House under the appropriate customary law practice.

On the second issue for determination which deals with the order of retrial, learned counsel for the appellants submitted that an order for retrial is not granted to afford a losing party an opportunity for a second bite at the cherry vide the case of *Ezeoke & Ors. v. Nwogbo & Ors.* 1 NWLR (Pt.72) 616. He highlighted all the material

issues in contest between the parties upon which the trial court made specific findings favourable to the appellants which were not reversed by the court below and submitted that in the circumstance an order of retrial was most inappropriate, rather the court below ought to have affirmed the verdict of the trial court, citing the cases of Onowan v. Iserhien (1976) 9-10 S.C. 95; Idundun v. Okumagba (1976) NMLR B 200; Balogun v. Agboola (1974) 10 S.C. 111, Woluchem v. Gudi (1981) 5 S.C. 291.

In reply, learned counsel to the respondents in regard to his first issue for determination submitted that both from the pleadings of the parties filed at the trial court and the respondents' grounds of appeal before the court below, the question of the applicable customary law and practice relating to the installation of the Chief of the Ogolo Main House of Opobo was clearly in dispute between the parties. References were made to paragraphs 13, 14, 15, 21 and 22 of the Amended Statement of Claim and paragraphs 9, 10, 11 and 21 of the Further Amended Statement of Defence and the cases of Messrs. Lewis & Peat Ltd. v. A.E. Akhimien (1986) 4 S.C. 157 at 163-167; and Akintola & Anor. v. Solana (1986) 4 S.C. 141 at 188, 189. Counsel also referred to the Amended Notice of Appeal filed by the respondents herein dated 16/3/95 and particularly to grounds 8 and 14 which were said to have been covered by issue 2.6 in the issues for determination formulated by the respondents as appellants in the court below and also issue No. 4 of the appellants as respondents in the court below and submitted that they all touched directly on the various aspects of the customary law and practice relating to the installation of the Chief of Ogolo Main House of Opobo. These customary law and practices, it was contended, would include the procedures for the chieftaincy and the role of the distinct War Canoe Houses in Diepiri section and the powers and responsibilities of the Committee or Warisenapu with respect to the said installation. It was submitted that where any of these elements or features is in issue between the parties the applicable customary law and practice can justifiably be said to be in issue between the parties. On the authority of the case of Bankole v. Belu (1991) 8 NWLR (Pt.211) 523 at 537, it was stressed that the Court of Appeal is at liberty to reject all the issues as formulated by the parties and frame its own issues as was done in the instant case if in its view the issue as framed by the parties

will not lead to a proper determination of the appeal.

With respect to the respondents' second issue for determination dealing with the order for retrial, learned counsel pointed out in his brief that one of the distinct features of the customary law and practice in dispute was whether the other Five War Canoe Houses in Diepiri Section have any role to play in the installation of the Chief of Ogolo Main House. He noted that the learned trial Judge did not make any specific finding in that regard apart from the casual remark that the first plaintiff was never presented to the other Five War Canoe Houses in Diepiri section. It was submitted that a finding on this issue is indispensable in reaching a decision on whether or not the 1st plaintiff/ respondent's installation was in compliance with the applicable native law and custom and therefore valid. Alluding to the cases of *African Continental Bank Limited v. Nwadiogbu* (1994) 7 NWLR (Pt. 256) 330 at 343, *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426 at 441, *Reynord v. William Allan* 2 WACA 52 at 53, learned counsel submitted that failure by a trial Judge to make a finding of fact on a crucial issue in dispute is fatal where such a finding is necessary for a proper decision. It was further contended that in such a situation where the resolution of the issue by the trial Judge would certainly have turned wholly or partly on the credibility of the witnesses, an appellate court would have no alternative but to remit the case for retrial as it is in no position to accredit one set of witnesses and discredit others and in support of the proposition, the following cases were cited - *Adeyemo v. Arokopo* (1988) 2 NWLR (Pt. 79) 203 at 316. *Armels Transport Ltd. v. Martin* (1970) 1 ANLR 27 at 32. It was therefore, submitted that the court below was justified in ordering a retrial.

It is convenient to treat the two sets of issues together as one composite issue which is whether there was any material issue unresolved by the trial court which was relevant in the adjudication of the vital dispute between the parties to justify an order of retrial made by the court below. ***The reliefs sought by the plaintiffs at the trial court have already been set out but at the risk of repetition, the two principal reliefs are a declaration that the 10th defendant was not but the 1st Plaintiff was duly installed as the Chief of Ogolo Main House in accordance with the custom of Ogolo Main House of Opobo. A proper adjudication of such claims***

will naturally entail the ascertainment of the customary law and practices relating to the installation of that chieftaincy stool.

Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is a mirror of the culture of the people. Under our law, customary law is a question of fact to be proved by evidence or judicial notice if it has been established as required by Sections 14(2) and 73 of the Evidence Act; *Oyewunmi V. Ogunesan* (1990) 3 NWLR (Pt. 137) 182 at 207, *Taiwo v. Dosunmu* (1966) NMLR 67 *Otogbolu v. Okeluwa* (1981) 6-7 S.C. 99. Being a fact to be established by evidence, customary law must be specifically pleaded. In the case in hand, the plaintiff pleaded though inelegantly the customary law and practice they relied upon as is evident from the following paragraphs of the Amended Statement of Claim:-

“10. For many generations Ogolo Main House has been by custom and tradition autonomous in handling her War Canoe House Affairs without let or hindrance from any person including the other five Canoe War Houses, which make up the Diepiri section of Opobo town.

11. The historical and cultural position of the Ogolo Main House made it mandatory for the said House to be informed of an installed chief of any of the aforementioned War Canoe House in Diepiri section for onward introduction to the Opobo Council of Chiefs. The other members of Diepiri section can only watch the installation of a chief of Ogolo Main House and cannot by custom question the manner of choice.

12. Similarly, it is not open to the Chief of Ogolo Main House and the members thereof to question the validity of the choice of Chiefs of the various subordinate War Canoe Houses and whoever is introduced to the Main Houses as the Chief is always accepted by all.

13. The Chiefs of Ogolo Main Houses have for many generations worked together in conjunction with their committee of Ogolo Main House who run the affairs of the House.....

The choice and election of the Chief of Ogolo Main House is the sole prerogative and functions of the said Committee of the Main House with the unanimous decision and popular support of members of Ogolo Main House.

14. The said Committee of Ogolo Main House is the only au-

thentic and competent body to nominate any person or persons for the Chieftaincy of Ogolo Main House and then present such to the General Meeting of the whole Ogolo Main House comprising of the adult males and females of the aforementioned Ogolo Main House who in turn vote in the open for the candidate of their choice.

- B (e) *The Plaintiffs will rely on the installation instruments of Chiefs ... to substantiate the assertion that there is nobody called Warisenapu, neither is it necessary for any of the other War Canoe Houses to signify their approval to the choice of the Chief of Ogolo Main House.*
- C *The Plaintiff would further aver that the choice of who should be chief of Ogolo Main House is the exclusive prerogative of the Committee of Ogolo Main House.*

D 21. *The installation of the 1st Plaintiff was popular and the associated ceremonies thereto were carried out in accordance with the custom of Ogolo Main House.....*

- E 22. *In the instant case the 1st Plaintiff had the “Ekere” (xylophone) of chief Ogolo Main House sounded for him coupled with the display of “Ngunume” dance by the people of the compound/invitees. After this display the Chief Priest of Ogolo Main House (Aaron S. Ogolo) performed the necessary rites and conducted the 1st Plaintiff to all vital shrines at “IHU EZE” and “OPUMONGU” of Ogolo Main House compound where he poured libation on the various shrines invoking the spirits of the ancestors for the protection of the 1st Plaintiff and welfare of the public.”*

F In reply to the above averments, the defendants pleaded in the Further Amended Statement of Defence, inter alia thus:-

- G “9. *In answer to paragraphs 10, 11 and 12 of the amended statement of claim, the defendants deny the distorted history contained therein and state that all War Canoe Houses are autonomous with regard to their internal affairs but in matters affecting the section, all branch War Canoe Houses are subordinate to the Main House and therefore take part in the selection and installation of the Chief of the Main House who by tradition and custom becomes their Head*
- H *Chief after installation. This is the customary practice in Opobo Town in all sections.*

10. *While the Warisenapu of the Main Ogolo House selects a Chief to the stool of the Main Ogolo House (who eventually becomes the Head of Diepiri section), it is the prerogative of the other*

War Canoe House to approve or reject any such candidate presented to them.

11. In further answer to paragraph 11 the defendants say that by custom any chief installed in any of the War Canoe Houses is introduced to Diepiri section for presentation to the Opobo Council of Chiefs. B

12. The defendants deny emphatically that the affairs of the Main Ogolo House are run by a committeethe Defendants aver that after the Nigerian Civil War, late Chief Raymond Ogolo appointed a committee which helped in collecting revenue from real property C for his subsistence allowance ...

That although each War Canoe House in Diepiri section of Opobo Town enjoys some autonomy, such autonomy does not extend to the selection and installation of the Chief of Main Ogolo House who by custom and tradition becomes the Head Chief of Diepiri D section on installation...

22. The defendants deny paragraph 22 of the amended statement of claim and will put the plaintiffs to the strictest proof of the allegations therein contained. The Defendants in further answer to the said paragraph state that there is a customary procedure for the E installation of all Heads of the Main House in Opobo and will rely on a document titled programme of events for installation ceremonies of the 10th Defendant which is attached to the special invitation."

From the excerpts of the pleadings quoted above, it is glaring F that while the parties agree that the procedure leading to the succession of their chieftaincy stool in dispute consists of several stages involving several customary practices, they are not *id idem* with respect to the precise nature of those practices. One cardinal area in which the parties have joined issue is on the body which customarily selects G or nominates a candidate for the chieftaincy title. The plaintiffs' case is that the nomination is the exclusive prerogative of the committee of Ogolo Main House and that the 1st plaintiff was validly nominated by that committee and further that Warisenapu does not exist in the affairs of the community. In direct opposition to those assertions, the H defendants maintained that Warisenapu exist, that it is the body customarily charged with the responsibility of nominating a candidate for eventual approval and installation as the Chief of Ogolo Main House. The learned trial Judge reviewed the evidence proffered by

the witnesses for the parties and at p. 178 of the record, in rejecting the case propounded by the plaintiffs, made a finding to the following effect:-

B *“It has been clearly shown that Warisenapu exist in Opobo and also in Ogolo House and that part of/ its function is the selection of the Chief of the Main House ... I am fully of the view that Warisenapu exists in the Main House and that even if one chooses to call it a committee, that it is different from an ordinary committee as it is a stool and the appointment is for life unless one misbehaved. They are sort of kingmakers.”*

C By that finding, it seems to me that 1st plaintiff was not nominated by the kingmakers. The plaintiffs’ case was therefore devastated beyond redemption since they have failed to scale through the first of several hurdles in the chieftaincy process.

D In addition to the above finding, the trial court appraised the evidence adduced by the parties regarding the presentation of the selected candidate to the other subordinate War Canoe Houses, the installation process and final presentation to the Opobo Council of Chiefs and at p. 194 et seq of the record, it encapsulated its findings
E thus:-

F *“It can be seen that the 10th Defendant was not only selected by the Warisenapu of the Main House and the general house of the main house but also the Warisenapu of the Diepiri section; further the procedure adopted in his installation is exactly the same as shown in Chief Strongface’s programme of events Exhibit D.3A.”*

G *As for the 1st Plaintiff, he was nominated by a committee which is said to derive its powers from Exhibit 1 and Exhibit 15A shows that everything about his installation took place on the same day. The meeting started at 12 p.m; the 1st plaintiff was elected there and it was agreed that installation would go on that day; P.W.1 was chosen by the House to officiate as the Chief Priest and it was then agreed that other War Canoe Houses should be invited to participate in the ceremony. The 1st plaintiff was then installed and the shrine rituals were performed. No doubt what is shown in Exhibit 15A falls far short of what should be done.*

H *Besides, the fact that the 1st Plaintiff was not selected by Warisenapu or a committee that has the power to select and install a chief, he was never presented to the other five War Canoe Houses in*

Diepiri section, there was no Resolution or Rules and Regulations by the members of the Houses, he was not presented with the staff of office by the Acting Head of the section. There is nothing to show that he was presented by the Acting Head of section to Opobo Council of Chiefs in public and the date of presentation.”

It is pertinent to observe that none of the above findings was faulted on appeal before the Court of Appeal which court in the lead judgment of Akintan, JCA., at p.359 lines 29 to 31 of the record held:-

“Although the learned Judge made specific findings of fact and gave reasons for accepting or rejecting certain evidence led before him, he, however, failed to make the necessary findings of fact relevant to the resolution of the dispute submitted to the court.” (Underlining for emphasis)

Earlier, on the same page at line 10 to 20, ***the lower court*** held:-

“..... it is clear from the claim before the court that among the disputes which the lower court was called upon to decide or pronounce upon are, inter alia, to declare whether or not the said installation of Levi Brown Ogolo (the 10th defendant) was lawful or not. In doing so, the court would be expected to make specific findings of fact from the evidence led before it as to what would amount to lawful installation of the Chief of the Ogolo Main House under the appropriate law and practice.

The court was also required to declare whether the installation of the 1st Plaintiff (Joseph T. Ogolo) as Chief of the same Ogolo Main House on 29/11/85 was lawful or not.”

With profound respect to the learned Justices of the Court of Appeal, I think each party pleaded and gave evidence as to what it conceived to be a valid selection and installation of the Chief of the Main House. The trial court for the various reasons it gave rejected the procedure outlined by the plaintiff through which the 1st plaintiff underwent as conforming to the prevailing customary law of the people and by implication held that the installation of 1st plaintiff was not valid. As the trial court rightly pointed out, the defendants had no counter-claim and therefore were not entitled to any declaration in their favour. The court below did not pinpoint at any material as-

pect of the customary law on which the trial court did not make a finding.

Learned counsel to the plaintiffs in his brief in this court in support of the judgment of the court below argued that the trial court did not make any finding about the necessary law and practice as to whether the subordinate five War Canoe Houses in Diepiri section have any role to play in the installation of the Chief of the Ogolo Main House. With respect to learned counsel, I do not share this view. At the risk of repetition but for the sake of clarity, the trial court at page 194 lines 15 to 17 stated:-

“Besides the fact that the 1st Plaintiff was not selected by Warisenapu or a Committee that has the power to select and install a chief, he was never presented to the other five War Canoe Houses in Diepiri section...”

Implicit in the above statement is a finding that it is part of the customary law that a candidate nominated or selected from the Main House must be presented to other five War Canoe Houses for approval. That apart ***the finding by the trial court to the effect that the 1st Plaintiff was not nominated by Warisenapu or a committee vested with power to do so has not been challenged either in the court below or in this court. As I had earlier observed that finding was crucial as it was fatal to the plaintiffs’ case whose principal claim is a declaratory relief.*** It is trite law that such a relief is a discretionary remedy which will be refused where the plaintiff fails to establish his alleged entitlement to the satisfaction of the court: See *Oni & Ors. v. Arimoro* (1973) 3 S.C. 165, (1973) 8 NSCC 108; *Anyaku v. Adi* (1986) 3 NWLR (Pt.31) 731 at 749 *Clay Industries (Nig.) Ltd. v. Aina* (1997) 8 NWLR (Pt.516) 208 at 228. ***The plaintiffs having failed to show that the nomination or selection of the 1st plaintiff was in accordance with custom, the purported nomination was void and a nullity and as such nothing can stand on it:*** *Macfoy v. U.A.C. Ltd.* (1961) 3 AER 1169, 1172, 1405; *Kolawole v. Alberto* (1989) 2 S.C. (Pt.II) 1; (1989) 1 NWLR (Pt. 98) 382. ***It follows, therefore, that any subsequent installation of the 1st plaintiff cannot be valid. It is against this background that there cannot be any justification for the order of retrial made by the court below.***

It is a well settled principle that an order of retrial should not be

made where it only serves the purpose of giving the losing party the opportunity to prove afresh what it has failed to prove: see *Ezeoke & Ors. v. Nwogbo* 1 NWLR (Pt.72) 616, (1988) 3 SCNJ (Pt. 1) 37 at p.48. ***Before an order of retrial can be properly made, an appellate court or tribunal ought to satisfy itself that the other party is not thereby being wronged in such a manner as to occasion a miscarriage of justice. A retrial is inappropriate where the plaintiff has failed to prove his case and no irregularity of a substantial nature is apparent on the record:*** see *Dantubu v. Adene* (1987) 4 NWLR (Pt.65) 314, *Solomon v. Mogaji* (1982) 11 S.C. 1 at 24; *Mogaji v. Odojin* (1978) 4 S.C. 91; *Ayoola v. Adebayo* (1969) 1 All NLR 159 and *Ayisa v. Akanji* (1995) 7 NWLR (Pt. 406) 129. ***In the instant case the plaintiffs have failed to establish a valid nomination of the 1st plaintiff. Even if the question about the role of Five War Canoe Houses were resolved in their favour that would not have affected the verdict of the trial court.***

For the foregoing reasons, it is my judgment that the learned trial Judge made specific findings favourable to the defendants substantially on all the material issues in contention between the parties. These findings were not faulted by the court below. In these circumstances, the order of retrial made by the court below cannot be sustained. In the event, this appeal has merit and is accordingly allowed.

The judgment of the Court of Appeal, Port Harcourt Division, delivered on 15th April, 1997, is hereby set aside and in its place the judgment of the trial court delivered on 28th July, 1993, dismissing the plaintiffs' case is restored.

The defendants/appellants are entitled to costs assessed and fixed at N10,000.00 against the plaintiffs/respondents.

BELGORE JSC

I had the privilege of having read in advance the judgment of my learned brother, Edozie, JSC., and I agree that the appeal has merit. I, for the reasons set out in the said judgment, also allow the appeal, setting aside the judgment of Court of Appeal and restore the judgment of trial High Court. I make the same consequential order as to costs.

KALGO JSC

I have read in advance the judgment just delivered by my learned brother, Edozie, JSC., in this appeal. I agree with his reasoning and conclusions reached therein which I adopt as mine. I am therefore of the view that the decision of the learned trial Judge, Opene, J., (as he then was), was not faulted by the Court of Appeal. I therefore find that there is merit in the appeal. I allow it, set aside the decision of the Court of Appeal and restore that of the trial court. I award N10,000.00 costs to the respondents.

UWAIFO JSC

I had the opportunity to read in advance the judgment of my learned brother, Edozie, JSC. I am in entire agreement with his reasoning and conclusion. The judgment has comprehensively demonstrated that the court below was in error to have ordered a retrial of the suit. There was absolutely no justification for such order. I gratefully adopt the reasoning of my learned brother, Edozie, JSC., to reach the same conclusions as he has done.

I too allow the appeal, set aside the judgment of the court below and restore that of the trial court. I award costs of N10,000.00 to the appellants against the respondents.

KATSINA-ALU JSC (DISSENTING)

This is an appeal from a decision of the Court of Appeal, Port-Harcourt Division, delivered on 15th April 1997, setting aside the judgment of Opene, J., (as he then was), and ordering a retrial before another Judge.

This is a chieftaincy suit relating to the chieftaincy stool of the Ogolo Main House of Opobo Town. Both the plaintiffs on record and the defendants are members of the Diepiri Section of Opobo. The Diepiri Section is made up of six (6) autonomous war canoe houses. By tradition from time immemorial, the Chief of the Ogolo Main House is ipso facto the traditional Head of the Diepiri Section.

The plaintiffs' case is that the 1st plaintiff was validly and duly elected and installed the Chief of the Ogolo Main House and there-

fore head of Diepiri section on 29th November, 1985, upon the demise of the incumbent, Chief Raymond D. Ogolo. The defendants being aggrieved by the installation of the 1st plaintiff instituted suit No. BHC/66/85 at the High Court of Justice, Bori, challenging the said installation.

During the pendency of suit No. BHC/66/85, the defendants B herein who were the plaintiffs in Suit No. BHC/66/ 85 installed the 10th defendant as the Chief of the Ogolo Main House on 10th April, 1986. The subsequent installation led to the institution of the present suit by the plaintiffs wherein they claimed a number of declaratory C and injunctive reliefs against the defendants including a declaration that the installation of the 10th defendant is null and void.

After a full trial Opene, J., (as he then was), dismissed the plaintiff's suit. The plaintiffs' appeal to the Court of Appeal was allowed. The judgment of trial court was set aside and the case was D remitted to the High Court to be heard de novo before another Judge. The defendants have now appealed to this court.

Based upon the grounds of appeal filed, the defendants raised two issues for determination which read thus:

"ISSUE No. 1

Whether the learned Justices of the court below were correct in determining the appeal upon the footing that the essential elements of lawful installation of the Chief of the Ogolo Main House under the customary law and practice relating to such installation was F a distinct issue placed before the lower court for adjudication.

ISSUE No. 2

Whether the court below acted arbitrarily in ordering a retrial having regard to the very substantial specific findings of fact by the trial court which were unreserved and also considering the issues resolved in favour of the Appellants by the lower court as well as the G other surrounding circumstances of the case on appeal?"

For their part, the plaintiffs formulated two issues for determination. They read:

"1. Whether the learned Justices of the court below were justified in holding that the applicable customary law and practice relating to the lawful installation of the Chief of the Ogolo Main House of Opobo was a crucial issue in dispute between the parties and that failure by the trial Judge to make a specific finding thereon was fatal. H

2. *Whether the court below was wrong in ordering a retrial having regard to its holding that the learned trial Judge failed to make a specific finding on the applicable customary law and practice relating to the lawful installation of the Chief of the Ogolo Main House of Opobo which was an issue in dispute.*"

B The defendants/appellants opened their submissions on their issue No.1 in this way:

C *"The gravamen of the complaint in Issue No.1 is that no question as to the essential features or requirements of a valid selection installation and presentation of the Chief of Main Ogolo House under the appropriate Customary law arose for determination before the Court of Appeal. It is submitted that for such a question to arise, there must be specific ground or grounds of appeal giving rise to such a question or from which such a question could be distilled... It was not the case of the plaintiff/respondents in the lower court that the trial court failed to make specific findings of facts as to the conglomeration of the prescribed acts requisite to ensure a valid installation of the Chief of Ogolo Main House under the customary law applicable between the parties."*

E This of necessity leads me to the pleadings in the court of trial and the issues for determination (distilled from the grounds of appeal) before the Court of Appeal. In paragraphs 10, 11, 12, 13 and 14 of the Amended Statement of Claim the plaintiffs averred as follows:

F 10. For many generations right from the death of Chief of Ogolo of Diepiri, Ogolo Main House has been by custom and tradition autonomous in handling her War Canoe House Affairs without let or hindrance from any person including the other 5 Canoe War Houses which make up the Diepiri Section of Opobo Town.

G 11. The historical and cultural position of the Ogolo Main House made it mandatory for the said House to be informed of an installed chief of any of the aforementioned War Canoe Houses in Diepiri Section for onward introduction to the Opobo Council of Chiefs. H The other members of Diepiri Section can only watch the installation of a Chief of Ogolo Main House and cannot by custom question the manner of choice.

12. Similarly, it is not open to the Chief of Ogolo Main House and the members thereof to question the validity of the choice of

Chiefs of the various subordinate War Canoe Houses and whoever is introduced to the Main House as the Chief is always accepted by all.

13. The Chiefs of Ogolo Main House have for many generations worked together in conjunction with their committees of Ogolo Main House who run the affairs of the House. The Plaintiffs will rely on a Statement of Defence dated 29th November, 1979, in Suit No. A/131/78 filed at Aba High Court. The choice and election of the Chief of Ogolo Main House is the sole prerogative and functions of the said Committee of the Main House with the unanimous decision and popular support of members of Ogolo Main House.

14. The said Committee of Ogolo Main House is the only authentic and competent body to nominate any person or persons for the chieftaincy of Ogolo Main House and then present such person or to the General Meeting of the whole Ogolo Main House comprising of the adult males and females of the aforementioned Ogolo Main House, who in turn vote in the open for the candidate of their choice.

The plaintiffs in the foregoing paragraphs pleaded that by their custom it is the Executive Committee of the Ogolo Main House that selects or elects a chief to the stool of the Ogolo Main House. They also averred that the Executive Committee installs the chief so elected without let or hindrance or interference from any of the other 5 sub War Houses. That is to say that in the process of selection and installation the other War Canoe Houses which made up the Diepiri Section, have no say.

Now the defendants denied the above averments in their paragraphs 9 and 10 of Further Amended Statement of Defence. Paragraphs 9 and 10 state as follows:

"9. In answer to paragraphs 10, 11 and 12 of the amended Statement of Claim, the defendants deny the distorted history contained therein and state that all War Canoe Houses are autonomous with regard to their internal affairs but in matters affecting the Section, all branch War Canoe Houses are subordinate to the Main House and therefore take part in the selection and installation. This is the customary practice in Opobo Town.

10. While the Warisenapu of the main Opobo House selects a chief to the stool of the Main Ogolo House (who eventually becomes the Head of Diepiri Section), it is the prerogative of the other War

Canoe Houses to approve or reject any such candidate presented to them.”

For the defendants, it was averred, as shown above, that it is the Warisenapu of the Main Ogolo House whose duty is to select a chief to the stool of the Main Ogolo House. It was also asserted that it is the prerogative of the other War Canoe Houses to approve or reject any such candidate presented.

It will be seen clearly that from the pleadings of the parties the question as to the applicable customary law and practice relating to the selection and installation of the chief of the Ogolo Main House was an issue between the parties. The law is now settled. It is the primary duty of the court of trial to make findings of fact on material issues, nay, on all issues placed before it. The real issue between the parties is which or who as between the House Committee and Warisenapu elects and installs a chief of the Ogolo Main House and whether the other War Canoe Houses have a say or a role in the appointment. This is the crucial issue between the parties, and it was on that issue that the trial Judge was expected to make a finding. As I have already stated above a trial court has a duty to make a finding on the issues before it. See *Atanda v. Ajani* (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. 111) 511; *Ishola* (1973) 3 S.C 43; *Mogaji v. Odofin* (1978) 4 S.C. 91. Where a trial court fails to make findings of fact on specific issues of fact and in consequence fails to resolve the issues that arise in the pleadings of the parties, the proper course an appellate court should take is to remit the case for retrial by another Judge - See *Olufosoye v. Olorunfemi* (1989) 1 S.C (Pt. I) 29; (1989) 1 NWLR Pt. 95 26.

It is important to observe that the Amended Notice of Appeal filed by the Plaintiffs dated 6th March, 1995, before the Court of Appeal contains grounds of appeal which raised question as to the applicable customary law and practice relating to the installation of the Chief of the Ogolo Main House. I refer particularly to grounds 9 and 14 which together with their particulars states as follows:-

“9. *The learned trial Judge erred in law when he held that the first plaintiff/appellant was not properly installed as the Chief of Ogolo Main House.*

PARTICULARS OF ERRORS IN LAW

There was evidence before the learned trial Judge that Opobo

Council of Chiefs is the custodian of the Native law and custom of the Opobo and that if in case of any conflict it is that Council that can resolve it.

(i) *P.W.3 gave evidence of the native and characteristics of the Native Law and Custom of Opobo people regulating the installation of Chiefs of War-Canoe Houses.* B

(ii) *There was evidence before the Court below that he did so as a representative or spokesman of the unified Opobo Council of Chiefs.*

(iii) *He neither talked of a staff of office, nor talked of immediate subscription to any rules or regulations.* C

(iv) *That P.W.3 also said in the installation of a Chief other Sub-War Canoe Houses have no say.*

(v) *That trial Judge found a fact that the first plaintiff was actually installed a Chief of Ogolo Main House but by a faction of the Opobo Council of Chiefs.* D

15. *The learned trial Judge erred in law by his failure to return a finding on the question whether the other War-Canoe Houses in the section have a say in the installation process of the Chief of the Ogolo Main House.* E

PARTICULARS OF ERRORS IN LAW

(i) *It is trite law that the Court must return a finding of fact on all issues submitted to it for adjudication.*

(ii) *According to the pleadings of the parties, one of the cardinal issues submitted to it for adjudication is whether the other houses in the section have a say, i.e. to approve or reject the nominee of the Main House in the process of installing a new Chief of that House.* F

(iii) *The court below glossed over this very vital issue without returning a finding.* G

The plaintiffs, in their brief of argument in the court below raised 7 issues for determination by that court. The plaintiffs have argued that these grounds of appeal (i.e. grounds 9 and 14 are adequately covered by Issue No. 2.6) That Issue reads:

2.6. Whether the court below returned a finding on all the issues submitted to it for adjudication before it. H

I am not unmindful of the fact that the issue has been inelegantly couched. But when it is put side by side with the crucial issues in the pleadings that call for resolution, grounds 9 and 14 above it

cannot but said to relate to those issues. Moreover if the issue is seen in the light of the grounds 9 and 14 of appeal earlier on reproduced, then no one is left in doubt as to what it means.

I have endeavoured above to show that grounds 9 and 14 of the grounds of appeal filed in the Court of Appeal raised question as to the applicable customary law and practice relating to the installation of the Chief of the Ogolo Main House. I have also drawn attention to issue No. 2.6. raised from these grounds of appeal. In the circumstance, it cannot be seriously contended, as the defendants have done, that the plaintiffs did not place this issue for determination by the Court of Appeal.

The Court of Appeal, in my view, was clearly justified when it held that:

"It is clear from the pleadings of the parties in the instant case that the main issues in controversy between the parties are set out in appellant's brief. These may briefly be summarised as:

(1) What is the native law and custom relating to the installation of a Chief of a War Canoe House in Opobo;

(2) Have the sub-houses a say in the installation process of the Chief of the Main House;

(3) Which of the two installations performed by each of the two main contending parties was lawful and in accordance with the customary law and practice of Opobo.

The plaintiff sought from the court, inter alia, a declaration that the purported and mock installation of the 10th defendant (Levi Brown Ogolo) as Chief Ogolo Main House on 10/4/86 was of no legal effect whatsoever, and another declaration that installation of the 1st plaintiff (Chief Joseph T. Ogolo) as the Chief of Ogolo Main House on 29/11/85 is lawful and valid in accordance with the custom of Ogolo Main House of Opobo. The other 3 legs of the claim are ancillary to the two aforementioned legs. It is no longer in doubt that writing a judgment is an art and as such each Judge is entitled to and free to follow his own style in achieving the end result. However, there are certain essential components which a good judgment must incorporate inter alia, set out the nature of the action before the court; the issues in controversy; a review of the case for the parties; a consideration of the relevant law raised and applicable to the case; specific findings of the fact, and conclusions. The reasons for arriving

at the conclusions must also be stated. As there should be no fixed or right form of embarking on the process of achieving the end result stated above, what is, however, most essential is that the Judge should show a clear understanding of the facts and issues raised in the case, the law applicable; and from all these, he should be able to arrive at a conclusion deciding all the issues in controversy in the case before him. See Onuoha v. The State (1988) 2 S.C. (Pt. II) 115; (1988) 3 NWLR 9 (Pt.83) 460; Igwe v. Alvan Ikoku College of Education, Owerri (1994) 8 NWLR (Pt.363) 459 at 480-481; Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703; Imogiemhe v. Alokwe (1995) 7 NWLR (Pt. 409) 581 at 593; and Akinfolarin v. Ademola (1994) 3 NWLR (Pt.335) 659.

Applying the principles of law declared above to the facts in the instant case, it is clear from the claim before the court that among the disputes which the lower court was called upon to decide or pronounce upon are, inter alia, to declare whether or not the said installation of Levi Brown Ogolo (the 10th defendant) was lawful or not. In doing so, the court would be expected to make specific findings of fact from the evidence led before it as to what would amount to lawful installation of the Chief of the Ogolo Main House under the appropriate customary law and practice.

The court was also required to declare whether the installation of the 1st plaintiff (Joseph T. Ogolo) as Chief of the same Ogolo Main House on 29/11/85 was lawful or not. The court's decision could also be made after making the necessary findings of fact as to the appropriate customary law and practice of the people in respect of the matter.

It is unfortunate that the learned trial Judge failed to make specific pronouncements on the afore-mentioned two main disputes placed before his court. Similarly, there is also no specific findings of fact made on the question relating to the customary law and practice relating to the installation of the Chief of Ogolo Main House in Opobo. Although the learned Judge made specific findings of fact and gave reasons for accepting or rejecting certain evidence led before him, he, however, failed to make the necessary findings of fact relevant to the resolution of the disputes submitted to the court."

As I have already stated above, the learned trial Judge not only failed to resolve the main disputes submitted to his court for

adjudication, he went ahead to quote portions of the plaintiff's pleadings as the plaintiffs' claim in the case before him. The contention that such a mistake was a slip could have been justifiable if it was shown that the slip was later seen to have been done if it was shown that the learned trial Judge in fact, had a good grasp of the issues raised in the case before him and that he proceeded to resolve all disputes submitted to him for adjudication in the matter. But he failed to do it."

I think the reasoning and the conclusion of the court below cannot be faulted. The Court of Appeal has found that the trial court did not make specific findings of fact on the question of the applicable customary law and practice relating to the selection and installation of the Chief of the Ogolo Main House. The defendants have not appealed against this finding. Rather they have contended that the issue was not raised in the court below for its determination. I have shown above that the issue was raised in the court below. And failure to make a finding on the issue is fatal and the proceedings must be declared a nullity. The proper order to make in the circumstances, as I have already said, is one sending the case back for re-trial. It cannot therefore be said that the court below acted arbitrarily in the circumstances of this case.

The learned trial Judge in the course of his judgment said:

"Besides the fact that the 1st Plaintiff was not selected by Warisenapu or a committee that has the power to select and install a chief, the houses in Diepiri Section"

This in my view cannot be taken to be findings of fact that (a) the power to select and install a chief was in Warisenapu as contended by the defendants or committee of the Main House as contended by the plaintiffs and (b) the chief had to be presented to the other five (5) War Canoe Houses for their approval as contended by the defendants. The contention of the plaintiffs on the other hand is that the other 5 War Canoe Houses have no say in the selection and installation of the chief of the Ogolo Main House.

The above quoted excerpt is a conclusion. It is established practice that conclusion arrived at in a judgment must be based on the findings of fact made by the trial Judge. This certainly was not the case here. This whole case hinges on the appropriate or relevant applicable customary law and practice relating to the selection and

installation of the chief of the Ogolo Main House. Regrettably, no findings on the contentions of the parties were made.

For the foregoing reasons, this appeal fails and I dismiss it. Accordingly I affirm the judgment of the Court of Appeal given on 15th April, 1997. The plaintiffs/appellants are entitled to costs which I assess at N10.000.00.

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