

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 104/1998
CORAM:- I. L. KUTIGI, U. MOHAMMED, A. I. IGUH,
S. O. UWAIFO, D. MUSDAPHER, JJSC

OTUNBA ABDUL LATEEF OWOYEMI APPELLANT
AND
1. PRINCE YINUSA OLADELE
ADEKOYA RESPONDENTS
2. MILITARY ADMINISTRATOR OF
OGUN STATE
3. SECRETARY IJEBU-ODE LOCAL GOVT.

APPEALS - Concurrent findings - Setting aside - Basis - Such findings must be shown to either be perverse - Or wrong conclusions from accepted evidence - Leading to miscarriage of justice (H1)

EVIDENCE - Dead witness - Testimony of - In previous proceeding - Unless there is compliance with s. 34(1) Evidence Act - Such evidence is inadmissible in subsequent proceeding - But there is enough evidence - To justify trial court's finding (H2)

ADMINISTRATIVE LAW - Chieftaincy matters - Exercise of discretion - An exercise of discretion based on misinformation - Or suppression of facts - Is not a proper exercise (H3)

ADMINISTRATIVE LAW - Chieftaincy matters - Judicial review - Correctness of - Lower courts rightly held that setting aside of selection of 1st respondent by Governor - Was unfair since he acted on misinformation (H4)

CHIEFTAINCY MATTERS - Actions - Standard of proof - Civil suits are decided on relative strengths of the cases of the parties - Upon a preponderance of evidence - Resolved on the imaginary scale principle (H5)

FACTS

Plaintiff/1st respondent before the High Court of Ogun State,

sued 2nd and 3rd respondents and appellant as 1st, 2nd and 3rd defendants respectively. Plaintiff's claims were for sundry declarations and injunction by which he challenged the purported setting aside by the Governor, of his appointment as Dagburewe of Idowa. 2nd and 3rd respondents filed a joint statement of defence. Appellant filed a separate statement of defence in which he incorporated a counter-claim. It was 1st respondent's case that he was validly selected by the Chiefs and Odis responsible for doing so.

Appellant on the other hand did not deny that the Chiefs and the Odis were responsible for such selection. He however claimed that 9 of the 12 Odis qualified to vote were unlawfully excluded by supporters of 1st respondent. He also alleged that 12 of the 13 Chiefs that participated in the selection were not qualified to vote. Appellant finally contended that the action of the State Governor was validly done by virtue of the Chiefs Law, Cap. 20, Laws of Ogun State. After hearing, the learned trial judge found for 1st respondent and gave judgment accordingly, dismissing appellant's counter-claim. Aggrieved, appellant appealed to Court of Appeal which court upheld the judgment of trial court. Still dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

"1) Was the Court of Appeal right in sustaining the decision of the trial court rejecting the case of the appellant in respect of the making of an Odi and the lapsing of the chieftaincies of the chiefs who attended and voted at the kingmakers' meeting?"

2) Should the Court of Appeal have sustained the judgment of the trial court granting a declaration that the kingmakers' meeting of 24/5/82 was valid when the court itself had held the Olotu Ashipa (who was not invited to attend the kingmakers' meeting by the Olisa was in fact under the Registered Declaration of the Dagburewe Chieftaincy entitled to attend and vote at the said kingmakers' meeting?"

iii) Was the Court of Appeal right in upholding the setting aside of the letter of 2nd and 3rd respondents (Exhibit P) that cancelled the election of 1st respondent as Dagburewe and called for fresh nominations and election to fill the post?"

iv) Whether the Court of Appeal was right in holding that a mere 15 days delay in delivering the judgment by the lower court was not inordinate and did not occasion a miscarriage of justice."

HELD

(Unanimously dismissing the appeal per

UWAIFO JSC)

APPEALS - Concurrent findings - Setting aside - Basis

1. An appellant who seeks the Supreme Court's intervention in concurrent findings of fact must have at the back of his mind that the court will generally be unwilling to do so. Therefore such appellant must be prepared to demonstrate the element of perverse findings or wrong conclusions from accepted credible evidence, resulting in a miscarriage of justice. But when there are no such errors, an appellate court hearing an appeal from concurrent findings will refrain from setting them aside, even if it might have thought that different conclusions could have been reached, so long as the findings of fact in question are reasonably justified by the evidence available.

(p. 2914 E)

EVIDENCE - Dead witness - Testimony of

2. The only irregular aspect of the evidence relied on by the two courts below was Exhibit A1, evidence given in a previous proceeding by a person who was not called as a witness in the present case. In fact the witness had since died. Unless there is proper compliance with the requirements of Section 34(1) of the Evidence Act, such evidence is inadmissible and ought to have been discountenanced even on appeal by the court below. The two courts below were clearly in error in this regard. But notwithstanding that error, there is enough evidence to justify the preference given to the plaintiff's case. I am satisfied that the trial court's findings were not perverse, nor did the court arrive at erroneous conclusions either by inference from accepted facts or from a wrong application of law, substantive or procedural. (p. 2915 A)

Chieftaincy matters - Exercise of discretion

3. The Governor apparently relied on that to set aside the selection. But it has turned out that he was misinformed. The

appellant has relied on Section 20(3) of the Chiefs Law, Cap.20 of Ogun State, which provides that the Executive Council may decide to approve or set aside an appointment of a Chief “notwithstanding that it appears to it the appointment had been made in accordance with the provisions of this law..... if it is satisfied that it is in the interest of peace, order and good government to do so.”

I do not think that there is any doubt that the Executive Council had that discretion. But it must be recognised that an exercise of discretion based on misinformation or suppression of facts cannot be considered a proper or just exercise. A ministerial exercise of discretion which denies or affects a citizen’s right on the ground that it was in the interest of peace, order and good government is not expected to be founded on the arbitrary resolve or the whim of that minister.
(p. 2915 E)

Chieftaincy matters - Judicial review - Correctness of

4. In a situation where the minister is expected to take certain matters into consideration to reach a decision, he performs a quasi-judicial function and his action is amenable to judicial remedy. It is quite a different situation, in cases of purely ministerial acts, in which a decision of the minister is one that rests entirely with him and based on no criteria to justify what he resolves to do.

I am satisfied that the two courts below rightly held that the Governor’s action in setting aside the selection of the 1st respondent as the Dagburewe of Idowa was not fair or just as he acted upon a misinformation. (p. 2916 B)

Actions - Standard of proof

5. The appellant’s counsel made some effort at showing under issue (iv) that the trial court made perverse findings of fact which the court below affirmed. I do not think he had succeeded in that effort having myself read the record of proceedings closely. The plaintiff presented a case which, on the balance of probabilities, was preferable to that of the defendants. Civil suits, generally, chieftaincy matters inclusive, are

decided on the relative strengths of the cases presented by the parties upon preponderance of evidence resolved on the imaginary scale principle: (p. 2919 F)

REPRESENTATION

M. J. Onigbanjo Esq., for the 3rd Defendant/Appellant B
A. Adesanya, Esq., SAN, with T.A. Adebajo Esq., and Chief
B. Ayorinde, for the plaintiff/1st Respondent
2nd and 3rd Respondent un-represent

CASES REFERRED TO

Olabanji v. Omokewu (1999) 6 NWLR (Pt.250) 671
Adeyeri II v. Atanda (1995) 5 NWLR (Pt.397) 512
Kaiyaoja v. Egunla (1974) 12 S.C. 55
Mogaji v. Odofin (1978) 4 S.C. 91 D
Ifezue v. Mbadugba & Anor (1984) 5 S.C. 79
Anyaoke & Ors v. Adi & Ors (1985) 1 NWLR (Pt.2) 342
Egwu v. Egwu & Ors (1995) 5 NWLR (Pt. 396) 493
Piaro v. Tenalo (1976) 12 S.C. 31
Odife v. Aniemeka (1992) 7 NWLR (Pt. 251) 25 E
Shanu v. Afribank Nig. Ltd. (2002) 6 S.C. (Pt. II) 135
Omoregie v. Edo (1971) 1 All NLR 282
Fashanu v. Adekoya (1974) 1 All NLR 35 at 41
Okolo v. Uzoka (1978) 4 S.C. 77
Ivienagbor v. Bazuaye (1999) 6 S.C. (Pt. 1) 149 F

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, as amended
by the Constitution (Suspension and Modification) Amendment De- G
cree No.17 of 1985, s. 258
Chiefs Laws Cap 20 Laws of Ogun State 1978, ss. 20 and 28

LEAD JUDGMENT BY UWAIFO JSC

This is an appeal from a judgment of the Court of Appeal H
Ibadan Division given on 20th April, 1998. The Writ of Summons
which commenced this action was taken out on 20th June, 1986. It
was amended and filed on 24th March, 1987. The Statement of
Claim was also amended. The Statement of Defence filed by the 1st

and 2nd defendants was also amended while the one filed by the 3rd defendant was amended to include a counterclaim. There were separate replies to the two statements of defence. The one in respect of the 3rd defendant had subjoined to it a statement of defence to the counterclaim to which the 3rd defendant filed a reply. I have
B stated the above to show that copious steps were taken by the parties to join issues on all matters they considered relevant.

It is necessary to make it clear that the present 1st respondent was the plaintiff; the 2nd and 3rd respondents were the 1st and 2nd
C defendants; while the appellant was the 3rd defendant.

The reliefs sought in the main claim were five and were stated against only the 1st and 2nd defendants. This remained unchanged even after the writ of Summons and Statement of Claim were amended consequent upon the joinder of the 3rd defendant upon
D the application made by him to the court. The said reliefs read thus:

“The plaintiff’s claims against the first and second defendants jointly and severally are as follows:

*(a) A declaration that the nomination of the plaintiff by the Agbonmagbe Ruling House on the 10th day of May, 1982, to fill the
E vacancy in the Dagburewe of Idowa Chieftaincy is valid.*

*(b) A declaration that the appointment of the plaintiff by the kingmakers to the Dagburewe of Idowa on the 24th day of May, 1982, to fill the vacancy in the Dagburewe of Idowa Chieftaincy is
F valid.*

*(c) A declaration that the letter LLG 140/vol. 12/2 dated the 1st day of September, 1982, and issued by the Secretary of Leguru Local Government setting aside the appointment of the plaintiff as
Dagburewe of Idowa is null and void.*

*(d) A declaration that Public Notice LLG/140/156 dated the 5th day of September, 1982, and issued by the Secretary of the Leguru Local Government calling for another nomination by the
G Agbonmagbe Ruling House is null and void.*

*(e) An injunction restraining the first and second defendants
H and their agents from disturbing the appointment of the Plaintiff as the Dagburewe of Idowa.”*

The 3rd defendant in his counterclaim stated his claim thus:

*“The third defendant therefore seeks declaration as follows:
That*

- (a) 1. Ali Ogunbadejo (*Olisa elect*)
2. Abasi Olaitan (*Olowa Gboyeru elect*)
3. Jimo Lawal (*Elejjepono elect*)
4. Labale Ogunlaja (*Jamuodigba elect*)
5. B. O. Alaba (*Aloran elect*)
6. Awesu Adekoya (*Alase elect*)
7. Yisau Salami (*Oliwo elect*)
8. Abosede Lawal (*Olotu Apena elect*)
9. Ismaila Egunjobi (*Kankanfo elect*)
10. James Oduntan (*Agbo elect*)
11. Daniel Ajayi (*Lapoekun elect*)
12. George Adeneye (*Laketu elect*)

B

C

having failed to perform the traditional rights pertaining to their respective chieftaincies during the life of Oba Olaneye, the late Dagburewe of Idowa, who nominated them as chiefs, cannot lawfully function or perform the duties of the nominated chieftaincies to which they were nominated and in particular cannot in accordance with traditions and or customary laws be kingmakers of the Dagburewe of Idowa Chieftaincy.

(b) That those enumerated above in (a) as CHIEF'S (sic) ELECT whose Chieftaincies have lapsed that is 'OGBE SAGBE' are not lawfully Chiefs of Idowa and could not act as kingmakers in accordance with the approved and registered Declaration of Idowa relating to the appointment and selection of the Dagburewe of Idowa.

F

(c) That the majority of lawful kingmakers present and voting at the meeting of the 24th day of May, 1982, by a majority of three votes to one abstention lawfully selected Otunba Abdul Lateef Adebayo Owoyemi as the Dagburewe elect of Idowa in accordance with the registered declaration.

G

(d) That the said Otunba A. L. A. Owoyemi be presented to the Awujale of Ijebu land for his consent and subsequently approval be sought from the first defendant for the said selection made by the lawful kingmakers."

I like to start by touching on some preliminary facts put in issue between the parties, or at any rate raised on the pleadings. It is not in dispute from the various pleadings that both the plaintiff and the 3rd defendant are Princes from Agbonmagbe Ruling House of the Dagburewe of Idowa Chieftaincy. But the plaintiff says that once a

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prince, according to the custom of Idowa, has accepted the title of Otunba, he cannot become an Oba and that the 3rd defendant having been appointed Otunba cannot be lawfully nominated for the stool of Dagburewe of Idowa. Further, the plaintiff says the 3rd defendant being partly from the female line of the Agbonmagbe Ruling House and partly from Odi line through his father (Alhaji Yinusa Owoyemi) is not qualified for the said stool.

Second, it is common ground that certain Chiefs and Odis take part as kingmakers to select a Prince for the stool of Dagburewe. But while the plaintiff says that on 24th May, 1982, which was the material time he was selected, there were 13 Chiefs and 3 Odis alive and qualified to vote, the 3rd defendant did not come clean about the number of chiefs. He placed emphasis on the fact that there were 12 Odis qualified to vote out of whom 9 were “unlawfully excluded by force of arms by Ogunbade, a strong supporter of the plaintiff, from the kingmakers’ meeting” of 24th May, 1982. However, the first declaration sought by him in his counterclaim is that 12 named chiefs elect were not qualified to vote as kingmakers.

Third, the plaintiff’s contention is that although a son of an Odi will become an Odi himself, he must be of age and be initiated by the Oba before he can perform the function of an Odi. The 3rd defendant on the other hand claims that the only event which makes an Odi’s son a functioning Odi is the touching of his forehead on the ground before the Oba on the 8th day of his birth.

Evidence was led before the trial Judge concerning these issues. One Jimoh Olumide Lawal (PW.6) testified as to the selection of the plaintiff on 24th May, 1982, at a meeting attended by 13 Chiefs and 3 Odis, and at which the plaintiff got 9 votes and the 3rd defendant 6 votes, with one of the Chiefs, Adeniyi Tilepo, abstaining from voting. He gave the names of all the 13 Chiefs and the 3 Odis whom he said were the kingmakers at the material time in Idowa. This witness is the Secretary of the kingmakers as well as the Secretary of the Chiefs.

H Emmanuel Ali Ogunbadejo (PW.5), the Olisa of Idowa, said he was next in rank to the Dagburewe of Idowa. His evidence confirms that there were 13 Chiefs and 3 Odis at that time, and that a son of an Odi must first be initiated by the Oba before he can perform the duty of Odi. He said he took part in the selection in ques-

tion of the plaintiff as the Dagburewe and that votes were 9 to 6 in favour of the plaintiff; and that none of the 3 Odis indicated that there was any other Odi. One Aruna Bello (P.W.4) said he was the son of an Odi but not yet an Odi until initiated by the Oba. He was not cross-examined as to whether or not he was a son of an Odi. His line of evidence was confirmed by Fatayi Ogunkoya Abiona (P.W.7) as to the making of an Odi, giving many names of sons of Odi who are not yet made to perform the duty of Odi. B

Some of the witnesses called by the defence gave evidence which either outrightly supported or in some instances tended to support the plaintiff's case. One Samuel Adegbayega Bolarinwa (D.W.1 to 1st and 2nd defendants) was such a witness whose evidence tended to some extent to support the plaintiff's case. He was the Secretary of Leguru Local Government responsible for chieftaincy matters in that area of Idowa. He attended the meeting at which the selection in question was made by the kingmakers of Dagburewe Chieftaincy as an observer on the directive of the office of the Governor. He said that some six persons presented themselves as Odis. But on inquiry they were found not yet properly appointed Odis and that only three known living Odis were permitted to attend the kingmakers' selection meeting. He confirmed that the 16 kingmakers who attended of the meeting voted 9 in favour of the plaintiff and 6 in favour of the 3rd defendant, while one abstained. He also confirmed that when he was the Secretary of Leguru Local Government Council, the 3rd defendant was the Executive Chairman of the Council. He forwarded his report of the kingmakers' meeting as well as the protest letter by the 3rd defendant to the Governor's Office. After two months of that report, he received instruction from the Office of the Governor to conduct the selection of the new Dagburewe of Idowa. F G

As to how the selection done by the kingmakers was set aside, one Sigismund Olusegun Abiodun (D.W.2 to 1st and 2nd defendants), who was the Secretary of Chieftaincy Matters in the Chieftaincy Department of the Governor's Office, gave some insight. He admitted that the setting aside of the selection exercise was not done by the Governor-in-Council (i.e. the Executive Council) but by the then civilian Governor himself who minute to that effect. H

It was following that decision of the Governor that this witness wrote the letter directing a fresh selection exercise. In consequence,

the Secretary to the Local Government Council wrote letter LLG.140/VOL.12/2 dated September 1st, 1982, to set aside the appointment (or selection) of the plaintiff as the Dagburewe of Idowa, and calling another nomination by the Agbonmagbe Ruling House. That letter is, of course, the subject of the two declarations sought by the plaintiff in reliefs (c) and (d).

A vital defence witness, (D.W.2 for the 3rd defendant) HRH Oba Sikiru Kayode Adetona, the Awujale of Ijebu Land, gave evidence relating to when an Odi's son can be said to qualify as an Odi to perform in that office. I think it is pertinent to reproduce the relevant portions of that evidence as recorded. First, in evidence-in-chief, the witness said:

"The male children of existing ODIS become ODIS. Another class are ASAFORITTS (sic) who are criminals that managed to escape to the palace and there they start to serve."

The young ODIS follow their parents to the Oba's palace but not all the males as if it were to the place will not contain all of them, (sic) when they become 'old' and they are to start to perform on their own they are initiated on the authority of the Oba. The initiation is a private affair of the ODIS on the authority of the Oba. It is not a ceremony to which initiations (sic: invitations) are issued and no Chief knows about it nor (is) consulted. It is a secret affair and it is only when they are seen functioning that the public know."

Later in cross-examination, he said:

"All the children of Odis who are males cannot serve immediately but before they can serve and be called ODIS they would have been going to understudy their parents to perform rituals. I agree that being called an Odi the person must have been in service."

This is evidence which appears to support the plaintiff's position as to when an Odi's son can be recognised as an Odi to perform 'public' duty; and it is clearly undermines the case of the 3rd defendant that what qualifies an Odi's son for such duty is only the ceremony on the 8th day of his birth whereby he is brought before the Oba for obeisance in which his forehead is made to touch the ground. Even on this point, some witnesses for the 3rd defendant are not consistent. The D.W.3 to the 3rd defendant Omooba Ambali Adenuga, said:

"The children of ODIS are taken before the Oba on the eighth

day of a ceremony which is between the ODIS and the Oba but after the ceremony the child will be seen loined with cloth around his waist and another cloth like sack dropping to the waist from his shoulder but I cannot remember whether the sack made of white cloth will drop from left or right shoulder. During the eighth day ceremony the child's head will be made to touch the ground before the ODI in the presence of the OBA who is the 'leader' of ODI." ^B

While the said D.W.3 talked about white cloth, D.W.5, Omooba Olatunji Ajayi, talked about yellow cloth when he said:

"When ODI'S son is born the ceremony of initiation starts from the eighth day of his birth and the birth announcement is made to the Oba by Ogbeni Odi who does so by congratulating he Oba that his servants have increased. On the same eighth day the father of the ODI and the newly born son will go to the palace for the IFORIBALE ceremony before the OBA and on that day the child will receive the first EBO that is YELLOW cloth and as he grows up he begins to follow his father to the palace and when he becomes an adult he begins to perform the work of an ODI." ^C

The inconsistency was carried further by D.W.7, Akintunde Akilapa who said he started rendering service as Odi as an infant still attending school although he admitted that being an Odi was a full time job. To use his own words, he said:

"I became an Odi in 1942 and I admit that I was a pupil at St. Peter's School, Idowa up to 1960. It is true my father died in 1959 at which I was ten years old (sic)." ^F

I admit I do not know the year I was born. My father did not tell me the date I was born and ditto my mother."

Later he said:

"It is true that I started serving Oba Arijeloye as Odi when I was 10 years old. After the 8th day ceremony for an Odi there was no ceremony other than to be earning promotion in that class. I know as a fact that being an Odi is a full time job." ^G

Another witness, Sunmola Okiji (D.W.8), also stuck to the claim that it is the 8th day of birth ceremony that initiates an Odi's son into a full-fledged Odi. He said in evidence-in-chief: ^H

"I am one of the ODIS of Dagburewe of Idowa. I am now sixty years (60) old and I have been an Odi since the 8th day of my birth that I performed the 'IFORIBALE' ceremony."

He maintained this in cross-examination thus:

“All the ODIS who had male children during the life of Oba Olaneye had their ceremonies of initiation performed on the 8th day”

B The 8th day of birth ceremony to become an Odi relied on by the 3rd defendant, through his witnesses who testified to that effect, was clearly contradicted, as already shown, by the evidence of the Awujale of Ijebu Land.

C The learned trial Judge considered the evidence of P.W.5, P.W.6 and P. W.7 as it related to the contention about Odi in support of the plaintiff’s case in comparison with the evidence on it on behalf of the 3rd defendant. He obviously preferred the case of the plaintiff in this regard. Perhaps it is best to quote a passage of the learned trial Judge on the issue as follows:

D *“All the 3rd defendant’s witnesses save Chief George Adeneye, the Laketu (1st D.W.), Chief Ogunbadejo, the Olisa (4th D.W.), Mr. Sonuga (6th DW) and Mr. John Olusegun Faleye (10th D.W.) gave their own version of the making of an ODI by his initiation on the 8th day of his birth and I have also the version of His Highness, Oba*
 E *Sikiru Adetona, the Awujale of Ijebu Land, who testified that he knows the history of the ODIS in Ijebu land and which includes Idowa and who also stated in substance and the details which are already stated supra verbatim et literatim that although the initiation of the ODIS is*
 F *a private affair between the Oba and the ODIS and that it is only when the young ODIS become old and they are to start to perform on their own that they are initiated on the authority of the Oba. He also testified that all his chiefs know his ODIS and agreed that being called an ODI, the person must have been in service. Suffice it to say*
 G *that the evidence of his Highness Oba Sikiru Adetona, the Awujale of Ijebu land, which I believe, is enough to debunk any evidence given by the rest of the 3rd defendant’s witnesses to the effect that any baby boy can be made an Odi on the 8th day of his birth irrespective of whether or not the Chiefs are present at the initiation ceremony.*

H *In like manner, the Kabiyesi’s evidence to the effect that all his chiefs know all his ODIS seems to accord with the custom in Idowa and which has again knocked out the bottom of the 3rd defendants case in that there is direct confirmation of his assertion by Kabiyesi from 5th, 6th, 7th PWs and in particular the 6th PW Chief Lajjeporo*

and the Secretary to the kingmakers who stated emphatically that he knows who and who are the ODIS as a true son of Idowa and a chief next in rank to Olisa and which evidence is also confirmed by the ODIS 7th and 8th DWs themselves and in particular the 7th DW to the 3rd defendant Akintunde Akilapa who admitted under cross-examination that he knows that Chief Ogunbadejo the Olisa knows the ODIS’. ^B

Thereafter, the learned trial Judge proceeded to find as a fact that only three persons, namely, Abu Ramoni, Mudasiru Fanuyi and Adesanya Okiji, whose initiation as Odis was made in accordance with the custom stated by the Awujale of Ijebu Land were the living Odis as at 24th May, 1982. He further found that no qualified Odi was prevented from the Kingmakers’ meeting of that day. The learned trial Judge carefully examined the evidence on other issues, such as the chiefs that has fully performed all the rites pertaining to their chieftaincy titles and therefore qualified to participate as kingmakers. He named who they were at the material time as: Olisa, Chief Emmanuel Ogunbadejo, the Kakanfo of Idowa, the late Chief Sunmola Egunjobi, Chief Ola Ogunlaja, the Jamudigba, Chief Jimo Lawal, the Lajieporo, Chief Daniel Ajayi, the Lapoekun, Chief James Oduntan, the Agbon of Idowa, Chief Yisau Salami, the Oliwo, Chief Bosede Lawal, the Olotu Apena, Chief B. O. Alaba, the Aloran of Idowa, Chief Awesu Adekoya, the Alase and Chief Yesufu Adebambo, the Olotu Ashipa. It must be remarked that the last named admitted he was a chief elect who had not performed all the customary rites. He did not qualify as a kingmaker and did not in fact take part to select the plaintiff. ^F

The learned Judge considered the question of the selection of the plaintiff which was set aside by the Governor. He reached the conclusion that it was on the basis that some Odis were prevented from voting and that, that had proved to be untrue. He also considered the implication of the ouster clause in the Chiefs Law, Cap. 20, Laws of Ogun State, Section 28, along with the power conferred under Section 20 (3) on the Governor to set aside an appointment of a Chief. He came to the conclusion that the ouster clause was ineffective under the 1979 Constitution and that the Governor cannot act arbitrarily or upon misleading information under Section 20(3) of the Chiefs Law to set aside an appointment “in the interest of ^H

peace.”

In the end the learned trial Judge accepted the plaintiff’s case and on 17th October, 1991, granted the reliefs sought. The counter-claim was dismissed. The Court of Appeal, Ibadan Division, in a judgment delivered on 20th April, 1998, unanimously upheld the judgment of the trial court along with the findings of fact made by the learned trial Judge on the vital issues considered by him.

The 3rd defendant (now appellant) has further appealed to this court, raising four issues for determination as follows:

“1) *Was the Court of Appeal right in sustaining the decision of the trial court rejecting the case of the appellant in respect of the making of an Odi and the lapsing of the chieftaincies of the chiefs who attended and voted at the kingmakers meeting?*

2) *Should the Court of Appeal have sustained the judgment of the trial court granting a declaration that the kingmaker’s meeting of 24/5/82 was valid when the court itself had held the Olotu Ashipa (who was not invited to attend the kingmakers meeting by the Olisa) was in fact under the Registered Declaration of the Dagburewe Chieftaincy entitled to attend and vote at the said kingmakers meeting?*

iii) *Was the Court of Appeal right in upholding the setting aside of the letter of 2nd and 3rd respondents (Exhibit P) that cancelled the election of 1st respondent as Dagburewe and called for fresh nominations and election to fill the post?*

iv) *Whether the Court of Appeal was right in holding that a mere 15 days delay in delivering the judgment by the lower court was not inordinate and did not occasion a miscarriage of justice.”*

The 1st respondent formulated four issues as follows:

“The Plaintiff submits that four issues arise for determination in this appeal. The Plaintiff adopts the 3rd Defendant’s issues (i) and (ii) only, and sets out his four identified issues as follows:-

(i) *Was the Court of Appeal right in sustaining the decision of the trial court rejecting the case of the 3rd Defendant in respect of the making of an Odi and the lapsing of the Chieftaincies of the Chiefs who attended and voted at the kingmakers meeting?*

(ii) *Whether in all the circumstances of the case, the Lower Court was right in holding that the Plaintiff was validly appointed the Dagburewe of Idowa at the kingmakers meeting held on 24/5/82. The Plaintiff shall elsewhere in this Brief argue that the 3rd Defendant’s*

issue in this regard is incompetent and should be struck out.

(iii) Was the Court of Appeal right in upholding the setting aside the letter of the 1st and 2nd Defendants (Exhibit P) that cancelled the election of the Plaintiff as Dagburewe and called for fresh election to fill the post?

(iv) Whether the Court of Appeal was right in upholding that the delivery of the judgment of the High Court three months after address of counsel did not occasion a miscarriage of justice as to warrant its being set aside by virtue of S.258 of the 1979 Constitution.”

Issues (i), (iii) and (iv) as set down by both parties are similar. The respondent has complained of the appellant's issue (ii) as being incompetent. I have considered the arguments of both parties on that issue as well as the question of its competency. Although the appellant seems by that issue to have slightly changed the thrust of his defence in regard to the ineligibility of Chief Yesufu Adebambo to attend and vote at the kingmakers' meeting of 24th May, 1982, as Olotu Ashipa, it cannot be disputed that his grouse throughout is that the said chief should not have been found competent by the two courts below to be invited and entitled to vote. The simple truth is that the Chief said in evidence led by the appellant that he had not performed all the necessary rites of a Chief elect as the Olotu Ashipa and therefore his chieftainship had lapsed.

I think it was a slip on the part of the courts below to hold that he was entitled to attend and vote at the kingmakers' meeting even after they appeared to have accepted that the Chief was suspended at the material time. Even though the Registered Declaration of the Dagburewe Chieftaincy (Exhibit C) recognises Olotu Ashipa as one of the kingmakers, it would be erroneous to suggest that a "suspended" person from that office would nonetheless be entitled to attend and vote at a meeting of kingmakers. The issue (ii) raised by the appellant is not incompetent as argued by the learned Senior Advocate for the 1st respondent but is, with due respect, frivolous. The said Chief did not in fact attend the meeting. Had he attended, he would certainly, from the landscape of the support relied on by both sides, have voted for the 1st respondent. So, the slip by the two courts below caused no injustice to either side, more particularly the appellant. It is in this light that I say that issue (ii) by the appellant is a storm in a tea cup.

I must however say that the tenets of the Registered Declara-

tion of the Dagburewe Chieftaincy were complied with in the selection exercise by the Kingmakers. This is so notwithstanding that Olotu Ashipa did not take part. Since there was no such qualified chief, the chief elect having failed to complete the customary rites, no Olotu Ashipa could reasonably be expected to participate in the exercise.

B This is, I think, the rational view to take because the said chief elect who would have become the Olotu Ashipa can only complete the customary rites before a reigning Dagburewe in order to qualify. Since no Dagburewe was available for the purpose of completing those
C rites, it would be absurd to say no valid appointment of the Dagburewe could be made without the Olotu Ashipa. The matter of Olotu Ashipa was not given as a reason or one of the reasons taken into account by the Governor for the purported cancellation of the selection of the plaintiff/1st respondent. At no point did the defence (in particular
D the 3rd defendant) make it an issue in their pleadings that Chief Adebambo was unlawfully excluded from the selection meeting or that the absence of Olotu Ashipa from the meeting made the selection carried out invalid. I think it is unprofitable to rely on a non-issue in any proceedings.

E Issue (i) is really querying the concurrent findings of the two courts below. ***An appellant who seeks the Supreme Court's intervention in concurrent findings of fact must have at the back of his mind that the court will generally be unwilling to do so. Therefore such appellant must be prepared to demonstrate the element of perverse findings or wrong conclusions from accepted credible evidence, resulting in a miscarriage of justice.*** It is of course true that there cannot arise the need to accord
F normal respect to concurrent findings of fact if the trial court's findings are fraught with the type of perversity of erroneous conclusions
G sufficient to affect the justice or the case: see *Omoregie v. Edo* (1971) 1 All NLR 282 at 289; *Fashanu v. Adekoya* (1974) 1 All NLR 35 at 41; *Okolo v. Uzoka* (1978) 4 S.C. 77 at 86; *Ivienagbor v. Bazuaye* (1999) 6 S.C. (Pt. 1) 149; (1999) 9 NWLR (Pt.620) 552 at 529. ***But***
H ***when there are no such errors, an appellate court hearing an appeal from concurrent findings will refrain from setting them aside, even if it might have thought that different conclusions could have been reached, so long as the findings of fact in question are reasonably justified by the evidence available*** see

Globe Fishing Industries Ltd. v. Coker (1990) 7 NWLR (Pt.162) 265 at 297;

The only irregular aspect of the evidence relied on by the two courts below was Exhibit A1, evidence given in a previous proceeding by a person who was not called as a witness in the present case. In fact the witness had since died. Unless there is proper compliance with the requirements of Section 34(1) of the Evidence Act, such evidence is inadmissible and ought to have been discountenanced even on appeal by the court below: see Shanu v. Afribank Nig. Ltd. (2002) 6 S.C. (Pt. II) 135; (2002) 17 NWLR (Pt. 795) 185 at 222. The two courts below were clearly in error in this regard. But notwithstanding that error, there is enough evidence justify the preference given to the plaintiff's case. I am satisfied that the trial court's findings were not perverse, nor did the court arrive at erroneous conclusions either by inference from accepted facts or from a wrong application of law, substantive or procedural.

Issue (iii) concerns the setting aside by the Governor of Ogun State of the selection done by the kingmakers on 24th May, 1982, on the ground that it was done in the interest of peace. The Governor had been told that there were more than three Odis qualified to take part in the selection and that some six others were unlawfully excluded from the exercise. ***The Governor apparently relied on that to set aside the selection. But it has turned out that he was misinformed. The appellant has relied on Section 20(3) of the Chiefs Law, Cap.20 of Ogun State, which provides that the Executive Council may decide to approve or set aside an appointment of a Chief "notwithstanding that it appears to it the appointment had been made in accordance with the provisions of this law..... if it is satisfied that it is in the interest of peace, order and good government to do so."***

I do not think that there is any doubt that the Executive Council had that discretion. But it must be recognised that an exercise of discretion based on misinformation or suppression of facts cannot be considered a proper or just exercise. A ministerial exercise of discretion which denies or affects a citizen's right on the ground that it was in the interest of peace, order and good government is not expected to be founded on

the arbitrary resolve or the whim of that minister. It must be an exercise inferentially based on reasons arising from true facts, which exercise satisfied the ordinary criterion that the minister acted fairly, justly and in good faith in the interest of peace, order and good government: see *Smith v. A.G. Federation* (1986) 5 NWLR (Pt.46) 1007
 B at 1025; (1986) 17 NSCC (Pt. II) 1389 at 1401.

In a situation where the minister is expected to take certain matters into consideration to reach a decision, he performs a quasi-judicial function and his action is amenable to judicial remedy: see *Hart v. Military Governor of Rivers State*
 C (1976) 11 S.C 211 at 240 where the Supreme Court observed that:

*“Although the Military Governor was not sitting as a court stricto sensu, it is our view, nevertheless, that, in ascertaining the facts and directing finally that a much lighter punishment should be meted out
 D to the appellant, he was under a duty to act judicially or fairly.”*

It is quite a different situation, in cases of purely ministerial acts, in which a decision of the minister is one that rests entirely with him and based on no criteria to justify what he resolves to do; see *Amaka v. Lt. Governor, Western Region* (1956)
 E SCNLR 122 at 123-124.

I am satisfied that the two courts below rightly held that the Governor’s action in setting aside the selection of the 1st respondent as the Dagburewe of Idowa was not fair or just as he acted upon a misinformation. I may here remark, although it
 F was not a point canvassed, that the 2nd witness to the 1st and 2nd defendants, Sigismand Olusegun Abiodun, said that the selection exercise was not set aside by the Executive Council but by the Governor personally casually minuting on a document to that effect:
 G whereas Section 20(3) of the Chiefs Law confers power to approve or set aside an appointment on the executive council. This to my mind envisages a formal deliberation on the matter by the Governor-in-council.

Issue (iv) complains of the judgment of the trial court not having
 H ing been delivered within three months after receiving addresses of council. In the present case the court exceed the three months by 15 days. The appellant’s learned counsel argues that the learned trial Judge had lost sight of the pleading and evidence as a result of not having his judgment delivered within the three month period. The

learned Senior Advocate of Nigeria for the 1st respondent has in reply drawn attention to the hardship caused by the interpretation given by this court to Section 258(1) of the 1979 Constitution (now Section 294(1) of the 1999 Constitution) in *Ifezue v. Mbadugha* (1984) 15 NSCC 314; (1984) SCNLR 427, that a judgment delivered outside the three months' period was a nullity, and to the amendment which was consequently made to the Constitution. The amendment reads:

"The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof."

What does the amendment of the Constitutions stated above imply? Appellant's learned counsel did not discuss this in his argument. He merely wants it assumed that the delay of 15 days outside the 3 months led to some perverse findings of fact by the learned trial Judge. I am afraid I find it difficult to accept such assumption. The learned Senior Advocate for the 1st respondent argues that in order to establish that a judgment delivered more than three months after the date of final addresses of counsel occasioned a miscarriage of justice, it is not enough to show that evidence was not "properly remembered or summarised by the trial Judge. "He cited *Egwu v. Egwu* (1995) NWLR (Pt. 396) 493 at 505, a decision of the Court of Appeal, as authority.

I do not think the interpretation given to the amendment in question by the Court of Appeal in *Egwu v. Egwu* (supra) can be reasoned to be right. In that case *Akpabio, JCA.*, delivering the leading judgment after reproducing the text of the amendment, observed at page 505 as follows:

"In view of the above provision the onus was shifted to the appellant to satisfy this court that failure to deliver judgment within three months from date of conclusion of evidence and final addresses occasioned a miscarriage of justice. It can no longer be presumed for him. In the instant case it is not disputed that judgment was actually delivered more than three months after date of final addresses. What is disputed is whether such failure occasioned any miscarriage of justice to the appellant. To do this it is not enough to show the evidence

was not properly evaluated. It must be shown that facts were not properly remembered or summarised'. (Akpabio, JCA's emphasis).

I have said that the view expressed in the above-quoted observation, with due respect, cannot logically be defended. First, there is nothing in the provision of the Constitution which stipulates three months within which to deliver Judgment after the conclusion of evidence and the final addresses to court to suggest it was presumed in favour of an appellant complaining of non-compliance with that provision that failure to comply, before the amendment was introduced, led to a miscarriage of justice. That is what is implied by Akpabio, JCA., when he said the amendment had shifted the onus to the appellant to show a miscarriage of justice, and that it can no longer be presumed for him. There was never a presumption of a miscarriage of justice for non-compliance arising from misapprehension of the evidence led. The original provision was simply a mandatory constitutional directive to the courts to ensure they delivered judgments within the time stipulated. There was no saving grace for non-compliance. It was the hardship likely to be suffered by either party from a strict interpretation of that provision that gave rise to the amendment. An otherwise well-considered judgment in which either party could be the winner must be set aside even if the judgment was given one day outside three months. All a party who did not like the judgment needed to do as an appellant was simply to point out that there was non-compliance with the three months' period.

Second, it is not strictly right to say that by the amendment, the onus was shifted to the appellant' who relied on non-compliance to show a miscarriage of justice. It may be said that a burden has now been placed on him and not "shifted to" him.

Third, the nature of the burden which has been stated in *Egwu v. Egwu* (supra) that the appellant is to show not only that the evidence was not properly remembered or summarised is rather ambiguous, if not misleading. An appellant in ordinary circumstance who is able to show that the evidence was not properly evaluated, if that leads to a miscarriage of justice, will succeed in having the judgment set aside. Why is it necessary to say that an appellant who relied on non-compliance with the three months' period will have to satisfy the court that there has been a miscarriage of justice by first showing improper evaluation of evidence and then, over and above that, that

the “facts were not properly remembered or summarised.” What difference does it make if such an appellant shows improper justice but not that the “facts were not properly remembered and summarised” by the trial Judge? If facts were not properly remembered and summarised that would amount to improper evaluation of evidence.

I think the true positions now is that a party should not just go on appeal merely on the ground that the judgment he wants set aside was given outside the three months’ period. He will have to fight the appeal on all known grounds which can render the judgment unsustainable, not merely on the assessment of facts. Indeed, an appellant with good grounds of appeal may have no need at all to canvass a ground on non-compliance with the three months’ period except for the purpose of having the judge (or justice) disciplined by drawing attention of the breach to the court hearing the appeal in view to subsection (6) of Section 294 of the 1999 Constitution (formerly subsection (5) of Section 258 of the 1979 Constitution) which reads:

“As soon as possible after hearing and deciding any case in which it had been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the Council informed of such action as the Council may deem fit.”

In my view, such report shall be made by the person presiding on the appeal whether or not the appeal was allowed.

The appellant’s counsel made some effort at showing under issue (iv) that the trial court made perverse findings of fact which the court below affirmed. I do not think he had succeeded in that effort having myself read the record of proceedings closely. The plaintiff presented a case which, on the balance of probabilities, was preferable to that of the defendants. Civil suits, generally, chieftaincy matters inclusive, are decided on the relative strengths of the cases presented by the parties upon preponderance of evidence resolved on the imaginary scale principle: see Olabanji v. Omokewu (1999) 6 NWLR (Pt.250) 671 at 681; Adeyeri II v. Atanda (1995) 5 NWLR (Pt.397) 512 at 533 in regard to chieftaincy matters; and Kaiyaoja v. Egunla (1974) 12 S.C. 55; Mogaji v. Odofoin (1978) 4 S.C. 91;

Onwuama v. Ezeokoli (2002) 2 S.C. (Pt. II) 76; (2002) 5 NWLR (Pt. 760) 353 at 367. At the same time it must be said that the plaintiff must succeed on the strength of his case and not on the weakness of the defence although he is entitled to rely on evidence revealed in such weakness to strengthen his case: see *Piaro v. Tenalo* (1976) 12 S.C. 31; *Odife v. Aniemeka* (1992) 7 NWLR (Pt. 251) 25. The plaintiff in this case met that requirement, in the course of which he relied on some evidence coming from the defence to strengthen his case as to what qualifies on Odi to perform traditional duties, and has on the whole made out a case sufficient for him to succeed in his claim. The court below was right to have affirmed the judgment of the trial court.

I have resolved all the four issues against the appellant. In the result, I hold that this appeal lacks merit and dismiss it. I award N10,000.00 costs in favour of the plaintiff/1st respondent against the 3rd defendant/appellant.

KUTIGI JSC

I have had a preview of the judgment just rendered by my learned brother, Uwaifo, JSC. I agree with his reasoning and conclusions. The appeal which is largely on concurrent findings of fact must fail because the appellant has not been able to show that the findings are wrong or perverse or show any special circumstance at all for us to interfere with the findings which I must say were amply supported by the evidence before the trial court. (see for example *Omorie v. Ed* (1971) 1 All NLR 282, *Okolo v. Uzoka* (1978) 4 S.C. 77, *Lokoyi v. Olojo* (1983) 8 S.C. 61.

The appeal is accordingly dismissed with N10,000.00 costs in favour of the 1st respondent against the appellant.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Uwaifo, JSC., and I agree with him that this appeal is without merit. For the reasons given in that judgment which I adopt as mine this appeal is dismissed. I affirm the concurrent decisions of the two courts below. I also award N10,000.00 costs in favour of the 1st respondent.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother. Uwaifo, JSC., and I am in complete agreement with him that this appeal is without substance and ought to be dismissed. B

I propose however, to comment briefly on issue 4. That issue complained against the judgment of the learned trial Judge on the ground that it was not delivered within 3 months of the final addresses of counsel as provided under Section 258(1) of the Constitution of the Federal Republic of Nigeria, 1979, as amended by the Constitution (Suspension and Modification) Amended Decree No. 17 of 1985, now re-enacted in Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999. The point stressed by learned counsel for the appellant is that the trial court delivered judgment in D the suit 15 days after the expiration of the 3 months period prescribed by the Constitution. The question posed by the appellant under this issue is whether the Court of Appeal was right in holding that mere 15 days' delay in the delivery of the judgment by the trial court was not inordinate and did not occasion a miscarriage of justice. E

For the avoidance of doubt, the provisions of Section 258 of the 1979 Constitution as amended by the Constitution (Suspension and Modification) Amendment Decree No. 17 of 1985 are as follows:- F

“258(1) Every court established under this Constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final address, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof. G

(2) Each Justice of the Supreme Court or of the Federal Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion; provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing. H

(3) *A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members.*

(4) *The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection 1 of this Section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.*

(5) *As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the Court shall send a report on the case to the Chairman of the Advisory Judicial Committee informed for appropriate action.'*

It cannot be disputed that the first limb of Section 258(1) of the Constitution of the Federal Republic of Nigeria, 1979, before it was amended, stipulated a period of 3 months within which the superior courts of record created under the Constitution shall deliver their judgment in writing and failure to comply with (his mandatory provision of the Constitution automatically invalidated such a judgment delivered outside the prescribed period and rendered it null and void. See *Chief Dominic Ifezue v. Livinus Mbadugba and Anor.* (1984) 5 S.C. 79, *Anachuna Anyaoke and Ors. v. Dr. Felix Adi and Ors.* (1985) 1 NWLR (Pt.2) 342. But as I have already indicated, that section of the Constitution was subsequently amended by the addition of subsections (4) and (5) above. It is plain from the said amendment that the position of the Law as enunciated by the decisions of this court in *Chief Dominic Ifezue v. Livinus Mbadugba and Ors.* (supra) and a host of other subsequent cases necessarily changed radically.

It is quite clear from the amendment in question that failure by the courts of law concerned to deliver their judgments within 3 months from the conclusion of evidence and final addresses does not now ipso facto render such judgments automatically null and void and of no effect. Such a decision shall only be set aside or treated as a nullity by an appellate court or a court of review if it is satisfied that the party raising the complaint has suffered a miscarriage of justice by reason of the breach. It is important however to note that by virtue of Sec-

tion 258(4) of the 1979 Constitution (as amended) the onus is on the party complaining of such non-compliance with the provisions of the said Section 258(1) to satisfy the court that failure to deliver the judgment within the prescribed period of time occasioned a miscarriage of justice and this may not be presumed in his favour. See *Chukwiedo Egwu v. Bello Egwu and Ors.* (1995) 5 NWLR (Pt. 396) B 493 at 505.

The Court of Appeal in the concluding passage of its treatment of the issue under consideration stated as follows:-

"I agree that in the present case the appellant has not established a miscarriage of justice by his complaints against the findings of the learned trial Judge. In other words, it had not been shown that the delay in the present case which was for only 15 days has affected the trial Judge's perception, appreciation and evaluation of the evidence in such a way that it will be easily seen that he had lost the impression made on him by the witnesses. It is only when this happens that a possible miscarriage of justice can be implied or said to have been occasioned and the trial court's judgment will be regarded or treated as a nullity by the appellate court." C D

I think, with respect, that the court below was entirely right in its above observations. I have myself carefully studied the pleadings, the evidence and the findings of the learned trial Judge in the case and cannot see my way clear in what respect the perception and appreciation of the evidence on the part of the trial court occasioned any miscarriage of justice. I am therefore satisfied that the appellant failed to establish that he suffered any miscarriage of justice by reason of the fact that the learned trial Judge delivered his judgment in the suit 15 days after the stipulated period of 3 months prescribed under the Constitution. I accordingly resolve issue 4 against the appellant. E F G

It is for the above and more detailed reasons contained in the leading judgment of my learned brother, Uwaifo, JSC., that I, too, dismiss this appeal as lacking in substance. The 1st respondent is awarded N10,000.00 costs against the 3rd appellant. H

MUSDAPHER JSC

I have had the honour to read before now the judgment of

my Lord Uwaifo, JSC., just delivered. For the same reasons contained therein, which I respectfully adopt as mine, I too find this appeal unmeritorious.

This appeal is mainly an appeal on facts decided concurrently by the two lower courts and the appellant has not convinced me that
B the two lower courts were wrong in their decisions on the facts. The decision of the lower courts to set aside Exhibit P was clearly right in view of the provisions of Section 20(3), Chiefs Law Cap 20, Laws of Ogun State, 1978, which clearly did not apply to enable the Govern-
C ment of Ogun State interfere in the way and manner they did. The lower court was also right in holding that the delivery of the judgment of the trial court three months after the final address of counsel did not occasion any miscarriage of justice as to warrant any interference by virtue of Section 258 of the 1979 Constitution. In any event,
D the appellant has not shown the occurrence of any miscarriage of justice or how he was prejudicially affected by the delay.

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