

SUPREME COURT OF NIGERIA
22ND JUNE, 2004. SC. 117/2000
CORAM:- S. M. A. BELGORE, S. U. ONU,
A. I. IGUH, N. TOBI, D. O. EDOZIE, JJSC

1. JOHN ONYENGE

2. ANDREW AMADI DEFENDANTS/APPELLANTS

3. IKECHI NWACHI

(For themselves and on behalf
of Umungede family, Uwaza in
Ukwa LGA of Abia State)

AND

CHIEF LOVEDAY EBERE

ENOCH EBERE PLAINTIFFS/RESPONDENTS

PETER ALIRI

(For themselves and on behalf of
“Ulogor” Family, Owaza in
Ukwa LGA of Abia State)

CUSTOMARY LAW - Proof - Party who alleges a custom - Is obliged to prove it - Unless it can be judicially noticed (H1)

CUSTOMARY LAW - Applicable custom - Evidence - Admission against interest - Oath-taking - Custom of the parties is applicable here (H2)

EVIDENCE - Admission against interest - Oath-taking - Arbitration - Resiling from - Appellants cannot resile from the oath-taking - They were instrumental to (H3)

CUSTOMARY LAW - Land matters - Possession - Oath-taking - Being a recognized customary arbitration - Has settled this land dispute - Common law is not applicable (H4)

CUSTOMARY LAW - Land matters - Pledge of the land in dispute - Is an

issue in this case not a mere after thought - Which was settled by the oath-taking (H5)

APPEALS - Concurrent findings - Meaning of - Case that passed through three Courts - Same findings of two of the Courts - That are not perverse - Will be upheld by the Supreme Court as concurrent (H6)

FACTS

The plaintiffs/respondents filed an action before the Ukwa Customary Court of Abia State against the defendants/appellants. They claimed entitlement to customary right of occupancy, N2,000.00 general damages and perpetual injunction in respect of the land in dispute. Plaintiffs averred that the land in dispute which belongs to their ancestors was pledged to one of the defendants' ancestors. Years rolled past without redemption of the land. As a later head of their family sought to redeem the land, the defendants refused claiming that the land was never pledged to them, and that plaintiffs did not descend from their original ancestor. Towards a resolution of this dispute, the parties resorted to juju oath-taking as a means of settling the matter. Defendants finally brought a foreign juju from Okija, Anambra State, which plaintiffs swore to, survived the oath as they did not die within one year and are, therefore, entitled to exclusive possession of the land.

The defendants denied the claim, agreed that moves were made to settle the matter through oath-taking arbitration but contended that the arbitration was inconclusive. The trial Court found in favour of the plaintiffs. Defendants' appeal to the Customary Court of Appeal Abia State was allowed. Plaintiffs' appeal to the Court of Appeal was upheld with a confirmation of the trial court's findings. Being dissatisfied, defendants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Were the learned Justices of the Court of Appeal right when they held that the plaintiffs proved the ownership of the land in dispute by oath-taking and applicable custom to the oath administered by priest from Okija in Anambra State was that of Ukwa people and not that of the people of

Okija in Anambra State?

(2) *Were the learned Justices of the Court of Appeal right when they held that the appellants could be held Liable in trespass when there was evidence that they were in exclusive possession of the land in dispute?"*

(3) *Were the learned Justices of the Court of Appeal right when they held that the plaintiffs proved the alleged pledge of the land in dispute to the defendants?"*

(4) *Were the learned Justices of the Court of Appeal right when they held that the Customary Court of appeal was in serious error when it interfered with the decision of the trial court on facts?"*

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

Proof - Party who alleges a custom

1. The burden of proof in a civil matter such as this is on the party who alleges the affirmative. And that party could be the plaintiff or the defendant, depending on the state of the pleadings. In other words, the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all was given on either side. While the first burden is on the party who alleges the affirmative in the pleadings, the second burden, the evidential burden, lies on the adverse party to prove the negative.

A related aspect is that a party who alleges the existence of customary law must prove that customary law because the Law of Evidence regards it as a fact, unless it can be noticed judicially. (p. 1725 A)

CUSTOMARY LAW - Applicable custom - Evidence

2. *Those facts proclaimed loudly that the applicable custom was the Ukwa custom."*

I am in grave difficulty to disagree with the above conclusion because it is clearly borne out from the evidence before the trial court. After all, D.W.4 said in evidence that "the place of origin of the juju sworn upon was totally irrelevant and that everything was done according to Ukwa custom". And this is clearly admission against interest, and it is against the interest of the appellants as defendants. It is the best evidence in favour of the respondents.

Learned Senior Advocate relied on Section 16(2)(d) of the Imo State Customary Courts Edict (now Law), 1984. The subsection provides that “a customary law shall be deemed to be binding upon a person where that person agrees or is deemed to have agreed to be bound by the customary law.” It is obvious from the decision of the Customary Court that the customary law binding on the parties was Ukwa custom and not that of Okija in Anambra State. And I do not see any perversity or perverseness in that finding. (p. 1727 D)

C Appellants cannot resile from the oath-taking

3. Learned Senior Advocate does not seem to like the tradition or custom of oath-taking. He cited quite a number of cases including Nwoke v. Okere, supra. This court recognizes oath-taking as a valid process under customary law arbitration. In Ume v. Okoronkwo (1996) 1SCNJ 404, Ogwuegbu, JSC, held that oath-taking was one of the methods of establishing the truth of a matter and was known to customary law and accepted by both parties. I am bound by that decision.

One fairly curious aspect in this case is that the appellants, who were instrumental to the exercise of oath-taking, are trying to resile from it. I do not think that such a position is available to them in law. (p. 1727 H)

F CUSTOMARY LAW - Land matters - Possession - Oath-taking

4. *After one year of the oath the defendants could not be said to be in possession as against the plaintiffs. What they had was mere physical occupation. The plaintiffs had legal right of possession, which was better than the defendants' occupation. The plaintiffs could, therefore, maintain action in trespass against the defendants. The trial court was perfectly justified in so holding."*

I can hardly improve on the above conclusion of the Court of Appeal. The situation in this case is different from the point made by learned Senior Advocate for the appellants. The issue was based on the oath-taking and the after-effect of the exercise on the parties. In view of the fact that the respondents survived after taking the oath, the parties were not bound by the niceties of the law as submitted by learned Senior Advocate that posses-

sion is nine tenths of ownership. That may well be so under the common law but certainly not the position in the customary law under which the oath was taken.

It is my view that where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such a situation, the proof of ownership or title to land will be based on the rules set out by the traditional arbitration resulting in oath taking. It is in this regard that I find it difficult to go along with counsel in his submissions bordering on the common law. I think it is *good* law that in arbitration under customary law, the applicable law is customary law and not common law principles with their characteristic certainty and ossification. (p. 1728 H)

Land matters - Pledge of the land in dispute

5. I cannot, with the greatest respect to learned Senior Advocate, agree that the issue of pledge was an afterthought. The Customary Court dealt with the issue when that court said, and I quote the court at the expense of prolixity:

“Court is satisfied that the oath taken by the plaintiffs justified them that the land is on pledge with the defendants.....This is as it should be, for as long as the land is on pledge, the pledgees have every right to continue enjoying everything on the land until the land is redeemed.”

The above finding is based on the evidence before the court. P.W.1, the 1st plaintiff, in his evidence-in-chief said:

“The land pledged to Nwosu Nwokiri is the land now in dispute. Elechi pledged this land in dispute to Nwosu for 400 manilas. Elechi also pledged another part of the Egbelu Umuologo Umueme family for 400 manilas. The one pledged to Umueme is not in dispute. It has been redeemed by Igba.”

In my view, there is enough evidence for the Customary Court to arrive at the conclusion it arrived at. Similarly, the Court of Appeal was justified in its own conclusion on the issue of pledge, and I so hold. (p. 1730 D)

APPEALS - Concurrent findings - Meaning of

6. The final issue relates to concurrent findings of the courts. Learned Senior Advocate's submission is to the effect that since the Customary Court of Appeal did not go along with the findings of the Customary Court, the respondents cannot be heard to say that there are concurrent findings of the two courts below. The word "concurrent" means existing or happening at the same time. It also means in agreement, or meeting of minds of assent. In my view, the situation in this appeal conveys the second meaning as both the Customary Court and the Court of Appeal are in agreement as to the findings of fact and conclusions in this matter. There was also meeting of minds of the two courts. The mere fact that the Customary Court of Appeal came in between the Customary Court and the Court of Appeal did not destroy the concurrent findings of the two courts. In view of the fact that the concurrent findings of the Customary Court and the Court of Appeal are not perverse, the respondents are entitled to urge this court to dismiss the appeal and, indeed, they are right in so urging this court.

In sum, this appeal has no merit and it is dismissed. The decision of the Court of Appeal which restored the judgment of the Customary Court is upheld. (p. 1730 H)

REPRESENTATION

Chief Chris Uche, SAN., (with him, M.I. Onochie and Ojike), for the Appellants.

Chief T.E. Nwanosike, for the Respondents.

CASES REFERRED TO

Okechukwu and Sons v. Ndah (1967) NMLR 368

Osawaru v. Ezeiruke (1978) 6-7S.C. 135

Akinfosile v. Ijose (1960) 5 FSC 192)

Angu v. Attah CP (1874-1928) 43

Ekpana v. Uyo (1986) 3 NWLR (Pt.26) 63

Kwasi v. Lavbi(1950) 13 WACA 76

Okoiko v. Esedalue (1974) All NLR 409

Njoku v. Ekeocha (1972) ECSLR 199

Akunyili v. Ejidike (1996) 5 NWLR

Ume v. Okorokwo (1996) 12 SCNJ 404

STATUTES & RULES REFERRED TO

Petroleum (Drilling and Production) Regulations Act Cap. 350 LFN 1990, S.17 (1) (C) (ii) B

Customary Court Law of Imo State 1984 S .16 (2) (d)

Customary Court Rules 1989 of Imo State O. X r. 6 (4)

Evidence Act Cap. 112 LFN 1990, S.14 C

LEAD JUDGMENT BY TOBIJSC

This case has moved through three courts, viz: Ukwa Customary Court, Ukwa Local Government Area; Customary Court of Appeal, Abia State and the Court of Appeal, Port Harcourt Division. This is the fourth court. D

The plaintiffs, who are the respondents in this court, claimed against the defendants, who are the appellants in this court: (a) a declaration that the plaintiffs are entitled to the customary right of occupancy in and over the piece of land called Egbelu Ulogor; (b) N2,000 general damages; and (c) perpetual injunction restraining the defendants, their servants, agents and or privies from committing further acts of trespass on the said land. E

The trial court gave judgment to the plaintiffs in terms of their claims, except the relief on trespass where the court awarded N700.00 damages. The Abia State Customary Court of Appeal allowed the appeal of the defendants and dismissed the case of the plaintiffs. The plaintiffs' appeal to the Court of Appeal was allowed. That court restored in full the judgment of the trial court. It is against the judgment of the Court of Appeal that the defendants as appellants have appealed to this court. And so the plaintiffs won in two courts (Customary Court, Ukwa and Court of Appeal), while the defendants won in one court (Customary Court of Appeal, Abia State). F G H

Let me state the facts of the case. The plaintiffs' case is that they are descendants of one Ulogo who deforested the land in dispute, "*Egbelu Ulogo*", situate at Owaza in Ukwa Local Government Area within the

jurisdiction of Ukwa Customary Court. The plaintiffs stated in evidence that one Elechi, the 1st son of Ulogo, their ancestor, pledged the land in dispute to one of the defendants' ancestors, Nwosu Nwokiri for 400 manilas. The pledge was not redeemed by subsequent heads of the plaintiffs' family until when the 1st plaintiff's father, Ebere Oforji as head of Ulogo family, approached the defendants for redemption of the pledge of the land in dispute. Ebere Oforji tendered N6.68 as the equivalent of 400 manilas to the defendants which they refused to accept claiming that the land in dispute was not on pledge to the defendants and particularly that the plaintiffs are not the descendants of Ulogo.

For the refusal of the defendants to accept redemption of the pledge and asserting ownership of the land in dispute, the plaintiffs, in accordance with the custom of the parties deposited the redemption money of N6.68 with "AKPAM JUJU" at Obuzo, Asa in Ukwu Local Government Area. P.W.2, Nna Nwankpa, was the Chief Priest of the "AKPAM JUJU".

The evidence is that the parties appeared before the "AKPAM JUJU" and each party stated its case before the juju priests. The juju priests gave a decision that the plaintiffs should take oath since the defendants had refused to take the oath. The defendants were ordered to provide any juju of their choice for the plaintiffs, within eight days, to take the oath. This, the defendants failed to do but rather summoned the plaintiffs before a foreign juju, "OGWUGWU AKPU" of Okija in Anambra State, demanding that the plaintiffs should take oath before the juju that the land in dispute is the plaintiffs' family land and that the said land in dispute was pledged to the defendants' ancestor by the plaintiffs' ancestor. The plaintiffs agreed to take the oath and the "OGWUGWU AKPU" juju from Okija in Anambra State was brought down to Ukwu and placed on the land in dispute. The plaintiffs took the oath that they are descendants of Ulogo and that the land in dispute was the property of their ancestor, Ulogo. On the death of Ulogo, the land was pledged by their ancestor, Elechi, to the defendants' ancestor. The plaintiffs survived the customary one year of the oath-taking and celebrated the survival in compliance with the custom of Asa-Ukwu people to which the parties hereof belong. The plaintiffs thereafter became entitled to the exclusive possession of the land in dispute by the custom of the

parties. That is the story of the plaintiffs.

The defendants, on the other hand, also laid claim to the ownership of the land in dispute. The defendants maintained that they were on the land in dispute not as pledges but in exercise of their rights as owners of the said land. The defendants admitted that the matter now before the court was referred to the “*Akpam Juju*” at Obuzo Asa for arbitration but that the arbitration was inconclusive as they insisted that more than one member of the plaintiffs’ family should swear to the juju. As a consequence they referred the matter to the “*Ogwugwu Akpu*” juju who ruled that seven members of the plaintiffs’ family should swear to an oath. It is the defendants’ case that on the date of oath-taking the juju priest from Okija who administered the oath made it abundantly clear that the juju will not kill any one who took the oath enter into the land to farm thereon. The defendants maintained that after the oath taking the plaintiffs never entered into the land in dispute.

The parties filed and exchanged briefs. The appellant four issues for determination:

“(1) *Were the learned Justices of the Court of Appeal right when they held that the plaintiffs proved the ownership of the land in dispute by oath-taking and that the applicable custom to the oath administered by the juju priest from Okija in Anambra State was that of Ukwa people and not that of the people of Okija in Anambra State?*”

(2) *Were the learned Justices of the Court of Appeal right when they held that the appellants could be held liable in trespass when there was evidence that they were in exclusive possession of the land in dispute?”*

(3) *Were the learned Justices of the Court of Appeal right when they held that the plaintiffs proved the alleged pledge of the land in dispute to the defendants?*

(4) *Were the learned Justices of the Court of Appeal right when they held that the Customary Court of Appeal was in serious error when it interfered with the decision of the trial court on facts?”*

The respondents also formulated four issues for determination:

“(i) *Whether the learned Justices of the Court of Appeal were not right to uphold the finding of trial Customary Court that the proved*

customary law of Asa, Ukwa Local Government Area governed the oath taken by the plaintiffs over the land in dispute.

(ii) *Was it not an act of trespass under the customary law of Ukwa people when the appellants entered the land over which the respondent at the instance of the same appellants, took oath and survived the mandatory customary one year period?*

(iii) *Were the learned Justices of Court of Appeal wrong in upholding the finding of the trial Customary Court that the land in dispute was on pledge to the appellants?*

(iv) *Whether the Court of Appeal was not right to have upheld the finding of fact of the trial Customary Court arrived at as a result of proper evaluation of evidence? “*

The appellants also filed a Reply Brief.

Learned Senior Advocate for the appellants, Chief Chris Uche, submitted on Issue No. 1 that the arbitration can only be said to be conclusive if it is shown that the plaintiffs satisfied all the conditions laid down by the juju priest from Okija. Relying on the evidence of D.W.3, D.W.I, D.W.2 and D.W.4, learned Senior Advocate submitted that the Court of Appeal was wrong in holding that the oath taking in this case was conclusive.

On the conclusion of the Court of Appeal that the evidence of defendants in respect of the issue of oath taking was contradictory, learned Senior Advocate cited the case of Nwokoro v. Onuma (1999) 9 S.C. 59, (1999) 12 NWLR (Pt.631) 342 at 355. He submitted that the material point in issue is whether the juju priest ever gave a condition that the plaintiffs should enter the land in dispute and not necessarily the period the juju will last before the plaintiffs can be said to have survived the oath. On this point there was no inconsistency in the evidence put forward by the defendants, learned Senior Advocate argued. He finally submitted on Issue No.1 that the arbitration was inconclusive and that the plaintiffs failed to prove ownership of the land in dispute by customary arbitration.

Learned Senior Advocate submitted on Issue No.2 that a customary pledgee is entitled to go into immediate possession of the pledged land and put the land into productive use and that the pledgee is also entitled to remain in possession of the pledged land until it is redeemed by the pledgor. He

cited Okoiko v. Esedalue (1974) All NLR 409. Calling in aid Adeleke v. Adewusi (1961) All NLR 40 at 45 and Akinkuowo v. Fafimoju (1965) NMLR 349 at 351, learned Senior Advocate submitted that a pledgee, like a customary tenant in possession, cannot be held liable in trespass until the redemption of the pledge. As the plaintiffs were not in possession of the land in dispute at the time of the institution of the action in trespass, they cannot succeed in an action on trespass which is rooted on possession. He cited Alhaji Yusuf v. Akindiye (2000) 8 NWLR (Pt.669) 376 at 385. B

On Issue No.3, learned Senior Advocate cited the case Nwoke v. Okere (1994) 5 NWLR (Pt.343) 159 at 172 and 173 in respect of juju oath taking. He submitted that where a parcel of land is on pledge or subject to customary tenancy, the pledgee is entitled to compensation for his crops on the land while the pledgor is entitled to compensation as the owner of the radical title to the land. He cited Section 17(l)(c)(ii) of the Petroleum (Drilling and Production) Regulations Act, Cap. 350 Laws of the Federal Nigeria, 1990. In a case such as this, where both parties gave divergent evidence on the issue of pledge, ipse dixit of plaintiffs, without more, was insufficient to prove the pledge; and this is because the existence or non existence of pledge is a question of fact and the onus of proving same is on the party who alleges its existence, learned Senior Advocate contended. He cited Ezeudu v. Obiagwu (1986) 3 S.C. 1 at 4. It was the argument of learned Senior Advocate that in a case such as this, the court ought to have used evidence of acts of possession (particularly the payment of compensation made by Shell) to resolve the conflicting claim to title made by Shell) to resolve the conflicting claim to title made by the parties. E F

On Issue No.4, learned Senior Advocate submitted that the court of Appeal was in error when it held that the Customary Court of Appeal ought not to have interfered with the findings of fact made by the trial court. Citing Chief Ebba v. Chief Ogodo (1984) 1 SCNLR 372: Shell Development Petroleum Company Limited v. His Highness Pere Cole (1978) African Continental Seaways Limited v. Nigerian Dredging Road and General Works Limited (1977) All NLR 179 at 190 and 191 and Akporo v. Egbalaa (1995) 8 NWLR (Pt.441) 118 at 128, learned Senior submitted that the findings of the Customary Court of Appeal on decision of the Customary Court were G H

valid and the Court of Appeal was wrong in interfering with them. He urged the court to allow the appeal.

Learned counsel for the respondents, Chief T.E. Nwanosike submitted on Issue No. 1 that the learned Justices of the Court were very
B right to uphold the finding of fact by the trial Customary law of Ukwa Local Government Area, that it was the customary law of Asa-Ukwa people that governed the oath taken by respondents. He argued that the custom that was in evidence before the trial Customary custom was the
C custom of Asa-Ukwa Clan of Abia State and not the custom of Ubahu Okija in Anambra State. He relied on Section 16(2)(d) of the Imo state of Nigeria Customary Courts Edict (now Law) 1984 applicable to Abia State.

It was the submission of counsel that by Order X Rule Imo State Customary Court Rules, 1989, the burden of proving the customary law of
D Okija, which the appellants wished to rely on, was on them. To counsel, there was no such proof before the trial Customary Court and the appellants cannot now complain. On what counsel called the alleged terms and conditions which the appellants have consistently canvassed in all the courts,
E he submitted that the so-called conditions were not clearly established by the evidence of the proponents of the conditions. He took the evidence of D.W. 1, D.W.2, D.W.3 and submitted that relying on Opare v. Sampson 3 WACA 169; Uzolechi v. Onyenwe (1999) 1 SCNJ 35 at 39, learned counsel
F submitted that the Court of Appeal was right to uphold the finding of fact by the trial Customary Court that it was the customary law of Ukwa Local Government Area that governed the oath taken by the respondents on the “*Ogwugwu Akpu*” juju of Okija, Anambra State in 1981.

Learned counsel submitted on Issue No.2 that under the customary
G law of Ukwa Local Government Area the appellants were liable to the respondents in trespass having entered the land in dispute without the consent of the respondents after they had taken oath on the Okija juju at the instance of the appellants and survived the said oath. Counsel urged the
H court to refuse to set aside or interfere with the concurrent findings of the trial Customary Court and the Court of Appeal, as the findings were the result of proper evaluation of the facts in evidence.

Reacting to the appellants’ submission on pledge, learned counsel

submitted that the principle adumbrated by the appellants is not derived from the custom of the parties which the trial Customary Court is enjoined to administer under Section 16 of Imo State of Nigeria Customary Courts Edict (Law), 1984. He pointed out that there was no evidence of the principle before the trial Customary Court. The evidence of custom of the parties before the trial Customary Court, counsel claimed, is that the respondent became automatically, after one year of the oath taking, the owner in possession of the land in dispute. B

Learned counsel submitted that the appellants are bound by decision of the traditional arbitration which they initiated by demanding that the respondents should take oath on the Okija juju, and that they cannot now resile from the consequences of that decision. C

On Issue No.3, learned counsel submitted that the Court of Appeal was right to have upheld the finding of the trial Customary Court that the land in dispute was on pledge to the appellants. He called in aid the arguments he advanced in Issue No.2 and the evidence of D.W. 1 and D.W.2. Relying on *Ume v. Okorokwo* (1996) 12 SCNJ 404, learned counsel contended that oath taking was one of the methods of establishing the truth of a matter and was known to customary law and accepted by both parties. D E

Learned counsel submitted on Issue No. 4 that the Court of Appeal was right not to have interfered with the findings of the trial Customary Court because the findings were supported by evidence and they were not perverse. He cited *Efi v. Enyinfu* (1954) 14 WACA 424. Counsel urged the court to dismiss the appeal. F

Chief Uche, SAN., in his Reply Brief, submitted that there is a great difference between customary arbitration and an oath taking exercise. He pointed out that whereas oath-taking is an aspect of customary arbitration, yet it is not all customary arbitration that involve oath-taking. He argued that the oath-taking in this matter was neither complete nor conclusive parties were not ad idem on the terms and conditions of the oath. G

It was the submission of learned Senior Advocate that since the respondents were the plaintiffs at the trial court, and they were claiming that they swore to the "*Ogwugwu Akpu*", the onus was on them to prove their case by calling evidence as to the oath taken by them. Relying on Eze H

v. Atasie (2000) 12 S.C. (Pt. 1) 24, (2000) 10 NWLR (Pt.676) 470 at 481, learned Senior Advocate submitted that the burden is squarely claiming declaration of title to adduce credible and admissible evidence in support of the title.

B Learned Senior Advocate repeated his argument on the inconclusive nature of the oath-taking exercise and cited the following cases: Agu v. Ikewibe (1991) 3 NWLR (Pt.180) 385 at 470; Awosile v. Sotunbo NWLR (Pt.243) 514 at 532; Okereke v. Nwankwo (2003) 4 S. C. (Pt 1) 16 (2003) 9 NWLR (Pt.826) 592 at 622; Odonigi v. Oyeleke (2001) 2 S. C. 194,(2001) 6 NWLR (Pt.708) 12 at 28; Nwoke v. Okere (1994) 5 NWLR (Pt.343) 159 at 173; Achiakpa v. Nduka (2001) 7 S.C. (Pt. 111) 125, (2001) 14 NWLR (Pt.734) 623 at 650 and Igwego v. Ezeugo (1992) 6 NWLR (Pt.249)561 at 587.

D On Issue No.2, learned Senior Advocate submitted that since the respondents admitted that the appellants were and are in possession, their claim in trespass ought to have failed, as possession remains nine-tenths of ownership. He cited Akunyili v. Ejidike (1996) 5 NWLR (Pt. 449) 381 and E Emodi v. Kwento (1996) 2 NWLR (Pt.433) 656.

It was the submission of learned Senior Advocate on Issue No. 3 that it is not correct, as contended by the respondents, that the issues submitted to arbitration included the issue of pledge to land, just as same was not a claim before the lower court. Counsel pointed out that respect of ownership or title; hence in the writ no mention was made of a pledge or any relief for redemption included. To learned Senior Advocate, the issue of pledge was an after-thought, which the respondents failed to prove as required by law. He cited Akuchie v. Nwamadi (1992) 8 NWLR (Pt.258) 214 at 226; Oyediran v. Alebiosu II (1992) 6 NWLR (Pt.249) 550 5 at 559 and Eze v. Atasie, supra.

On Issue No.4 on concurrent findings, learned Senior Advocate submitted that the Customary Court of Appeal set aside the judgment of the Customary Court, and it is therefore inappropriate to talk about concurrent findings of fact in this matter, particularly as the respondents have not shown upon which facts such concurrent findings were made. He cited Chinwendu v. Mbamali (1980) 3-4 S.C. 31. He once again urged the

court to allow the appeal.

The burden of proof in a civil matter such as this is on the party who alleges the affirmative. And that party could be the plaintiff or the defendant, depending on the state of the pleadings. In other words, the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all was given on either side. While the first burden is on the party who alleges the affirmative in the pleadings, the second burden, the evidential burden, lies on the adverse party to prove the negative. (See generally Okechukwu and Sons v. Ndah (1967) NMLR 368; Osawaru v. Ezeiruke (1978) 6-7 S.C. 135; Atana v. Amu (1974) 10 S.C. 237; Fashanu v. Adekoya (1974) 6 S.C.83; Akinfosile v. Ijose (1960) 5 FSC 192).

A related aspect is that a party who alleges the existence of customary law must prove that customary law because the Law of Evidence regards it as a fact, unless it can be noticed judicially. See Section 14 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. See also Angu v. Attah CP (1874 -1928) 43; Buraimo v. Bamgboye (1940) 15 NLR 139; Adagun v. Fagbola (1932) 11 NLR 110; Giwa v. Erinmilokun (1961) 1 All NLR 294; Ekpana v. Uyo (1986) 3 NWLR (Pt.26) 63.

It is the case of the respondents that they proved their case of title to the land in dispute, and this was by the decision of the traditional or Customary Arbitration arising from the exercise of oath-taking. It is the case of the appellants that the exercise of oath-taking was inconclusive and therefore could not have given rise to a decision in favour of the respondents.

What is the evidence? It is in evidence that the oath-taking exercise was initiated by the appellants. D.W.3, the juju priest from Okija, the choice of the appellants, said in evidence-in-chief:

“My name is Okonkwo Chukwueta. I live at Ubaha Ezike Okija in Anambra State. I am a juju priest. The name of my juju is Ogwugwu H Akpu of Obaha Ezike in Okija. I know the parties in this suit. The defendants summoned the plaintiffs in 1981 before my juju. I did not judge any case for them as plaintiffs did not come to Okija. My duty was to

come and administer the juju. I then brought the juju to their place, Owaza. We took the juju on the land in dispute. I came alone to Owaza. Both parties were present. The villagers who decided on the swearing of the juju including the Eze and his Chiefs were there. I swore before administering the juju that I never brought poison to Owaza. The Eze asked me how many days this juju will last before killing any defaulter. I replied that it has no specific period. I told Eze that as long as the plaintiffs had already sworn on the juju, that defendants who brought the juju can no more enter into the land in dispute. I warned the Eze that those who swore should start farming on the land that year. I told the Eze that if neither party entered into the land, the juju will not kill anybody. After this the plaintiffs swore to the juju. I do not know whether either party has been farming on the land. After five years ago I removed the juju at the instance of the defendants. I also testified before the Magistrate Court, Obehie as I have done in this court.”

D.W.4, in his evidence-in-chief also said:

“In 1981, 1st plaintiff had a land dispute with Jiochan Nwosu (now late). Jiochan Nwosu insisted that Loveday Ebere (1st plaintiff) should swear to a juju before the land in dispute, is left for him. Juju was brought on the land from Okija in Anambra State.”

Witness said in cross-examination as follows:

“It is one year, after which he can enter the land after the necessary ceremonies of showing that he has survived. The man who took oath in “Ukwa custom owns the land.”

The Customary Court, in its judgment said:

“This court has a duty to determine which custom of oath-taking should prevail in this circumstance. It is the opinion that since the juju was brought into Ukwa, within the jurisdiction of this Honourable Court, it is Ukwa custom that should prevail. In Ukwa custom and in Asa in particular, oaths are administered and are allowed a period of not less than one year to watch the outcome of the juju on the party who took the oath. Court is of the opinion that plaintiffs having taken the oath and survived the one year period allowed by Ukwa custom, the defendants have no more claim over the piece of land for which they the defendants administered oath on

the plaintiffs. It is also court opinion that defendants have no right whatsoever to command the plaintiffs as to when they (plaintiffs) should enter their land. Court is satisfied that the oath taken by the plaintiffs justified them that the land is on pledge with the defendants. Court noted that one of the arguments of the defendants is that they were enjoying Shell compensation on the land. This is, as it should be, for as long as the land is on pledge, the pledgees have every right to continue enjoying everything on the land until the land is redeemed.” B

The Court of Appeal agreed with the conclusion of the Customary Court. The court said: C

“Considering all the circumstances, I have no hesitation in holding that the conclusion reached by the trial court is far more reasonable than that by the lower court. With all due respect to the Justices of the lower court, they picked the most inconsequential fact in the pack as a basis for overturning the decision of the trial court, which had been reached after examination of the facts before the court. Those facts proclaimed loudly that the applicable custom was the Ukwa custom.” D

I am in grave difficulty to disagree with the above conclusion E because it is clearly borne out from the evidence before the trial court. After all, D.W.4 said in evidence that “the place of origin of the juju sworn upon was totally irrelevant and that everything was done according to Ukwa custom”. And this is clearly admission against interest, and it is against the interest of the appellants as defendants. It is the best evidence in favour of the respondents. F

Learned Senior Advocate relied on Section 16(2)(d) of the Imo State Customary Courts Edict (now Law), 1984. The subsection provides that “a customary law shall be deemed to be binding upon a person where that person agrees or is deemed to have agreed to be bound by the customary law.” It is obvious from the decision of the Customary Court that the customary law binding on the parties was Ukwa custom and not that of Okija in Anambra State. And I do not see any perversity or perverseness in that finding. G H

Learned Senior Advocate does not seem to like the tradition or custom of oath-taking. He cited quite a number of cases including

Nwoke v. Okere, *supra*. This court recognizes oath-taking as a valid process under customary law arbitration. In Ume v. Okoronkwo (1996) 12 SCNJ 404, Ogwuegbu, JSC, held that oath-taking was one of the methods of establishing the truth of a matter and was known to customary law and accepted by both parties. I am bound by that decision.

One fairly curious aspect in this case is that the appellants, who were instrumental to the exercise of oath-taking, are trying to resile from it. I do not think that such a position is available to them in law. In Oparaji v. Ohanu (1999) 6 S.C. (Pt.1) 41, (1999) 9 NWLR (Pt.618) 290, Iguh, JSC., correctly made the point at page 304:

“I think I ought to start by restating the well settled principle of law that where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced.”

See also Kwasi v. Lavbi (1950) 13 WACA 76; Oline v. Obodo (1958) SCNLR 298; Njoku v. Ekeocha (1972) ECSLR 199; Inyama v. Essien (1957) 2 FSC 39.

Dealing with the issue on trespass the Court of Appeal said:

“Once the fact of such arbitration and oath-taking and survival have been successfully established the oath-taker acquires the rights of full ownership and possession. If the other party remains in possession he does so as a trespasser if such possession is not with the consent of the owner. In the circumstances of this case the lower court was clearly wrong to hold that the plaintiffs should have sued for redemption first. It was because the defendants refused to take the redemption money that arbitration became necessary. The evidence before the trial court, confirmed by the defendants, was that the plaintiffs were to swear that the defendants held the land for them as pledgees and (not) to take the land. There was evidence also that the plaintiffs did take the oath and survived. Right of ownership and possession therefore automatically became vested in them. After one year of the oath the defendants could not be said to be in possession as against

the plaintiffs. What they had was mere physical occupation. The plaintiffs had legal right of possession, which was better than the defendants' occupation. The plaintiffs could, therefore, maintain action in trespass against the defendants. The trial court was perfectly justified in so holding."

I can hardly improve on the above conclusion of the Court of Appeal. The situation in this case is different from the point made by learned Senior Advocate for the appellants. The issue was based on the oath-taking and the after-effect of the exercise on the parties. In view of the fact that the respondents survived after taking the oath, the parties were not bound by the niceties of the law as submitted by learned Senior Advocate that possession is nine tenths of ownership. That may well be so under the common law but certainly not the position in the customary law under which the oath was taken.

It is my view that where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such a situation, the proof of ownership or title to land will be based on the rules set out by the traditional arbitration resulting in oath taking. It is in this regard that I find it difficult to go along with counsel in his submissions bordering on the common law. One of such submissions is the rule, or should I say principle, that possession is nine-tenths of ownership. The other is on principles of law governing proof of title to land. I think this is what counsel means by his submission that the burden is squarely on a party claiming declaration of title to adduce credible admissible evidence in support of the title. I think it is good law that in arbitration under customary law, the applicable is customary law and not common law principles with their characteristic certainty and ossification.

On the issue of pledge raised by learned Senior in the Court of Appeal, that court said:

"Chief Uche, for the respondents, submitted that the lower court was justified in holding that appellants did not prove pledge. Learned counsel pointed out that the plaintiffs did not make a claim for redemption of pledge and that they brought up the issue of pledge as an afterthought. He con-

tended that they should have given particular of it and proved them. Counsel contended also that the traditional evidence given by the plaintiffs fell far short of that required for establishing title to land. With all due respect to Chief Uche, his standpoint in this case completely overlooks importance of traditional arbitration in general and oath-taking in particular in our legal system. It is true that this form of adjudication is not part of our judicial system in the sense that a traditional arbitration panel is not one of the courts or tribunals recognised by the Constitution. It is equally true, however, that before the British brought their system of administration of justice we had our traditional system that worked. It worked and still works better for the indigenes because it is faster and cheaper and they understand it, not being bugged by unnecessary and avoidable technicalities that beset the English.”

Again, I can hardly improve on the above conclusions. **I cannot**, with the greatest respect to learned Senior Advocate, agree that the issue of pledge was an afterthought. The Customary Court dealt with the issue when that court said, and I quote the court at the expense of prolixity:

“Court is satisfied that the oath taken by the plaintiffs justified them that the land is on pledge with the defendants.....This is as it should be, for as long as the land is on pledge, the pledgees have every right to continue enjoying everything on the land until the land is redeemed.”

The above finding is based on the evidence before the court. P.W.1, the 1st plaintiff, in his evidence-in-chief said:

“The land pledged to Nwosu Nwokiri is the land now in dispute. Elechi pledged this land in dispute to Nwosu for 400 manilas. Elechi also pledged another part of the Egbelu Umuologo Umueme family for 400 manilas. The one pledged to Umueme is not in dispute. It has been redeemed by Igba.”

In my view, there is enough evidence for the Customary Court to arrive at the conclusion it arrived at. Similarly, the Court of Appeal was justified in its own conclusion on the issue of pledge, and I so hold.

The final issue relates to concurrent findings of the courts. Learned Senior Advocate’s submission is to the effect that since the

Customary Court of Appeal did not go along with the findings of the Customary Court, the respondents cannot be heard to say that there are concurrent findings of the two courts below. The word “*concurrent*” means existing or happening at the same time. It also means in agreement, or meeting of minds of assert. In my view, the situation in this appeal conveys the second meaning as both the Customary Court and the Court of Appeal are in agreement as to the findings of fact and conclusions in this matter. There was also meeting of minds of the two courts. The mere fact that the Customary Court of Appeal came in between the Customary Court and the Court of Appeal did not destroy the concurrent findings of the two courts. In view of the fact that the concurrent findings of the Customary Court and the Court of Appeal are not perverse, the respondents are entitled to urge this court to dismiss the appeal and, indeed, they are right in so urging this court.

In sum, this appeal has no merit and it is dismissed. The decision of the Court of Appeal which restored the judgment of the Customary Court is upheld. I award N 10,000 costs to the respondents.

BELGORE JSC

I agree with the lead judgment by my learned brother, Tobi, JSC., and I adopt his extensive reasoning as mine in dismissing this appeal. I award the same costs as ordered by him.

ONU JSC

I have read before now in draft the judgment of my learned brother, Niki Tobi, JSC., just delivered and with it I am in entire agreement that the appeal be and is hereby dismissed

I make similar consequential orders inclusive of cost as herein awarded.

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Tobi, JSC., and I agree entirely that this appeal is without substance and should be dismissed..

Accordingly, I, too, dismiss this appeal with cost to the respondent against the appellant that I assess and fix at N10,000.00.

C

EDOZIEJSC

I am in agreement with the leading judgment of my learned brother, Tobi, JSC., whereby the appellants' appeal with dismissed. For the reasons advanced in the said judgment which I adopt, I, also dismiss the appeal with D N 10,000 costs to the respondents.

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