

SUPREME COURT OF NIGERIA
9TH JULY, 2004. SC.139/2000
CORAM:- I. L. KUTIGI, S. U. ONU, S. O. UWAIFO,
N. TOBI, D. O. EDOZIE, JJSC

OBA J. A. AREMO II PLAINTIFF/APPELLANT
(The Alakungba of Akungba)

AND

1. S. F. ADEKANYE
2. THE GOVERNOR OF
ONDO STATE DEFENDANTS/RESPONDENTS
3. THE COMMISSIONER
FOR LOCAL GOVERNMENT
AND CHIEFTAINCY AFFAIRS

COURTS - Jurisdiction - Fundamentality of - In considering issue of jurisdiction - Only the writ of summons and the statement of claim - Are examined (H1)

ACTIONS - Justiciability of an action - Applicable law and Rules of Court - The Law applicable at the time cause of action arose is applied - While the Rules of Court in force at trial time are applied (H2)

CHIEFTAINCY MATTERS - Actions - Justiciability of - Cause of action that accrued before 1979 - When court's jurisdiction was ousted - Can not be justiciable in 1988 (H3)

ACTIONS - Justiciability - Chieftaincy matter - That is not justiciable - Commission of Inquiry - Set up to investigate the dispute - Did not occasion a fresh cause of action - Redressible in court (H4)

ACTIONS - Limitation of - Where a statute of limitation - Prescribes period for commencing an action - It becomes statute barred if the period has elapsed (H5)

ACTIONS - Limitation of - Justification for existence of statutes of limitation - Determination of whether an action is statute-barred - Is by reference to the Writ and Statement of claim (H6)

ACTIONS - Limitation of - Exceptions recognized by law - Includes a case of continuance of the damage - Which is not the case here (H7)

ACTIONS - Preliminary objection - Judgment - Appeal - Failure of a preliminary objection on appeal - Does not entitle plaintiff to judgment automatically (H8)

FACTS

This is a chieftaincy dispute that started long ago between 1913 and 1918 in the days of colonial administration. The dispute is over the headship or paramount rulership of Akungba clan in Ondo State. The plaintiff gave a historical analysis of how the dispute has continued for several years up to 1951 when plaintiff became a traditional ruler who wrote series of petitions to reverse the trend whereby 1st defendant and his predecessors usurped the position of paramount rulership which belongs to plaintiff and his predecessors. In 1979, the Ondo State Government set up the Ajayi Judicial Commission of Inquiry into the headship dispute between the parties. The government rejected the report and recommendation of the Commission which found in plaintiff's favour.

Aggrieved by this rejection of the Commission's recommendation, plaintiff filed this action on 11th of August, 1988. At the close of the plaintiff's case, 1st defendant objected to the jurisdiction of the trial court on the grounds that plaintiff's action is not justiciable, and that it is statute barred. The trial court ruled that the plaintiff's action is statute barred and struck it out. His appeal to the Court of Appeal was dismissed, while the 1st defendant's cross appeal on the issue of justiciability of the action was upheld. Being dissatisfied, plaintiff has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. If it is correct as the Court of Appeal held that the cause of action

occurred and accrued pre 1979, which is denied, did the decision of the 2nd respondent as contained in Exhibit 1, not amount to re-acknowledgment of the cause of action under the Doctrine of Reoccurrence of cause of action in Torts.

“2. Whether the Court of Appeal, Benin, was correct in law in holding that the action of the appellant is statute barred and ipso facto, that the court lacks jurisdiction, having found that the action of the appellant was instituted to challenge the decision of the 2nd respondent contained in Exhibit 1, which was made in 1982 when the 1979 Constitution was in operation.

3. If this court holds, as we urged, that the action was not statute barred, would it be in the “interest of justice to order a retrial de novo.”

HELD (Unanimously dismissing the appeal per UWAIFO JSC)

Jurisdiction - Fundamentality of

1. It is an elementary principle of law that the jurisdiction of a court is very fundamental to the adjudication of the matter before it. It is so radical that it forms the foundation of adjudication: if a court lacks jurisdiction, it lacks the necessary competence to entertain the claim before it: vide *Oloba v. Akereja* (1988) 7 S. C (Pt. 1) 1 } (1988) 3 NWLR (Pt. 84) 508. Where an objection is raised to the jurisdiction of the trial court, to try an action, the court at that stage has to enquire whether in fact its jurisdiction has been ousted.

In considering whether the court has the jurisdiction to entertain an action, it is the plaintiff's claim as endorsed on the writ of summons and the statement of claim that the court has to consider and not the defence. (p. 2143 D)

Justiciability of an action - Applicable law and Rules

2. The crucial question then is whether the appellant's action which was not justiciable before 1979 when it accrued could be entertained in the law court in 1988, that is, when the 1979 Constitution was in force? The legal position is that the applicable law to a cause of action is the law prevailing at the time the cause of action arose notwithstanding that that law had been revoked at

the time the action is being tried: Governor of Oyo State v. Folayan (1995) 9 SCNJ 50 at 64. In respect of practice and procedure, the applicable Rules of court are those in force at the time of the trial. (p. 2144 A)

B Cause of action that accrued before 1979

3. From the exposition of the applicable law in the above illuminating judgment, it is clear that the appellant's action in respect of the cause of action that accrued before 1979 when the jurisdiction of the court to entertain it was ousted, could not be justiciable in 1988. (p. 2145 C)

Chieftaincy matter - That is not justiciable

4. But learned counsel for the appellant has forcefully argued that the Government's White Paper Exhibit 1 made in 1982 rejecting the Ajayi Commission of Inquiry, occasioned a fresh cause of action redressible in the law court. In my humble view, the reliefs claimed in paragraphs 72(4), 72(5) and 72(6) of the statement of claim based on the rejection of the recommendation of the Judicial Commission of Inquiry could not have given the appellant a cause of action that is redressible in a court of law. This is so because the Ondo State Government that set up the Commission of Inquiry was at liberty to reject the recommendation of the Commission and the appellant has no legal right to compel it not to do so. It is my considered view that the appellant's suit was not justiciable. (p. 2145 D)

Where a statute prescribes period for commencing an action

5. Sometimes, the legislature prescribes certain periods of limitation for institution of certain actions. The statutes that prescribe such periods and regulate the subsistence of causes of action are known as statutes of limitation. Where a statute of limitation prescribes period within which an action must be commenced, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Where an action is statute barred, a plaintiff who might otherwise have had a cause of action loses the right to enforce it by judicial process because the period of time laid down by the limitation for instituting such an action has elapsed. (p. 2145 H)

Justification for existence of statutes of limitation

6. The rationale or justification supporting the existence of statutes of limitation includes the following:- (1) that long dormant claims have more of cruelty than justice in them: Lloyd v. Butler (1950) 1 KB 76 at 81 - 82, (2) that a defendant might have lost the evidence to disprove a stale claim: Jones v. Bellprove Properties Ltd (1949) 2 KB 700 at 704 and (3) that persons with good causes of action should pursue them with reasonable diligence: Board of Trade v. Cayzer, Irvine & Co. (1927) AC 610 at 628. The period of limitation begins to run from the date on which the cause of action accrued. To determine whether an action is statute barred, all that is required is for one to examine the writ of summons and the statement of claim alleging when the wrong was committed which gave the plaintiff a cause of action and comparing that date with the date on which the writ of summons was filed. If the time on the writ is beyond the period allowed by the limitation law, then the action is statute barred. (p. 2146 C)

ACTIONS - Limitation of - Exceptions recognized by law

7. Admittedly legal principles are not always inflexible. Sometimes they admit of certain exceptions. The law of limitation of action recognizes some exceptions. Thus, where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused: Battishill v. Reed (1856) 18 CB 696 at 714. For example, if the owner of mines works them and causes damage to the surface more than six years before action, and within six years of action a fresh subsidence causing damage occurs without fresh working by the owner, an action in respect of the fresh damage is not barred as the fresh subsidence resulting in injury gives a fresh cause of action: Darley Main Colliery Co. v. Mitchell (1886) 11 App Cas 127. In the case in hand, it is difficult to see how the mere rejection of the recommendations of the Ajayi Judicial Commission of Inquiry in 1982 could result in injury giving rise to a fresh cause of action. I agree with the submission of learned counsel for the 2nd and 3rd respondents that the foreign authorities cited by appellant's counsel including Darley Main Colliery v. Mitchell supra are not applicable to the facts of the

present case. As noted earlier on, the making of Exhibit 1 in 1982 even if not statute barred is not actionable as it did not create any cause of action. I therefore see no merit in this arm of the preliminary objection. (p. 2147 D)

B ACTIONS - Preliminary objection - Judgment

8. The appellant had in his 3rd and last issue for determination contended that if his appeal is successful, he would be automatically entitled to judgment. From the turn of events, the appeal is not successful on the two issues canvassed. But even if the appeal had succeeded, I do not share the optimism of the appellant. A defendant who conceives that ex facie he has a good ground of law which if raised will determine the action in limine, is entitled to raise such ground of law. In the determination of the action, before the court, the defendant may without filing a defence apply to strike out the action as disclosing no cause of action on the writ of summons and statement of claim. In such a case, he relies on the writ of summons and statement of claim for his contention. He may also in his statement of defence rely on the ground of law he considered complete answer to the claim of the plaintiff. The ground of law will then be argued as a preliminary point. If successful the action of the plaintiff ends. If the preliminary point fails, the trial commences or is continued if it had already started as in the present case provided there is still a triable issue to be determined. (p. 2148 B)

REPRESENTATION

C. K. Akinrinsola, Esq, Director, Civil Litigation, Ministry of Justice, Ondo State, (with him, A. Adelana, Esq, Senior Legal Officer), for 2nd and 3rd Respondents.
Appellant and 1st Respondent unrepresented

CASES REFERRED TO

H Oloba v. Akereja (1988) 7 S. C (Pt. 1) 1; (1988) 3 NWLR (Pt. 84) 508
Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 715
Governor of Oyo State v. Folayan (1995) 9 SCNJ 50 at 64

Mustapha v. Governor of Lagos State (1987) 9 NWLR (Pt. 58) 539

Alao v. Akano (1988) 1 NWLR (Pt. 71) 431

Uwaifo v. Attorney General Bendel State (1988) 7 S.C. 124

Rossek & Ors v. ACB Ltd & Ors (1993) 10 SCNJ 20

Eboipbe v. NNPC (1994) 5 NWLR (Pt. 347) 649

B

Odubeko v. Fowler (1993) 7 NWLR (Pt. 308) 637

Senda v. Kukawe Local Government (1991) 2 NWLR (Pt. 174) 379 Ekeogu

v. Aliri (1991) 3 NWLR (Pt. 179) 258

C

STATUTES & RULES REFERRED TO

Limitation Law Cap. 61 of Ondo State s. 4 (1) (a)

Supreme Court Rules 1999 O. 6 r. 8 (6)

Constitution of Nigeria 1979 ss. 6 (6) (b), 33 (1), 236

D

LEAD JUDGMENT BY EDOZIE JSC

This appeal emanated from a chieftaincy dispute between the plaintiff, Oba J. A. Aremo II known by the title of Alakungba of Akungba and the 1st defendant S. F. Adekanye designated as the Alale of Ilale. The dispute is over the headship or paramount rulership of Akungba clan in Akoko South West Local Government Area of Ondo State. This dispute started long ago between 1913 and 1918, when the then colonial administrator accorded recognition to village heads in Akoko District of the then Kabba Division. The plaintiff alleged that one of the 1st defendant's predecessors called Alale Omobobokun usurped the position of one of his predecessors as the Alakungba or Paramount ruler of Akungba. The said Alale Omobobokun died in 1918 and was succeeded by Alale Ajimo 1 to whom the colonial administration handed over the "*village book*" (a symbol of paramouncy) and other paraphernalia. In 1923, when one of the plaintiff's predecessors was succeeded by Alakungba Esugbe, Alale Ajimo I refused to recognize him as the headchief. In consequence, Alakungba Esugbe in 1924 petitioned the then District Officer for Owo Division, Mr. J. A. Mackenzie who in his report found in favour of the defendant's predecessor. However, in 1951 when the plaintiff became the Alakungba, he wrote series of petitions to Akoko Federal Council, Ikemerin Local Council and the Resident,

Ondo Province, to reverse the trend but all were in vain.

In 1979, the Ondo State Government set up the Ajayi Judicial Commission of Inquiry into the headship dispute between the Alale and Alakungba. In its White Paper of 1982, Exhibit 1, the Government rejected the report and recommendation of that Commission of Inquiry, which found in favour of the plaintiff. Aggrieved by the government's rejection of the Report of Inquiry, the plaintiff by a writ of summons issued on 11th of August, 1988 filed in the Ondo High Court sitting in Akure, commenced action in Suit No. HC/121/88 against the 1st defendant joining the Ondo State Governor and the Ondo State Commissioner for Local Government and Chieftaincy Affairs as the 2nd and 3rd defendants. In paragraph 72 of the statement of claim, the reliefs sought against them are formulated thus:-

"72 WHEREUPON, the plaintiff claims against the Defendants jointly and severally as follows:

(1) An order holding that the 1st Defendant and his predecessors had been wrongfully recognized by the 2nd and 3rd defendants as the Oba and prescribed authority of Akungba, and further holding that the plaintiff is the Oba and the Paramount Ruler of Akungba.

(2) An order holding that the 1st defendant and his predecessors had wrongfully arrogated to themselves the right to be called the paramount ruler and the prescribed authority over all other chieftaincies in Akungba.

(3) An order holding that the plaintiff is the paramount ruler and the prescribed authority over all other chieftaincies in Akungba.

(4) An order setting aside the Ondo State Government's decision concerning the Akungba chieftaincy dispute between the plaintiff and the 1st defendant in respect of which the 2nd and 3rd defendants have recognized the 1st defendant and his predecessors as the Oba and Paramount Ruler of Akungba contrary to the report and recommendations of Ajayi Judicial Commission of Enquiry.

(5) An order setting aside the decision of the Ondo State Government which rejected the report and recommendation of the Ajayi Judicial Commission of Inquiry into the Akungba Headship Dispute as it was null, void, unconstitutional and against the tenets of natural justice.

(6) And a perpetual injunction restraining the 2nd and 3rd defen-

dants, their agents, and or servants or privies from further recognizing the 1st defendant and or any other person made as Alale as the Oba or Paramount Ruler of Akungba, except the plaintiff.”

After pleadings were filed and exchanged, the plaintiff called witnesses and closed his case. Thereafter, the 1st defendant by a Notice of Preliminary Objection dated 22nd January 1996, objected to the jurisdiction of the trial court on the following grounds:

(1) That the cause of action being a chieftaincy dispute arose before 1979 Constitution and therefore not now justiciable.

(2) That the plaintiff’s claim before the court is statute barred by virtue of Section 4 (1) (a) of Limitation Law Cap. 61 of Ondo State and should be dismissed or struck out.”

The learned trial Judge, Aguda, J., heard the addresses of both counsel on the Preliminary Objection and in his ruling thereon Law when he ruled thus: -

“I therefore conclude that the action of the plaintiff in this case commenced in 1988 is statute barred by virtue of the English Limitation Act of 1623 which was applicable in the Protectorate of Nigeria, (including present day Ondo State), in 1924, when the cause of action in this case arose or accrued. I hereby strike out this suit.”

The plaintiff appealed against the order striking out the suit while the 1st defendant cross-appealed on the failure of trial court to rule on the issue of justiciability of the action but the Court of Appeal, Benin Division dismissed the appeal and allowed the cross-appeal in its unanimous judgment delivered on 2nd December, 1999. Against the judgment, the plaintiff has further appealed to this court.

The plaintiff, hereinafter referred to as the appellant, filed a brief of argument. Similarly, the 1st defendant and 2nd and 3rd defendants, respectively referred to as 1st respondent and 2nd and 3rd respondents, filed their respective briefs of arguments. On 20th April, 2004, when the appeal was heard, Mr. C. K. Akinrinsola, Director Civil Litigation and Mr. A. Adelana, Senior Legal Officer both of the Ondo State Ministry of Justice appeared for the 2nd and 3rd respondents and adopted their brief of argument. Neither the appellant nor the 1st respondent appeared by himself or through

his counsel but since briefs had been filed on their behalf, the appeal was deemed argued on those briefs pursuant to Order 6 Rule 8(6) of the Rules of this court as amended in 1999.

In the appellant's brief of argument, the following three issues were submitted for determination -

1. If it is correct as the Court of Appeal held that the cause of action occurred and accrued pre 1979, which is denied, did the decision of the 2nd respondent as contained in Exhibit 1, not amount to re-acknowledgment of the cause of action under the Doctrine of Reoccurrence of cause of action in Torts.

Ground 2

"2. Whether the Court of Appeal, Benin, was correct in law in holding that the action of the appellant is statute barred and ipso facto, that the court lacks jurisdiction, having found that the action of the appellant was instituted to challenge the decision of the 2nd respondent contained in Exhibit 1, which was made in 1982 when the 1979 Constitution was in operation.

Grounds 1, 3 and 4.

3. If this court holds, as we urged, that the action was not statute barred, would it be in the "interest of justice to order a retrial de novo."

For the 1st respondent, the issues for determination are two, viz:

"Issue No. 1 Whether the Court of Appeal, Benin, was correct in affirming the High Court decision that the action of appellant is statute barred.

Issue No.2 Whether or not it is competent for the appellant to institute an action in 1988 when the 1979 Constitution came into force to challenge an act which he could not have competently challenged before the promulgation of the 1979 Constitution."

The 2nd and 3rd respondents couched their two issues in the following terms:

"Issue No.1 Whether the Court of Appeal was right in dismissing the appeal and affirming the High Court decision that the action of the appellant is statute barred.

Issue No.2 Whether the appellant has the power under 1979 Constitution of Nigeria to challenge the decision of the 2nd respondent on

chieftaincy matter.”

With respect to the appellant’s first issue for determination, it was pointed out that one of the exceptions to the operation of the Statute of Limitation is where there is a re-acknowledgment of the claim of the claimant or where there is a repetition of the wrongful acts even though the subsequent actions are traceable to the earlier actions in which case the cause of action would continue to run from a later date and not from the date the first wrongful act was committed. References were made to Halsbury’s Laws of England 4th Edition paragraphs 622-623 (Volume not indicated) and the cases of *Darley Main Colliery v Mitchell* (1886) 11 App Cases 127 and *Hart v. St. Marylebone Borough Council* (1912) 76 J. P 251. It was then submitted that the making of Exhibit 1, that is, the 2nd respondent’s rejection in 1982 of the Ajayi Judicial Commission of Inquiry occasioned a fresh deprivation of the appellant’s right as the head of Akungba which constituted a fresh and distinct cause of action in 1982. It was further submitted that each of the reliefs claimed by the appellant is independent of the other and that the Court of Appeal was in error to have lumped all the reliefs together. The case of *Dantata v. Mohammed* (2000) 5 S.C. 1; (2000) 5 SCNJ 17 at 26 and *Adigun v. Attorney General of Oyo State* (1989) 1 NWLR (Pt 53) 678 at 741 were referred to. On the appellant’s second issue, it was contended that the appellant’s suit involved a chieftaincy dispute which was not statute barred having regard to Exhibit 1 made in 1982, and that the action was justiciable pursuant to Sections 6(6)(b), 33(1) of the 1979 Constitution of the Federal Republic of Nigeria. Regarding the appellant’s 3rd issue, the contention in the appellant’s brief is that the purported preliminary objection of the 1st respondent, the subject-matter of this appeal was in actual fact a statutory defence the failure of which entitles the appellant to judgment on his claim thereby making unnecessary the continuation of hearing or an order of trial de novo.

Learned counsel for the 1st respondent in his brief of argument adverted to his first issue for determination dealing with limitation period pointed out that the appellant’s cause of action or grievance originated from the findings of the Mackenzie’s report and the recognition accorded the Alale as the Paramount Ruler of Akungba over the Alakungba as far back

as 1924. He then submitted that the appellant's action instituted in 1988 after a period of 64 years was statute barred. In determining whether a cause of action is statute barred, learned counsel referred to the case of *Olaniyi v. Aroyewun* (1991) 5 NWLR (Pt 194) 652 at 689, and *Edosomwam v. ACB Ltd* (1995) 7 NWLR (Pt 408) 472. Finally, learned counsel submitted that the doctrine of re-occurrence of action in tort canvassed by the appellant is strange and novel to our adversary system of law adding that since the appellant's principal reliefs 1, 2 and 3 were not justiciable, the ancillary reliefs 4,5 and 6 could not be entertained vide *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt 117) 517 at 560.

Regarding the second issue dealing with jurisdiction, learned counsel stressed that the appellant's action being a chieftaincy matter was not justiciable before the 1979 Constitution, which conferred jurisdiction on courts over such matters. He however submitted that the jurisdiction of court is determined by the existing law at the time the cause of action arose and not by the existing law at the time court's jurisdiction is invoked contending that although the appellant's action was filed in 1988 when the 1979 Constitution was in force, it was not justiciable before 1979 Constitution when the cause of action accrued.

In the 2nd and 3rd respondents' brief, it is submitted with respect to the first issue therein concerning limitation of action that the court below was right in holding that the appellant's cause of action which accrued in 1924 was statute barred as at 8th of August, 1988, when the action was instituted. It was further submitted that the principle of re-acknowledgment or reoccurrence of cause of action which the appellant sought to introduce in this case does not apply to the facts of this case as the foreign authorities relied upon were not concerned with chieftaincy matters as in the present case. Dealing with second issue concerning jurisdiction of the court, it was repeated on the authorities of *Ekechi v. Military Governor. Bendel State* (1992) 3 NWLR (Pt. 237) 39 at 50-51, *Olaniyi v. Aroyehun* (1991) 5 NWLR (Pt. 194) 652 at 679, that the applicable law to a cause of action is the law in force when the cause of action arose and not the law at the time the jurisdiction of the court was invoked adding that since the appellant's principal claims were not justiciable pre 1979, the court still lacked

the jurisdiction to entertain them in 1988 notwithstanding that by the 1979 Constitution which was then in force the courts were vested with the jurisdiction over chieftaincy matters.

In line with the 1st respondent's preliminary objection, the issues for determination in this appeal are whether the court below was right in holding that the court lacked the jurisdiction to entertain the appellant's claims and also that the claims were statute barred. B

The two grounds of the preliminary objection relate to the jurisdiction of court but while the first ground deals with want of jurisdiction of court to entertain a particular subject-matter, the second ground concerns lack of jurisdiction of court over a subject-matter after a stipulated statutory period. I propose to consider the complaint on want of jurisdiction on the first ground. C

It is an elementary principle of law that the jurisdiction of a court is very fundamental to the adjudication of the matter before it. It is so radical that it forms the foundation of adjudication: if a court lacks jurisdiction, it lacks the necessary competence to entertain the claim before it: vide Oloba v. Akereja (1988) 7 S.C. (Pt. I) 1 (1988) 3 NWLR (Pt. 84) 508. Where an objection is raised to the jurisdiction of the trial court, to try an action, the court at that stage has to enquire whether in fact its jurisdiction has been ousted: Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 715. D E F

In considering whether the court has the jurisdiction to entertain an action, it is the plaintiff's claim as endorsed on the writ of summons and the statement of claim that the court has to consider and not the defence; see Adeyemi v. Opeyori (1976) 9-10 S.C. 31, Izenkwe v. Nnaedozie (1953) 14 WACA 361. G

In this connection, a careful reading of the six reliefs claimed by the appellant in paragraph 72 of the statement of claim as set out in the introductory part of this judgment reveals that they relate to a chieftaincy title, that is , the Paramount Rulership or Oba of Akungba. Being a chieftaincy matter, the jurisdiction of the court to entertain such a matter was before the 1979 Constitution ousted. However, that position as reversed by the 1979 Consti- H

tution by virtue of Section 236 thereof. **The crucial question then is whether the appellant's action which was not justiciable before 1979 when it accrued could be entertained in the law court in 1988, that is, when the 1979 Constitution was in force? The legal position is that the applicable law to a cause of action is the law prevailing at the time the cause of action arose notwithstanding that that law had been revoked at the time the action is being tried: Governor of Oyo State v. Folayan (1995) 9 SCNJ 50 at 64, Mustapha v. Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539, Alao v. Akano (1988) 1 NWLR (Pt. 71) 431; Uwaifo v. Attorney General Bendel State (1982) 7 S.C. 124. In respect of practice and procedure, the applicable Rules of court are those in force at the time of the trial: Owata v. Aniogo & Ors. 2 SCNJ 1 at 10; Rossek & Ors v ACB Ltd & Ors (1993) 10 SCNJ 20.**

D In a case not too dissimilar, this court, per Nnaemeka-Agu, JSC, restated and applied the above principle in the case of Olaniyi v Aroyehun (1993) 5 NWLR (Pt. 194) 652, 681 – 692 where he said:

“The question is whether by the Constitution vesting in the courts the jurisdiction to adjudicate over chieftaincy questions, the appellant could have competently instituted this action in 1984 in order to challenge an installation which took place in 1963. The answer to this question is clearly in the negative for two main reasons. First, the Constitution was not made to have a retroactive effect. A Constitution, like other statutes, operates prospectively and not retrospectively unless it is expressly provided to be otherwise. Such a legislation affects only rights which come into existence after it has been passed: See on this, Smith v. Callander (1901) AC 297 also Re Snowdon Colliery Co. Ltd (1925) 94 LJ Ch 1 305. Secondly, it is a fundamental principle of our law that rights of parties in an issue in litigation are decided on the basis of the substantive or organic law in force at the time of the act in question. This distinguishes them from adjectival or procedural law: See on this Lami Koro Ojokolobo and Ors v Lapade Alamu H & Anor (1987) 3 NWLR (Pt. 61) 377, Kpema v The State (1986) 1 NWLR (Pt. 17) 396; Obadiara v. Uyigwe (1986) 3 S.C. 39 and Adeyeye v. Ajiboye (1987) 3 NWLR (Pt. 61) 432, 444. These are the reasons why this court has consistently held that it is not competent for a party to institute an action

after October 1, 1979 when the 1979 Constitution came into force to challenge an act which he could not have competently challenged before the promulgation of the 1979 Constitution. See *Uwaifo v Attorney General Bendel State* (1982) 7 S.C. 124, *Attorney General Lagos State v Dosunmu* (1989) 6 S.C. (Pt. 1) 1; (1989) 3 NWLR (Pt. 111) 552; *Mustapha v. Governor of Lagos State* (1987) 2 NWLR (Pt. 53) 539. Applying the above principles to the instant case, it is clear that by the promulgation of the 1979 Constitution which vested the jurisdiction to adjudicate over chieftaincy matters in our courts, the appellant did not acquire the right to challenge a chieftaincy issue the cause of action over which arose in February, 1963. The jurisdiction of the court remained completely ousted.”

From the exposition of the applicable law in the above illuminating judgment, it is clear that the appellant's action in respect of the cause of action that accrued before 1979 when the jurisdiction of the court to entertain it was ousted, could not be justiciable in 1988. But learned counsel for the appellant has forcefully argued that the Government's White Paper Exhibit 1 made in 1982 rejecting the Ajayi Commission of Inquiry, occasioned a fresh cause of action redressible in the law court. In my humble view, the reliefs claimed in paragraphs 72(4), 72(5) and 72(6) of the statement of claim based on the rejection of the recommendation of the Judicial Commission of Inquiry could not have given the appellant a cause of action that is redressible in a court of law. This is so because the Ondo State Government that set up the Commission of Inquiry was at liberty to reject the recommendation of the Commission and the appellant has no legal right to compel it not to do so.

It is my considered view that the appellant's suit was not justiciable. As this is the case, it would not have been necessary to consider the next issue dealing on limitation law but since counsel have made elaborate submissions in their brief on the matter, I am inclined for the sake of completeness to express my opinion on the issue.

Sometimes, the legislature prescribes certain periods of limitation for institution of certain actions. The statutes that prescribe such periods and regulate the subsistence of causes of action are

known as statutes of limitation. Where a statute of limitation pre-
scribes period within which an action must be commenced, legal pro-
ceedings cannot be properly or validly instituted after the expiration
of the prescribed period. Where an action is statute barred, a plaintiff
B who might otherwise have had a cause of action loses the right to
enforce it by judicial process because the period of time laid down by
the limitation for instituting such an action has elapsed: See the
cases of Eboigbe v. NNPC (1994) 5 NWLR (Pt. 347) 649; Odubeko v.
C Fowler (1993) 7 NWLR (Pt. 308) 637, Senda v. Kukawe Local Govern-
ment (1991) 2 NWLR (Pt. 174) 379; Ekeogu v. Aliri (1991) 3 NWLR (Pt.
179) 258. The rationale or justification supporting the existence of
statutes of limitation includes the following:- (1) that long dormant
claims have more of cruelty than justice in them: Lloyd v. Butler
D (1950) 1 KB 76 at 81 - 82, (2) that a defendant might have lost the
evidence to disprove a stale claim: Jones v. Bellgrove Properties Ltd
(1949) 2 KB 700 at 704 and (3) that persons with good causes of
action should pursue them with reasonable diligence: Board of Trade
E v. Cayzer, Irvine & Co. (1927) AC 610 at 628. The period of limitation
begins to run from the date on which the cause of action accrued. To
determine whether an action is statute barred, all that is required
is for one to examine the writ of summons and the statement of
F claim alleging when the wrong was committed which gave the plaintiff
a cause of action and comparing that date with the date on which the
writ of summons was filed. If the time on the writ is beyond the period
allowed by the limitation law, then the action is statute barred: See
the case of Egbe v. Adefarasin (1987) 1 NWLR (Pt. 47) 1 at 20-21. In
G adopting and applying this principle to the facts of the instant case, the
court below, at p. 39, of the report opined, inter alia, thus:-

“Section 4(1) (a) of the Limitation Law of Western Region of Nige-
ria, Cap. 61, 1959, applicable to Ondo State reads:

H “4(1) The following actions shall not be brought after the expira-
tion of six years from the date on which the cause of action accrued that is
to say:

(b) actions founded on simple, contract or tort.....”

Looking at the writ of summons dated 8/8/88, endorsed by the registrar of the Ondo State High Court and the statement of claim, it is easy to determine whether the action is statute barred or not. It is clear that the appellant's grievance originated from the findings of the Mackenzie's report and the recognition accorded to Alale as the paramount ruler of Akungba over the Alakungba as far back as 1924, as rightly decided, in my view, by the learned trial Judge. If the appellant is simply challenging an act that occurred in 1982, as the appellant, it would not have been necessary to extend the claim to his predecessors or that (sic) of the 1st respondent. I therefore agree with the learned trial Judge that the action commenced in 1988 is statute barred."

In my view, there is considerable force in that reasoning. Learned counsel for the appellant has harped on what he termed "*re-occurrence*" of cause of action or "*re-acknowledgment*" of a claim contending that the making of Exhibit 1 in 1982 by the 1st respondent rejecting the Ajayi Commission of Inquiry constituted a fresh and distinct cause of action.

Admittedly legal principles are not always inflexible. Sometimes they admit of certain exceptions. The law of limitation of action recognizes some exceptions. Thus, where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused: Battishill v. Reed (1856) 18 CB 696 at 714. For example, if the owner of mines works them and causes damage to the surface more than six years before action, and within six years of action a fresh subsidence causing damage occurs without fresh working by the owner, an action in respect of the fresh damage is not barred as the fresh subsidence resulting in injury which gives a fresh cause of action: Darley Main Colliery Co. v. Mitchell (1886) 11 App Cas 127: West Leigh Colliery Co. Ltd v. Tunnidiffe Hanepson Ltd (1908) AC 27; See Halsbury's Laws of England 4th Edition Vol. 28, paragraph 821. In the case in hand, it is difficult to see how the mere rejection of the recommendations of the Ajayi Judicial Commission of Inquiry in 1982 could result in injury giving rise to a fresh cause of action. I agree with the submission of learned counsel for the 2nd and 3rd respondents that the foreign authorities cited by appellant's coun-

sel including **Darley Main Colliery v. Mitchell** *supra* are not applicable to the facts of the present case. As noted earlier on, the making of Exhibit 1 in 1982 even if not statute barred is not actionable as it did not create any cause of action. I therefore see no merit in this arm of the preliminary objection.

The appellant had in his 3rd and last issue for determination contended that if his appeal is successful, he would be automatically entitled to judgment. From the turn of events, the appeal is not successful on the two issues canvassed. But even if the appeal had succeeded, I do not share the optimism of the appellant. A defendant who conceives that *ex facie* he has a good ground of law which if raised will determine the action in limine, is entitled to raise such ground of law: see *Martins v. Administrator of the Federation & Anor* (1962) 1 SCNLR 219, (1962) 1 All NLR 120. In the determination of the action before the court, the defendant may without filing a defence apply to strike out the action as disclosing no cause of action on the writ of summons and statement of claim. In such a case, he relies on the writ of summons and statement of claim for his contention: see *Habib v. Provincial Immigration Officer* (1958) SCNLR 219, (1958) 3 FSC 75. He may also in his statement of defence rely on the ground of law he considered complete answer to the claim of the plaintiff: see *Gold Coast and Ashanti Electric Power Development Authority v. Attorney-General* (1937) 4 WACA 215. The ground of law will then be argued as a preliminary point. If successful the action of the plaintiff ends: see *Dina v. The Trustees of Nigeria Railway Pension Fund* (1970) All NLR. If the preliminary point fails, the trial commences or is continued if it had already started as in the present case provided there is still a triable issue to be determined.

Having regard to all the foregoing, it is my view that the appeal is devoid of any substance. It is accordingly dismissed with N10,000.00 costs to each set of respondents.

KUTIGI JSC

I have had the opportunity of reading in advance the judgment just rendered by my learned brother, Edozie, JSC. He has meticulously dealt with all the material issues in this appeal. I entirely agree with him that the appellant's appeal is devoid of merit. It is accordingly dismissed with B costs as assessed.

ONU JSC

Having had the privilege to read in draft the judgment of my learned brother, Edozie, JSC., I am in entire agreement with him that the appeal is devoid of any substance. I accordingly dismiss it with N 10,000.00 costs to each set of respondents.

UWAIFO JSC

I had the opportunity to read in advance the judgment of my learned brother, Edozie, JSC. I agree with it for the reasons he gives.

I wish to comment briefly on the consequences of the Ajayi Judicial Commission of Inquiry which was set up by the Ondo State Government in 1979. This was a deliberate action taken by the Government with a view to revisiting the dispute between Alale of Ilale and Alakungba of Akungba as to who is the paramount ruler of Akungba Clan in Akoko South West Local Government Area. The chieftaincy dispute started as far back as 1913. Under the 1963 Constitution, such a chieftaincy dispute was not justiciable.

But under the 1979 Constitution such a chieftaincy dispute became justiciable. As I have said, the action of the Government of Ondo State to set up a Judicial Commission on the dispute over the paramountcy of Akungba Clan was capable of creating a justiciable dispute under the 1979 Constitution. It is on that basis, in my view, that claims (4) and (5) sought by the plaintiff might have gained justiciability. The said reliefs read:

“(4) An order setting aside the Ondo State Government's decision concerning the Akungba chieftaincy dispute between the plaintiff and the

1st defendant in respect of which the 2nd and 3rd defendants have recognized the 1st defendant and his predecessors as the Oba and paramount ruler of Akungba contrary to the report and recommendations of Ajayi Judicial Commission of Enquiry.

B (5) *An order setting aside the decision of the Ondo State Government which rejected the report and recommendation of the Ajayi Judicial Commission of Inquiry into the Akungba Headship Dispute as it was null, void, unconstitutional and against the tenets of natural justice.”*

C However, the reliefs actually sought in the above-stated claims are for court orders to set aside the decision of the Ondo State Government which rejected the recommendation of the Ajayi Judicial Commission of Inquiry. This request cannot be considered a non-justiciable chieftaincy issue caught under the pre 1979 Constitution. It is an issue which arose through Government action thus creating a possible cause of action for anyone duly aggrieved by the consequences of that action. The plaintiff would have been entitled to challenge in court, for instance, the Judicial Commission of Inquiry for any good cause. He could well also have gone to law in case the Government accepted the recommendations of the Commission and obstacles were placed in his way of benefiting from them. But the said reliefs (4) and (5) as they stand give no cause of action to the plaintiff. The Government is not bound to accept the recommendations of the Commission. When, therefore, it rejected them, it acted within its exclusive authority.

E For these reasons and those more elaborately stated by my learned brother, Edozie, JSC., I too, find no merit in this appeal. I dismiss it with G N10,000.00 costs to each set of respondents.

TOBI JSC

H In Uwaifo V. Attorney-General, Bendel State (1982) 7 S.C. 124, Nnamani, JSC., said at pages 279 and 280:

“It is however my respectful view, and in this I agree with the Federal Court of Appeal, that jurisdiction of the court should be examined not when it is invoked but when the cause of action arose. It seems to me to

accord more with reality. Chief Williams himself conceded, as he had to, that the obligations and rights of parties must be considered in the light of the law at the time the cause of action arose. It seems to me again that whether a court has jurisdiction to enforce those rights or to entertain matters relating to them has to be considered at the same time i.e. when the cause of action arose. In the instant case, although the matters in respect of which appellant complains arose in 1977, he did not file his suit until 2nd October 1979. In other words, the suit was in respect of past transactions. The appellant's cause of action can be said to have arisen on the date when Edict No. 10 of 1977 was promulgated and his property forfeited. Whatever cause of action he may have had in 1977, it was clear that as the law stood then he could not enforce any rights he may have had in any court of law. This was because the jurisdiction of the courts to entertain matters related to actions such as was taken in Edict No. 10 of 1977 has been ousted by Section 6(3) of Act No. 10 of 1976 and Section 2(2) of Act No. 18 of 1988."

In *Adeyeye v. Alhaji Ajiboye* (1987) 3 NWLR (Pt. 61) 432, the 1st defendant was appointed the Onijagbo of Ijagbo on the 21st August, 1979. The plaintiffs thereafter filed an action challenging the appointment as ultra vires the Oyun Traditional Council. This court held that the High Court rightly came to the conclusion that it had no jurisdiction to entertain the matter as the cause of action arose before the coming into force of the 1979 Constitution on 1st October, 1979. Falling back on the provisions of the 1963 Constitution ousting the jurisdiction of the courts in chieftaincy matters, this court held that the High Court had no jurisdiction to entertain the matter. See also *Attorney-General of Kwara State v. Olawale* (1993) 1 NWLR (Pt. 272) 645; *Bello v. The Governor of Kogi State* (1997) 9 NWLR (Pt. 521) 496.

It would appear that the cause of action in this matter arose way back in 1924 as the action relates to reliefs (1), (2) and (3). In paragraphs 34 and 35 of the Statement of Claim, the plaintiff who is the appellant in this court averred:

Sometime in 1923 and 1924, when Alale refused to surrender the Alakungba's right as the head and paramount ruler of Akungba, Alakungba

declared a dispute against Alale.

Alakungba Osugbe continued with the struggle to regain his paramouncy until, 1933 when he died.

And so, by the above paragraphs, the cause of action in respect of B reliefs (1), (2) and (3) arose in 1924, and this is as pleaded by the appellant.

The Court of Appeal confirmed this at page 363 of the Record when the court dealt with the action as statute barred:

C “Looking at the Writ of Summons dated 8/8/ 88 endorsed by the Registrar of the Ondo State High Court and the Statement of Claim it is easy to determine whether the action is statute barred or not. It is clear that the appellant’s grievance originated from the findings of the Mackenzie’s D Akungba over the Alakungba as far back as 1924 as rightly decided by the learned trial judge”

I entirely agree with the above conclusion as it relates to reliefs (1) (2) and (3). But the situation is different as far as reliefs (4) and (5) are E concerned. In my view, the reliefs donate cause of action as averred in paragraphs 40,41,42, 67, 68 and 69 of the statement of claim. Having said that, the cause of action apparently donated by reliefs (4) and (5) are not reasonable, as the Government of Ondo State is not bound to accept the F recommendations of the Ajayi Judicial Commission of Inquiry. Above all the appellant has no legal right to compel the Government of Ondo State to accept the recommendations of the Ajayi Judicial Commission of Inquiry.

I therefore agree with my learned brother, Edozie, JSC., that the G appeal on this issue fails. In the circumstances, I do not see the need to take the second issue on whether the action was statute barred as it becomes essentially an academic exercise. I am also of the view that the appeal is devoid of any substance. It is accordingly dismissed with N10,000.00 costs to each set of respondents.

H