

**SUPREME COURT OF NIGERIA**  
9TH JULY, 2004. SC. 151/2000  
**CORAM:- I. L. KUTIGI, S. U. ONU, A. I. IGUH,**  
**S. O. UWAIFO, N. TOBI, JJSC**

1. IWUORIE IHEANACHO
2. JEROME MBAERI
3. OSUCHUKWU AHAMEFULE
4. IGBOJIONU UKWUEGBU
5. CHRISTOPHER EZIBE ..... APPELLANTS
6. UCHECHUKWU OMEMMA
7. ICHIE DAMIAN MBAERI

(For themselves and as representing the  
other members of Umudim, Amagwu  
Imeowere Isu Njaba, Nkwere Isu LGA)

AND

1. MATHIAS CHIGERE
2. CHIEF SUNDAY NWADIKE ..... RESPONDENTS
3. MODESTUS OKPE
4. CHARLES ONWUZURIKE

(For themselves and as representing the  
other members of Okwaraji Family, Ndiuhu  
Imeowere, Isu Njaba, Nkwerre Isu LGA)

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ACTIONS - Issue - Family headship - Custody of the symbol of authority - Is the central issue in this case (H1)

EVIDENCE - Pleadings - Evidence led by a party - Can be relied upon by the other party (H2)

COURTS - Pleadings - Nature of the case before the court - Was not appreciated by the trial court - Which occasioned a miscarriage of justice (H3)

CUSTOMARY LAW - Family headship - Present acts of control/ownership - Were not exercised by the respondents over the family headship - To warrant applying *Kojo v. Bonsie* rule in their favour (H4)

COURTS - Case for the parties - Duty of the Judge - Is not to make a case for the parties - Issue dabbled into by trial court - Was not an issue before the court (H5)

COURTS - Judgments - Evidential burden of proof - Was wrongfully placed by the court - Upon the defendants (H6)

COURTS - Witnesses - Demeanour and Credibility - Appellate court may not interfere - With trial court's findings on issue of credibility of a witness - But will disturb wrongful evaluation of evidence (H7)

### **FACTS**

Before the Imo State High Court Orlu, the plaintiffs/respondents filed an action against the defendants/appellants. Plaintiffs claimed certain reliefs relating to the headship ("*Diokwara*") of Imeowere, Isunjaba in the then Nkwere/Isu Local Government Area of Imo State. It is the case of both parties that the staff of office "*Ofo*" is the symbol of office title and authority of the headson. So that whoever is in possession of the staff of office is the headson. Both parties claimed being in possession of the *Ofo*. The parties all tried to establish how through their various lines of descendants, they became entitled to the headship ("*Diokwara*") that is in issue. Customary arbitration sought by the plaintiff before their King-in-Council was not successful, hence their filing of this suit.

The trial court found in favour of the plaintiffs. In doing so, it brought in the issue that was not raised by the parties and misconceived the case before it by its view about the staff of office (*Ofo*). Defendants appeal to the Court of Appeal was dismissed. Being aggrieved, they have further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the High Court having found that the custody of the *ofo*

*diokwara Imeowere was a live issue at the trial ought not to have proceeded to make a specific finding as to the person in possession and the value or the Court of Appeal ought not to have made a specific finding as to the importance of the custody in the context of the case instead of affirming the finding of the trial court that "The custody of Ofo as physical object is a non-issue". (Grounds 1, 2, 3 and 7).*

*2. Was the Court of Appeal right to affirm the obvious misapplication of the Rule in Kojo v. Bonsie by the High Court (Grounds 4 & 5).*

*3. Was the Court of Appeal right to have affirmed the judgment of the trial court when (plaintiffs) respondents failed to prove their case. (Ground 8)*

*4. Was it right for the Court of Appeal to affirm the findings of the trial court which were obviously baseless when in so doing a serious miscarriage of justice will be the result. (Grounds 6, 9 and 11).*

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

***ACTIONS - Issue - Family headship***

1. Hence, the issue of the custody of the ofo which is the symbol of authority, office or traditional staff of the Diokwara is at the very heart and soul of the case before the court. The respondents admitted so much and pleaded as such in paragraph 16 of the Statement of Claim (*ibid*) as well as in the evidence of P.W.3 and P.W.6.

The respondents are bound by the pleadings and cannot at the trial be allowed by the Supreme Court or indeed any other court to set up a case different from pleadings at the trial. (p. 2164 D)

***Pleadings - Evidence led by a party***

2. Secondly, evidence led by a party can be fully relied on by the other party either to establish his case or to damage or demolish the case of the person leading the evidence.

Thus having set out in the pleadings that they are in possession of the ofo and with the evidence of strategic importance of the possession of the Ofo, the admission by the respondents through P.W.6, their witness, should have put the lower courts on their guard. P.W.6, it will be

recalled stated: “*They also insisted that the defendants should surrender the Ofo (traditional staff) of Okwaraihu who was regarded as the founder of Imeowere.*” The learned trial Judge with due respect to him, ought not to have emphasized “*the custody of Ofo as a physical object*” and to insist that relief the respondents sought before the Eze in Council (P.W.6) in the customary arbitration (i.e. handing over of the ofo to the respondents) was different from a declaration that the respondents were diokwara. (p. 2164 F)

**C Pleadings - Nature of the case before the court**

3. Be it noted, however, that it is very clear that from the pleadings and the evidence led on record, the problem between the parties hereof over the years had been the issue of Diokwaraship of Imeowere. See page 73, line 35 - page 75, line 1 of the record. In effect, the Respondents were the claimants before P.W.6 before whom they could not obtain a declaration for possession of the Ofo back. Hence, they filed a suit at the High Court. This was struck out on the death of Chigere Onwuzulike. They then filed this action. I agree with the appellants that shorn of all technicality, the claim of the respondents remained the same against the appellants and it is that they wanted the Ofo so they could be the Diokwara Imeowere. I also share appellant’s view that the trial court failed to fully appreciate the nature of the case it was called upon to try and this failure led to a serious miscarriage of justice when the court below affirmed this misconception instead of correcting or setting same aside. (p. 2165 D)

**G Family headship - Present acts of control/ownership**

4. It is pertinent to point out that there has been no evidence proffered or adduced of such current or present acts of control/ownership or authority exercised by the respondents with respect to the Diokwara of Imeowere in recent times and showing that they might as well be the rightful owners rather than being pretenders/trespassers. On the contrary then, before the trial court the evidence of P.W.I, P.W.3, P.W.6 and D.W.1 to the effect that the Respondents have within the past ten years initiated proceedings before the Eze-in-Council and also before the High Court (a case which was

struck out) demanding from the appellants the “Ofo Diokwara” the symbol of power/authority or staff of office to the Diokwara.

From the foregoing I agree with the appellants that there is no basis for the application of the rule in *Kojo v. Bonsie* in this case and that the court below ought not to have affirmed that application. (p. 2167 H) B

***Duty of the Judge - Is not to make a case for the parties***

5. It has been held times without number that it is not the duty of the Judge to make case for the parties different from what they have pleaded and proffered in evidence themselves. C

It is for the above reasons that I agree the court below ought to have set aside the findings/holdings of the trial court.

Secondly, the issue that Uzoma was once the head of Ozo in Imeowere and that he thereby automatically became the “*Diokwara of Imeowere*” was D neither pleaded nor proved. For these reasons these findings cannot be allowed to stand since they are illogical and go to no issue. Being no live issue before the court therefore, the High Court ought not to have considered it or made heavy weather of it, thus ultimately utilizing it as one of the E main planks of the judgment. (p. 2168 E)

***Judgments - Evidential burden of proof***

6. In the course of the trial it was clear that the respondents had commenced a form of action against the appellants at the court of the Eze-in-Council in a Native or Customary Arbitration. The Eze testified as P.W.6 in a case which ended against the plaintiffs/respondents. On appeal to the Court of Appeal the latter affirmed the judgment of the High Court. See F *Nkwo v. Iboe* (1998) 7 NWLR (Pt. 558) 354 at 363. G

Besides, looking at the Judgment in totality, it will be observed that the trial Judge misconceived the placing of the evidential burden of proof. He appeared to labour under the grave error that the burden of proving that they were entitled to the Diokwaraship was on the appellants. See the H case of *Akinkunmi v. Sadiq* (1997) 8 NWLR (Pt. 516) 277 at page 291 where it was held that where a court misplaces the onus of proof on the wrong party thus erroneously shifting the burden placed by law under Sec-

tion 136 of the Evidence Act Cap. 22 Laws of the Federation, then the judgment ought to be set aside. (p. 2169 F)

***Witnesses - Demeanour and Credibility***

B 7. It would appear that ab initio, the court below had proceeded on the basis that since it was the trial Judge that saw the witnesses and watched their demeanour when they testified, that court (Court of Appeal) could not interfere with the findings.

C I hold the view that this principle applies only where the decisive issue was the credibility of the witnesses and not where the findings were based on evaluation of evidence as in this case. The affirmation of the findings of the court below which has now turned out to be without any basis, in my view, emanated from the errors made by the trial court in not making D this basic distinction and determining from the outset the essential source or basis of the ascription of probative value to the evidence of the Respondents' witnesses in this case by the High Court. See Eboade v. Atomesin (1997) 5 NWLR (Pt. 506) 490 at 507-508.

E At it turned out, the learned trial Judge in the instant case failed to reasonably utilize the advantage of seeing the witnesses and of properly evaluating the evidence proffered before him. (p. 2170 D)

F **NOTABLE POINTS OF INTEREST**  
**UWAIFO JSC**

*1. Evidence that is inadmissible even if extracted in cross-examination*  
There is nothing averred in the pleadings that one Uzoma became the head of Ozo or that by virtue of that he became the diokwara of Imeowerre. G That was not made part of the plaintiffs' case. Such evidence is inadmissible even if extracted in cross-examination: see Nwawuba v. Enemuo (1988) 1 NSCC (Pt. 19) 930 at 940. In such a situation, the evidence goes to no issue and must be disregarded. But in the present case, worse than H just relying on inadmissible evidence, it is clear that no such evidence credited to D.W. 1 was given by him. (p. 2176 B)

**TOBIJSC**

*2. Burden of proof is on the plaintiff*

Let me take the issue of proof. By Section 14 of the Evidence Act, a custom which is not noticed judicially must be proved by evidence in court, and the burden of proof lies upon the person alleging its existence. B

The initial burden to prove the case is on the plaintiffs/respondents. It is after such a proof that the evidential burden falls on the appellants/defendants. I have examined the evidence before the learned trial Judge and I am not able to arrive at the conclusion that the plaintiffs/respondents successfully proved their case. They did not, and were therefore not entitled to judgment. (p. 2179 A) C

**REPRESENTATION**

A.A. Kayode, SAN, (with him, A.A. Adebisi (Miss) ) for the Appellants.  
P. U. Nnodum, SAN, for the Respondents. D

**CASES REFERRED TO**

Edokpolor & Co. Ltd. v. Bendel Insurance Co. (1997) 2 NWLR (Pt. 486) 133 at 140-141  
Ajagunbade III v. Laniyi (1999) 13 NWLR (Pt. 633) 92 at page 114 F  
Ezeogu v. Onwuchekwa (1997) 4 NWLR (Pt. 502) at pages 707-708  
Nor v. Tarkaa (1998) 4 NWLR (Pt. 544) 130 at 138  
Buraimo v. Bamgboye (1940) 15 NLR 139  
Ngene v. Igbo (1991) 7 NWLR (Pt. 203) 358 at 369-370  
Adelaja v. Alade (1999) 4 S.C. (Pt. 1) 81; (1999) 6 NWLR (Pt. 608) 544 G  
at 559  
Nwawuba v. Enemuo (1988) 1 NSCC (Pt. 19) 930 at 940  
Oladele v. Anibi (1998) 9 NWLR (Pt. 567) 559 at 566-567  
Nkwo v. Iboe (1998) 7 NWLR (Pt. 558) 354 at 363 H

**LEAD JUDGMENT BY ONU JSC**

In this case which has to do with family status and the custody of Ofo (traditional staff), the respondents were the plaintiffs at the High Court, B Orlu, Imo State wherein they claimed certain reliefs relating to the headship (“*diokwara*”) of Imeowerre, Isunjaba in the then Nkwerre/Isu Local Government Area of Imo State while the appellants were the defendants. After due trial upon the exchange of pleadings, the learned trial Judge, Oyudo, J., entered judgment in favour of the respondents.

C Dissatisfied with the judgment, the appellants appealed to the Court of Appeal, Port Harcourt (hereinafter in the rest of this judgment referred to as the court below) which dismissed their appeal. They have now further appealed to the Supreme Court with leave.

D The facts of the case may be briefly stated as follows:

Both parties are from the Imeowere section of Isunjaba town in Nkwere/Isu Local Government Area of Imo State of Nigeria, while the appellants are from Umudim Amafuin Imeowere. The respondents for their E part are from Ndiuha Imeowere.

It is common ground that they (both parties) have the same ancestor, Isu Njaba who had seven sons one of whom is Nwokedike the ancestral father of both parties.

F While the appellants claimed that Nwokedike begot Nwaowere through (Imeowere) who in turn begot Okwarauhu the father of Dimola, the appellants have maintained an unbroken line of Diokwaraship (headship) of Imeowere up to the present 6th appellant a direct descendant of Nwaowere. The respondents on the other hand claimed through the same G Nwokedike as follows:

Nwokedike begot Imeowere the father of Uga.

Uga begot Okeem the father of Okwauhu and Okwaraji.

H According to the respondents Okwauhu was Diokwara being the 1st son but he soon died childless. He was then succeeded by Okwaraji the respondents’ direct ancestor.

It was also the case of the respondent that along the line, when Okwaraji died, his first son Okwaigwe took over, but when Okwaigwe died

he had no grown up son to take the position, then the position was temporarily given to his younger brother Okwaraihezue. Okwaraihezue continued its own lineage of diokwara through Arukwa, Anozie and finally Uzoma Amaechi.

In 1981, the respondents through one Chigere Onwuzulike, the 1st respondent's father purportedly through an alleged arbitration oath-taking process take (sic) over from Uzoma as Diokwara and thereby restoring the line of the Okwaraji. The appellants were not parties to this alleged customary arbitration/oath taking.

The appellants denied that either Uzoma Amaechi or Chigere Onuzulike was ever a Diokwara.

It was common ground between the parties that some time in 1982 the respondents summoned the appellants to the council of the Eze (Paramount) rulers of Izunba for customary arbitration. The claims before the Eze-in-Council were:

(i) a declaration that Okwarauhu was the ancestor of the appellants and as such the appellants had no right to perform any final burial rites for him.

(ii) An order that the "*Ofo Diokwara*" traditional symbol of authority of the Diokwara Imeowere be handed over to the respondents by the appellants.

The Eze (P.W.6) could not decide in favour of the respondents because he could not fathom the history of and background of the various claims. He directed that everything remained as they were. Indeed, the respondents failed to obtain the reliefs they had sought. Thereafter, they through the 1st respondent sued at the High Court. That case having been struck out, the suit leading to the appeal herein was filed.

The presentation of the facts of traditional history albeit that it is complicated and most confusing, three vital facts need to be emphasized. They are:

1. Both sides alluded to or alleged a stranger status to the other. Respondents were alleged to have migrated from Amucha while the appellants were said to have come from Uzoafor (see the evidence of P.W. 3 which is relevant in this regard).

2. The “*Ofo Diokwara*”, the symbol of office title and authority of the Diokwara. Since you cannot be a Diokwara without Ofo then whoever is in possession of the “*Ofo*” is the Diokwara. Both sides lay claim to possession of the Ofo (vide paragraph 16 of the Statement of Claim (page B 16) and paragraph 18 of the further Amended Statement of Defence (page 61)).

3. The appellants also alleged that the customary arbitration/oath taking between Chigere Onwuzulike and Uzoma Amauchi was with respect to the Diokwaraship of the Okwaraji family and not the Diokwaraship of Imeowere. Briefs were duly filed and exchanged.

Four issues were submitted as arising for determination on behalf of the appellants, to wit:

1. Whether the High Court having found that the custody of the ofo diokwara Imeowere was a live issue at the trial ought not to have proceeded to make a specific finding as to the person in possession and the value or the Court of Appeal ought not to have made a specific finding as to the importance of the custody in the context of the case instead of affirming the finding of the trial court that “*The custody of Ofo as physical object is a non-issue*”. (Grounds 1, 2, 3 and 7).

2. Was the Court of Appeal right to affirm the obvious misapplication of the Rule in *Kojo v. Bonsie* by the High Court (Grounds 4 & 5).

3. Was the Court of Appeal right to have affirmed the judgment of the trial court when (plaintiffs) respondents failed to prove their case. (Ground 8)

4. Was it right for the Court of Appeal to affirm the findings of the trial court which were obviously baseless when in so doing a serious miscarriage of justice will be the result. (Grounds 6, 9 and 11).

At the respondents’ instance the following issues call for determination having regard to the eleven grounds of appeal (Ground Ten having been abandoned) filed by the appellants, viz:

(a) Whether the lower court was in error in affirming the trial court’s decision that the custody of “*Ofo*” was a non-issue: Grounds One, Two, Three and Seven.

(b) Whether the lower court rightly affirmed the trial court appraisal

of the evidence of D. W. 1 in regard to the status of Uzoma Amaechi: Grounds Four, Five and Six.

(c) Whether the respondents proved their case: Grounds Eight, Nine and Eleven. ;

In the argument of the appeal, I propose to stick to the appellants' issues, which, in my view, look more comprehensive and clearer. B

#### ARGUMENT OF ISSUE No. 1

#### CUSTODY OF THE OFO

It is pertinent to observe that the points canvassed in relation to this issue were fully considered by the trial court and affirmed on appeal by the lower court when it held that the issue as to the custody of the "Ofo Diokwara" was fully pleaded; that copious evidence was also led in proof by P.W. 6. Unless clearly shown to be perverse, the findings of fact ought not to be upset by this court as decided in *Biariko & Ors. v. Edeh-Ogwule & Ors.* (2001) 4 S. C (Pt.II) 96; (2001) 12 NWLR (Pt.726) 235, 254-5. C D

Be that as it may, in paragraph 16 of the Statement of Claim the respondents pleaded as follows:-

*"It is the custom in Imeowerre Isunjaba which is hereby relied on, that the incumbent head of or diokwara of Imeowerre possessed the ofo diokwara symbol of office and the said ofo is in the custody of the 1st plaintiff."* E

The appellants in answer to paragraph 16 of the Statement of Claim reproduced above, pleaded, in paragraph 18 of their defence as follows:- F

*".....The Ofo Diokwara and all the other symbols and paraphernalia of the office of Diokwara Imeowerre are in the custody of the incumbent the 6th defendant and they devolved on him by custom as pleaded herein before. The said symbols had at all material times since immemorial times been in the custody of forebears of the 6th defendant that is to say in Umudim Amagwu."* G

At pages 96-97 of the records, P.W.6 said:-

*".....They also insisted that defendants should surrender the ofo (traditional staff) of Okwaraihu who was regarded as the founder of imeowerre....."* H

At page 97 he (PW. 6) also said:

*"They went further to claim the right to the ofo Okwaraihu which they wanted to be returned to them (plaintiffs)." Suffice it therefore to say that the submissions of learned counsel for the respondents that the ofo was not pleaded by any of the parties and as such any evidence led in support of it by P.W.6 is totally misplaced."*

P.W.3 who was the respondents' witness state (page 88).

*"I did not know who holds the Ofo of Imeowere before this case in court. The parties are in court over the dispute of "Okwaraship of Imeowere. Under the Isunjaba custom "Ofo" resides in the Diokwara (1st son) of a particular place or village."*

Thus, taken together with the evidence of P.W.6, it is clear that whosoever has possession of the "ofo" is the one legitimately entitled to claim "Diokwaraship". Hence the various actions and litigation by the respondents. **Hence, the issue of the custody of the ofo which is the symbol of authority, office or traditional staff of the Diokwara is at the very heart and soul of the case before the court. The respondents admitted so much and pleaded as such in paragraph 16 of the Statement of Claim (ibid) as well as in the evidence of P.W.3 and P.W.6.**

The respondents are bound by the pleadings and cannot at the trial be allowed by the Supreme Court or indeed any other court to set up a case different from pleadings at the trial. See K. A. Onamade & Anor v. African Continental Bank Ltd. (1997) 1 NWLR (Pt. 480) 123 and Akaniwo v. Nsirim (1997) 9 NWLR (Pt. 520) 255.

**Secondly, evidence led by a party can be fully relied on by the other party either to establish his case or to damage or demolish the case of the person leading the evidence** vide Edokpolor & Co. Ltd. v. Bendel Insurance Co. (1997) 2 NWLR (Pt. 486) 133 at 140-141; Ajagunbade III v. Laniyi (1999) 13 NWLR (Pt. 633) 92 at page 114 and Ezeogu v. Onwuchekwa (1997) 4 NWLR (Pt. 502) at pages 707-708.

Thus having set out in the pleadings that they are in possession of the ofo and with the evidence of strategic importance of the possession of the Ofo, the admission by the respondents through P.W.6, their witness, should have put the lower courts on their guard. P.W.6, it will be recalled stated: *"They also insisted that the defendants*

*should surrender the Ofo (traditional staff) of Okwaraihu who was regarded as the founder of Imeowere.”* The learned trial Judge with due respect to him, ought not to have emphasized “*the custody of Ofo as a physical object*” and to insist that relief the respondents sought before the Eze in Council (P.W.6) in the customary arbitration (i.e. handing over of the ofo to the respondents) was different from a declaration that the respondents were diokwara. The lower courts ought to have enquired whether being a Diokwara is any different from having possession of the Ofo diokwara?

Had the court below probed the matter more circumspectly for what it really was, it would not have held (as Akpiroroh, JCA., did) to the effect that:

*“It is my view that the statement made by the learned trial Judge that the custody of Ofo as a physical object is a non-issue in the case before him does not occasion any miscarriage of justice because he was only comparing the reliefs before P.W.6 and the reliefs in the present case.”*

Be it noted, however, that it is very clear that from the pleadings and the evidence led on record, the problem between the parties hereof over the years had been the issue of Diokwaraship of Imeowere. See page 73, line 35 - page 75, line 1 of the record. In effect, the Respondents were the claimants before P.W.6 before whom they could not obtain a declaration for possession of the Ofo back. Hence, they filed a suit at the High Court. This was struck out on the death of Chigere Onwuzulike. They then filed this action. I agree with the appellants that shorn of all technicality, the claim of the respondents remained the same against the appellants and it is that they wanted the Ofo so they could be the Diokwara Imeowere. I also share appellant’s view that the trial court failed to fully appreciate the nature of the case it was called upon to try and this failure led to a serious miscarriage of justice when the court below affirmed this misconception instead of correcting or setting same aside. See Nor v. Tarkaa (1998) 4 NWLR (Pt. 544) 130 at 138 and Nkado v. Obiano (1997) 5 NWLR (Pt. 503) 31 at page 57.

My answer to issue 1 is accordingly in the negative.

ARGUMENT OF ISSUE No. 2

APPLICATION OF THE RULE IN KOJO v. BONISIE

The Rule in Kojo v. Bonsie 1957 1 NWLR 1223 at 1226 is that:

B *“Where parties rely on traditional history in proof of their title and the evidence of traditional history is conflicting or is inconclusive, the rule is to be applied to the case by making reference to facts in recent history to resolve the issue.”*

C This Rule is usually applied in land cases where acts of ownership exercised within living memory is used as litmus test in verification of evidence of tradition and history.

D A plaintiff who relies on traditional history in proof of a claim for declaration of title to land must lead evidence to show the root of his title; and this includes how the land descended over the years on the claimant’s family until it got to the claimant. See Madubuonwu v. Nnalue (1992) 8 NWLR (Pt. 260) 440 at 449 G-H. See also Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt.7) 393.

E In Sanusi v. Ameyogun (1992) 4 NWLR (Pt.237) 527 at 548 D-G it was held inter alia “..... the only proper approach to ascertaining which of two sets of tradition set up by parties to the suit should be accepted as more probable, is by reference to acts within living memory.” See Alade v. Awo (1975) 4 S. C. 215; Onwuka v. Ediala (1989) 1 S.C. (Pt.II) 1; (1989) 1 F NWLR (Pt.96) 182; Okafor v. Idigo (1984) 1 SCNLR 481 and Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195 at 201.

In the present case the learned trial Judge in his judgment stated:

G *“It is clear to me that the bulk of evidence led on Okwaraship of Imeowere in Isunjaba is traditional. No doubt this is an accepted method of proving title to property or a customary right as in the present case. However the law has prescribed the correct method of assessing evidence of tradition. It is thus that the best way to test them is by reference to established and accepted facts within living memory and seeing there from which H of them is more probable.”* See Kojo II v. Bonsie (supra) and Agedegudu v. Ajenifuja (1963) All NLR 109.

The learned trial Judge proceeded to find that the “victory” of Chigere over Uzoma in the customary arbitration/oath taking in 1981 was evi-

dence of such facts “*within living memory*” which go to confirm the respondents’ claim.

But with all due respect, many problems have bedevilled this postulation.

(1) First, the customary arbitration/oath taking was a fact within living memory but the appellants were not parties to that incident. They were in consequence not bound by the result of the oath-taking. See *Bright Motors Limited & Ors. v. Honda Motor Company Limited & Anor.* (1998) 12 NWLR (Pt.577) 230; *Alam Oparaji & Ors. v. Nwosu Ohanu* (1999) 6 S.C. (Pt. 1) 41; (1999) 9 NWLR (Pt. 618) 290 at 304 and *Okere v. Nwoke* (1991) 8 NWLR (Pt. 209) 317 at 343-345 the latter in which the Court of Appeal (Per Edozie, JCA., as he then was) held, *inter alia* that

“*Where a body of men, be they Chiefs or otherwise act as arbitrators over a dispute between two parties, their decision shall have a binding effect, if it is shown:*

(a) *That both parties submitted to the arbitration.*”

(2) Secondly, the mere fact that as late as 1981 the respondents were still involved in a struggle to assert their authority and dominion over the Diokwaraship is with all due respect in itself evidence that they do not have clear, clean and unassailable title or right thereto. On the contrary, this was definite evidence that all was not well with their claim to the Diokwaraship.

(b) Thirdly, the rule in *Kojo v. Bonsie* applies where there is a conflict in the traditional evidence of parties in an action for declaration of title, where the best way to resolve such conflicting traditional evidence is by reference to facts in recent years of acts of ownership and control as established by evidence to determine which of the two competing histories is more probable. See *Abasi v. Onido* (1998) 5 NWLR (Pt. 548) 89 at 104; *Nwololo v. Ukegbu* (1997) 4 NWLR (Pt.500) 436 at 449-451 and *Ojokolobo v. Alamu* (1991) 1 NWLR (Pt. 165) 1 at 12. The Rule also applies where traditional history is needed to prove title to anything e.g. chieftaincy title. See *Olanrewaju v. Governor of Oyo State* (1992) 9 NWLR (Part 265) 335. H

**It is pertinent to point out that there has been no evidence proffered or adduced of such current or present acts of control/ownership or authority exercised by the respondents with respect to the**

**Diokwara of Imeowere in recent times and showing that they might as well be the rightful owners rather than being pretenders/trespassers. On the contrary then, before the trial court the evidence of P.W.1, P.W.3, P.W.6 and D.W.1 to the effect that the Respondents have within the past ten years initiated proceedings before the Eze-in-Council and also before the High Court (a case which was struck out) demanding from the appellants the “Ofo Diokwara” the symbol of power/authority or staff of office to the Diokwara.**

**From the foregoing I agree with the appellants that there is no basis for the application of the rule in *Kojo v. Bonsie* in this case and that the court below ought not to have affirmed that application.**

This was not all. The trial court, after having found, though erroneously, that Chigere won the tussle with Uzoma in 1987, proceeded to import the issue of headship of Ozo title into the controversy and by a very interesting albeit strange process of deduction, arrived at a finding that since Uzoma was once the head of Ozo in Imeowere, and that whoever that holds office of the head of Ozo of Imeowere automatically becomes the Diokwara of Imeowere. In the learned trial Judge’s view “*the effect of this is to make the story of the Plaintiffs (Respondents) more probable and a fortiori, their traditional evidence equally more probable.*”

**It has been held times without number that it is not the duty of the Judge to make case for the parties different from what they have pleaded and proffered in evidence themselves** vide *Ngene v. Igbo* (1991) 7 NWLR (Pt. 203) 358 at 369-370 and *Adelaja v. Alade* (1999) 4 S.C. (Pt. 1) 81; (1999) 6 NWLR (Pt. 608) 544 at 559.

**It is for the above reasons that I agree the court below ought to have set aside the findings/holdings of the trial court.**

**Secondly, the issue that Uzoma was once the head of Ozo in Imeowere and that he thereby automatically became the “*Diokwara of Imeowere*” was neither pleaded nor proved. For these reasons these findings cannot be allowed to stand since they are illogical and go to no issue. Being no live issue before the court therefore, the High Court ought not to have considered it or made heavy weather of it, thus ultimately utilizing it as one of the main planks of the judg-**

**ment.** I agree with the appellants' submission that there was absolutely no basis for the finding by the trial court on this issue and the court below should not, with all due respect, have affirmed the finding and the holding founded on it. I, therefore, agree that the finding ought to have been set aside and not affirmed by the court below vide *Agbabiaka v. Saibu* (1998) 10 NWLR (Pt. 571) 534 at pages 548, 553 and *Oladele v. Anibi* (1998) 9 NWLR (Pt. 567) 559 at 566-567.

### ISSUE NO.3

The third issue posed by the appellants queries whether the court below was right to affirm the judgment of the High Court when the respondents failed to prove their case. Respondents claimed before the High Court as follows:

(a) Declaration that the Okwaraji family of the plaintiffs is the head or diokwara family of Imeowere, Isunjaba within jurisdiction in accordance with the custom of the people.

(b) Declaration that the 1st plaintiff is the head or diokwara of Imeowere Isunjaba also within jurisdiction in accordance with the custom of the people.

(c) Perpetual injunction restraining the defendants by themselves etc. from parading themselves as diokwara family in Imeowere Isunjaba and/or parading the 6th Defendant (appellant) as the head of Diokwara of Imeowere, Isunjaba or at all or in any (sic) interfering with the rights, duties and privileges of the plaintiffs and/or 1st plaintiff as the Diokwara family in or diokwara of Imeowere Isunjaba.

**In the course of the trial it was clear that the respondents had commenced a form of action against the appellants at the court of the Eze-in-Council in a Native or Customary Arbitration. The Eze testified as P.W.6 in a case which ended against the plaintiffs/respondents. On appeal to the Court of Appeal the latter affirmed the judgment of the High Court. See *Nkwo v. Iboe* (1998) 7 NWLR (Pt. 558) 354 at 363.**

Besides, looking at the Judgment in totality, it will be observed that the trial Judge misconceived the placing of the evidential burden of proof. He appeared to labour under the grave error that the burden of proving that they were entitled to the Diokwaraship was on

the appellants. See the case of **Akinkunmi v. Sadiq (1997) 8 NWLR (Pt. 516) 277** at page 291 where it was held that where a court misplaces the onus of proof on the wrong party thus erroneously shifting the burden placed by law under Section 136 of the Evidence Act Cap.

**B 22 Laws of the Federation, then the judgment ought to be set aside.** See **U.B.N Ltd. v. Osezuah (1997) 2 NWLR (Pt. 485) 28** and **Nor v. Tarkaa (1998) 4 NWLR (Pt. 544) 130** at 137-138.

The essential nature and the legal implications of customary arbitration are as explained in the cases of **Aku v. Ikewibe (1992) 3 NWLR (Pt. 180) at 385**, **Ohaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1** at pages 23-24 and **Akaose v. Nwose (1997) 1 NWLR (Pt. 482) 478**.

The answer to this issue is also rendered in the negative.

ISSUE NO.4

**D AFFIRMATION OF FINDINGS NOT BACKED BY EVIDENCE**

**It would appear that ab initio, the court below had proceeded on the basis that since it was the trial Judge that saw the witnesses and watched their demeanour when they testified, that court (Court of Appeal) could not interfere with the findings.**

**I hold the view that this principle applies only where the decisive issue was the credibility of the witnesses and not where the findings were based on evaluation of evidence as in this case.** See **Okonkwo v. C. C. B (Nigeria) Plc (1997) 6 NWLR (Pt. 507) 48** at 67; **Musa v. Yerima (1997) 7 NWLR (Pt. 511) 27** and **Uyo v. IndiamaoWei (1999) 13 NWLR (Pt.633) 152** at 164. **The affirmation of the findings of the court below which has now turned out to be without any basis, in my view, emanated from the errors made by the trial court in not making this basic distinction and determining from the outset the essential source or basis of the ascription of probative value to the evidence of the Respondents' witnesses in this case by the High Court.** See **Eboade v. Atomesin (1997) 5 NWLR (Pt. 506) 490** at 507-508.

**H At it turned out, the learned trial Judge in the instant case failed to reasonably utilize the advantage of seeing the witnesses and of properly evaluating the evidence proffered before him.** See **C. C. B (Nig) Plc v. Okpala (1997) 1 NWLR (Pt. 518) 693** and **Ojukwu v. Kaire**

(1997) 9 NWLR (Pt. 522) 613 at 640.

A vital instance of this that would suffice to elucidate this issue goes thus:

*“In the case of Ozo, I am at the head and will take first and then pass it on to the Diokwara if fully initiated.”*

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This shows that a Diokwara may not even be fully initiated into the Ozo Society and the effect of this, with due respect, is to render suspect the finding of the trial court which was affirmed by the Court of Appeal that whoever was head of Ozo was automatically the Diokwara. As there is no shred of evidence to support that finding, it ought not to stand. See Adekanbi v. Folani (1998) 11 NWLR (Pt. 578) 498 at 502-503.

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In his judgment the learned trial Judge had this to say:

*“But the defendant’s (sic) contention became punctured by the evidence of the defendants albeit under cross-examination that Uzoma was once the head of Ozo of Imeowere who automatically became the diokwara of Imeowere. The effect of this is to make the story of the Plaintiffs more probable and fortior (sic) their traditional evidence equally more probable.”*

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The evidence of the defence the learned trial Judge appears to be referring to in the above extract was the evidence of D.W.I wherein he testified as follows:-

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*“But I agree that Uzoma Amaechi is a member of Ozo titled clan. He got it from his maternal home. Uzoma hails from plaintiffs family. Uzoma was once the head of Ozo titled men in Imeowere.”*

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From the foregoing, I am in agreement with the appellants’ submission that the trial before the Eze-in-Council was not concluded but was rather left at large.

Learned counsel for the appellants submitted in conclusion that it was his understanding of the law that if a person who has brought a case before a court or tribunal fails to obtain a judgment in his favour one way or another, it can be said that he lost in that court/tribunal, adding that on the record, P.W.6, the Eze stated at page 97 of the Record:

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*“It was not easy for my cabinet to decide the matter one way or another because I am rather young and I did not find it feasible to say which side is right, and we advised the two sides to go and live in peace as our*

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*forefathers had done.”*

In the result, I am in entire agreement that the decision of the trial High Court as well as that of the Court of Appeal cannot be allowed to stand. Accordingly, I allow the appeal, set aside the decisions of the two courts below and make an order dismissing the plaintiffs/respondents’ claims. Costs for defendants/appellants in the sums of N2,000, N3,000 and N10,000 in the High Court, Court of Appeal and in this court respectively.

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#### **KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother, Onu, JSC. I agree with his reasoning and conclusions. I will therefore allow the appeal, set aside the judgments of the lower courts and in their places substitute an order dismissing plaintiffs/respondents’ claims in their entirety. The defendants/appellants are awarded costs of N2,000.00, N3,000.00 and N10,000.00 respectively in the High Court, Court of Appeal and in this court all against the plaintiffs/respondents.

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#### **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Onu, JSC., and I agree that there is merit in this appeal.

The appeal accordingly succeeds and it is hereby allowed. The judgments of both courts below are hereby set aside and in substitution thereof is an order for the dismissal of the plaintiffs’ claims. I abide by the order for costs made in the leading judgment.

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#### **UWAIFO JSC**

H I had the privilege of reading in draft the judgment of my learned brother, Onu, JSC., in this appeal. I am in complete agreement with it for the reasons he has given.

The facts of the case as are relevant for the appeal have been well

stated in the leading judgment. I shall make no attempt to go over them. Relying on those facts as stated, I wish to say that the learned trial Judge had before him two competing traditional histories. Both were probable. So, the court must decide which one to accept. Traditional history is an accepted method of proving customary title to property or a customary B right although it is more prevalent in proving customary title to land. But it may be used for chieftaincy title or stool: see *Olarenwaju v. Gov. of Oyo State* (1992) 9 NWLR (Pt. 265) 335. According to the well-known principle laid down in *Kojo II v. Bonsie* (1957) 1 NWLR 1223 at 1226-1227, the C way to decide which of two plausible histories is more probable is to test them by reference to established facts within living memory. The learned trial Judge recognized this in the present case and purported to apply the said principle.

Unfortunately, the learned trial Judge misapplied the said principle in D *Kojo v. Bonsie* (supra) by his approach to some recent facts and the issue of credibility of certain witnesses. Instead of going on the basis that the two traditional histories were probable and sorting out relevant established facts within living memory to adjudge which is more probable, he got involved E with the issue of credibility and dubious and misrepresented facts. For instance, he said:

*“The defendants’ evidence of recount (sic: recent) events was that in 1984 or thereabout they proceeded to perform the second burial ceremony F of Okwaraihu whose Diokwaraship is the bone of contention. But the contest came up after the tussle Between Uzoma and Chigere had (been ) resolved in favour of Chigere. The defendants did not tell the court what necessitated the performance of the 2nd burial ceremony of Okwaraihu G who died thousand years ago according to the evidence. Why was the ceremony not performed all the time? On this come the testimony of PW.2 and P.W.4 attracts a compelling credit and I hereby hold that the two witnesses gave credence to the traditional evidence of P.W.I.” (sic)*

H With utmost respect this was a most unfair observation. The defendants pleaded about six generations from the time of Okwaraihu their ancestor and testified through D.W.I, Ichie Damian Mbaeri (7th defendant) that Okwaraihu died some 100 (hundred) years ago. The question of

1000 (thousand) years was a result of what fell from P.W.6, Eze B. C. Osuala, who had invited the parties when the plaintiffs wanted the defendants to surrender the ofo (staff of office) which they had in their possession through, and from the time of, Okwaraihu. It was in this connection, B P.W.6 while testifying said:

“My cabinet and myself went into the matter and found out the plaintiffs were insisting that it was their right to perform a second burial ceremony of late Okwaraihu of Imeowerre. They went further to claim the C right to the Ofo Okwaraihu which they wanted to be returned to them (plaintiffs). The defendants on their part maintained that they inherited the said Ofo from their great grandfather. They mentioned some names which I cannot remember. The defendants maintained that the Ofo had D passed many generations in lineage and they cannot now surrender it. It was not easy for my cabinet to decide the matter one way or another because I am rather young (about 35 years old then). Okwaraihu lived thousand years ago and I did not find it feasible to say which side is right, and we advised two sides to go and live in peace as our forefathers had E done.”

It was clearly wrong for the learned trial Judge to rely on the 1000 years referred to in apparent frustration by P.W.6 to discredit the defendants’ case when indeed, the defendants’ case was that Okwaraihu died 100 F years ago.

The learned trial Judge made other crucial errors. Instead of him to use the fact of possession of the Ofo by the defendants as an established fact in living memory to decide which traditional history was more probable, he held that the custody of the Ofo was a non-issue in this case. But in G fact it was a vital issue. The plaintiffs pleaded it in paragraph 16 of their Statement of Claim thus:

“16. It is the custom in Imeowerre, Isunjaba, which is hereby relied on, that the incumbent head or diokwara of Imeowerre possessed the ‘ofo H diokwara’ - the symbol of office - and the said ‘ofo’ is in the custody of the plaintiff.”

The defendants in reaction pleaded that “The Ofo Diokwara and all other symbols and paraphernalia of the office of Diokwara Imeowerre are

*in the custody of the incumbent the 6th defendant and they devolved on him by custom as pleaded hereinbefore. The said symbols had at all material times since immemorial times been in the custody of forebears of the 6th defendant that is to say in Umudim Amagwu.”*

Both sides agreed that the ofo was the symbol of office, the said B office being Diokwara of Imeowerre which was the very subject-matter of litigation. How could the custody of such an item be a non-issue as held by the learned trial Judge? From the proceedings before P.W. 6, the plaintiffs wanted the defendants to surrender the ofo to them but they did not suc- C ceed. The evidence coming from the plaintiffs was strongly against them. Mathias Chigere, 1st plaintiff who testified as P.W. 1 acknowledged the importance of having custody of the ofo. He said: “*Diokwara of Imeowerre according to our custom holds ofo diokwara which I hold now.*” But he was in fact not holding the said ofo. One of his witnesses, P.W.3, Eze Augustine D Adimoha said: “*I did not know who holds the ofo of Imeowerre before this case in court. The parties are in court over the dispute of ‘Okwaraship’ of Imeowerre. Under the Isunjaba custom ‘of’ resides in the Diokwara (1st son) of a particular place or village.*” Another, P.W.4, Utugbaraego E Nwachioma, also said: “*I know of the Ofo orie and Ofo ala both in Isu but I am not their ‘holder’ nor do I know who the holder is. Their holder should by the custom of Isu Njaba be the ‘Diokwara’ of Imeowerre.*” I have said that at the proceedings before P.W.6’s cabinet the plaintiffs wanted the defen- F dants to be compelled to surrender the ofo. The issue of ofo was impor- tant but the learned trial Judge played it down.

Again, the learned trial Judge misconceived a portion of the evidence given under cross-examination by D.W. 1 and relied on it when he said in his judgment: G

*“In the case before me there is evidence that Uzoma of the plain- H tiffs’ Okwaraji family of Imeowerre and Chigere 1st plaintiff’s father of the same family were engaged in a tussle for years as to which of the two was entitled to diokwaraship of Imeowerre and that eventually Chigere won and later died in 1987. The defendants’ answer to this was that the two men vied for diokwaraship of Okwaraji family and not of Imeowerre. But the defendants’ contention became punctured by the evidence of the defen-*

*dants albeit under cross-examination, that Uzoma was once the head of Ozo in Imeowerre and that whoever that holds the office of head of Ozo of Imeowerre automatically becomes the ‘Diokwara’ of Imeowerre. The effect of this is to make the story of the plaintiffs more probable. I have to say B that this conclusion is inevitable on the evidence and pleadings before me.”*

There is nothing averred in the pleadings that one Uzoma became the head of Ozo or that by virtue of that he became the diokwara of Imeowerre. C That was not made part of the plaintiffs’ case. Such evidence is inadmissible even if extracted in cross-examination: see *Nwawuba v. Enemuo* (1988) 1 NSCC (Pt. 19) 930 at 940. In such a situation, the evidence goes to no issue and must be disregarded. But in the present case, worse than just relying on inadmissible evidence, it is clear that no such evidence credited D to D.W. 1 was given by him. What he said in cross-examination was recorded thus:

“Put: Plaintiffs and their family are members of Ozo titled men in Imeowerre society.  
E Ans: They are not. But I agree that Uzoma Amaechi is a member of Ozo titled class. He got it from his maternal home. Uzoma hails from the plaintiffs’ family. Uzoma was once the head of Ozo titled men in Imeowerre.”

Nowhere was it said by D.W.I or anyone else that the head of Ozo F titled men in Imeowerre automatically becomes the diokwara of Imeowerre as the learned trial Judge said. Although there is evidence that the diokwara of Imeowerre is usually the head of Ozo in Imeowerre, which evidence is obviously inadmissible because no pleading was made along that line, there is nothing to suggest that the reverse follows that trend even if the said G evidence had been admissible. The learned trial Judge relied on the said event of Uzoma having been the head of Ozo as a recent fact which made the plaintiffs’ traditional history more probable. In my view, the findings made by the learned trial Judge to give plaintiffs judgment were perverse. H The court below fell into the error of upholding those findings.

For the reasons I have given and those more fully stated by my learned brother, Onu, JSC., I have come to the conclusion that the judgment of the court below cannot be allowed to stand. I too, accordingly allow the

appeal, set aside the judgments of the two courts below and dismiss the claim. I abide by the costs awarded in the leading judgment.

### TOBIJSC

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The main plank of this appeal is the custody of the “*Ofo Diokwara*” in relation to the title of Diokwara Imeowere. In paragraph 16 of the Statement of Claim, the plaintiffs/respondents averred as follows:

In paragraph 16 of the statement of Claim, the plaintiffs/respondents averred as follows: C

*”It is the custom in Imeowere Isu Njaba which is hereby relied on, that the incumbent head of diokwara of Imeowere possessed the ofo diokwara symbol of office and the said ofo is in the custody of the 1st plaintiff.”*

The defendants/appellants averred in paragraph 18 of their Statement of Defence: D

*“...The Ofo Diokwara and all other symbols and paraphernalia of the office of Diokwara Imeowere are in the custody of the incumbent the 6th defendant and they devolved on him by custom as pleaded hereinbefore. The said symbols had at all material times since immemorial times been in the custody of the 6th defendant that is to say in Umudim Amagwu.”* E

By the above paragraphs, the parties clearly joined issues as to the party in custody of the Ofo Diokwara. In the circumstances, the learned Judge, with respect, was in error when he held at page 133 of the Record that “*the custody of Ofo as a physical object is non-issue in this case*”. And the Court of Appeal was, with respect, equally in error when it held at page 277 of the Record that “*the statement made by the learned trial Judge that the custody of Ofo as a physical object is a non-issue in the case before him does not occasion any miscarriage of justice because he was only comparing the reliefs before P.W.6 and the reliefs in the present case*”. F G

Where parties have clearly taken opposite positions in their pleadings in respect of the live issues in the matter, a court of law cannot correctly come to the conclusion that it is a non-issue. If the custody of Ofo Diokwara was a non-issue, which was the real issue in the case? The learned trial Judge, with respect, played down on the importance of ofo Diokwara H

by referring to it as physical object. I think both parties regarded it as more than a physical symbol. To them, Ofo Diokwara was the symbol of office. P.W.6 called it traditional staff.

Let me read part of the evidence of P.W.6, a traditional ruler, at B pages 225 and 226 of the Record:

*“The Ofo concept attracts some right to landed property. I invited the two sides - plaintiff and defendants. I advised them to have the matter resolved by themselves alone. I gave them about one year to do so. At the end of the period of one year they informed me that they could not effect any amicable settlement of the issue..... It was not easy for my cabinet to decide the matter one way or another because I am rather young (about 35 years old then) ..... In effect I directed the two sides not to disrupt the peace in the community and they should try to avoid wrecking up problems.”*

Frankly, I do not see the usefulness of the evidence of P.W.6 to the plaintiffs/respondents who called him to testify in court. And the plaintiffs/respondents must take his evidence in the way they see it. He did not involve himself in the live issue placed before him as he claimed that he was too young to handle the matter.

What was the evidence of the plaintiffs/respondents? P.W.1, the 1st plaintiff, said in evidence in-chief at page 68 of the Record:

*“Diokwara of Imeowere according to our custom holds ofo diokwara which I hold now.”*

P.W.3, the witness of the plaintiffs, said under cross-examination at page 88 of the Record:

*“I do not know who holds the Ofo of Imeowere before this case in court. The parties are in court over the dispute of Okwaraship of Imeowere. Under the Isu Njaba custom ofo resides in the Diokwara (1st son) of a particular place or village.”*

It is surprising that P.W.3, the witness of the plaintiffs/respondents, did not know who held the Ofo of Imeowere when he gave evidence. I expected him to know holder of the symbol of authority, but he said that he did not know. And this is a witness who gave detailed and intimate evidence in respect of the parties, their vicinity including juju and shrines. Witness

however said that the Ofo resides in the Diokwara.

Let me take the issue of proof. By Section 14 of the Evidence Act, a custom which is not noticed judicially must be proved by evidence in court, and the burden of proof lies upon the person alleging its existence. See Angu v. Attah CP 1874-1928, 43; Buraimo v. Bamgboye (1940) 15 NLR B 139; Farinde v. Ajiko (1940) 6 WACA 108; Giwa v. Erinmilkun (1961) 1 All NLR 294.

The initial burden to prove the case is on the plaintiffs/respondents. It is after such a proof that the evidential burden falls on the appellants/defendants. I have examined the evidence before the learned trial Judge and I am not able to arrive at the conclusion that the plaintiffs/respondents successfully proved their case. They did not, and were therefore not entitled to judgment.

It is in the light of the above and the more detailed reasons given by my learned brother, Onu, JSC., that I, too, set aside the judgments of the High Court and the Court of Appeal. The claim is dismissed. I allow the appeal. I abide by the costs awarded in the leading judgment.

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