

SUPREME COURT OF NIGERIA

14TH MAY, 2004. SC. 186/2002

**CORAM:- M.L. UWAIIS CJN, A.I. KATSINA-ALU, S.O. UWAIFO,
A.O. EJIWUNMI, D.O. EDOZIE, JJSC**

ALHAJI UMARU SANDA NDAYAKO DEFENDANT/
(ETSU NUPE)(CHAIRMAN, INTERESTED PARTY
NIGER STATE
COUNCIL OF CHIEFS)

AND

1. ISIYAKU MUSA JIKANTORO
2. ATTORNEY-GENERAL, NIGER STATE APPELLANTS
3. THE EXECUTIVE GOVERNOR, NIGER STATE
4. COMMISSIONER FOR LOCAL GOVERNMENT
AND CHIEFTAINCY AFFAIRS (ALHAJI SHASI)
5. WAZIRIN BORGU (ALIYI MOHAMMED)
(DECEASED)
6. GARKUWA BORGU (MALL IBRAHIM)
7. MADAKIN BORGU (MOH'DTANKO)

AND

1. ALHAJI HALIRU DANTORO
2. ALHAJI MOH'D INUWA GUNU
3. ALHAJI ABDULLAHI BAWA MOH'D RESPONDENTS
4. ALHAJI MOHAMMED ISAH
5. ALHAJI MUSA RUFIA
6. BAKAROBONDE (MUSAM)
7. CHIEF IMAN. NEW BUSSA. (MOH'D SHEHU)

CHIEFTAINCY MATTERS - Selection of Emir - Validity of - Governor's directive in exhibit NB/2 - Was not violated - In the selection of 1st respondent as Emir (H1)

APPEALS - Concurrent findings - Chieftaincy matters - Where injustice or perverseness was not shown - Concurrent findings will not be disturbed (H2)

EVIDENCE - Admission - Chieftaincy matters - Quorum for selection - Two exhibits in this case - Show that appellants admitted - That 3 king-makers constitute a quorum - And what is admitted needs on further proof (H3)

ACTIONS - Declaratory reliefs - Principle that guides grant of - Relevance of - Does not apply to this case - By reason of nature of the declaration claimed (H4)

ACTIONS - Declaratory reliefs - Admission - Witnesses - Where witnesses were called in spite of the admission - Trial court's satisfactory evaluation - Will not be disturbed (H5)

CHIEFTAINCY MATTERS - Vested right - Selection of Ist respondent by the kingmakers - Though Governor's approval was not acquired - He has a vested right in the emirate (H6)

CHIEFTAINCY MATTERS - Council of chiefs - Order of court - Does not derogate from the law - That requires Governor - To consult the council - Before approving an Emir elect (H7)

PRACTICE & PROCEDURE - Writ of summons - Pleadings - Statement of claim - As it supersedes the writ - Complaint against the amended writ and claim - Is not well founded (H8)

PRACTICE & PROCEDURE - Waiver - Claim - Amendment of - Without leave, and without payment of court fees - Not being raised before trial court - The issues are deemed to be waived (H9)

COURT PROCESSES - Service of process - Proof - Affidavit of service - Is best evidence of proof - Under normal circumstance (H10)

APPEALS - Judgment appealed against - Whether it is right - Is appellate

court's concern - Not the reasons for the judgment (H11)

JUDGMENTS - Validity of - Exparte order - Until set aside - A judgment of the court is binding - Whether it is null or not (H12)

FACTS

Before the High Court of Niger State, the plaintiffs /respondents filed an action against the defendants/appellants claiming various reliefs in respect of succession to the stool of Emir of Borgu. The Stool became vacant following the demise of the last incumbent on 3-2-2000. There were many contestants for the Stool but the principal candidates are the 1st respondent and the 1st appellant. The Governor vide a letter, Exhibit NB/2, gave directives to the Chairman of Borgu Local Government Area to pursue selection of a successors to the late Emir. In keeping with the directive, the 3 surviving kingmakers out of five, met on 9th Feb, 2000, and unanimously selected the 1st respondent. The Governor (3rd appellant), did not give his approval. Rather he made an order reconstituting the council of kingmakers adding 2 people to replace the deceased ones. The Commissioner for Local Government (4th appellant) then directed that a second selection exercise be conducted which was schedule to take place on 12-2-2000.

1st to 5th respondents secured an exparte injunction restraining the 5 kingmakers from attending the meeting. Notwithstanding the exparte order, the meeting took place with 1st appellant emerging as the successful candidate. The plaintiffs in their claim sought lots of declaratory reliefs towards establishing 1st respondent's selection, and declaring 1st appellant's selection null and void. The trial court found in favour of the plaintiffs. Defendants' appeal to the Court of Appeal failed. They have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether in all the circumstances of this case, it can be said that the 1st respondent's purported selection was done strictly in line with Exhibit NB/2 and if not, whether the court below was right in affirming the decision of the High Court that he was properly appointed - Ground 4.

(2) *Whether the plaintiffs proved their case that 1st plaintiff was appointed in accordance with the native law and custom of Borgu and whether the onus of proof placed on the plaintiffs was discharged on the basis of admission, if any of some of (sic) only some of the defendants or even all the defendants – Grounds 1, 2 and 3.*

(3) *Whether the court below was right in holding that, 1st plaintiff must be approved as the Emir of Borgu when such directive negates clear provisions (of) the Chief(s) Law of Niger State and whether 1st plaintiff has any vested right in all the circumstances of this case to forbid the appellants from conducting a second exercise-Grounds 5 and 6.*

(4) *Whether the complaint of a breach of court order is available to the plaintiffs and was any breach proved to entitle the court to confirm the assumption of jurisdiction by the High Court to entertain such a complaint – Grounds 7,8,9,10,11 and 12.*

(5) *Whether the ex-parte order of 9th (sic) February, 2000, is not a nullity having been made without jurisdiction and whether the appellants' rights to fair hearing was not breached when the original trial Judge who was quite aware of the facts of the case failed to disqualify himself from adjudicating on same until he had granted an order of injunction ex-parte –Ground 15.*

(6) *Whether estoppel can be validly raised in this case against the appellants – Grounds 13 and 14."*

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

Selection of Emir - Validity of

1. As ingenious and attractive as these arguments are, with much respect learned counsel, they are by no means sound. In the first place, Exhibit NB/2 did not spell out the mode of selection by the kingmakers, that is, whether it should be by balloting, secret or open. The kingmakers, quite rightly in my view chose a method of selection by consultation among themselves, a procedure typical of our custom and tradition. That selection did not derogate from the directive in Exhibit NB/2. Secondly, the officials mentioned in the said Exhibit NB/2 were merely to act as witnesses or observers in the selection exercise; they were not to participate

therein. Since they were present when the three kingmakers announced their unanimous choice of the 1st respondent, the directive in Exhibit NB/2 was duly complied with. It is, with respect, absurd and indeed invidious to suggest, as learned counsel has done, that the supposed breach of Exhibit NB/2 is not part of Chiefs Law nor was it made pursuant to it. B
Consequently, non-compliance therewith is not a breach of the Chiefs Law. (p. 1348 H)

APPEALS - Concurrent findings - Chieftaincy matters

2. There is thus a concurrent finding by two lower courts. The principle C
has long crystallized that an appellate court will not interfere with the concurrent findings of the two lower courts on issues of fact except there is established a miscarriage of justice from perverse findings or a violation of some principle of law or procedure: See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) D
1 NWLR (Pt. 14) 1 at 36. Nothing has emerged from the arguments of learned counsel for the appellants to bring this case within the ambit of the exception to the age long principle enunciated above. I am therefore E
persuaded to resolve the issue under consideration against the appellants and in favour of the respondents. (p. 1350 F)

Admission - Chieftaincy matters - Quorum for selection

3. In the face of Exhibits NB/2 and NB/25/6, the contention that the F
appellants did not in their pleadings admit that three kingmakers constitute a quorum is preposterous and puerile. Clearly, Exhibits NB/2 and NB/25/6 belie their denial in that regard. I am of the view that the two G
lower courts were justified in holding, as they did, that there was an admission to that effect. Therefore the admission by the appellants through Exhibits NB/2 and NB/25/6 as demonstrated above is full proof of that fact, for it is well settled that what is admitted needs no further proof: H
(pp.1352 E / 1353 B)

Declaratory reliefs - Principle that guides grant of

4. Admittedly, as rightly submitted by learned counsel for the appellants,

the court does not grant declarations of right either in default of defence or indeed on admissions without hearing evidence and being satisfied by such evidence; see Bello v. Eweka (1981) 1 S.C. 101. The making of a declaratory order is within the discretion of the trial Judge and the discretion should not be too readily exercised, per Taylor, JSC., in Ogundairo & Ors. v. Okonlawon & Ors (1963) 1 AII NLR 358. In considering the relevance of this principle to the case in hand, I will pause to examine critically some of the reliefs sought by the respondents. In this regard, relief 42(i) is germane and for ease of reference it reads:-

“A DECLARATION that the 1st plaintiff has been duly and properly selected as the Emir of Borgu by the Traditional kingmakers of Borgu in a accordance with Borgu native law, custom and tradition on Wednesday, 9th February, 2000.”

It is evident that by that relief, the respondents did not specifically seek a declaration that three kingmakers constitute a quorum for the purpose of the selection of the Emir of Borgu. (p. 1352 F)

E ***Declaratory reliefs - Admission - Witnesses***

5. Notwithstanding the above submission, the respondents called witnesses to reinforce the fact that the three kingmakers including the 6th respondent – Baa kara Bonde constitute the customary quorum for the selection of the Emir of Borgu and that the selection of 1st respondent on 9/2/2000 by the 6th and 7th respondents and the late Waziri Borgu is valid and in accordance with the custom and tradition of Borgu. It is the prerogative of the trial court to admit, assess and evaluate evidence and when these have been satisfactorily done, an appellate court does not interfere with the findings of fact made by the trial court: see the case of Michael Romanie v. Christopher Romain (1992) 5 SCNJ 25 at 23. (p. 1353 D)

H ***CHIEFTAINCY MATTERS - Vested right***

6. The substance of the contention of learned counsel for the appellants is that because the selection of the 1st respondent had not been approved by the Governor, he, the 1st respondents had not acquired a vested right.

With due respect to counsel, I do not share that view. The 1st respondent having been duly and validly selected as the Emir as earlier noted and the Council of Chiefs not having advised against the approval of that selection, had acquired an interest or a vested right enforceable at law to restrain the conduct of another selection exercise. The Governor of Niger State, 3rd respondent, cannot, in my view, arbitrarily jettison that selection and direct another selection exercise to secure the appointment of a candidate of his own choice. I am reinforced in this view by the decision of this court in the case of Ojo v. Governor of Oyo State (1989) 1 S.C. (Pt.1) 1; (1989) 1 NWLR (Pt.95) 1 at 22. (p. 1355 A) C

Council of chiefs - Order of court

7. I have carefully considered the order of the court below vis-a-vis Section 7 of the Chiefs (Appointment and Deposition) Law, *supra* and I am unable to see anything in the order, which derogates from the Law. Put differently, the Order as modified by the Court of Appeal did not compromise the right of the Council of Chiefs to be consulted by the Governor before giving his approval to the appointment of a person selected as Emir of Borgu. I therefore see no merit in issue three which is accordingly resolved in favour of the respondents against the appellants. (p. 1356 C) D E

Writ of summons - Pleadings

8. On the first question regarding amendment to the writ of summons, it has been settled beyond dispute that subject to the limitation that a plaintiff will not be permitted to set up a completely different suit or claim in his statement of claim (for which see Caren v. Gew (1983) 62 LJ Ch 530, Ekpen v. Ugo (1986) 3 NWLR (Pt. 26) 63) the statement of claim supersedes the writ: see F.O. Fadahunsi v. Shell Co. of Nigeria Ltd (1969) NMLR 304. In the instant case, since the reliefs under consideration are reflected in the statement of claim, the complaint about the amendment of the writ of summons is not well founded. (p. 1357 A) F G H

Waiver - Claim - Amendment of - Without leave

9. The complaints in regard to the first two questions relate to matters of practice and procedure not amounting to a breach of natural justice, which ought to have been taken up timeously at the court of first instance. By raising them belatedly at the appellate court, the appellants are deemed to have waived their rights.

Order 3 rule 4 of the Niger State High Court Rules supra which requires that particulars of claim shall not be amended except by leave of court as well as rules on payment of requisite court fees are rules the breach of which do not infringe on the rules of natural justice and objection thereof ought appropriately to have been taken at the stage of trial and not at appellate level. Thus, where an action was commenced by an irregular procedure and a defendant did not complain but took active part therein, he cannot later be heard to complain and take advantage of the irregularity. (pp. 1357 D/1358 E)

Service of process - Proof - Affidavit of service

10. Under normal circumstance, the best evidence of proof of service of process is by affidavit of service. It is not disputed that there was such document in the court's file. That document forms part of the court's record which the court could look at to confirm that there was proof of service even if it was not tendered as an exhibit: see Chief M.O.A. Agbaisi and Ors v. Ebikorejie (1997) 4 NWLR (Pt. 502) 630, 648. If despite the personal service as disclosed in the affidavit of service, the respondents ex abundante cautela caused the exhibit in question to be pasted at the venue of the meeting, that is superfluous but it did not vitiate the personal service already effected. (p. 1359 B)

Judgment appealed against - Whether it is right

11. An appellate court is only concerned with whether the judgment appealed against is right or wrong not whether the reasons are. Where the judgment of the court is right but the reasons are wrong, the appellate court does not interfere. It is only where the misdirection has caused the court to come to a wrong conclusion that the appellate court will

interfere: see Abaye v. Ofili (1986) 1 NWLR (Pt. 15) 134 at 179, Ukejianya v. Uchendu 19 WACA 46. Since in the instant case, there was evidence on record to support the finding of service of Exhibit NB/1 on the appellants, the giving of a wrong reason by the court below in arriving at the same conclusion is of no moment. (p. 1359 E)

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JUDGMENTS - Validity of - Exparte order

12. The sum total of the arguments of learned counsel is that the ex-parte order in question was a nullity having been granted irregularly by a Judge who was biased by reasons of his closeness to the parties and of his previous knowledge of the facts of the case. Whilst not necessarily agreeing with the allegation and I do not consider it necessary to pronounce upon it, suffice it to say that the validity and bindingness of a judgment or order of court until set aside was exhaustively considered by this court in the celebrated case of Rossek v. ACB Ltd. (1993) 8 NWLR (Pt. 312) 382 at pp. 434, 435.

By the force of the weighty decisions referred to above, it is plain that learned counsel for the appellants cannot be right in his contention that the ex-parte order in question was a nullity and not capable of being breached. As long as it subsisted, whether null or not, those affected thereby are bound to obey it and the trial court was right and the Court of Appeal justified in affirming the decision of the trial court to set aside the selection of the 1st appellant as the Emir of Borgu on 12/2/2000 in breach of the ex-parte order, Exhibit NB/1. See Registered Trustees of Apostolic Church v. Olowolemi (1990) 6 NWLR (Pt. 158) 514.(p. 1360 F/1362 B)

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NOTABLE POINTS OF INTEREST

EDOZIE JSC

1. Purpose of a brief - When respondent should adopt appellant's issues

It is pertinent to mention that a brief of argument is meant to assist the court in appreciating the issues in controversy between the parties and thus enhance and facilitate the easy resolution of those issues. It is not meant to befog and becloud those issues or put unnecessary strain on the court in the determination of the issues in controversy. In a contentious

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and voluminous appeal of this nature where the appellants formulated six issues for determination with some of the issues containing three or more sub-issues, I think that even if the respondents' counsel does not quite agree with the approach of the appellants, it is advisable that he endeavours, as far as possible, to tailor or present the arguments in his brief in a manner consistent with the sequence of the topics canvassed in the appellants' brief. This will obviate the necessity of the court having to scan often through the respondents' brief in search for the corresponding topic being treated in the appellants' brief with the attendant risk of inadvertently glossing over relevant argument. (p. 1346 F)

2. Jurisdiction - Difference between procedural and substantive jurisdiction

It is noteworthy that a distinction must be drawn between two types of jurisdictions viz – jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant can confer jurisdiction on the court where the constitution or a statute or any provision of the common law says that the court shall have no jurisdiction. A litigant may submit to the procedural jurisdiction of the court e.g. where a writ has been served outside jurisdiction without leave: Re Orr v. Ewing (1882) 22 Ch. D 456, 463. In the case of Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619 at 632, it was held that where a party consented to wrong procedure at the trial court and in fact suffers no injustice, it would be too late to complain on appeal that a wrong procedure was adopted. (p. 1358 B)

REPRESENTATION

L. O. Fagbemi, Esq., SAN (with him, H. Afolabi, Esq., K.O. Fagbemi, Esq., and S.O. Adewoye, Esq.), for the Appellants.
O.I. Olorundare, Esq., for the Appellant/Interested Party.

Chief Wole Olanipekun, SAN, (with him, Stephen Abolaji, Esq., Joe Agi Esq. and Waheed Gbadamosi, Esq.), for the 1st to 5th respondents.
A.O. Mohammed, Esq., (with him, Richard Baiyesha, Esq.), for the 6th and 7th Respondents.

CASES REFERRED TO

F.O. Fadahunsi v. Shell Co. of Nigeria Ltd (1969) NMLR 304	
Rossek v. ACB Ltd. (1993) 8 NWLR (Pt. 312) 382 at pp. 434	
Abaye v. Ofili (1986) 1 NWLR (Pt. 15) 134 at 179	B
Michael Romanie v. Christopher Romain (1992) 5 SCNJ 25 at 23	
Mohammed Tajira v. North Brewery Co. Ltd (1972) NMLR 2	
Orah v. Nyam (1992) 1 NWLR (Pt. 217) 279 at 288	
Enigbokan v. Aiico (1994) 6 NWLR (Pt. 348) 1	
Enang v. Adu (1981) 11-12 SC. 25 at 42	C
Nwangwu v. Okonkwo (1987) 3 NWLR (Pt.60) 314 at 321	
Igwego v. Ezeugo (1992) 7 NWLR (Pt. 460) 254 at 278	
Motunwase v. Sorungbe (1988) 4 NWLR (Pt.92) 90	
Ogunjuma v. Ademola (1995) 4 NWLR (Pt. 389) 254 at 269	D

STATUTE REFERRED TO

Chiefs (Appointment and Deposition) Law Cap. 19, Laws of Niger State 1989, ss. 3, 7	E
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LEAD JUDGMENT BY EDOZIE JSC

This appeal arose from a chieftaincy tussle over the succession to the stool of the Emir of Borgu in Borgu Local Government Area of Niger State which stool became vacant following the demise on 3rd February, 2000, of the last incumbent by name Alhaji Musa Mohammed Kigero III. There were many contestants for the vacant stool but the principal candidates are Alhaji Haliru Dantoro, a former Senator who is the 1st respondent and Isiyaku Musa Jikantoro, Commissioner for Lands and Survey, Niger State Government, the 1st appellant in these proceedings.

Arrangement to fill the vacant stool was initiated by a letter dated 7th February, 2000, (Exhibit NB/2) written by the Commissioner for Local Government (4th appellant) at the instance of the governor of Niger State (3rd appellant) directing the Chairman of Borgu Local Government to set in motion within 48 hours from receipt of the letter the machinery for the selection of a successor to the late Emir. At the material time,

there were three surviving kingmakers, to wit, the 5th appellant (deceased), 6th and 7th respondents, out of a total of five kingmakers, two of whom had died. In apparent compliance with the directive in the letter Exhibit NB/2, a meeting of the aforesaid surviving kingmakers, was convened B on 9th February, 2000, at which meeting Alhaji Haliru Dantoro, the 1st respondent herein, was unanimously selected by the three kingmakers in a ceremony that was witnessed by the Chairman Borgu Local Government, Commissioner for Local Government and Chieftaincy Affairs (4th appellant) among others.

C However, for inexplicable reasons, the governor of Niger State did not give approval to the selection of the 1st respondent as the new Emir. Rather the Governor of Niger State, (3rd appellant) pursuant to the Chiefs (Appointment and Deposition) Law Cap. 19, Laws of Niger State 1989, D made an Order dated 10th day of February, 2000, titled “*The Appointment and Deposition of Chiefs (Appointment of the Emir of Borgu) Order 2000*” (Exh. NB/25/6), whereby he reconstituted the Council of Borgu kingmakers by the addition of 6th and 7th appellants as kingmakers E to replace the two deceased ones. The Commissioner for Local Government (4th appellant) then directed that a second selection exercise be conducted with the three surviving and the two additional kingmakers participating in the exercise, which was slated to take place on Saturday 12th F February, 2000. Angered by this development, the 1st to 5th respondents herein, went to the Niger State High Court to apply for and were granted an order of ex parte injunction (Exhibit NB/1) on 11th February, 2000, by Auta, J., restraining the five kingmakers, that is, the 5th 6th 7th appellants and 6th and 7th respondents from attending the meeting of 12th February, G 2000. Notwithstanding the said ex parte order (Exhibit NB/1), the meeting took place as scheduled and at the end of the second selection exercise, the 1st appellant, Isiyaku Musa Jikantoro was alleged to have emerged as the successful candidate. Those were in outline the background facts H culminating in the suit by the 1st to 5th respondents as plaintiffs against the appellants as defendants. In their 42 paragraph statement of claim, they averred facts as substantially hereinbefore narrated claiming in paragraph 42 thereof reliefs formulated thus:-

“42. WHEREOF the plaintiffs claim against the defendants jointly and or severally as follows:-

(i) A DECLARATION that the 1st plaintiff has been duly and properly selected as the Emir of Borgu by the Traditional Kingmakers of Borgu in accordance with Borgu native law, custom and tradition on Wednesday 9th February, 2000. B

(ii) A DECLARATION that the Emir of Borgu stool is traditional institution rooted in the Borgu people’s customs and that the stool cannot be awarded to any Prince of Borgu as a political patronage by any Chief Executive of the State, particularly the 3rd Defendant. C

(iii) A DECLARATION that the 3rd defendant has no power or right to constitute an Electoral College including the 7th and 9th defendants for the people of Borgu in order to ensure the ascendance of his own candidate (1st defendant) to the throne of Emir of Borgu. D

(iv) A DECLARATION that the purported order made and signed by the 3rd defendant on 10th February, 2000, amending the Chiefs (Appointment and Deposition) Law, Cap. 19, Laws of Niger State, 1989, is irregular, illegal, unconstitutional, null and void and of no effect whatsoever because:- E

(a) The purported Order was made pursuant to a non-existing Law, to wit, Section 3(1)(A) of the Chiefs (Appointment and Deposition) (Amendment) Law, 1997. F

(b) The purported Order (though styled as an Order) effected substantial amendments to the Chiefs (Appointment and Deposition) Law of Niger State without such amendments passing through the Niger State House of Assembly.

(c) The 3rd defendant exceeded his jurisdiction and breached the Constitution of the Federal Republic of Nigeria 1999 by making or promulgating such an Order. G

(d) The said Order changed, upturned and corrupted the tradition of Borgu people in relation to the filling of the stool of the Emir of Borgu. H

(e) The Order conflicts with and abrogates the vested rights of the 1st plaintiff who has already been duly selected as the Emir of Borgu.

(v) A DECLARATION that the 7th and 9th defendants being not related to any of the families of the traditional kingmakers of Borgu cannot be appointed as kingmakers of Borgu or members of an Electoral College for the purpose of selecting a new Emir of Borgu.

B (vi) A DECLARATION that the purported meeting of the Electoral College set up by the 3rd defendant on 12th February, 2000, despite the service of a court order on the defendants is irregular, contemptuous of the institution of the judiciary, illegal, null an void and of no effect whatsoever.

C (vii) AN ORDER setting aside the Order made by the 3rd Defendant on 10th February, 2000 titled: Appointment and Deposition of Chiefs (Appointment of Emir of Borgu) Order 2000 and all processes conducted pursuant to that Order, including any meeting of the Electoral College D held, the purported selection and appointment of the 1st defendant as the Emir of Borgu etc.

(viii) AN ORDER commanding the 3rd defendant to approve the selection of the 1st plaintiff by the Traditional Kingmakers of Borgu as E the Emir of Borgu since 9th February, 2000.

(ix) AN ORDER of perpetual injunction restraining the 2nd, 3rd and 4th defendants either by themselves, agents, privies, servants or through any person or persons however, from treating, presenting, or dealing with F or installing the 1st defendant as the Emir of Borgu or handing over to him the staff of office of the Emir of Borgu.

(x) AN ORDER of perpetual injunction restraining the 1st defendant from parading, presenting or styling himself as the Emir of Borgu or from putting on or wearing any paraphernalia or insignia of the Emir of G Borgu.

(xi) AN ORDER of perpetual injunction restraining the 7th and 9th defendants from parading themselves as Kingmakers or members of any Electoral College for the purpose of selecting any candidate for the stool H of Emir of Borgu.

(xii) AN ORDER of perpetual injunction restraining the 5th, 6th and 8th defendants from dealing with:-

(a) the 1st defendant as the Emir of Borgu

(b) the 7th and 9th defendants as Kingmakers for the purpose of selecting any candidate to the stool of Emir of Borgu.”

In reaction to the claim, the 1st to 7th appellants as defendants in their statement of defence denied the claim impugning the selection of the 1st respondent on the ground that it was contrary to their custom and confirming the appointment of the 1st appellant as the new Emir. The 6th and 7th respondents herein as the 6th and 8th defendants in their joint statement of defence conceded to all the claims of the plaintiff. There was also a Reply to the statement of defence of 1st to 7th appellants filed by the 1st to 5th respondents. After due trial at which four witnesses testified for the respondents and two for the 1st to 7th appellants, the learned trial Judge, Ahmed Bima, J., of the High Court, Suleja, meticulously reviewed the evidence before him and the submissions of counsel and in a reserved judgment delivered on 11th September, 2000, entered judgment for the plaintiffs/respondents. On appeal by the appellants, that judgment was subsequently affirmed substantially in a unanimous decision of the Abuja Division of the Court of Appeal delivered on 26th April, 2002, (Coram Muntaka-Coomassie, Fabiyi, Oduyemi, JJCA) Against that decision, the appellants have now approached this court with a number of complaints seeking a judgment in their favour. Indeed, there two appeals in connection with that judgment. The first is the main appeal by the Appellants and the second is the appeal by the appellant/Interested party, the Chairman, Niger State Council of Chiefs, who with leave of the court below is appealing against the order of that court which he perceived to undermine the right of the Council of Chiefs to be consulted by the Governor of Niger State for its advice before the approval of the appointment of an Emir.

In respect of both appeals, several briefs of arguments were filed by learned counsel as follows:-

1. L.O. Fagbemi Esq., SAN-

(a) Appellants' brief of argument dated 11/10/2002 filed on 15/10/2002.

(c) Appellants' Reply brief of argument to 1st – 5th respondents'

brief dated

16/1/2002 filed on 21/1/2003.

2. Chief Wole Olanipekun, SAN-

(a) 1st to 5th Respondents' brief of argument dated 9/12/2002 filed
B on 11/12/2003.

(b) 1st to 5th Respondents' brief in Reply to Appellant/Interested
Party brief dated

9/12/2002 filed on 11/12/2002.

C 3. A.O. Muhammed Esq.-

(a) 6th and 7th respondents' brief of argument dated 23/11/2002
filed on

23/12/2002.

(b) 6th and 7th Respondents' brief of argument to the Appellant/
D Interested Party brief dated 23/12/2002 filed the same date.

4. O.I. Olorundare Esq.-

(a) Appellant/Interested Party's brief of argument dated 15/10/2000
filed the same

E date.

(b) Appellant/Interested Party's Reply brief to the 6th and 7th Re-
spondents' brief dated 4/8/2002 filed the same date.

(c) Appellant/Interested Party's Reply brief of argument dated 8/
F 1/2003 filed the same date.

At the hearing of the appeal, each counsel adopted and relied on
his briefs of argument. In the main appeal, the appellants raised six issues
for the determination of the appeal. The 6th and 7th respondents adopted
those issues but the 1st to 5th Respondents framed only three issues. It is
G pertinent to mention that a brief of argument is meant to assist the court
in appreciating the issues in controversy between the parties and thus
enhance and facilitate the easy resolution of those issues. It is not meant
to befog and becloud those issues or put unnecessary strain on the court
H in the determination of the issues in controversy. In a contentious and
voluminous appeal of this nature where the appellants formulated six
issues for determination with some of the issues containing three or more
sub-issues, I think that even if the respondents' counsel does not quite

agree with the approach of the appellants, it is advisable that he endeavours, as far as possible, to tailor or present the arguments in his brief in a manner consistent with the sequence of the topics canvassed in the appellants' brief. This will obviate the necessity of the court having to scan often through the respondents' brief in search for the corresponding topic being treated in the appellants' brief with the attendant risk of inadvertently glossing over relevant argument. For the determination of the main appeal in this case, I am prepared to adopt the sic issues as identified in the appellants' brief which are as follows:-

"(1) Whether in all the circumstances of this case, it can be said that the 1st respondent's purported selection was done strictly in line with Exhibit NB/2 and if not, whether the court below was right in affirming the decision of the High Court that he was properly appointed – Ground 4.

(2) Whether the plaintiffs proved their case that 1st plaintiff was appointed in accordance with the native law and custom of Borgu and whether the onus of proof placed on the plaintiffs was discharged on the basis of admission, if any of some of (sic) only some of the defendants or even all the defendants – Grounds 1, 2 and 3.

(3) Whether the court below was right in holding that, 1st plaintiff must be approved as the Emir of Borgu when such directive negates clear provisions (of) the Chief(s) Law of Niger State and whether 1st plaintiff has any vested right in all the circumstances of this case to forbid the appellants from conducting a second exercise-Grounds 5 and 6.

(4) Whether the complaint of a breach of court order is available to the plaintiffs and was any breach proved to entitle the court to confirm the assumption of jurisdiction by the High Court to entertain such a complaint – Grounds 7,8,9,10,11 and 12.

(5) Whether the ex-parte order of 9th (sic) February, 2000, is not a nullity having been made without jurisdiction and whether the appellants' rights to fair hearing was not breached when the original trial Judge who was quite aware of the facts of the case failed to disqualify himself from adjudicating on same until he had granted an order of injunction ex-parte –Ground 15.

(6) *Whether estoppel can be validly raised in this case against the appellants – Grounds 13 and 14.*”

The first issue for determination deals with the validity of the selection of the 1st respondent as the emir of Borgu with respect to the compliance or non-compliance of the directives of the 3rd and 4th appellants as per the letter of 7/2/2000 (Exhibit NB/2) in which the Chairman of Borgu Local Government was instructed to set in motion within 48 hours from the receipt of the letter the machinery for the selection of a successor to the late Emir of Borgu. The said letter, exhibit NB/2, further directed that “*the Chairman of Borgu and Agwara Local Governments should observe the proceedings during selection while the Hon. Commissioner for Local government, Community Development and Chieftaincy Affairs and the Permanent Secretary of the same Ministry will witness the entire process*”. A meeting of the three Kingmakers was convened on 9/2/2000 for the exercise. According to the minutes of the proceedings of that exercise, Exhibit NB/5, it was recorded that when the chairman of Borgu Local Government asked the kingmakers whether or not they would like to conduct the selection through open or secret balloting, the kingmakers requested that they be left alone to consult with one another for ten minutes.

In consequence, the meeting hall was vacated by all except the kingmakers who after due consultation called in the officials present at the meeting and make a resolution to the effect that all the three kingmakers and unanimously selected the 1st respondent as the next Emir. The pith of learned counsel’s complaint is that the officials who were to witness the selection process as directed in the letter, Exhibit NB/2 were not allowed to do so as the selection was done behind their backs and this, learned counsel submitted, was in breach of or non-compliance with Exhibit NB/2. It was further contended that since Exhibit NB/2 was made in exercise of the power of the Governor (3rd appellant) pursuant to the Chiefs (appointment and Deposition) Law Cap. 19, Laws of Niger State, (chiefs Law for short) a breach of the former is an infringement of the latter and amounts to non-compliance of a statutory provision thereby rendering as nullity the selection of the 1st respondent as the Emir of Borgu. **As inge-**

nious and attractive as these arguments are, with much respect learned counsel, they are by no means sound. In the first place, Exhibit NB/2 did not spell out the mode of selection by the kingmakers, that is, whether it should be by balloting, secret or open. The kingmakers, quite rightly in my view chose a method of selection by consultation among themselves, a procedure typical of our custom and tradition. That selection did not derogate from the directive in Exhibit NB/2. Secondly, the officials mentioned in the said Exhibit NB/2 were merely to act as witnesses or observers in the selection exercise; they were not to participate therein. Since they were present when the three kingmakers announced their unanimous choice of the 1st respondent, the directive in Exhibit NB/2 was duly complied with. It is, with respect, absurd and indeed invidious to suggest, as learned counsel has done, that the supposed breach of Exhibit NB/2 is not part of Chiefs Law nor was it made pursuant to it. Consequently, non-compliance therewith is not a breach of the Chiefs Law. The question whether the selection exercise of 9/2/2000 conformed with the directive in Exhibit NB/2 is a question of fact. The trial court addressed this issue and at pages 200 and 205 of the record it held thus: -

“I now come to issue No. 2: That is whether or not the 1st plaintiff has been appointed/selected as the Emir of Borgu in compliance with the directives of the 3rd defendant in Exhibit NB/2 of 20th February, 2000.

.....
I shall in the light of the foregoing hold that the 1st plaintiff has been appointed/selected as the new Emir of Borgu in compliance with the directive of the Governor in Exhibit NB/2 of 7th February, 2000 and in accordance with Borgu native law, custom and tradition.”

This finding was upheld by the court below when in pages 295 and 296 of the record, it observed, inter alia, as follows:-

“It was the submission of the counsel to the appellants that the exercise of 9/2/2000 was not conducted in accordance with the provisions of the Chiefs (Appointment and Deposition) Law of Niger State. This being that some government officials were excluded from the proceed-

ings. With due respect to the learned counsel to the appellants, this submission sounds strange to me. The evidence of P.W. 4 which was not challenged is very clear on this point.”

On page 122 of the records of proceedings, the learned trial Judge said-

B “.....

This witness was not cross-examined on this evidence and neither was any evidence adduced in rebuttal. The position of law in situation like this has been settled in the case of I.B.W.A. v. Imano Ltd (2001) 3 SCNJ 160/183.

C *The only evidence before the court in respect of the conduct of the exercise of 9/2/2000 was that provided by evidence of P.W. 4 which gave details of how the 1st respondent was selected by the existing 3 kingmakers. No other evidence was provided by the appellants and neither was this*
D *witness cross-examined on this point. In the circumstances, I hold that the exercise conducted on 9/2/2000 for the selection of a new Emir of Borgu by the traditional kingmakers as directed by the 3rd appellant was conducted as directed in Exhibit NB/2, and by extension, complied with the*
E *provisions of the Chiefs (Appointment and Deposition) Law of Niger State.*

I therefore hold that the selection of the 1st plaintiff/Respondent as the Emir of Borgu on 9/2/2000 by the three existing traditional kingmakers
F *as directed by the 3rd defendant and witnessed by the 4th Defendant and other government officials was valid.”*

There is thus a concurrent finding by two lower courts. The principle has long crystallized that an appellate court will not interfere with the concurrent findings of the two lower courts on issues of fact except there is established a miscarriage of justice from perverse findings or a violation of some principle of law or procedure: See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 14) 1 at 36;
G
H **Enang v. Adu (1981) 11-12 SC. 25 at 42, Nwangwu v. Okonkwo (1987) 3 NWLR (Pt.60) 314 at 321, Igwego v. Ezeugo (1992) 7 NWLR (Pt. 460) 254 at 278. Nothing has emerged from the arguments of learned counsel for the appellants to bring this case within the ambit of the**

exception to the age long principle enunciated above. I am therefore persuaded to resolve the issue under consideration against the appellants and in favour of the respondents.

The 2nd issue for determination posed the question whether the 1st respondent's selection as the Emir was in accordance with the custom of the people of Borgu. The central issue agitated by the parties on this issue is the number of kingmakers that can form a quorum for the purpose of the selection of an Emir of Borgu. The 1st to 5th respondents had in paragraph 25 of their statement of claim pleaded that three kingmakers constituted a quorum for the selection; the appellants as the 1st set of defendants in paragraphs 10 and 21 of their statement of defence denied that averment. But the 6th and 7th respondents as the second set of defendants admitted that averment. Learned counsel for the appellants then submitted that in the face of the pleadings, where one set of the defendants denied that three kingmakers constituted a quorum, the court below was in error to have held that there was an admission on that matter and that in any case since the respondents were seeking declaratory reliefs, an admission could not sustain such reliefs. He craved in aid the case of Bello v. Eweka (1981) 1 S.C. 101. It is the submission of counsel that the respondents had failed to plead and lead evidence on the evolution and devolution of the custom with the particulars of those people or persons who had been appointed by three kingmakers as the Emir. The case of Egbo v. Agbara (1987) 1 NWLR (Pt.481) 293 at 317-318; Mogaji v. Cadbury (Nig) Ltd (1985) 2 NWLR (Pt. 7) 393 and Balogun v. Oligbede (1991) 8 NWLR (Pt. 208) 223 at 231 were cited in support.

Learned counsel for the two sets of respondents contended in their briefs that by the letter of the 7th February, 2002, Exhibit NB/2 and the Appointment and Deposition of chiefs (Appointment of the Emir of Borgu) Order of 10th February, 2000, exhibit NB/25/6, the appellants admitted that three kingmakers constituted a quorum for the selection of the new emir. I am inclined to accept this proposition.

It is conceded that the appellants denied the averment in paragraph 25 of the statement of claim to the effect that three kingmakers constitute a quorum for the purpose of the selection of the Emir. That denial,

however, was not made honestly as I will show anon. Paragraph 3 of Exhibit NB/2 is pertinent and it reads as follows:-

“3 The kingmakers are:

(i) Waziri Borgu, (ii) Ba Kara Bonde (iii) Liman New Bassa (iv) Magajiye and (v) Ba Tafu.

However, the last two positions (iv-v) above are vacant. Hence for quorum the three others ii and iii) shall deliberate and take binding decisions in the overall interest of the Emirate.

(Underlined for emphasis)

the letter, Exhibit NB/2, was written by the Commissioner for Local Government (4th appellant) at the instance of the Governor of Niger State (3rd appellant) and it expressly stated from the underlined extract quoted above that the three surviving kingmakers should form a quorum. As if that was not enough, the Appointment and Deposition of Chiefs (Appointment of the Emir of Borgu) Order, 2000, Exhibit NB/25/6, made by the 3rd appellant on 10th February, 2000, provides in Section 4(3) thereof as follows:-

“Three members of the Electoral College shall constitute a quorum for any meeting of the Electoral College.”

In the face of Exhibits NB/2 and NB/25/6, the contention that the appellants did not in their pleadings admit that three kingmakers constitute a quorum is preposterous and puerile. Clearly, Exhibits NB/2 and NB/25/6 belie their denial in that regard. I am of the view that the two lower courts were justified in holding, as they did, that there was an admission to that effect.

Admittedly, as rightly submitted by learned counsel for the appellants, the court does not grant declarations of right either in default of defence or indeed on admissions without hearing evidence and being satisfied by such evidence; see Bello v. Eweka (1981) 1 S.C. 101; Motunwase v. Sorungbe (1988) 4 NWLR (Pt.92) 90, Ogunjuma v. Ademola (1995) 4 NWLR (Pt. 389) 254 at 269. The making of a declaratory order is within the discretion of the trial Judge and the discretion should not be too readily exercised, per Taylor, JSC., in Ogundairo & Ors. v. Okonlawon & Ors (1963) 1 AII NLR 358. In considering the relevance of this principle to the case in

hand, I will pause to examine critically some of the reliefs sought by the respondents. In this regard, relief 42(i) is germane and for ease of reference it reads:-

“A DECLARATION that the 1st plaintiff has been duly and properly selected as the Emir of Borgu by the Traditional kingmakers of Borgu in a accordance with Borgu native law, custom and tradition on Wednesday, 9th February, 2000.”

It is evident that by that relief, the respondents did not specifically seek a declaration that three kingmakers constitute a quorum for the purpose of the selection of the Emir of Borgu. Therefore the admission by the appellants through Exhibits NB/2 and NB/25/6 as demonstrated above is full proof of that fact, for it is well settled that what is admitted needs no further proof: See Egbunike v. ACB Ltd (1995) 2 NWLR (Pt. 376) 34 at 53, Obimiami Brick and Stone (Nig) Ltd v. ACB Ltd (1992) 3 NWLR (Pt. 229) 260 at p. 301, Akpan Obong Udofia and Anor v. Okon Akpan Udo Afia (1940) 6 WACA 216 at 218, 219.

Notwithstanding the above submission, the respondents called witnesses to reinforce the fact that the three kingmakers including the 6th respondent – Baa Kara Bonde constitute the customary quorum for the selection of the Emir of Borgu and that the selection of 1st respondent on 9/2/2000 by the 6th and 7th respondents and the late Waziri Borgu is valid and in accordance with the custom and tradition of Borgu. It is the prerogative of the trial court to admit, assess and evaluate evidence and when these have been satisfactorily done, an appellate court does not interfere with the findings of fact made by the trial court: see the case of Michael Romanie v. Christopher Romain (1992) 5 SCNJ 25 at 23 where this court held:-

“A judge of trial is in a pre-eminent position to make findings of facts based on the evidence before him. When this exercise is properly done, an appellate court cannot interfere to change the findings. But when a trial Judge abdicates this sacred duty or when he demonstrates that he has not taken proper advantage of his having heard and seen a witness testify, the matter is at large for the appellate court.”

See also Akinolu v. Olowu (1962) 1 SCNLR 352 or (1962) 1 AII NLR (Pt. 11) 224, Ebba v. Ogodo (1984) 1 SCNLR 372.

From the arguments canvassed by learned counsel, I see no justification for interfering with the finding of the court below on the issue under consideration, which is resolved in favour of the respondents against the appellants.

The 3rd issue for determination deals with the approval by the Governor of the selection of the 1st respondent as the Emir of Borgu. The contention of learned counsel for the appellants is that contrary to the finding of the lower court, the 1st respondent has no vested right by reason of his selection as the Emir of Borgu because whatever right he acquired by that exercise is a contingent right since the selection was not done in compliance with the directive in Exhibit NB/2; the 1st respondent had not been notified of his selection by the kingmakers and the traditional Council of chiefs had not discharged its statutory responsibility of advising the Governor for his approval pursuant to Section 7 of the Chiefs (Appointment and Deposition) Law supra. It was further contended that the order made by the trial court even as modified by the Court of Appeal to the effect that the 1st respondent is entitled to receive the approval of the Governor implied that once the kingmakers select a person as an Emir to be, what remains is the approval of the Governor, a situation that compromises the right of the Council of Chiefs under Section 7 of the Chiefs (Appointment and Deposition) Law supra.

The New Webster's Dictionary of the English Language defines 'vested interest' as "*personal interest or right to derive or share a benefit, protected by law, custom etc.*"

Blacks Law Dictionary, 6th Edition, defines vested right thus:

In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person and which is right and equitable that the government should recognize and protect as being lawful in themselves and settled according to the then current rules of law and of which the individual could not be deprived arbitrarily without injustice or of which he could not justly be deprived otherwise

than by the established methods of procedure and for the public welfare."

The substance of the contention of learned counsel for the appellants is that because the selection of the 1st respondent had not been approved by the Governor, he, the 1st respondents had not acquired a vested right. With due respect to counsel, I do not share that view. The 1st respondent having been duly and validly selected as the Emir as earlier noted and the Council of Chiefs not having advised against the approval of that selection, had acquired an interest or a vested right enforceable at law to restrain the conduct of another selection exercise. The Governor of Niger State, 3rd respondent, cannot, in my view, arbitrarily jettison that selection and direct another selection exercise to secure the appointment of a candidate of his own choice. I am reinforced in this view by the decision of this court in the case of Ojo v. Governor of Oyo State (1989) 1 S.C. (Pt.1) 1; (1989) 1 NWLR (Pt.95) 1 at 22 cited by Chief Wole Olanipekun, SAN, in his brief. In that case, this court held that kingmakers have a vested right in a chieftaincy stool as each of them has a constitutional right to take part in the selection or appointment of Baale of Ilara-elect in the event of a vacancy in that stool and that no amendment to the chieftaincy declaration could be made to abrogate that right after it had accrued. Similar conclusion was reached in the case of Afolabi v. Governor of Oyo State (1985) 2 NWLR (Pt.9) 734. If kingmakers can acquire vested right in a chieftaincy stool, a fortiori a person validly selected to the chieftaincy stool.

On the second limb of the issue under consideration concerning the order made by the trial court which was modified by the Court of Appeal and the contention that the said order offends against Section 7 of the Chiefs (Appointment and Deposition) Law, supra, it is pertinent to set out the order and the law.

In its judgment, the trial court at p. 212 of the record ordered, *inter alia*-

“(vii) That the 3rd defendant is hereby commanded to approve the selection of the 1st plaintiff by the traditional kingmakers of Borgu as the

Emir of Borgu since 9th February, 2000.”

In affirming the judgment of the trial court, the Court of Appeal at page 313 of the record modified the above order to read as follows-

B *“The 1st respondent having been selected/nominated as the emir of Borgu by the 3 traditional kingmakers at the election on 9/2/2000 is entitled under Section 3 of the law to be approved by the 3rd Appellant.”*

The provision of Section 7 of the Chiefs (Appointment and Deposition) Law supra is in the following terms:-

C *“The power of the Governor under the preceding sections of this law shall only be exercised after receiving the advice of the Council of Chiefs.”*

I have carefully considered the order of the court below vis-à-vis Section 7 of the Chiefs (Appointment and Deposition) Law, D supra and I am unable to see anything in the order, which derogates from the Law. Put differently, the Order as modified by the Court of Appeal did not compromise the right of the Council of Chiefs to be consulted by the Governor before giving his approval E to the appointment of a person selected as Emir of Borgu. I therefore see no merit in issue three which is accordingly resolved in favour of the respondents against the appellants.

Under the 4th issue for determination, several issues were canvassed touching on the nullification of the selection of the 1st appellant on F 12/2/2000 as the Emir of Borgu. Firstly, it was contended that several reliefs including relief 42(vi) seeking the nullification of the selection of the 1st appellant as the Emir, were added to the original reliefs sought in the writ of summons without the leave of court, in breach of Order 3 rule G 4 of the High Court (Civil Procedure) Rules of Niger State 1989, and in consequence all the additional reliefs 42(iii)(iv)(vii) and (viii) were incompetent, citing the case of Skenconsult v. Ukey (1981) 1 S.C. 6 Secondly, that fees were not paid for the said additional reliefs as a result of H which the court lacked the jurisdiction to entertain them on the authority of the case of Madukolu v. Nkemdilim (1962) 2 SCNLR 341, Onwugbufor v. Okoye (1996) 1 NWLR (Pt. 424) 252 at 282 and Fada v. Naomi (2002) 4 NWLR (Pt. 757) 318 at pp 335-336; and thirdly, that there was no

proper proof of the service of the ex-parte order of 11/2/2000 on the appellants and consequently, there was no justification to set aside the selection of the 1st appellant as the emir on 12/2/2000 on the ground that the same was effected or done in breach of court order.

On the first question regarding amendment to the writ of summons, it has been settled beyond dispute that subject to the limitation that a plaintiff will not be permitted to set up a completely different suit or claim in his statement of claim (for which see Caren v. Gew (1983) 62 LJ Ch 530, Ekpen v. Ugo (1986) 3 NWLR (Pt. 26) 63) the statement of claim supersedes the writ: see F.O. Fadahunsi v. Shell Co. of Nigeria Ltd (1969) NMLR 304, Mohammed Tajira v. North Brewery Co. Ltd (1972) NMLR 27, Orah v. Nyam (1992) 1 NWLR (Pt. 217) 279 at 288, A.G. Bendel State and Ors. v. Aideyan (1989) 9 S.C. 70; (1989) 4 NWLR (Pt. 118) 646 Otanioku v. Alli (1977) 11-12 SC 19 and Enigbokan v. Aiico (1994) 6 NWLR (Pt. 348) 1. In the instant case, since the reliefs under consideration are reflected in the statement of claim, the complaint about amendment of the writ of summons is not well founded. Besides, the complaints in regard to the first two questions relate to matters of practice and procedure not amounting to a breach of natural justice, which ought to have been taken up timeously at the court of first instance. By raising them belatedly at the appellate court, the appellants are deemed to have waived their rights.

In the case of Akande v. Ajani (1989) 3 NWLR (Pt. 111) 511 at 545, this court, per Nnaemeka-Agu, JSC., observed as follows:-

“Now, by a long line of decided cases, this court as well as the Court of Appeal has reiterated the fact that pursuant to the principle that it will always lean in favour of doing substantial justice in a case rather than hanging on technicality, it will not re-open a procedural irregularity that has been waived at the instance of a party who could have raised the point timeously. This principle was recently re-affirmed by this court in the case of Nneji and Ors v. Chukwu and Ors (1988) 6 SCNJ 132 at pages 138-140 per Wali, JSC.”

Order 3 rule 4 of the Niger State High Court Rules supra which

requires that particulars of claim shall not be amended except by leave of court as well as rules on payment of requisite court fees are rules the breach of which do not infringe on the rules of natural justice and objection thereof ought appropriately to have been taken **at the stage of trial and not at appellate level.** It is noteworthy that a distinction must be drawn between two types of jurisdictions viz – jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant can confer jurisdiction on the court where the constitution or a statute or any provision of the common law says that the court shall have no jurisdiction. A litigant may submit to the procedural jurisdiction of the court e.g. where a writ has been served outside jurisdiction without leave: Re Orr v. Ewing (1882) 22 Ch. D 456, 463: See Practice and Procedure of the Supreme Court; Court of Appeal and High Courts of Nigeria by T. Akinola Aguda, 1980 Edition at page 86 paragraph 7.03. In the case of Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619 at 632, it was held that where a party consented to wrong procedure at the trial court and in fact suffers no injustice, it would be too late to complain on appeal that a wrong procedure was adopted. **Thus, where an action was commenced by an irregular procedure and a defendant did not complain but took active part therein, he cannot later be heard to complain and take advantage of the irregularity:** see also Naser Management Services Ltd v. B.N. Amaku transport Ltd (1999) 1 NWLR (Pt. 588) 576 at 588.

In Ibeanu v. Ogbeide (1994) 7 NWLR (Pt. 369) 697 at 716, it was held following the decision in Edegoke Motors Ltd v. Adesanya (1989) 5 S.C. 113 (1989) 3 (Pt. 109) 250 that non-compliance with the statutory and mandatory provisions of Sections 97 and 99 of the Sheriffs and Civil Process Act is deemed waived if not timeously objected to.

With respect to the 3rd question regarding the non-service of the ex parte order (Exhibit NB/1) on the appellants, Mr. Fagbemi, SAN, of counsel to the appellants, argued that the court below relied on the evidence of P.W. 4 to the effect that Exhibit NB/1 was pasted at the venue of the meeting of 12/2/2000 in reaching a conclusion that there was service of the ex parte order (Exhibit NB/1) whereas no order for substituted

service was made. He pointed out that the affidavit of service of the order in the court's file indicated that personal service was effected and reasoned that in view of the conflict, the finding that there was service was perverse and consequently the nullification of the selection of 1st appellant as Emir of Borgu on the ground of disobedience of court order was unjustified. **Under normal circumstance, the best evidence of proof of service of process is by affidavit of service. It is not disputed that there was such document in the court's file. That document forms part of the court's record which the court could look at to confirm that there was proof of service even if it was not tendered as an exhibit: see Chief M.O.A. Agbaisi and Ors v. Ebikorejie (1997) 4 NWLR (Pt. 502) 630, 648, Ade v. Uku (1997) 5 FCA 208 at 228, Ogbunyinya v. Okudo and Ors (1979) 3 LRN 318 at 324, Ladunni v. Kukoyi (1972) ALL NLR (Pt. 1) 133, Salami and Ors v. Oke (1987) 5 NWLR (Pt. 63) 1 at 9, (1987) 2 NSCC 1167 at 1173, U.T.C. v. Pamotei (1989) 3 S.C. (Pt. 1) 79; (1989) 3 SCNJ 79 at 97 If despite the personal service as disclosed in the affidavit of service, the respondents ex abundante cautela caused the exhibit in question to be pasted at the venue of the meeting, that is superfluous but it did not vitiate the personal service already effected. An appellate court is only concerned with whether the judgment appealed against is right or wrong not whether the reasons are. Where the judgment of the court is right but the reasons are wrong, the appellate court does not interfere. It is only where the misdirection has caused the court to come to a wrong conclusion that the appellate court will interfere: see Abaye v. Ofili (1986) 1 NWLR (Pt. 15) 134 at 179, Ukejianya . Uchendu 19 WACA 46. Since in the instant case, there was evidence on record to support the finding of service of Exhibit NB/1 on the appellants, the giving of a wrong reason by the court below in arriving at the same conclusion is of no moment. For the various reasons given above, the appellants' 4th issue for determination is baseless and is resolved in favour of the respondents against the appellants.**

The gravamen of the appellants' 5th issue for determination is that

the ex-parte order of injunction, (Exhibit NB/1), was a nullity and not capable of being breached on two prongs. Firstly, it was contended on the authority of Kotoye v. CBN (1989) 2 S.C. (Pt.1) 150 (1989) 1 NWLR (Pt. 98) 419 at 447 that a person who seeks an interim order ex parte while also applying for an interlocutory injunction files two motions, simultaneously, one ex parte asking for an interim order and the other on notice applying for an interlocutory injunction. Learned counsel for the appellants pointed out that this procedure was not adhered to as no motion on notice was filed simultaneously with or even after the motion ex parte was filed. Secondly, learned counsel for the appellants submitted that the learned trial Judge who was originally handling the case, Auta, J., and who granted the ex parte order in question was biased in favour of the respondents in that immediately after granting the order, he declined and disqualified himself from further conducting the case on ground as he expressly state, inter alia, that he was “very familiar with the facts of the case and I have been close to both parties...” Learned counsel reasoned that by participating in the proceedings, a reasonable man would not say that the Judge has been fair in all the circumstances of the case and that his action amounted to a breach of the rule of fair hearing. He relied on the following cases: The Secretary Iwo Central Local Government v. Adio (2000) 8 NWLR (Pt.667) 115 at 113 and Metropolitan Properties Co. Ltd. v. Lannon (1969) 1 UB 577 at 599

The sum total of the arguments of learned counsel is that the ex-parte order in question was a nullity having been granted irregularly by a Judge who was biased by reasons of his closeness to the parties and of his previous knowledge of the facts of the case. Whilst not necessarily agreeing with the allegation and I do not consider it necessary to pronounce upon it, suffice it to say that the validity and bindingness of a judgment or order of court until set aside was exhaustively considered by this court in the celebrated case of Rossek v. ACB Ltd. (1993) 8 NWLR (Pt. 312) 382 at pp. 434, 435. Where in the leading judgment of Ogundare, JSC., his Lordship observed:-

“The law has been laid down as long ago on 1846 by Lord

Cottenham, LC., in Chuck v. Cremer, Cooper temp Cott 338 at 342; 47 ER 884 at 885 as follows-

‘ A party who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It did not even signify whether the order was drawn up. That there are many cases in which a party had been held to have committed a contempt for disobeying an order which had not only not been served but have not even been drawn up. It would be most dangerous to hold that the suitors, or their solicitors could themselves judge whether an order was null or void – whether it was regular or irregular. That they should come to the court and not take it upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.’

This view was re-echoed by Romer, LJ., in Hadkinson v. Hadkinson (supra) where he observed:-

‘It is plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of his obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. And affirmed by the Privy Council in Isaacs v. Robertoson (supra). Eso, JSC. Stated the same view in Oba Aladegbemi v. Oba Fasanmade (supra) where he observed:

‘..... for a court of competent jurisdiction, not necessarily of unlimited jurisdiction (and I will come to this anon) has jurisdiction to decide a matter rightly or wrongly. If that court never had jurisdiction in the matter, then its decision is, without jurisdiction, void, but then should a court of law not even decide the point? That is, the court without jurisdiction decided without jurisdiction? Should the decision just be ignored? Surely, it will not make for peace and finality which a decision of a court seeks to attain. It would at least be against public policy for persons, without the backing of the court, to pronounce a court decision a nullity, act in breach of the decision whereas others may set out to obey

it. In my respectful view it is not only desirable but necessary to have such decisions set aside firstly by another court before any act is built upon it despite the colourful dictum of the Law Lord in UAC v. Macfoy supra.

B *There is always a presumption of correctness in favour of a court's judgment. And until that presumption is rebutted and the judgment is set aside, it subsists and must to obeyed". See also FATB v. Ezegbu (1994) 8 NWLR. (Pt. 367) 149."*

C **By the force of the weighty decisions referred to above, it is plain that learned counsel for the appellants cannot be right in his contention that the ex-parte order in question was a nullity and not capable of being breached. As long as it subsisted, whether null or not, those affected thereby are bound to obey it and the trial court**
D **was right and the Court of Appeal justified in affirming the decision of the trial court to set side the selection of the 1st appellant as the Emir of Borgu on 12/2/2000 in breach of the ex-parte order, Exhibit NB/1. See Registered Trustees of Apostolic Church v. Olowolemi (1990) 6 NWLR (Pt. 158) 514.** I will also resolve the issue
E under consideration against the appellants.

Under the 6th and last issue for determination Mr. Fagbemi, SAN submitted that the 1st respondent by his selection as the Emir of Borgu on
F 9/2/2000 had no vested right to be protected and consequently, he could not legitimately claim that the Governor of Niger State, the 3rd appellant, is estopped from directing the conduct of another selection exercise as there was no evidence that he was aware of the result of the first exercise. This matter has been substantially considered under the appellants'
G 3rd issue for determination wherein I concluded that the 1st respondent having been validly selected as the Emir of Borgu on 9/2/2000 had acquired a right enforceable at law to be protected by preventing a second selection exercise, there being nothing on record to justify such a course.

H Additionally, I reached the conclusion under issue 5 that the court below was right to have upheld the trial court's nullification of the purported selection of the 1st appellant as the Emir of Borgu on 12/2/2000. By reason of the foregoing, the question whether the Governor of Niger

State, 3rd appellant, had the right to direct the conduct of the second exercise has become otiose. Accordingly, the 6th issue is resolved against the appellants.

In conclusion, since all the six issues canvassed have been resolved against the appellants, the appeal is bereft of any substance and is accordingly dismissed with N10,000.00 (ten thousand naira) costs to each set of respondents.

The *solitary* issue raised in the appeal by the appellant/interested party is as formulated in his brief thus:-

“...having regard to Section 7 of the Chiefs (Appointment and Deposition) Law Cap. 19, Laws of Niger State, can an appointment under Sections 1-6 of the said Law be made without seeking the advice of the appellant and what is the effect of the failure to seek the advice of the appellant.”

The issue is predicated upon the order made by the trial court which was modified by the Court of Appeal to the effect that *“the 1st respondent having been selected/nominated as the Emir of Borgu by the 3 traditional kingmakers at the election on 9/2/2000 is entitled under Section 3 of the Law to be approved by the 3rd appellant.”* The argument that this order was made in violation of Section 7 of the Chiefs (Appointment and Deposition) Law (*supra*) has been examined in my consideration of the 3rd issue in the main appeal with the conclusion that the said order as worded by the court below did not in any way compromise the right of the Council of Chiefs to be consulted by the Governor of Niger State for its prior advice on the approval of the appointment of the Emir of Borgu. In the circumstance the appeal by the appellant/interested party is dismissed with N10,000.00 (Ten Thousand Naira) costs to each set of the respondents.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Edozie, JSC. I entirely agree with his reasoning and conclusions.

Accordingly, I too hereby dismiss the appeal by the appellants

with N10,000.00 costs to each of the two sets of respondents. I also dismiss the appeal by the appellant/interested party on behalf of the Niger State Council of Chiefs, with no order as to costs.

KATSINA-ALU JSC

B I have had the advantage of reading in draft the judgment delivered by my learned brother, Edozie, JSC., in this appeal. I entirely agree with it. All the issues have been exhaustively and eloquently considered and resolved against the appellants. There is nothing I can usefully add. For
C the reasons contained in the leading judgment, I also dismiss the appeal with N10,000.00 costs in favour of each set of respondents. Similarly I dismiss the appeal by the appellant/interested party with N10,000.00 costs to each set of respondents.

UWAIFO JSC

I had the privilege of reading in advance the judgment of my learned brother, Edozie, JSC. I agree with it for the reasons he has stated. I too
E dismiss the two appeals and abide by the order for costs made in the leading judgment.

EJIWUNMI JSC

F Being privileged to have read the draft of the judgment just delivered by my learned brother, Edozie, JSC., I am quite satisfied that he examined properly all the issues raised in the appeal and with due regard to the facts and the law relevant that there is no merit in this appeal.

G Let me therefore state particularly that for the purposes of this appeal, the grounds canvassed for the main appellants to this appeal are devoid of any merit. Their appeal is therefore dismissed in its entirety with N10,000 cost in favour of the respondents. As for the appellant/
H interested party, his appeal is also dismissed by me for all the reasons given in the leading judgment of my learned brother, Edozie, JSC., and costs are awarded in favour of the respondents in the sum of N10,000.00.