

SUPREME COURT OF NIGERIA
21ST MAY, 2004. SC. 83/2000
CORAM:- S.M.A. BELGORE, U. MOHAMMED, S.U. ONU,
N. TOBI, D.O. EDOZIE, JJSC

CHIEF J.A. AGBANA APPELLANT
AND
1. RTD. MAJOR S.K. OWA
2. MILITARY ADMINISTRATOR,
KOGI STATE RESPONDENTS
3. ATTORNEY-GENERAL, KOGI STATE

APPEALS - Briefs of appeal - Record of proceedings - Index thereof - Definition of - A record that contains table of contents - Is not void for not using the expression index in context of O. 7 r. 7 (H1)

APPEALS - Grounds of appeal - Additional ground - That is not seen in the record of proceedings - Will be ignored by Supreme Court (H2)

APPEALS - Briefs of appeal - Filing time - Contention that brief was filed out of time - Without showing specific dates from the records - Is of no use (H3)

APPEALS - Judgments - Absence of a party - On the day of judgment - Will not invalidate the judgment (H4)

CHIEFTAINCY MATTERS - Appointment - Claim by plaintiff - That he was appointed chief - Without proving it - Will be dismissed (H5)

CHIEFTAINCY MATTERS - Appointment - Exhibit - That appointed 1st respondent as Chief - Allegation that it is contrary to Chiefs law - Is not substantiated (H6)

FACTS

Before the Kogi State High Court, the plaintiff/appellant filed an action against the defendants/respondents. Appellant sought to establish that the purported appointment and or approval of the 1st respondent as the Elegbe of Egbe by the 2nd and 3rd respondents is null, void and of no effect whatsoever. He also asked for a perpetual injunction prohibiting the 1st respondent from parading himself as the Elegbe of Egbe. Appellant gave evidence but did not call any witness. Respondents called six witnesses. The trial court at the end of the trial found in favour of the respondents.

Appellants appeal to the Court of Appeal also failed. Being dissatisfied, he has further appealed to the Supreme Court. Both appellant and 1st respondent raised preliminary objections to certain issues which the apex court determined before dealing with the appeal proper.

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

Briefs of appeal - Record of proceedings

1. An index is an alphabetical list at the back of a book, of names, subjects, etc. mentioned in it and the pages where they can be found. In the context of Order 7 rule 7, an index is simply the table of contents of the record of proceedings. A record of proceedings cannot be declared a nullity merely because it does not provide for the expression, “index”, if for all intents and purposes, the record contains the table of contents. If the parties and the court are not mistaken as to where to locate a particular process through the pages in the record, a party cannot complain because there is no miscarriage of justice. I have seen the “*contents*”. I have also seen “*file index*”.

While the table of contents contains the processes of the High Court, the “*file index*” contains the processes of the Court of Appeal. Although the arrangement is not very elegant, the contents therein (and this includes the “*file index*” whatever that means), will not mislead either the parties or the court in the location of any process in the record. (p. 1405 F)

Grounds of appeal - Additional ground

2. The second part of the objection is in respect of additional grounds. The record I have, ends at page 257 with the Notice of Appeal in which the appellant filed seven grounds of appeal. These are clearly original grounds and not additional grounds. Although the brief of the appellant purports to deal with a Ground 8 under Issue No. 1, I cannot place my hands on that additional ground in the record of proceedings. And what is more, counsel for the appellant did not, in his Reply Brief, deal with the objection of the 1st respondent. In the circumstance, I shall confine myself to the Brief of the appellant as it relates to the Notice of Appeal at pages 254 to 257 of the record. I will not take Issue No. 1 of the appellant as it is based on the so-called additional ground 8 which I cannot see in the record. And I am bound by the record. (pp. 1406 E/1407 A)

Briefs of appeal - Filing time

3. The appellant is correct in saying that the respondent filed his brief on 28th August, 2000, because I see that date on the brief. But counsel for the appellant did not show from the record when the appellant's brief was served on the respondent. He merely claimed that to be on 10th July, 2000. It is incumbent on a party who raises preliminary objection based on filing of court process out of time to call the attention of the court to the record showing specific date or dates. A mere ipse dixit of the objector will not be sufficient or enough. In the absence of showing when the appellant's brief was served on the 1st respondent, I am not in a position to determine the objection of the appellant. It therefore fails. (p. 1406 F)

APPEALS - Judgments - Absence of a party

4. It does not appear to me that the absence of a party on the day judgment is delivered can vitiate, nullify or invalidate the decision. This is because parties who are present on the day judgment is delivered do not really play any role rather than hearing the judgment delivered by the Judge and possibly taking some notes. Thus the absence of an appellant at the time judgment is delivered does not constitute a violation of his

constitutional right or render the judgment null and void ab initio. See Nwosu v. Board of Customs and excise (1988) 12 S.C. (Pt. II) 77, (1988) 5 NWLR (Pt. 93) 225 at 228. (p. 1407 D)

B Claim by plaintiff - That he was appointed chief

5. Like the learned Judge, I expected the appellant to call any of the kingmakers who appointed him as the traditional ruler. Unfortunately, he gave evidence for himself and did not call any witness to substantiate or authenticate his evidence of appointment. I am seriously tempted to invoke the provision of Section 149(d) of the Evidence Act against the appellant. See generally Okechukwu and Sons v. Ndah. (1967) NMLR 368.

D It is the duty of the plaintiff to prove his case and not the duty of the defendant to disprove the plaintiff's case. That is the essence of Section 137 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. Where a plaintiff fails to prove his case, it will be dismissed.

E Learned counsel for the appellant submitted that the relief the appellant sought from the High Court was for a declaration that the purported appointment of the 1st defendant who is now the 1st respondent was null and void and consequently asked for an order of perpetual injunction. Yes, I agree with learned counsel, but the question is whether F the appellant proved his case? I think not. He did not prove that the 1st respondent was not properly appointed as the Elegbe of Egbe. (p. 1409 E)

G Allegation that exhibit is contrary to Chiefs law

6. Counsel also submitted that Exhibit D4, the letter of appointment of 1st respondent by the Military Administrator of Kogi State is contrary to Section 3(1) of Chiefs appointment and Deposition etc., Law, No. 7 of H 1992. Learned counsel did not give the benefit to the court to know why the exhibit is contrary to the 1992 Law. In the circumstance, this court cannot make any further progress on the issue in favour of the appellant.

And what is more, Prince Ijaodola, counsel for the appellant was

also counsel for the plaintiff at the High Court. He did not object to the admissibility of Exhibit D4. Although the exhibit could still be expunged at the appellate court, if it is clearly inadmissible in law, counsel has not made such a case.

The learned trial Judge said at page 148 of the record on Exhibit D4:

“There is nothing to show that the above letter is Ultra Vires the powers of the State Administrator and in the absence of any evidence to the contrary this court is bound to give it the weight it deserves.”

I have no reason to reject the above conclusion of the learned trial Judge, a conclusion which is borne out from the contents of Exhibit, D4 vis-a-vis the enabling law.

I see in this case concurrent findings of the two lower courts. I do not see my way clear in disturbing the concurrent findings because they are not perverse. (p. 1410 B)

REPRESENTATION

PRINCE J.O. IJAODOLA, FOR THE APPELLANT.

CHIEF OLATUNJI AROSANYIN, (WITH HIM, A.G. JOSEPH) FOR THE 1ST RESPONDENT.

CASES REFERRED TO

Attorney-General of Imo State v. Attorney-General of Rivers State (1983) 8 S.C 10

Chief Igwe v. Chief Kalu (1993), 24 NSCC (Pt. 1) 393

National Bank of Nigeria Ltd. v. Guthrine (Nig) Ltd. (1993) 24 NSCC (Pt. 1) 401

Nwosu v. Board of Customs and excise (1988) 12 S.C. (Pt. II) 77, (1988) 5 NWLR (Pt. 93) 225 at 228

Okechukwu and sons v. Ndah. (1967) NMLR 368

Balogun v. Labiran (1968) 3 NWLR (Pt. 80) 66; Adegoke v. Adibi (1992) H 6 NWLR (Pt.242) 410

Asariyu v. State (1987) 4 NWLR (Pt.67) 709

Ajao v. Alao (1986) 5 NWLR (Pt. 45) 802

Kimdey v. Military Governor, Gongola State (1988) 2 NWLR (Pt. 77) 445

Dibiamaka v. Osakwe (1989) 3 NWLR (Pt. 107) 101

B STATUTES & RULES REFERRED TO

Supreme Court Rules O. 7 r. 7(2) & (3)

Court Appeal Act No.43 of 1976, ss. 9, 10, 11

Constitution of Nigeria 1979 ss. 226, 258 (2) Proviso

Evidence Act ss.149 (d), 137

C Chiefs Law of Kogi State No.7 of 1992, ss. 3(1), 4(2)

LEAD JUDGMENT BY TOBI JSC

D This is yet another chieftaincy dispute. It is between the appellant on the one hand, and the respondents on the other. This appeal is between the appellant and the 1st respondent. It would appear that the 2nd and 3rd respondents are nominal parties.

E The appellant as plaintiff filed an action in the High Court of Kogi State, holden at Egbe asking for declarative and injunctive reliefs. He asked for a declaration that the purported appointment and or approval of the appointment of the 1st defendant as the Elegbe of Egbe by the 2nd and 3rd defendants is null and void and of no effect whatsoever. He also asked **F** for a perpetual injunction prohibiting the 1st defendant from acting as or parading himself as the Elegbe of Egbe and the 2nd and 3rd defendants treating the 1st defendant as the Elegbe of Egbe and or paying him the prerequisites of the said office.

G The appellant gave evidence at the trial. He did not call any witness. The respondents called six witnesses. At the end of the trial, the learned trial Judge, Medupin, J., gave judgment to the respondents. He said at page 152 of the Record:

H *“The claim of the plaintiff against the defendants both jointly and severally for the declaration that the purported appointment or approval of the 1st defendant as the Elegbe of Egbe as being void must in the opinion of this court fail. This court therefore holds that the 1st defendant was the person legally appointed as the Elegbe of Egbe in accor-*

dance with the tradition and custom of Egbe. Also this court is satisfied that the appointment of the 1st defendant before now as the then Baala of Egbe was with effect from 1st January, 1992.”

His appeal to the Court of Appeal failed. He has come to this court. Briefs were filed and duly exchanged. The appellant formulated three B issues for determination:

“i. Whether or not the Court of Appeal was properly constituted (Ground 8, the Additional Ground of Appeal)

ii. Whether or not it was proper of the Court of Appeal not to give C notice of hearing of the judgment to the appellant when she adjourned judgment sine die at the time of hearing the appeal on 26/1/99 as shown by last 2 lines of page 235 of the record (Ground 1) and

iii. Whether the Court of Appeal properly considered the appeal D before her or not (Grounds 2, 3, 4, 5, 6 and 7 of the appeal at pages 254-257 of the record)”

The 1st respondent also formulated three issues for determination:

“1. Whether the Court of Appeal can deliver her judgment at the E date fixed when the appellant and his counsel were not in court, but the respondents and their counsel were in court on the Notice served on them by the registrar of the Court of Appeal (Ground 1).

2. Whether the Court of Appeal adjudicated on the appellant’s F appeal without properly understanding the appellant’s case (Grounds 2, 3, 4, 6 and 7).

3. Whether the justices of the Court of Appeal can legally deliver G their judgment on 30/3/99 when only 2 of the justices were in attendance (Add. Ground).”

Respondents also raised preliminary objection in the brief.

Learned counsel for the appellant, Prince J.O. Ijaodola submitted on Issue No. 1 that the decision of the Court of Appeal by two justices who sat on 23rd March, 1999 or 30th March, 1999 was void because the court was not properly Constituted. He contended that Section 9 of the H Court of Appeal Act, No. 3 of 1976 and Section 226 of the 1979 Constitution were violated, as both require three justices of the court to determine an appeal. He argued that the case is distinguishable from the deci-

sions of Attorney-General of Imo State v. Attorney-General of Rivers State (1983) 8 S.C 10; Chief Igwe v. Chief Kalu (1993), 24 NSCC (Pt. 1) 393; National Bank of Nigeria Ltd. v. Guthrine (Nig) Ltd. (1993) 24 NSCC (Pt. 1) 401 and Okino v. Obanebira SC. 258/1993, (unreported) delivered B on 3/12/99. Counsel urged the court to answer the issue in the negative.

On Issue No. 2, learned counsel cited Nwosu v. Board of Customs and Excise (1988) 12 S.C. (Pt.II) 77; (1988) 12 SCNJ (Pt. II) 313 and conceded that although absence of an appellant at the time of delivery of a judgment does not invalidate a judgment, the position of the law C is subject to non-occasioning of substantial miscarriage of justice. While further conceding that there was no miscarriage of justice in this case since the affected appellant was able to file his appeal within time, he urged the court to go out of its normal course and give the cautionary D note, even though obiter dictum in the interest of justice such obiter dictum, learned counsel reasoned, will enjoy highest respect in all our courts, and that will avoid any abuse.

Taking Issue No. 3, learned counsel submitted that the Court of E Appeal erred in affirming the perverse decision of the High Court. To learned counsel, there is no way in which one may choose to look at the decision of the High Court as it is perverse in the extreme. He submitted that Exhibit D4, the letter of appointment from the Military Administrator F to the 1st respondent, is contrary to Section 3(1) of Chiefs (Appointment and Deposition, etc.) Law No. 7 of 1992, of Kogi State. The appointment of the 1st respondent was null and void, counsel contended. He urged the court to answer Issue No. 3 in the negative and allow the appeal.

Learned counsel for the 1st respondent, Chief Olatunji Arosanyin, G in his preliminary objection, submitted that the record of proceedings of the Court of Appeal failed to comply with Order 7 rule 8(2) and (3) of the Supreme court rules as it does not contain who were the parties present in court on the date of delivery of judgment and indicate or include the H evidence of hearing notice for the judgment of the Court of Appeal which was sent to the parties or the mode of communication to the parties.

It was also the submission of learned counsel in his preliminary objection that the appellant purportedly filed additional grounds of appeal

without waiting to have the motion dated 5th June, 2000, seeking to file the said additional grounds of appeal, heard and granted. He also contended that the appellant unilaterally and without an order of this court formulated issues from the alleged additional grounds and argued same in his brief dated 5th June, 2000. B

Citing Owena Bank (Nig) Plc. V. Nigerian Stock exchange Limited (1997) 7 SCNJ 160 at 163, learned counsel argued that where leave of court is required before a step is taken by any party, such leave must be sought and obtained before the step is taken. He urged the court to resolve the preliminary objection in favour of the respondents and strike out the offending additional grounds of appeal and discountenance submissions advanced by counsel in the appellant's brief of argument. C

Counsel, however, took the merits of the appeal in the alternative. He submitted on Issue No. 1 that the Court of Appeal can legally and validly deliver its judgment on the date fixed even if none of the parties and their counsel are in court on the date fixed for the judgment. Counsel pointed out that the case was not adjourned sine die, as alleged by the appellant, but rather the judgment of the case was reserved on a date to be announced and when the date for the judgment was given, notice of such date was given to the parties. The 1st respondent's counsel received his notice of the date of judgment and was present in the court when the judgment was delivered, learned counsel maintained. D E

Counsel submitted that the absence of an appellant at the time of delivery of a judgment does not invalidate the judgment. Citing Nwosu v. Board of Customs and Excise (1988) 5 NWLR (Pt.93) 225 at 228, counsel submitted that the absence of the appellant at the time judgment of Court of Appeal was delivered on 30th March, 1999 did not occasion any miscarriage of justice since the judgment was brought to the notice of the appellant and he was able to file his appeal within time. Counsel urged the court to resolve the issue in favour of the respondents and uphold the decision of the Court of Appeal. F G H

Learned counsel submitted on Issue No. 2 that the Court of Appeal properly understood the appellant's case before the trial court and examined the case as presented to that court. The appellant who was the

plaintiff at the trial court did not ask in his pleadings for a declaration that he was appointed as the Oba/Elegbe of Egbe, counsel contended.

Referring to paragraphs 1, 2 and 4 of the Statement of Claim and paragraphs 2 and 7 of the reply to the Statement of Defence, learned counsel submitted that the Statement of Claim supersedes the endorsement on the Writ of Summons. He referred to the evidence of the appellant on pages 28 – 33 of the record and the judgment of the learned trial Judge on pages 134 and 135 thereof. He also referred to the judgment of the court of Appeal on page 244 of the record.

Taking the evidence of D.W. 4, learned counsel submitted that the evidence given under cross-examination was in furtherance of his evidence in-chief that Anike ruling House in response to a request by Oba Olokundu for their nomination of a Baale, met and nominated 1st defendant for the position. To learned counsel, for the appellant quoted D.W. 4 out of context. He submitted that the Court of Appeal examined thoroughly the evidence proffered before the trial court, the exhibits tendered by the parties and the findings and judgment of the trial court before dismissing the appeal of the appellant.

On the issue of proof by the appellant, learned counsel submitted that it is the duty of the plaintiff/appellant to prove his claim or reliefs with credible evidence adduced by him and his witnesses and with documentary evidence, if any. He cited Kodilinye v. Odu (1935) 2 WACA 336 at 337; Mogaji v. Odofin (1978) 4 S.C. 91 at 93 and Adesanya v. Otuelo (1993) 1 NWLR (Pt.270) 442. He submitted that the cases of Chief Buraimah v. Chief Eso (1990) 1 SCNJ 1 and Amuda v. Adelodun (1997) 5 SCNJ 266 cited by counsel for the appellant are distinguishable. He distinguished the cases at pages 16 and 17 of his brief.

Learned counsel submitted that counsel for the appellant misunderstood the Chiefs (Appointment and Deposition) Law No. 7 of 1992. He examined some provisions of the law and submitted that the 1st respondent was properly nominated under the law and the subsequent approval as the Elegbe of Egbe is valid. He cited Adefulu v. Oyesile (1989) 12 S.C. 43; (1989) 5 NWLR (Pt. 122) 377 at 382.

On Issue No. 3, learned counsel submitted that the judgment of

Court of Appeal was not void simply because only two justices of the court who heard the appeal were present to deliver the judgment. As the appeal was heard by three justices, the procedure adopted by the court in delivering the judgment on 30th March, 1999 was proper as the court was properly constituted at the time the judgment was delivered. He cited Section 9 of the Court of Appeal Act, 1976, Section 258(2) of the Constitution of the Federal Republic of Nigeria 1979, and the following cases: Alhaji Ishola v. Societe General Bank (Nig) Limited (1997) 2 SCNJ 1 at 25, Globe Fishing Industries Ltd. v. Coker (1990) 7 NWLR (Pt. 162) 265 and Registered Trustee of Apostolic Church v. Olowoleni (1990) 6 NWLR (Pt. 158) without the page number. He urged the court to dismiss the appeal.

Learned counsel for the appellant in his Reply Brief on the constitution of the court, relied on Section 226 of the Constitution of the Federal Republic of Nigeria, 1979 and submitted that the constitutional provision was violated in the circumstances. He submitted further that the proviso to Section 258(2) of the Constitution was not applicable. Counsel pointed out that the opinion of Bulkachuwa, JCA., is unknown and not in writing as she did not take part in determining the appeal. He also cited Sections 9, 10 and 11 of the Court of Appeal Act, No. 43 of 1976.

Learned counsel also raised preliminary objection to the effect that the 1st respondent's brief was filed out of time. He claimed that although the appellant's brief was served on the 1st respondent on 10th July, 2000, the 1st respondent filed his brief on 28th August, 2000 and served on the appellant on 13th October, 2000. He cited order 6 rule 5(2) of the Rules of the Supreme Court.

Let me first take the preliminary objection of the 1st respondent. It is in two parts. I should take them in turn. The first one is that the Record of proceedings was not properly arranged and that it did not contain some relevant information. Counsel cited Order 7 rule 8(2) and (3) of the Supreme Court rules. I do not think he got the appropriate rule. It is not rule 8(2) and (3) but rule 7(2)(3).

An index is an alphabetical list at the back of a book, of names, subjects, etc. mentioned in it and the pages where they can be found.

In the context of Order 7 rule 7, an index is simply the table of contents of the record of proceedings. A record of proceedings cannot be declared a nullity merely because it does not provide for the expression, “index”, if for all intents and purposes, the record contains the table of contents. If the parties and the court are not mistaken as to where to locate a particular process through the pages in the record, a party cannot complain because there is no miscarriage of justice. I have seen the “*contents*”. I have also seen “*file index*”.

While the table of contents contains the processes of the High Court, the “*file index*” contains the processes of the Court of Appeal. Although the arrangement is not very elegant, the contents therein (and this includes the “*file index*” whatever that means), will not mislead either the parties or the court in the location of any process in the record. For example, the first court process in the “*contents*” is indicated to be on page 1 and this is clearly shown on that page. So too, the judgment of the learned trial Judge on pages 85 to 153. Similarly the appellant’s brief filed on 17/3/97 is indicated on what is called “*File Index*” on pages 154 to 165 and it is shown on those pages. So too, judgment of the Court of Appeal on pages 236 to 253. I think I can stop here with the examples, hoping that I have made the point.

The second part of the objection is in respect of additional grounds. The record I have, ends at page 257 with the Notice of Appeal in which the appellant filed seven grounds of appeal. These are clearly original grounds and not additional grounds. Although the brief of the appellant purports to deal with a Ground 8 under Issue No. 1, I cannot place my hands on that additional ground in the record of proceedings. And what is more, counsel for the appellant did not, in his Reply Brief, deal with the objection of the 1st respondent. In the circumstance, I shall confine myself to the Brief of the appellant as it relates to the Notice of Appeal at pages 254 to 257 of the record.

That takes me to the Preliminary objection of the appellant. The appellant is correct in saying that the respondent filed his brief on

28th August, 2000, because I see that date on the brief. But counsel for the appellant did not show from the record when the appellant's brief was served on the respondent. He merely claimed that to be on 10th July, 2000. It is incumbent on a party who raises preliminary objection based on filing of court process out of time to call the attention of the court to the record showing specific date or dates. A mere ipse dixit of the objector will not be sufficient or enough. In the absence of showing when the appellant's brief was served on the 1st respondent, I am not in a position to determine the objection of the appellant. It therefore fails.

That clears the coast for the merits of the appeal. I will not take Issue No. 1 of the appellant as it is based on the so-called additional ground 8 which I cannot see in the record. And I am bound by the record.

I go to the second issue. It is in respect of the date of judgment and notice to the parties. The record shows at page 235, per Musdapher, JCA., (as he then was) as follows:

"Judgment in the matter is reserved on a date to be announced."

It is the contention of learned counsel for the appellant that the appellant was not served the date for the delivery of the judgment. It is the contention of the 1st respondent that both parties were served. Assuming that the appellant is correct, what is the legal position of the absence of a party on the day judgment is delivered?

It does not appear to me that the absence of a party on the day judgment is delivered can vitiate, nullify or invalidate the decision. This is because parties who are present on the day judgment is delivered do not really play any role rather than hearing the judgment delivered by the Judge and possibly taking some notes. Thus the absence of an appellant at the time judgment is delivered does not constitute a violation of his constitutional right or render the judgment null and void ab initio. See Nwosu v. Board of Customs and excise (1988) 12 S.C. (Pt. II) 77, (1988) 5 NWLR (Pt. 93) 225 at 228.

Learned counsel for the appellant conceded to the above authority

and agreed that since the appellant was able to appeal against the judgment, there was no miscarriage of justice. He however submitted as follows:

B *“I therefore call on my noble Lords to go out of their course and give the cautionary note, even though obiter dictum in the interest of justice. Such obiter will enjoy highest respect in all courts. That will avoid any abuse.”*

C I do not think I will accept the above invitation of learned counsel because it will serve no useful purpose. The law is elementary that courts of law do not act in vain but for a purpose, and the purpose must be definite. A cautionary note, whatever that means, will not serve any purpose at all, because a party is free not to attend court on the day of judgment or on any day at all in civil matters.

D It is the contention of counsel for the appellant that the Court of Appeal did not properly understand the appellant’s case before the trial court. The case of the appellant is that he, from the Onimosi ruling House of Egbe, was duly appointed by the Egbe Traditional Appointors awaiting E the approval of the Military Administrator of Kogi state, when the 1st respondent was announced as Elegbe of Egbe by the 2nd and 3rd respondents. The learned trial Judge disbelieved the evidence of the appellant. He said at pages 134 and 135 of the record:

F *“Sad enough the plaintiff who had hinged his claim on his appointment by the said Egbe traditional Kingmakers failed to tell the court the composition of this body, the name of the members, their title, when they met to take the popular decision through which he was appointed to stand in place of the deceased. Where was their meeting held and on G which day. Throughout his evidence the plaintiff did not show the court that such a body had always existed with regard to previous appointments of Baales. One would have expected the plaintiff to arm himself with the relevant minutes of the meeting of the said kingmakers at which he was H appointed as a Baale. More still he would have called one or two of their members to add credence to his claim which the defendants denied.”*

The Court of Appeal said at pages 243 and 246 of the record:

“The Learned trial Judge also found that the plaintiff failed to

show who the Egbe traditional appointors or kingmakers who have claimed to have nominated him as Baale or Elegbe were, their composition or record of the proceedings whereby they nominated or appointed him, neither did plaintiff call any of them to testify on their behalf. He also held that plaintiff did not produce evidence of the custom whereby the traditional appointors of Egbe kingmakers made him either Baale or Elegbe of Egbe. He also found that it would not appear that the purported appointment had the blessing of the late Oba Olokundun because the Secretary to the Council of Elders of the Oba denied knowledge of plaintiff's appointment.... I therefore find nothing which learned counsel for plaintiff can hang on to in the evidence as being in favour of plaintiff. In the circumstances, my answer in respect of the second issue is that the totality of the evidence in this case is in support of the contention of 1st defendant that he was the one validly appointed first, the Baale of Egbe and subsequently, the Elegbe of Egbe in succession to Oba Olokundun."

With the greatest respect to counsel for the appellant, I do not see any perversity in the findings of the court of Appeal. In my humble view, the findings are clearly borne out from the evidence of the court and the decision of the learned trial Judge.

Like the learned Judge, I expected the appellant to call any of the kingmakers who appointed him as the traditional ruler. Unfortunately, he gave evidence for himself and did not call any witness to substantiate or authenticate his evidence of appointment. I am seriously tempted to invoke the provision of Section 149(d) of the Evidence Act against the appellant. See generally Okechukwu and sons v. Ndah. (1967) NMLR 368; Balogun v. Labiran (1968) 3 NWLR (Pt. 80) 66; Adegoke v. Adibi (1992) 6 NWLR (Pt.242) 410.

It is the duty of the plaintiff to prove his case and not the duty of the defendant to disprove the plaintiff's case. That is the essence of Section 137 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. Where a plaintiff fails to prove his case, it will be dismissed.

Learned counsel for the appellant submitted that the relief the appellant sought from the High Court was for a declaration

that the purported appointment of the 1st defendant who is now the 1st respondent was null and void and consequently asked for an order of perpetual injunction. Yes, I agree with learned counsel, but the question is whether the appellant proved his case? I think not. He did not prove that the 1st respondent was not properly appointed as the Elegbe of Egbe. Counsel also submitted that Exhibit D4, the letter of appointment of 1st respondent by the Military Administrator of Kogi State is contrary to Section 3(1) of Chiefs appointment and Deposition etc., Law, No. 7 of 1992. Learned counsel did not give the benefit to the court to know why the exhibit is contrary to the 1992 Law. In the circumstance, this court cannot make any further progress on the issue in favour of the appellant.

And what is more, Prince Ijaodola, counsel for the appellant was also counsel for the plaintiff at the High Court. He did not object to the admissibility of Exhibit D4. Although the exhibit could still be expunged at the appellate court, if it is clearly inadmissible in law, counsel has not made such a case. It should be mentioned for whatever it is worth that Prince Ijaodola objected to the question which immediately followed the reading of Exhibit D4 by the witness.

Let me pause here to read Exhibit D4.

“Dear Chief Stanley Kayode Owa,

APPOINTMENT OF STANLEY KAYODE AS ELEGBE OF EGBE.

In exercise of the powers conferred on me as the Military Administrator of Kogi State by Sections 3(1) and 4(2) of the Chiefs (Appointment and Deposition) Law No. 7 of 1992, and the advice of the State Council of Chiefs, I have the pleasure to inform you of your appointment as the Elegbe of Egbe with effect from 25th January, 1996.

2. *The appointment is of Second Class Status and is based on my conviction that you possess the requisite quality of tact, integrity, objectivity, industry and patriotism to shoulder the enormous responsibilities of the exalted office. You are therefore enjoined to use your new office to contribute meaningfully to the socio-economic development of your domain in particular and the state in general.*

3. *The salary and fringe benefits attached to your office will be*

communicated to you by the Department of Local Government and Chieftaincy Affairs of the Military Administrator's office in due course."

The learned trial Judge said at page 148 of the record on Exhibit D4:

"There is nothing to show that the above letter is Ultra Vires the powers of the State Administrator and in the absence of any evidence to the contrary this court is bound to give it the weight it deserves."

I have no reason to reject the above conclusion of the learned trial Judge, a conclusion which is borne out from the contents of Exhibit, D4 vis-à-vis the enabling law.

I see in this case concurrent findings of the two lower courts. I do not see my way clear in disturbing the concurrent findings because they are not perverse. See generally Asariyu v. State (1987) 4 NWLR (Pt.67) 709; Ajao v. Alao (1986) 5 NWLR (Pt. 45) 802; Kimdey v. Military Governor, Gongola State (1988) 2 NWLR (Pt. 77) 445; Dibiamaka v. Osakwe (1989) 3 NWLR (Pt. 107) 101.

In sum, this appeal fails and it is dismissed. I award N10,000.00 costs, in favour of the respondents against the appellant.

BELGORE JSC

The two courts below made clear findings of fact on evidence adduced at the trial High Court. The Court of Appeal not disturbing the findings of trial court is far from being perverse. This appeal is no more than inviting this court to set aside the concurrent findings of fact by the two courts below. There is no cogent reason for this appeal and I dismiss it in associating with the judgment of my learned brother. Tobi, JSC. I made the same order as to costs.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Niki Tobi, JSC., and I agree with him that the appeal is without merit. It is for those reasons advanced in the lead judgment that I dismiss the appeal. I

too award N10,000.00 costs to the respondents.

ONU JSC

B Having had the opportunity of a preview of the judgment of my learned brother. Tobi, JSC., just delivered, I agree with him that the appeal must perforce fail. Accordingly, I too dismiss the appeal and make similar consequential orders inclusive of the costs as assessed.

C _____

EDOZIE JSC

I had a preview of the leading judgment of my learned brother, Niki tobi, JSC and I endorse the views expressed therein and also dismiss
D the appeal with costs as awarded in the said judgment.

E

F

G

H