

SUPREME COURT OF NIGERIA
24TH JANUARY, 2005. SC.254/2000
CORAM:- S. U. ONU, A. O. EJIWUNMI, N. TOBI, D.
MUSDAPHER, D. O. EDOZIE, JJSC.

1. ALFRED USIOBAIFO

2. MR. EDOBOR APPELLANTS
AND

1. CHRISTOPHER USIOBAIFO

2. SUNDAY IGBINIGIE USIOBAIFO RESPONDENTS

CUSTOMARY LAW - Proof of a custom - Where not judicially noticed -
Party asserting must prove the custom (H1)

CUSTOMARY LAW - Proof of a custom - By evidence under s. 14(1)
EA - Can be by a single or more witnesses - Provided the evidence is
qualitative (H2)

COURTS - Issues - Perverse findings - Trial court did not introduce
extraneous issues - As to make its findings perverse (H3)

EVIDENCE - Contradictions - Can only avail the opposite party - Where
they are material - But there is no contradiction in the respondents' evi-
dence (H4)

CUSTOMARY LAW - Native law and custom - In determining issues of
custom - Books recognized by the natives - Are relevant (H5)

COURTS - Judgments - Book cited by counsel - Trial court is free - To
make use of pages not cited - In coming to a proper decision (H6)

LAND LAW - Family land - Sale - Where one sells family land - As his
own property - The purported sale is void (H7)

APPEALS - Issues - Allegation that Court of Appeal - Failed to consider various issues argued before it - Is not correct (H8)

COURTS - Orders - Consequential orders - Can be made as in this case (H9)

JUDGMENTS - Format of - There is no prescribed statutory format - Things a judgment should state - Include reliefs claimed and reactions of the judge (H10)

APPEALS - Judgment - Of trial court - Cannot be set aside - For not beginning - With an introduction of the parties (H11)

FACTS

Late Chief Usiobaifo Ekpuda an Ishan, was the father of the parties bearing his name. He died intestate. The 1st defendant/appellant claimed to have performed the burial ceremony of their late father. That as a result he became the exclusive owner of their late father's property at No. 107 Forestry Road, Benin City. He secured a transfer of the land to him vide Exhibit CU2 upon an application to the Oba of Benin. 1st appellant then sold the land to the 2nd appellant. He did not secure the consent of the other members of the family in alienating the said land. The respondents then filed this action against the appellants. They sought a declaration that the 1st appellant has no right to sell the family land without the approval of other principal members of the family and that the purported sale to the 2nd appellant is null and void.

After taking evidence and address of counsel, the trial court gave judgment against the appellants, and declared the sale of the property void. Appellants appeal to the Court of Appeal was dismissed. Being aggrieved, they have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the plaintiffs (respondents) discharged the onus of proof required of them as claimants for a declaratory judgment granted to them by the court of first instance and confirmed by the Court of

Appeal?

(ii) Whether the learned Justices of the Court of Appeal were right in not considering the various issues raised and argued before them by the appellants and making pronouncements on them?

(iii) Whether the learned Justices of the Court of Appeal were right in holding that there were no contradictions in the evidence of the plaintiffs' witnesses and at the same time providing an explanation for the contradictions?

(iv) Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge raising of 10 issues suo motu without calling on the parties to address him on the issues so raised did not amount to denial of the appellants' right to fair hearing?

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

Proof of a custom - Where not judicially noticed

1. By Section 14 of the Evidence Act, customary law is a fact that must be proved, unless judicial notice is taken of its existence. And the burden of proof is on the party asserting its existence, who in this case, are the plaintiffs/respondents. (p. 203 H)

Proof of a custom - By evidence under s. 14(1) EA

2. It is the argument of the appellants that a person other than the party asserting the custom should testify in proof or in support thereof. Although learned counsel cited *Ozolua II v. Ekpenga* (supra) and *Oyediran v. Alebiosu* (supra), it is my humble view that proof of customary law is not one of the areas in our adjectival law that needs corroboration. While it could be desirable that a person other than the person asserting the customary law should testify in support of the customary law, it is not a desideratum. This is because the Evidence Act does not so provide. And here, Section 14(1) provides the anchor. The subsection merely provides that a custom "*can be proved to exist by evidence*". And evidence can be led on the existence of the custom by a single witness or more witnesses. It is not my understanding of the law that a village or community of witnesses must be called to satisfy the provision of Section 14(1). In the

evidential scene in the context of probative value, it is not the number of witnesses that matter but the quality of the evidence given. And so, a situation may arise where a single witness gives credible evidence while a number of witnesses may not because they are a bundle of contradictions. Therefore, emphasis should be on the quality of evidence given rather than the quantity. (p. 204 B)

COURTS - Issues - Perverse findings

C 3. *Evidence also abounds that the property in point became inalienable after the 1st appellant had performed the funeral ceremonies for his late father. In view of the foregoing, I failed to see where the learned trial Judge introduced issues extraneous to the evidence before him as to amount to perverse findings. In sum, I agree with the learned trial Judge that*
D *there was preponderant evidence upon which the respondents discharged the onus to accord them the declaratory reliefs sought. The learned trial Judge did not arrive at any findings which are perverse and liable to cause miscarriage of justice. I accordingly resolve Issues Nos. 1 and 2 in*
E *the affirmative.”* It is difficult to fault the above conclusion by the Court of Appeal. (p. 207 D)

Contradictions - Can only avail the opposite party

F 4. I have carefully examined the submissions of learned counsel on the so-called contradictions and, like my learned brother, Ibiyeye, JCA., I do not find any. It is the law that contradictions in evidence of witnesses can only avail the opposite party where they are material, substantial and affect the live issues in the matter, to the extent that they affect the fortunes of the appeal in favour of the party raising the Issue.
G

I see in the evidence of the witnesses of the respondents a consistent pattern of a flowing story of truth how the 1st appellant bastardized the Igiogbe of his late father, thus trying to ruin or destroy Ishan customary law. I therefore do not agree with the submission of learned counsel for the appellants that there were material contradictions in the evidence of the respondents. (p. 208 C)
H

In determining issues of custom - Books are relevant

5. Section 59 of the Evidence Act provides that in deciding question of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any books or manuscripts recognized by natives as legal authority are relevant See *Orugbo v. Una* (2002) 9-10 S.C 61; (2002) 16 NWLR (Pt. 792) 175. (p. 209 C)

Judgments - Book cited by counsel

6. A trial Judge is free to use any book cited by a party or suo motu make reference to any book which is relevant to the issue or issues before him. A party cannot gag a Judge in the way learned counsel is contending in his brief. It is generally the practice for counsel to cite authorities favourable to his client's case and it is the duty of the Judge, as the independent umpire, so to say, to look at all available authorities on the issue to arrive at a just and proper decision. In this case, counsel for the defendants cited pages 69, 119 and 120 which strengthen the case of his clients and did not understandably call the court's attention to page 133. I think the judge was industrious to examine page 133 and come to the conclusion in respect of the inalienability of the Igiogbe. I cannot fault the learned trial Judge, rather I commend his industry. (p. 209 H)

Sale of family land as one's own property

7. As it is, this court developed the law further in (4) above, that is, the sale of family land by the head of the family as his own land is void. *Ekipendu v. Erika* (Supra) did not get to that stage or that far. It is this principle that is applicable in this case because the 1st appellant sold the family property (the Igiogbe) as his own exclusive property. In the light of the authorities, I have no difficulty to declare the purported sale void. (p. 211 A)

APPEALS - Issues

8. The appellants expected too much from the Court of Appeal in respect of Issue No. 3. The court tenaciously followed the issue when it said

inter-alia at page 137 of the Record:

“I have considered the seemingly ten vexed issues formulated by the learned trial Judge and I found that the basic issue raised in each of them relates to family land. I am of the strong view that the learned counsel for the appellants cannot be heard to say at this stage that the appellants were denied fair hearing..... The ten issues are in my opinion rooted in the issues distilled by the respondents and were therefore not raised suo motu at the judgment stage by the learned trial Judge. Issue No. 3 is accordingly resolved in the affirmative.” (p. 211 H)

COURTS - Consequential orders

9. Learned counsel for the respondents submitted that the order made by the learned trial Judge was consequential. I entirely agree with him considering the reliefs sought by the plaintiffs/respondents. If the trial Judge held that the sale of the property at No. 107 Forestry Road, Benin City, was null and void, then it follows that the purported title to the 1st appellant which gave rise to the sale, is equally null and void. Courts of law have the jurisdiction to give consequential orders where necessary. See *Akinbobola v. Plisson Fisko (Nig.) Ltd.* (1991) 1 NWLR (Pt. 167) 270. (p. 212 H)

JUDGMENTS - Format of

10. There is no constitutional requirement as to a particular format in the writing of a judgment. There is no statutory format either. Judgment writing being an art, needs the peculiar and personal dexterity of the judge who is the “artist”. No two artists convey exactly the same painting from an assigned object. So too, no two judges write judgment using exactly the same house style and the same coloration, and all that. Each judge has his own peculiar style and once the judgment contains the major attributes of a good judgment an appellate court will not interfere. Judgment writing is not an arithmetical or geometrical exercise which must answer exactly to laid down rules in the field of mathematics. A judge is not bound to follow the method or methodology stated by counsel in the brief. Once a judgment of a trial Judge states the claim or relief

of the plaintiff, the relevant facts and counter facts leading to the claim or relief, arguments of counsel, if counsel are in the matter, reactions of the judge to the arguments and the final order, an appellate court cannot hold that the judgment is not properly written. (p. 213 D)

B

When Judgment of trial court cannot be set aside

11. An appellate court cannot set aside a judgment of a trial Judge merely because it does not begin with an introduction of the parties, as contended by counsel for the appellants. A plaintiff in a case remains a plaintiff and needs no introduction. So too a defendant. As a matter of style, a trial court need not repeat in an introduction, in the context of this case, that Mr. Christopher Usiobaifo is the 1st plaintiff. An appellate court may do so in relation to the appellate status of the parties vis-a-vis their original status as trial parties. This is not even compulsory, it is a matter of style. Failure on the part of an appellate court to introduce parties is not condemnable. As a matter of practice, most appellate judgments do not start with introduction of parties. (p. 214 A)

D

E

NOTABLE POINT OF INTEREST

TOBIJSC

1. Sua motu issues - What courts cannot do

The case law is divided as to whether this court or the Court of Appeal can suo motu raise issues for determination of an appeal. I do not intend to go to the differences in the case law because it is not necessary here. But one aspect is necessary and I should touch it. A court of law has no jurisdiction to expand an issue formulated by a party to suit the yearnings of the case he makes out. That will be clashing with the court's unbiased position in the judicial process. (p. 211 G)

G

REPRESENTATION

Chief H. O. Ogbodu, (with him, S. A. Akhabeme), for the Appellants. H
R. E. Esekhaigbe, for the Respondents.

CASES REFERRED TO

- Orugbo v. Una (2002) 9-10 S.C 61; (2002) 16 NWLR (Pt. 792) 175
Akinbobola v. Plisson Fisko (Nig.) Ltd. (1991) 1 NWLR (Pt. 167) 270
Ademola v. Sodipo (1989) 5 NWLR (Pt. 121) 329
B Giwa v. Erinmilokun (1961) 1 All NLR 294
Ekpan v. Uyo (1986) 3 NWLR (Pt. 26) 63
Ifeajuna v. Ifeajuna (1997) 7 NWLR (Pt. 513) 405
Muojekwu v. Ejikeme (2000) 5 NWLR (Pt. 657) 402
Arehia v. The State (1982) 4 S.C. 78; (1982) 4 S.C (Reprint) 47
C Muka v. The State (1976) 9-10 S.C 305 (1976) 9-10 S.C. (Reprint) 193
Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393

LEAD JUDGMENT BY TOBI JSC

- D Chief Usiobaifo Ekpuda, an Ishan, was the father of the 1st and 2nd plaintiffs/respondents. He was also the father of the 1st defendant/appellant. He died in the year 1954. His eldest son, Oboite Usiobaifo died in 1973. Chief Usiobaifo died intestate. He was owner of the property at
E No. 107 Forestry Road, Benin City. The 1st defendant/appellant, the son of Chief Usiobaifo Ekpuda, claimed to have performed the burial ceremony of the late father, as a result of which he became the exclusive owner of the property in accordance with Esan native law and custom.
F 1st defendant/appellant sold the property to the 2nd defendant/appellant in 1992.

The plaintiffs/respondents filed an action. They asked for two reliefs:

- G “(i) A declaration that the first defendant has no right to sell the family properties known and situate at No. 107 Forestry Road, Benin City, without the consent and approval of other principal members of the family.

- H (ii) A declaration that the purported sale of the properties known and situate at No. 107 Forestry Road, Benin City, on the 11th day of September, 1992 by the first defendant to the second defendant within the jurisdiction of this honourable court is illegal, null and void and of no effect whatsoever.”

After taking evidence and address of counsel, the learned trial Judge gave judgment against the defendants/appellants. The sale of the property was declared void. Omage, J., (as he then was), declared at page 70 of the record.

“I declare that the said sale is void and that the said property B remains the properties of Usiobaifo family because the 1st defendant has no power or authority to sell family property as his own property. The sale is declared null and void.”

Dissatisfied, the appellants appealed to the Court of Appeal, that court affirmed the decision of the learned trial Judge. The appeal was dismissed. C

Still dissatisfied, they have come to the Supreme Court. Briefs were filed and exchanged. The appellants formulated the following issues for determination: D

(i) Whether the plaintiffs (respondents) discharged the onus of proof required of them as claimants for a declaratory judgment granted to them by the court of first instance and confirmed by the Court of Appeal? E

(ii) Whether the learned Justices of the Court of Appeal were right in not considering the various issues raised and argued before them by the appellants and making pronouncements on them?

(iii) Whether the learned Justices of the Court of Appeal were right in holding that there were no contradictions in the evidence of the plaintiffs’ witnesses and at the same time providing an explanation for the contradictions? F

(iv) Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge raising of 10 issues suo motu without calling on the parties to address him on the issues so raised did not amount to denial of the appellants’ right to fair hearing? G

(v) Whether the learned Justices of the Court of Appeal were right in answering the question:- whether the learned trial Judge was right in giving to the plaintiffs (respondents) what they did not ask for in the affirmative? H

The single issue formulated by the respondents reads:

“Whether in the circumstance of this case, the Court of Appeal was right in affirming the decision/judgment of the learned trial Judge granting the declaratory reliefs sought by the plaintiffs/respondents.”

Learned counsel for the appellants, Chief H. O. Ogbodu, submitted on issue No. 1 that in an action for declaratory order, the burden is on the plaintiff to prove his case by relying on the strength of his case and not on the weakness of the defendant’s case. He cited Sections 135, 136 and 137 of the Evidence Act and the case of Eledu v. Ekwoaba (1995) 3 NWLR (Pt. 386) 704 at 745. As the respondents relied on the customary law of inheritance in Ishan land, the burden was on them to prove that customary law, counsel submitted. He called in aid Section 2 of the Evidence Act on the definition of ‘custom’, and made a distinction between general custom and local custom. He contended that the case involved local and particular custom of Ishan people of Edo State.

Relying on Section 14 of the Evidence Act and the cases of Giwa v. Erinmilokun (1961) All NLR 297; Ozolua v. Ekpenga (1962) SCNLR 423; Oyediran v. Alebiosu (1992) 6 NWLR (Pt. 249) 558 and Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745 at 772; learned counsel submitted that customary law being facts, must be proved and that it is unsafe to accept the testimony of the person asserting the existence of a particular custom as conclusive.

It was the submission of learned counsel that as the evidence of the respondents’ witnesses were at variance with their pleadings, the court ought to have disregarded same because parties are bound by their pleadings and where evidence is at variance with the pleadings such evidence must be disregarded by the court whether it was objected to or not. He cited Oloriegbe v. Omotosho (1993) 1 NWLR (Pt. 270) 386. Counsel also cited Kodilinye v. Odu (1935) 2 WACA 336 at 338 and Mogaji v. Cadbury (Nig.) Ltd. (1985) 7 S.C. at 156 on the issue of contradictory and competing evidence. He also examined the evidence of the witnesses of the respondents, particularly the evidence of P. W. 1 and P.W.2 at pages 11 and 12 of his brief.

On the findings of fact by the trial Judge, learned counsel submitted that as the findings are perverse, this court is entitled to interfere in

view of the fact that the trial Judge failed to make a proper use of the opportunity of seeing and hearing the witnesses at the trial. He cited Nwoke v. Okeke (1994) 5 NWLR (Pt. 343) 159; Akinloye v. Eyiola (1968) NMLR 92. Counsel mentioned what he regarded as perverse findings of the trial Judge at pages 12,13 and 18 of the brief.

Learned counsel submitted on Issue No. 2 that the Court of Appeal failed or refused to consider the entire three issues raised in the appeal before it by the appellants for resolution. He called the court's attention to Issue No. 3 covering grounds 5 and 6 of the Grounds of Appeal in the Court of Appeal at page 96, paragraph 3.29 and page 103, paragraph 3.57 of the Record. The Court of Appeal touched the aspect dealing with the raising of issues suo motu by the trial Judge, but failed to take all other issues or sub-issues raised, counsel claimed. To counsel, the court was bound to take all the issues joined by the parties. He cited D Ehimare v. Emhonyon (1985) 1 NWLR (Pt. 2) 177 at 183. He dealt with the issues at paragraphs 3.20 to 3.25. Counsel also cited Ugbodume v. Abiegbe (1991) 8 NWLR (Pt. 209) 261 at 274; Eimskip Ltd. v. Exquisite Ind. Ltd. (2003) 4 NWLR (Pt. 809) 88 at 121.

Dealing with Issue No. 3, learned counsel submitted that the Court of Appeal was wrong in holding that there were no contradictions in the evidence of the plaintiffs' witnesses and at the same time went ahead to providing an explanation for the contradictions. He relied on the evidence of P.W.I, P.W.2 and P.W.3 and submitted that there were material contradictions. Learned counsel contended that it is not the function of the Court of Appeal to offer explanation for the contradictions in the evidence of the plaintiff's witnesses, that function properly belongs to the parties in the court of first instance. He cited Williams v. The State (1975) 9- 11 S.C. 139 at 151.

On Issue No. 4, learned counsel submitted that the Court of Appeal was wrong in holding that the ten issues formulated by the trial Judge "*are rooted in the issues distilled by the respondents and were therefore not raised suo motu at the judgment stage by the learned trial Judge*". It is an elementary and fundamental principle of the determination of dispute between parties that courts of law must limit themselves to the

issues raised by the parties in the pleadings, as to act otherwise, might result in the denial to one or the other of the parties of his right to fair hearing, counsel argued. He cited *Allied Bank of Nigeria Limited v. Akubueze* (1997) 6 NWLR (Pt. 509) 374 at 395 and *Ajuwon v. Akanni* B (1993) 9 NWLR (Pt. 316) 183.

Taking Issue No. 5, learned counsel submitted that the Court of Appeal was wrong in holding that the learned trial Judge was right in giving to the plaintiffs what they did not ask for. He cited *Osula v. Osula* C (1993) 2 NWLR (Pt. 274) 158; *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566. He urged the court to allow the appeal.

Dealing with the single issue, learned counsel for the respondents, Mr. R. E. Esekhaigbe, submitted that where the trial court has satisfactorily performed its primary function of evaluating evidence and correctly D ascribing probative value as was done in this case, the appellate court will not interfere with the findings. He cited *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643; *Okolo v. UBN Ltd.* (1998) 2 NWLR (Pt. 539) 618; *UBN Ltd. v. Boroni Prono Co. Ltd.* (1998) 4 NWLR (Pt. 547) 640.

Learned counsel also submitted that this court cannot interfere or disturb any concurrent findings unless it is shown to be perverse. He cited *Adeyeti v. Atanda* (1995) 5 NWLR (Pt. 397) 512 at 539-540; *Are v. Ipaye* (1990) 3 NWLR (Pt. 132) 298 at 317; *Enang v. Adu* (1981) 11-12 F S.C. (Reprint) 17; (1981) 11-12 S.C. 25 at 41 and *Ibodo v. Enarofia* (1980) 5-7 S.C. (Reprint) 29; (1980) 5-7 S.C. 43 at 58. On evaluation of evidence, learned counsel cited *Dakur v. Dapal* (1998) 10 NWLR (Pt. 571) 578 and *Igago v. State* (1990) 10-12 S.C. 89, and submitted that the trial Judge properly exercised his discretion.

G It was the submission of counsel that where family land is sold by the head of the family without the consent of the principal members of the family, such sale is voidable. He cited *Ekpendu v. Erika* (1959) 4 FSC 79; *Esan v. Faro* 12 WACA 135; *Alii v. Ekusebiaia* (1985) 1 NWLR (Pt. 4) H 631 and *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417 at 444. On the custom of allotment of plot in Benin City, learned counsel cited *Agbonifo v. Aiwerioba* (1988) 1 NWLR (Pt. 70) 325 at 336 and *Aigbe v. Bishop Edokpolor* (1977) 1 S.C. 1.

Taking Exhibit CU2, counsel submitted that the order made by the learned trial Judge was a consequential order which a court of law can make following from its decision provided it is related to or incidental to the reliefs claimed. He cited *Akinbobola v. Plisson Fisko (Nig.) Ltd.* (1991) 1 NWLR (Pt. 167) 270 at 288; *Adeyemi v. Atanda* (supra); *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550; *Adigun v. A-G. Oyo State* (1987) 1 NWLR (Pt. 53) 678 and *Usman v. Usman* (1987) 3 NWLR (Pt. 62) 655 at 672. B

In further justification of the order made by the learned trial Judge, counsel cited *Okonkwo v. Kpoiye* (1992) 2 NWLR (Pt. 226) 633 and *Mba v. Agu* (1999) 9 S.C. 73 at 79. Learned counsel curiously dealt with Section 16 of the Court of Appeal Act when he was on the orders made by the trial Judge. With respect, I do not see the relevance. C

Counsel submitted that the respondents who were the plaintiffs proved their case by preponderance of weighty evidence and on the balance of probability as required by law. He cited *Esan v. Faro* (supra); *Ekpendu v. Erika* (supra); *Ozolua II v. Ekpenga* (1962) SCNLR 423 and *Oyediran v. Alebiosu* (1992) 6 NWLR (Pt. 249) 558. D E

In reacting to the submission of learned counsel for the appellants that the trial Judge ought to have restricted himself to pages 69 and 119 of the book, *Ishan Law and Customs with Ethnographic Studies of Esan People* by Dr. C. C. Okojie, counsel contended that in view of the fact that the book was referred to at the address stage and not tendered in evidence, the learned trial Judge was free to look at other relevant pages. F He cited *Technoplastics Ltd. v. Jattu* (1986) 4 NWLR (Pt. 38) 771.

The rule that a plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case does not apply where the defendant's case contains evidence on which the plaintiff is entitled to rely, counsel argued. He cited *Akinola v. Oluwo* (1962) 1 All NLR 224 and *Ajao v. Ajao* (1986) 5 NWLR (Pt. 45) 802 at 805. He urged the court to dismiss the appeal. G H

By Section 14 of the Evidence Act, customary law is a fact that must be proved, unless judicial notice is taken of its existence. See *Giwa v. Erinmilokun* (1961) 1 All NLR 294; *Ekpan v. Uyo* (1986) 3

NWLR (Pt. 26) 63; Otaru v. Otaru (1986) 3 NWLR (Pt. 26) 14; Ifeajuna v. Ifeajuna (1997) 7 NWLR (Pt. 513) 405; Muojekwu v. Ejikeme (2000) 5 NWLR (Pt. 657) 402. **And the burden of proof is on the party asserting its existence, who in this case, are the plaintiffs/respondents.**

The main crux of this appeal is whether the respondents proved the Ishan customary law of inheritance. The appellants submitted that they did not. The respondents submitted that they did prove the customary law. **It is the argument of the appellants that a person other than the party asserting the custom should testify in proof or in support thereof. Although learned counsel cited Ozolua II v. Ekpenga (supra) and Oyediran v. Alebiosu (supra), it is my humble view that proof of customary law is not one of the areas in our adjectival law that needs corroboration. While it could be desirable that a person other than the person asserting the customary law should testify in support of the customary law, it is not a desideratum. This is because the Evidence Act does not so provide. And here, Section 14(1) provides the anchor. The subsection merely provides that a custom “can be proved to exist by evidence”. And evidence can be led on the existence of the custom by a single witness or more witnesses. It is not my understanding of the law that a village or community of witnesses must be called to satisfy the provision of Section 14(1). In the evidential scene in the context of probative value, it is not the number of witnesses that matter but the quality of the evidence given. And so, a situation may arise where a single witness gives credible evidence while a number of witnesses may not because they are a bundle of contradictions. Therefore, emphasis should be on the quality of evidence given rather than the quantity.**

And that takes me to the evidence on the Ishan customary law of inheritance. The 1st plaintiff/respondent said at pages 42 and 43 of the record:

“The property of my father was shared. I see a minute of the meeting showing how the property was shared which was given to me.....

After the death of my father, the family decided to divide the house. Alfred was asked to take care of the house and to use the property in rotation. The house was previously 101 now 107. That was where my father lived and died. As Alfred is from one door I am from another door. The third one, Sunday is also from another. Alfred said he sold the house to Edobor, second defendant. I am not aware of the sale. Sunday was not aware of the sale. The procedure under native law and custom of Ishan is that the older one will ask the younger ones to discuss the Igiogbe. Female members of family in Ishan do not inherit. The house was sold for N500,000.00 I am still living in the house. I ask the court to nullify the sale.” B C

Under cross-examination, witness said at page 43:

“It is not true that No. 107 was given absolutely to Alfred. The reason why the house was to be divided and held on rotational basis is that the 1st defendant arrested all the beneficiaries, and after one year the property was divided on rotational basis. It is untrue that the property is not shared on rotational basis. There was a meeting where family property was shared, and it was only my father’s property shared on that day..... The 1st defendant is the eldest son of my father.” D E

Buttressing the evidence of the 1st plaintiff/respondent, P.W.2, Akhimien Ofenagbon said at page 44:

“The property of Usiobaifo was shared by me. We were up to ten people at the sharing. Some of them are late. Okaisabor and Okogun of the people present are still alive. Others are late. We told 1st defendant Oboye to live in the house, and look after it for the family. That person is Afegigi. The house can never be sold. The house is lived in according (sic) to seniority in turn. The house is an Igiogbe, it can never be sold, it is a taboo; and the idea of brothers consent to sell does not arise. Under native law and custom of Ishan property is not shared to women. The next person after Afegigi is the 3rd son, who has a right to live in the house. I have come to testify for Uangbogbe the 3rd son of the deceased.” F G H

Under cross-examination, witness said at pages 44 and 45 of the record:

“I am a direct member of Usiobaifo family..... The Idiogbe

is put in care of the eldest son, not that he becomes the owner.”

P.W.3 Okaisabor Osaghae, said in examination-in-chief at page 46 of the record:

“We went to share property for the 1st plaintiff. Usiobaifo and I
B are from Idumugan. We shared Usiobaifo’s property for the deceased chil-
dren and Oboite’s property for his children. The house in Benin was given
to Alfred as the senior in joint ownership of the house with his brothers.
After Alfred, the next brother uses the house, after that another brother
C uses the property, after all brothers are deceased then the grandchildren
now take in turn..... Alfred cannot sell the house at all.”

The 1st defendant, Alfred Usiobaifo, in his evidence-in-chief said at pages 47 and 48 of the record:

“I summoned a meeting of the family, to inform them of the burial
D of my father. I performed the burial according to native law and custom
of Ishan..... After the burial on 12/2/94, the whole family gath-
ered to share the property of Chief Usiobaifo. The gathering was headed
by my father’s younger brother Iweren. The property was shared. I was
E given No. 101 now 107 Forestry or Ewaise Street. No. 19 Ukpenu Ekpane
was also given to me. 1st plaintiff was given a rubber plantation at
Ogogogien..... I know Ishan native law and custom. Only the first son
who can do the burial and inherit the deceased property.”

F Under cross-examination, witness said at page 49 of the Record:

“No 101 Forestry is not Igiogbe of my father. It is true that 1st
plaintiff lives in 101 Forestry Road, but he does not live in my father’s
house. I have a right to eject him from the father’s property. It is not true
that I am not the owner of the house I live in . The house belongs to my
G wife. I am not a prodigal son. I did not take the title, but I did Izakhue.
I got the consent of the plaintiff before I sold the property.”

Based on the above evidence and more, the learned trial Judge in his judgment, said:

H “Whether Esan custom or Benin customary law is applied, as stated
above, the common factor is the inalienability of the Ijiogbe for Ishan,
Igiogbe for Benin. Besides this, the house built by the 1st defendant
cannot be sold without conveying the family land, whereas the land de-

volves for the benefit of past, future and present members of the family.....

The 1st plaintiff testified and I believe the testimony that he was not consulted and he was not aware, and would not consent to the sale of any part of the three houses, the Igiogbe at No. 107 Forestry Road, Benin City, property of Chief Usiobaifo's family. Evidence exists though the instrument of sale was not tendered that the 1st defendant sold the house as his personal property. I declare that the said sale is void and the said property remains the properties of Usiobaifo family because the 1st defendant has no power or authority to sell family property or to sell the said property as his own property. The sale is declared null and void."

What did the Court of Appeal say? In his leading judgment, Ibiyeye, JCA., said at pages 187 and 188 of the Record:

"Furthermore, the evidence that it is a taboo to sell family land is purely to lay emphasis on the fact that family land per se does not admit of alienation or sale in its original status until it is partitioned..... Evidence also abounds that the property in point became inalienable after the 1st appellant had performed the funeral ceremonies for his late father. In view of the foregoing, I failed to see where the learned trial Judge introduced issues extraneous to the evidence before him as to amount to perverse findings. In sum, I agree with the learned trial Judge that there was preponderant evidence upon which the respondents discharged the onus to accord them the declaratory reliefs sought. The learned trial Judge did not arrive at any findings which are perverse and liable to cause miscarriage of justice. I accordingly resolve Issues Nos. 1 and 2 in the affirmative."

It is difficult to fault the above conclusion by the Court of Appeal.

Learned counsel for the appellants submitted that there are contradictions in the evidence of the witnesses of the respondents. He took time to enumerate what he regarded as contradictions from pages 25 to 29 of his brief. The Court of Appeal touched the issues at page 187 of the record:

"In order to weaken the strength of the respondents' evidence,

learned counsel for appellants said that the evidence was replete with contradictions. Upon a careful consideration of the alleged conflicting evidence, I could not find any material conflict. The resume of those items of evidence is instead that the property situate at 107 Forestry Road, Benin City is an Igiogbe and cannot be sold. What is described as contradiction is not a functional contradiction with regard to what is the status of the property in point. It is settled law that a piece of evidence will be regarded as contradiction when it affirms the opposite of what the other evidence has stated, not when there is a minor discrepancy between them. See Gabriel v. The State (supra)."

I have carefully examined the submissions of learned counsel on the so-called contradictions and, like my learned brother, Ibiyeye, JCA., I do not find any. It is the law that contradictions in evidence of witnesses can only avail the opposite party where they are material, substantial and affect the live issues in the matter, to the extent that they affect the fortunes of the appeal in favour of the party raising the Issue. See Arehia v. The State (1982) 4 S.C. 78; (1982) 4 S.C (Reprint) 47; Muka v. The State (1976) 9-10 S.C 305 (1976) 9-10 S.C. (Reprint) 193; Onubogu v. The State (1974) 9 S.C 1 (1974) 9 S.C. (Reprint) 1; Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393.

I see in the evidence of the witnesses of the respondents a consistent pattern of a flowing story of truth how the 1st appellant bastardized the Igiogbe of his late father, thus trying to ruin or destroy Ishan customary law. I therefore do not agree with the submission of learned counsel for the appellants that there were material contradictions in the evidence of the respondents.

Let me deal a bit with the evidence of the appellants, particularly that of the 1st appellant, as D.W. 1. I do not think he was correct when he said under cross-examination that No. 107 Forestry Road is not the Igiogbe of his late father. He did not tell the court which is the Igiogbe, if No. 107 Forestry Road is not the Igiogbe. In my humble view he was not telling the truth when he said under cross-examination that No. 107 Forestry Road is not the Igiogbe of his late father. All the witnesses of the

respondents gave evidence that No. 107 Forestry Road is the Igiogbe, and I believe them. That is not all on D.W. 1. He said under cross-examination and I repeat here what he said for ease of reference:

“It is not true that I am not the owner of the house I live in. The house belongs to my wife.”

Unless there is a “*printer’s devil*”, the above two sentences are clearly in conflict. In the first sentence, witness claimed, (and this is putting it in the affirmative), that he is the owner of the house. In the second sentence, he claimed that the house belongs to his wife. Which is the correct version?

Let me take at this stage, the book written by Dr. C. D. Okojie, on Ishan Native Law and Custom with Ethnographic Studies of the Esan People. **Section 59 of the Evidence Act provides that in deciding question of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any books or manuscripts recognized by natives as legal authority are relevant** See *Orugbo v. Una* (2002) 9-10 S.C 61; (2002) 16 NWLR (Pt. 792) 175.

Although counsel for the defendants/appellants cited pages 69 and 119 of the Book, the learned trial Judge relied on page 133 where the author said as follows:

“A man owned a piece of land on which he had his house. The land with the cleared area around it belonged to him and his children. If he left it and go and build somewhere else within or without the village, no one else had a right to build on the site which thus became the man’s Ijie Itokun or Ijiogbe. Although a man owned his Ijie he could not sell it to another villager or a stranger. This means that the ownership was not absolute.”

It is the argument of the appellants that the learned trial Judge ought to have confined himself to pages 69, 119 and 120 and not look at any other page of the book, including page 133. With respect, I do not agree with counsel. **A trial Judge is free to use any book cited by a party or suo motu make reference to any book which is relevant to the issue or issues before him. A party cannot gag a Judge in the**

way learned counsel is contending in his brief. It is generally the practice for counsel to cite authorities favourable to his client's case and it is the duty of the Judge, as the independent umpire, so to say, to look at all available authorities on the issue to arrive at a just and proper decision. In this case, counsel for the defendants cited pages 69, 119 and 120 which strengthen the case of his clients and did not understandably call the court's attention to page 133. I think the judge was industrious to examine page 133 and come to the conclusion in respect of the inalienability of the Igiogbe. I cannot fault the learned trial Judge, rather I commend his industry.

What is the effect of the head of family selling land without the consent of the principal members of the family? The case of *Ekipendu v. Erika* (1959) 4 FSC 70 provides the answer. It was held in that case that where a head of a family sells family land without the consent of the principal members of the family, the sale is voidable. See also *Esan v. Ero* 12 WACA 135. In *Alii v. Ikusebiala* (1985) 1 NWLR (Pt. 4) 630, this court held as follows: (1) Neither the head of the family alone, nor the principal members alone can make any valid alienation or give title to any person with respect to family land. (2) A head of a family not acting as such cannot convey a valid title in respect of family land. (3) Unimpeachable title can only be transferred from one community to another when head of the family does so with the consent and concurrence of the principal members of the family or community.

In *Adejumo v. Ayantegbe* (1989) 6 S.C. (Pt. 1) 76; (1989) 3 NWLR (Pt. 110) 417, this court went further. It held as follows: (1) Where there is a sale or conveyance of family land by the head of the family with some important members thereof but without the consent of some principal members of the family, then the transaction is voidable and those members who should have consented to the transaction but did not, can take out an action to have the transaction set aside. (2) The sale of family land by a member of the family who is not the head of the family, is void. (3) The sale of family land by the head of the family without the consent of principal members of the family is voidable. (4) The sale of family land by the head of the family as his own land is void. (5) Where a sale is void,

it has to be so declared if asked to be set aside but where it is voidable, whether or not it will be set aside will depend upon the facts and circumstances of the case.

As it is, this court developed the law further in (4) above, that is, the sale of family land by the head of the family as his own land is void. Ekpendu v. Erika (Supra) did not yet to that stage or that far. It is this principle that is applicable in this case because the 1st appellant sold the family property (the Igiogbe) as his own exclusive property. In the light of the authorities, I have no difficulty to declare the purported sale void.

Let me now take the issue that the Court of Appeal failed to consider the various issues raised and argued before it and make pronouncements on them. Learned counsel complained specifically that the Court of Appeal did not consider Issue No. 3 raised therein. Issue No. 3 in the appellant's brief in the Court of Appeal reads:

Whether the learned trial Judge was right when he suo motu raised issues and resolved them without giving the parties thereto opportunity of being heard?

Learned counsel conceded in his brief before this court that the "*lower court only touched on the aspect dealing with the raising of issues suo motu by the judge.*" He argued that all other issues or sub-issues raised and argued were not considered.

With the greatest respect, I do not see the slightest merit in this argument. It is clear that the issue dealt with only the learned trial Judge raising ten issues suo motu without giving the parties opportunity of being heard. And counsel agrees that the Court of Appeal did that. Where lies the complaint? I do not see any because there is really none.

The case law is divided as to whether this court or the Court of Appeal can suo motu raise issues for determination of an appeal. I do not intend to go to the differences in the case law because it is not necessary here. But one aspect is necessary and I should touch it. A court of law has no jurisdiction to expand an issue formulated by a party to suit the yearnings of the case he makes out. That will be clashing with the court's unbiased position in the judicial process. **The appellants expected too**

much from the Court of Appeal in respect of Issue No. 3. The court tenaciously followed the issue when it said inter-alia at page 137 of the Record:

“I have considered the seemingly ten vexed issues formulated by the learned trial Judge and I found that the basic issue raised in each of them relates to family land. I am of the strong view that the learned counsel for the appellants cannot be heard to say at this stage that the appellants were denied fair hearing..... The ten issues are in my opinion rooted in the issues distilled by the respondents and were therefore not raised suo motu at the judgment stage by the learned trial Judge. Issue No. 3 is accordingly resolved in the affirmative.”

That ends issues 2 and 4.1 go to issue No. 5 and it is that the learned trial Judge gave to the plaintiffs/respondents what they did not ask for. He specifically questioned the following passage on Exhibit CU2 by the learned trial Judge:

“I believe the testimony of the first plaintiff and hereby order that the 1st defendant has no position to change the title to family land without the consent of the family members and the change of name contained in Exhibit CU2 is obtained in bad faith. It is incompetent and hereby declared null and void.”

Learned counsel for the appellants submitted that “Exhibit CU2 was not before the court.” What does he mean by this? Does it mean that Exhibit CU2 was not tendered and admitted by the court? If he means so, then he is, with respect, wrong. It is clear from page 48 of the Record that Exhibit CU2 was tendered by 1st D.W., who is the 1st appellant. Let me quote the evidence by the 1st appellant leading to the admission of the Exhibit by the court.

“I made an application to Oba Akenzua, who approved my application transferring the land to me. I see the Oba’s approval now. Counsel seeks to tender same. Plaintiff’s counsel has no objection. Admitted as H CU2.”

By the above, the approval of Oba Akenzua was very much before the court as the court admitted it as Exhibit CU2.

Learned counsel for the respondents submitted that the or-

der made by the learned trial Judge was consequential. I entirely agree with him considering the reliefs sought by the plaintiffs/respondents. If the trial Judge held that the sale of the property at No. 107 Forestry Road, Benin City, was null and void, then it follows that the purported title to the 1st appellant which gave rise to the sale, is equally null and void. Courts of law have the jurisdiction to give consequential orders where necessary. See *Akinbobola v. Plisson Fisko (Nig.) Ltd.* (1991) 1 NWLR (Pt. 167) 270; *Adeteri II v. Atanda* (1995) 5 NWLR (Pt. 397) 516; *Ademola v. Sodipo* (1989) 5 NWLR (Pt. 121) 329. C

Learned counsel for the appellants is not happy with the way the learned trial Judge wrote the judgment. He submitted that the Court of Appeal ought to have considered whether the judgment of the learned trial Judge was written in a good and proper manner. He stated what a good judgment should contain; one of which is the introduction of the parties. D

There is no constitutional requirement as to a particular format in the writing of a judgment. There is no statutory format either. Judgment writing being an art, needs the peculiar and personal dexterity of the judge who is the “*artist*”. No two artists convey exactly the same painting from an assigned object. So too, no two judges write judgment using exactly the same house style and the same coloration, and all that. Each judge has his own peculiar style and once the judgment contains the major attributes of a good judgment an appellate court will not interfere. E F

Judgment writing is not an arithmetical or geometrical exercise which must answer exactly to laid down rules in the field of mathematics. A judge is not bound to follow the method or methodology stated by counsel in the brief. Once a judgment of a trial Judge states the claim or relief of the plaintiff, the relevant facts and counter facts leading to the claim or relief, arguments of counsel, if counsel are in the matter, reactions of the judge to the arguments and the final order, an appellate court cannot hold that the judgment is not properly written. G H

I should go further. **An appellate court cannot set aside a judgment of a trial Judge merely because it does not begin with an introduction of the parties, as contended by counsel for the appellants. A plaintiff in a case remains a plaintiff and needs no introduction. So too a defendant. As a matter of style, a trial court need not repeat in an introduction, in the context of this case, that Mr. Christopher Usiobaifo is the 1st plaintiff. An appellate court may do so in relation to the appellate status of the parties vis-a-vis their original status as trial parties. This is not even compulsory, it is a matter of style. Failure on the part of an appellate court to introduce parties is not condemnable. As a matter of practice, most appellate judgments do not start with introduction of parties.**

I think I have dealt with all the five issues in this appeal. In the light of all that I have said above, I do not see any merit in this appeal. I therefore dismiss it. I affirm the judgment of the learned trial Judge, which was affirmed by the Court of Appeal. I award N 10,000.00 costs against the appellants in favour of the respondents.

ONU JSC

I too dismiss the appeal.

EJIWUNMI JSC

I had the privilege of reading before now the draft of the judgment just read by my learned brother, Niki, Tobi, JSC. As I agree with his reasoning on the issues raised upon the facts in respect of the appeal leading to the dismissal of the appeal, I will also dismiss the appeal.

Accordingly, the appeal is dismissed by me and I award costs in the sum of N 10,000.00 to the respondents.

MUSDAPHER JSC

I have read before now, the judgment of my Lord, Niki Tobi,

JSC., which has just been read and I entirely agree with the reasoning and the conclusion arrived at. I accordingly dismiss the appeal and abide by the order for costs contained in the aforesaid judgment.

EDOZIE JSC

I had a preview of the leading judgment just delivered by my learned brother, Tobi, JSC., and I am in complete agreement with his reasonings and conclusion in dismissing the appeal. I abide by the consequential order as to costs.

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