

SUPREME COURT OF NIGERIA

20TH MAY, 2005. SC. 120/2000

**CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, U. KALGO, D. O.
EDOZIE, G. A. OGUNTADE, JJSC**

OKACHI AZUOKWU APPELLANT
AND
1. TASIE NWOKANMA RESPONDENTS
2. CUSTOMARY COURT ISIOKPO

EVIDENCE - Affidavits - Where there is a conflict therein - It is to be resolved - By calling evidence (H1)

PRACTICE & PROCEDURE - Evidence - Cross examination - Witnesses
- Where called to explain an issue - May be cross examined by the parties (H2)

COURTS - Judge - Bias - Where alleged against the court or judge - It should not be based on favouring one side - But on the impression of an onlooker (H3)

FACTS

Before the Customary Court, Isiokpo, Rivers State, the Plaintiff/ Respondents sued the defendants/appellants for trespass into their family land making a claim for N5,000 as general damages and injunction to restrain them from further entry into the land. The judgement of the court was in favour of the respondent. The appellant instead of appealing against the judgment, applied to the High Court for an order of certiorari to quash the decision.

The judgment was quashed on the ground of likelihood of bias in favour of the respondent . The respondent therefore appealed to the Court of Appeal which found merit in it and allowed it, setting aside the order of the High court quashing the judgment of the customary court. The appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. "Whether the Court of Appeal was right to hold that there was nothing on record to suggest that the court (Customary Court) knew what any of the witnesses called by the court was coming to say or that the Chairman had called them deliberately to favour the Appellant (now 1st respondent) against the 1st respondent (now Appellant) in spite of the grave and serious allegations.

2. Whether the High Court in his (sic) supervisory capacity over inferior courts (in an application for certiorari) was limited to consider the record of the inferior court as a whole to see whether there is error on the face of the record or a jurisdictional defect or irregularity which must be corrected by quashing the record of the inferior court.

3. Whether from the depositions in the affidavit in support of the motion before the High Court of Rivers State and upon which the application for judicial review was fought, it can be said that the High Court has no materials at all to grant the relief sought and or to hold as he did that there was real likelihood of bias in the customary court."

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

Affidavits - Where there is a conflict therein

1. From the affidavit evidence, there is an obvious conflict on the relationship between the chairman and the 1st respondent and this was not resolved by calling evidence as is required under the law. This is therefore the end of this allegation. I have also examined the totality of the testimony given by the 1st respondent at the trial in the customary court and nowhere was any question of his being a classmate or family friend of the chairman or any of the court members mentioned. (p. 1188 G)

Evidence - Cross examination

2. It is pertinent to observe that the procedure followed by the customary court at the locus in-quo was quite proper when it brought with it all the parties in the case and allowed the appellant, as plaintiff, to explain the nature and circumstances of the land in dispute and the court put everything in writing. This, to my mind, is in order and in accordance with

law and practice of courts in situations like that. See *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt.245) 22. It is also normal and usual for a native or customary court, which is normally not bound by rules of procedure and evidence or indeed any court, to call a witness, be he an expert or otherwise, in a particular case, to assist it in explaining some issues to be determined in the case. But what is essential in that respect is that the parties in the case must be given ample opportunity to ask the witness or witnesses so-called any question they may wish by way of cross-examination. See *Olusanmi* (supra). This has been done in this case.

There was nothing to show that the chairman or any member of the customary court acted as counsel to the 1st respondent. In fact, only one witness was asked a question by the court. There was also nothing on record to show that the customary court refused to hear the testimony of any witness brought before it. Even D.W.3, who was stopped from giving evidence at the beginning was recalled as D.W.6 to complete his evidence before the court inspected the locus in-quo. (p. 1190 A)

Bias - Where alleged against the court or judge

3. Bias in relation to a court or tribunal is an inclination or preparation or predisposition to decide a cause or matter in a certain pre-arranged way without regard to any law or rules and the likelihood of bias may be drawn or surmised from many factors such as corruption, partisanship, personal hostility, friendship, group membership or association and so on, towards or involving a particular party in a case.

Also in a case where bias is being alleged against a court or judge, it is not the real likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias.

From all what I examined above, there is no iota of evidence from which bias or likelihood of it can be found or even inferred in the circumstances of this case on the part of the customary court, Isiokpo, in the conduct of this case against the appellant or in favour of any party in the case. It is therefore my respectful view that the appellant has failed

to prove any bias on the part of the chairman or any member of the customary court. The High Court, Isiokpo, must perforce be wrong in holding otherwise and there are no material evidence on record upon which its decision can be justified. I so find. (p. 1190 G)

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REPRESENTATION

Ibrahim Idris, Esq., (with him, O. A. Owodunmi, Esq.), for the appellant.
Mr. E. A. Amadi, for the 1st Respondent.

C 2nd Respondent not represented.

CASES REFERRED TO

Uku v. Okumagba (1974) 3 S.C. (Reprint) 24 (1974) 3 S.C. 35

Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1 (1976) 9-10 S.C 1 at 15.

D Din v. A-G of Federation (1986) 1 NWLR (Pt.17) 471 at 487

Metropolitan Properties Co. Ltd. v. Lannon (1969) 1 QB 577

Olue & Ors v. Enenwali & Ors. (1976) 2 S.C. (Reprint) 12 (1976) 2 S.C
23

E Egware v. Governor, Bendel State (1991) 3 NWLR (Pt.178) 199 at 209

RULES REFERRED TO

High Court of Rivers State (Civil Procedure) Rules, O. 43 rr. 3(2)(b) &
F 6(1)

LEAD JUDGMENT BY KALGO JSC

This is an appeal from the decision of the Court of Appeal, Port
Harcourt, delivered on 4th April, 2000. The case started at the Customary
G Court, Isiokpo, Rivers State, where the 1st respondent and one Udom
Njoku as plaintiffs, on behalf of themselves and the Nsirim Omuisioha
family of Ibaa, sued the appellant representing himself and the Azuokwu
Omuisioha family of Ibaa, claiming the sum of N5,000 (five thousand naira
H only) as general damages for trespass into their family land and for
injunction to restrain them from further entry into the land.

In the Customary Court, the appellant denied the claim of the
respondent when it was read and explained to him. At the trial, both parties

called witnesses in support of their case and in the end the customary court gave judgment in favour of the 1st respondent on the 11/8/89.

The appellant was not happy with his decision but instead of appealing against the judgment, he applied to the High Court at Ahoada, for an order of certiorari to quash the said decision. His application was granted and the case was then transferred to the new division of the High Court at Isiokpo where the application was heard and the judgment of the customary court was quashed on the ground of likelihood of bias in favour of the 1st respondent.

The 1st respondent thereafter appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal, after hearing the appeal, found merit in it and allowed it. It set aside the order of the High Court quashing the judgment of the Isiokpo Customary Court and dismissed the application of the appellant in the High Court. The appellant now appealed to this court on 7 grounds.

Written briefs were filed and exchanged in this court by the appellant and the 1st respondent only as per the rules of court. The appellant identified 2 issues for determination by the court in the appeal. They read:-

1. *“Whether the Court of Appeal was right to hold that there was nothing on record to suggest that the court (Customary Court) knew what any of the witnesses called by the court was coming to say or that the Chairman had called them deliberately to favour the Appellant (now 1st respondent) against the 1st respondent (now Appellant) in spite of the grave and serious allegations.*

2. *Whether the High Court in his (sic) supervisory capacity over inferior courts (in an application for certiorari) was limited to consider the record of the inferior court as a whole to see whether there is error on the face of the record or a jurisdictional defect or irregularity which must be corrected by quashing the record of the inferior court.*

3. *Whether from the depositions in the affidavit in support of the motion before the High Court of Rivers State and upon which the application for judicial review was fought, it can be said that the High Court has no materials at all to grant the relief sought and or to hold as*

he did that there was real likelihood of bias in the customary court.”

The 1st respondent, on the other hand, raised only one issue for determination in this appeal which reads:

“Whether the court below was wrong in allowing the 1st respondent’s appeal to that court.”

At the hearing of the appeal on 22/2/05, the appellant’s counsel conceded that his grounds of appeal 2 to 7 inclusive were struck out on 23/3/04, but he did not say which were the issues affected as a result of this. This means that all issues for determination distilled from the grounds 2 to 7 cannot also exist any more. There is therefore only ground 1 which survives in the appeal. That ground with its particulars reads as follows:-

“1. The Court of Appeal erred in law when it held as follows:

“I agree with the appellant’s counsel that the learned judge based his decision on grounds other than any specified in the statement accompanying the application. This is a serious infringement of the provisions of Order 43 Rule 6(1).”

(a) The High Court had in his ruling set down Halsbury’s Laws of England, 4th Edition Volume 11 page 818 paragraph 1559 where it said inter alia:

“Where certiorari is sought on the ground of absence or excess of jurisdiction, bias by interest, fraud or breach of the rules of Natural Justice, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the Record”.

“The High Court also sought and had support in the Supreme Court Practice 1976, page 798 where it is stated thus:

“The most important function of the (certiorari) order is that by it, in exercise of the supervisory capacity of the High Court over inferior courts, judgments, orders, conventions other proceedings of inferior courts, whether civil or criminal, made without or in excess of jurisdiction may be removed into the High Court to be quashed.

Excess of jurisdiction is not shown merely because the inferior court has decided contrary to the facts or without evidence to justify the decision but only where in the circumstances it had no jurisdiction, for example, where the court acquits a defendant having already convicted him or has

imposed maximum or where there has been a disregard of the fundamental conditions of the administration of justice as where there is a real likelihood of bias or prejudice on the part of the tribunal.”

The High Court further relied on the case of Egware v. Governor, Bendel State (1991) 3 NWLR (Pt.178) 199 at 209.

(b) There was no appeal that the High Court as a court of equity lacked the power or jurisdiction to seek in his aid the above provisions to do justice in deciding the matter before him; particularly in his supervisory jurisdiction over inferior courts.

(c) These authorities took the High Court far beyond the Provisions of Order 43 Rule 6(1) of the Rules of the High Court.

(d) The High Court having armed himself as he did proceeded to review the entire evidence before the Customary Court and to see whether certiorari could apply.

(e) The High Court therefore, was no longer limited or to confine himself to what was only brought before him under and by virtue of Order 43 Rule 6(1) by the Applicant.”

It appears to me therefore that both issues 2 and 3 of the appellant have direct connection with ground of appeal 1, and are properly distilled from it. I shall consider these issues as formulated by the appellant.

I shall take the issues 2 and 3 together. These issues refer particularly to the affidavits filed in the High Court in the certiorari application to quash the proceedings in the Customary Court and questions whether there was any real likelihood of bias by the Customary Court having regard to the circumstances of the whole case. In the affidavit in support of the application for certiorari, the appellant deposed in the following paragraphs that:-

“3. That the Chairman of the customary court is not competent to hear and determine the case because of his relationship with the 2nd plaintiff who was his classmate in the school and who also is the Chairman’s family friend.

4. That the Chairman is biased and it is evident that I cannot have justice in his court.

6. That the Chairman was acting as counsel to the plaintiffs when

the case was being heard.”

The 1st respondent who was the 2nd plaintiff filed a counter-affidavit in answer to the appellant’s allegations. He said in paragraphs 6-9 and 13 thus:-

B *“6. That the judgment was delivered without any inhibitions placed on the customary court by any superior court.*

7. That applicant participated in the proceedings from the beginning to the end.

C *8. That the customary court has not acted in excess of jurisdiction nor acted in any manner suggesting bias.*

9. That there is no relationship between me and the chairman and members of the customary court, Isiokpo.

D *13. That the applicant at no time objected to the court hearing the matter.”* (Underlining mine)

From the above averments in the affidavit and counter-affidavit of the parties, it is very clear that the most serious allegation which might bring about the likelihood of bias was that both the Chairman of the Customary Court and the 1st respondent were classmates at school and that the 1st respondent was the family friend of the Chairman. But the 1st respondent flatly denied any relationship between himself and not only the chairman but all the members of the customary court, Isiokpo. He also went further to depose that the appellant participated throughout the proceedings of the customary court and at no time did he object to the court hearing the case or any part thereof. He also deposed to the fact that the customary court acted within its jurisdiction, without any bias and was not influenced in its decision by any authority or superior court.

G **From the affidavit evidence, there is an obvious conflict on the relationship between the chairman and the 1st respondent and this was not resolved by calling evidence as is required under the law.** See Uku v. Okumagba (1974) 3 S.C. (Reprint) 24; (1974) 3 S.C. 35; Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1; (1976) 9-10 S.C 1 at 15; Din v. AG of Federation (1986) 1 NWLR (Pt.17) 471 at 487. **This is therefore the end of this allegation. I have also examined the totality of the testimony given by the 1st respondent at the trial in the customary**

court and nowhere was any question of his being a classmate or family friend of the chairman or any of the court members mentioned.

The learned Judge of the High Court in arriving at the decision to quash the proceedings of the customary court of appeal which was reversed by the Court of Appeal had this to say :-

“From the Record of Proceedings and the Statement accompanying the motion and the affidavit evidence of both parties, I have no doubt in my mind that the circumstances of refusing the applicant’s witness to testify, calling a host of witnesses and exhaustively cross-examining the said witnesses will influence a reasonable person to infer that there is real likelihood of bias on the part of the customary court judges in their conduct of this matter.”

Let me now examine the proceedings of the Customary Court generally. The actual trial commenced on 19th September, 1988. The 1st respondent called 4 witnesses in support of his case and each was examined-in-chief, cross-examined and re-examined. The appellant as defendant, called 5 witnesses each of whom was also examined-in-chief, cross-examined and re-examined. So far the proceedings were properly conducted.

On the 27th of April, 1989, the customary court conducted the locus in-quo by visiting the land in dispute. There again all the parties were present. The appellant showed the court round the parcel of land in dispute and explained to the customary court the nature of the land and the different families that occupied part of it from time to time. The court recorded everything as shown on pages 33 and 34 of the record. On page 34, the court listed traditional elders of the families mentioned by the appellant during the locus in-quo as having been associated with the land in dispute and the customary court decided to call the elders of those families to give further clarification about the land in dispute. They were therefore called as additional witnesses by the court. There were 3 of them and from the record it is very clear that each of them was cross-examined by each of the parties after being examined by the court. This means that although the witnesses were called by the court to further explain more

about the land in dispute, each party was given the opportunity to ask the witnesses any question he wanted.

It is pertinent to observe that the procedure followed by the customary court at the locus in-quo was quite proper when it brought with it all the parties in the case and allowed the appellant, as plaintiff, to explain the nature and circumstances of the land in dispute and the court put everything in writing. This, to my mind, is in order and in accordance with law and practice of courts in situations like that. See *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt.245) 22. It is also normal and usual for a native or customary court, which is normally not bound by rules of procedure and evidence or indeed any court, to call a witness, be he an expert or otherwise, in a particular case, to assist it in explaining some issues to be determined in the case. But what is essential in that respect is that the parties in the case must be given ample opportunity to ask the witness or witnesses so-called any question they may wish by way of cross-examination. See *Olusanmi* (supra). This has been done in this case.

There was nothing to show that the chairman or any member of the customary court acted as counsel to the 1st respondent. In fact, only one witness was asked a question by the court. There was also nothing on record to show that the customary court refused to hear the testimony of any witness brought before it. Even D.W.3, who was stopped from giving evidence at the beginning was recalled as D.W.6 to complete his evidence before the court inspected the locus in-quo.

Bias in relation to a court or tribunal is an inclination or preparation or predisposition to decide a cause or matter in a certain pre-arranged way without regard to any law or rules and the likelihood of bias may be drawn or surmised from many factors such as corruption, partisanship, personal hostility, friendship, group membership or association and so on, towards or involving a particular party in a case.

Also in a case where bias is being alleged against a court or

judge, it is not the real likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias. See Metropolitan Properties Co. Ltd. v. Lannon (1969) 1 QB 577; Olue & Ors v. Enenwali & Ors. (1976) 2 S.C. (Reprint) 12; (1976) 2 S.C. 23. B

From all what I examined above, there is no iota of evidence from which bias or likelihood of it can be found or even inferred in the circumstances of this case on the part of the customary court, Isiokpo, in the conduct of this case against the appellant or in favour of any party in the case. It is therefore my respectful view that the appellant has failed to prove any bias on the part of the chairman or any member of the customary court. The High Court, Isiokpo, must perforce be wrong in holding otherwise and there are no material evidence on record upon which its decision can be justified. I so find. C D

The Court of Appeal had carefully and exhaustively considered all the allegations of bias raised by the appellant before it, one by one, and came to the conclusion that they were all mere speculations and doubtful inferences which the appellant has awfully failed to prove against the customary court or any of its members. I entirely agree with the findings and conclusions of the Court of Appeal on this. In the circumstances I answer issues 2 and 3 in the affirmative and against the appellant. E F

In sum, I find that there is no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal on the 4th of April, 2000. I award N10,000.00 costs to the 1st respondent against the appellant. G

UWAISCJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Kalgo, JSC. I agree with it in that there is no merit in the appeal. H

Although this appeal was brought on 7 grounds of appeal, grounds 2 to 7 inclusive were struck out by this court on the 23rd day of March,

2004, for being incompetent. As a result the appeal is rested on only one ground of appeal, namely ground 1, which reads thus-

“1. *The Court of Appeal erred in law when it held as follows:*

I agree with the appellant’s counsel that the learned Judge based his decision on grounds other than any specified in the statement accompanying the application. This is a serious infringement of the provisions of Order 43 Rule 6(1).”

PARTICULARS

(a) The High Court had in his RULING set down Halsbury’s Laws of England 4th Edition, Volume 11 page 818 paragraph 1559 where it said inter alia:

“Where certiorari is sought on the ground of absence or excess of jurisdiction, bias by interest, fraud or breach of the rules of Natural Justice, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the record”.

The High Court also sought and had support in the Supreme Court Practice, 1976, page 798 where it is stated thus:

“*The most important function of the (certiorari) Order is that by it, in exercise of the supervisory capacity of the High Court over inferior courts, judgments, order, convictions (other proceedings of inferior courts, whether civil or criminal, made without or in excess of jurisdiction) may be removed into High Court, to be quashed.*”

“*Excess of jurisdiction is not shown merely because the inferior court has decided contrary to the facts or without evidence to justify the decision but only where in the circumstances it had no jurisdiction, for example, where the court acquits defendant having already convicted him or has imposed maximum or where there has been a disregard of the fundamental conditions of the administration of justice as where there is a real likelihood of bias or prejudice on the part of the tribunal.*”

The High Court further relied on the case of Egware v. Governor, Bendel State (1991) 3 NWLR (Pt.178) 199 at 209.

There was no appeal that the High Court as a court of equity lacked the power or jurisdiction to seek in his aid the above provisions to do justice in deciding the matter before him; particularly in his supervisory jurisdic-

tion over inferior courts.

These authorities took the High Court far beyond the provisions of Order 43 Rule 6(1) of the Rules of the High Court.

The High Court having armed himself as he did proceeded to review the entire evidence before him under and by virtue of Order 43 r(6) (1) by the Applicant.”

The High Court therefore, was no longer limited or to confine himself to what was only brought before him under and by virtue of Order 43 r(6) (1) by the Applicant.”

The 3 issues formulated by the appellant are as follows-

"2.01 ISSUE NO. 1

Whether the Court of Appeal was right to hold that there was nothing on the record to suggest that the court (customary court) knew what any of the witnesses called by the court was coming to say or that he (The Chairman) had called them deliberately to favour the appellant (now 1st respondent) against the 1st respondent (now appellant), inspite of the grave and serious allegations:

(a) That both the 1st respondent and the chairman of the customary court were classmates at school.

(b) That, that relationship had blossomed into and consolidated as intimate family friends between them (Grounds 4 & 5).

2.02 ISSUE NO. 2

Whether the High Court in his (sic) supervisory capacity over inferior courts (in an application for certiorari) was limited to consider the record of the inferior court as a whole to see whether there is error on the face of the record or a jurisdictional effect or irregularity which must be corrected by quashing the record of the inferior court (Grounds 1 & 3).

2.03 ISSUE NO. 3

Whether from the depositions in the affidavit in support of the motion before the High Court of Rivers State and upon which the application for judicial review was fought, it can be said that the High Court had no materials at all to grant the relief sought and or to hold as he did that there was a real likelihood of bias in the customary court. (Grounds 2 & 6).”

It is clear from the foregoing, and as intended by the appellant, that only issue No.202 applies to the surviving singular ground of appeal, viz ground 1. Therefore, the point for determination in the appeal pertains to a limited scope on the application made for an order of certiorari in the High Court.

The trial court in considering the application took it upon itself to examine the procedure before the customary court, Isiokpo, in order to determine whether the chairman and members of the customary court were biased as alleged by the appellant herein. What the High Court was entitled to do was to examine the judgment of the customary court in order to find out from the face of the judgment, if indeed, there was evidence of bias as alleged. It was not the function of the High Court to examine the procedure or the manner in which the witnesses testified before the customary court. It was for doing so that the Court of Appeal rightly held thus:

“..... I agree with the appellant’s counsel that the learned Judge based his decision on grounds other than any specified in the statement accompanying the application. This is a serious infringement of the provisions of Order 43 rule 6(1) of the High Court of Rivers State (Civil Procedure) Rules.”

By Order 43 rule 3 (2) (b) of the High Court of Rivers State (Civil Procedure) Rules, the application for leave to apply for an order of certiorari must be supported by an affidavit which verifies the facts that the applicant relied upon. The Court of Appeal found that the applicant before the High Court failed to specify “any reason at all for saying that the Judges of the customary court were biased.”

In the circumstances, this appeal cannot succeed. It is for these and the reasons contained in the judgment of my learned brother, Kalgo, JSC., that I too hereby dismiss the appeal with N10,000.00 costs against the appellant, in favour of the 1st respondent.

H

KUTIGI JSC

I read before now the judgment just rendered by my learned

brother, Kalgo, JSC. I agree with his conclusion that this appeal lacks merit and ought to be dismissed. It is accordingly dismissed with costs as assessed.

B

EDOZIE JSC

The draft of the leading judgment of my learned brother, Kalgo, JSC., was made available to me before now. I am in complete agreement with his reasoning and conclusion in dismissing the appeal. The allegation of bias or the likelihood of it made by the appellant against the chairman of the customary court, Isiokpo, was not substantiated. The trial High Court was in error in holding otherwise and in quashing the proceedings of the customary court, Isiokpo on that ground. The Court of Appeal was justified in reversing the judgment of the High Court and dismissing the application for certiorari. C D

The appeal before us lacks substance and is accordingly dismissed with costs to the 1st respondent as assessed in the leading judgment.

E

OGUNTADE JSC

In Suit No. ICC/33/88 commenced at the customary court, Isiokpo, in Rivers State, the 1st respondent, as the representative of the Nsirim Omuisioha family of Ibaa, claimed against the appellant, as the representative of the Azuokwu Omuisioha family, Ibaa for: F

“The sum of N5,000.00 (five thousand naira only) being general damages for trespass and an injunction.”

The claim was in respect of a parcel of land described as “Nsirim family land.” It was alleged in the particulars of claim that the appellant “on or about 3rd January, 1988, without any lawful justification and or consent of the plaintiff did enter and damage economic crops and trespass to the said Nsirim family land.” G H

The suit was heard at the aforementioned customary court. On 11/8/87, the court in its judgment concluded that the respondents were the owners of the land in dispute. An order was made that the appellant should

vacate the land.

The appellant did not file an appeal against the said judgment. Rather, he brought a writ of certiorari before the High Court at Isiokpo to quash the judgment of the customary court. In the amended statement filed
B in support of the certiorari proceedings, the grounds relied upon for seeking an order of certiorari were stated to be these:

"1. *The Isiokpo customary court has no jurisdiction to determine Suit No. ICC/33/88 because the subject-matter of the suit is land in an urban area.*
C

2. *The chairman and members of the Isiokpo customary court were biased in their judgment of Suit No. ICC/33/88 and thereby failed to consider necessary evidence for the just determination of the suit.*

3. *As at the time of the judgment in Suit No. ICC/33/88 there was
D no customary court of appeal that the applicant can appeal to against the said judgment."*

The affidavit in support of the application for certiorari at pp. 65-66 of the record of proceedings reads:-

E "I, OKACHI AZUOKWU, male, farmer, Nigerian of Ibaa town make my oath and say as follows:-

1. *That I am the defendant/judgment creditor in this suit.*

2. *That judgment was delivered against me on 11th August, 1989,
F despite the notice served on the customary court at Isiokpo.*

3. *That the chairman of the customary court is not competent to hear and determine the case because of his relationship with the 2nd plaintiff who was his classmate in school and who is the chairman's family friend.*

4. *That the chairman is biased and it is evident that I cannot have
G justice in his court.*

5. *That already the plaintiff had been boasting and this is buttressed by the judgment he gave despite the fact that he was served a copy of the motion pending at Ahoada High Court for stay of proceedings.*

H 6. *That the chairman was acting as counsel to the plaintiff when the case was being heard.*

7. *That there is no Customary Court of Appeal in the State and there is nowhere to appeal to in case I am dissatisfied with the judgment of the*

court. So the judgment delivered on 11th August, 1989, should be quashed.

8. That I attach herewith a photocopy of the plaintiff's claim in the customary court, Isiokpo, and mark it Exhibit "A".

9. That I also attach statement setting out the name and description of the applicant and the acts relevant to the application and mark it Exhibit "B".

10. I also attach hereto certified true copy of the said judgment delivered by the customary court, Isiokpo on 11th August, 1989 and mark it Exhibit "C".

11. That I also filed another application for stay of proceedings on ground of bias before the vacation and the order was made and relied up and served on the judge, the chairman of Isiokpo customary court but the chairman ignored the order and delivered the judgment.

12. That I swear to this affidavit in good faith and in accordance with the Oaths Act, 1963."

The application for certiorari was heard by Peters-Amin, J. The learned Judge in his ruling, delivered on 3/2/94, held:

"1. That appellant's counsel did not establish that the land in dispute was situate in an area designated as an urban area under the designation of Urban Areas Order 1987.

2. That in the manner the Isiokpo customary court handled the proceedings in the case against the appellant in Suit No. ICC/33/88, there was a real likelihood of bias."

The learned Judge therefore issued an order of certiorari to quash the proceedings and judgment given on 11/8/89 by the customary court, Isiokpo.

The respondents were dissatisfied with the ruling of the High Court. They filed an appeal against it on 14/2/94. The appeal was brought before the Court of Appeal, Port Harcourt Division (hereinafter referred to as the 'court below'). The court below on 4/4/2000 in its judgment allowed the appeal. It set aside the ruling of Peters-Amain, J., which had quashed the proceedings and judgment of the Isiokpo customary court. It was the view of the court below that there was insufficient evidence to sustain the allegations of real likelihood of bias brought before the High Court against

the members of the Isiokpo customary court.

The appellant was dissatisfied with the judgment of the court below. He has come on appeal before this court. In his Notice of Appeal which was filed on 20/4/2000, the appellant raised seven grounds of appeal B against the judgment of the court below. However, the 1st respondent in his brief raised a preliminary objection against all the grounds of appeal. The ground of the objection was that all the grounds of appeal were of facts or mixed law and fact, for which the appellant requires the leave of the court below or this court in order to raise them on appeal before this court. C Following that objection, this court on 23/3/04 struck out the second to the seventh grounds of appeal. The only ground of appeal surviving is the 1st ground.

This court heard the appeal on 22/02/05 and appellant's counsel D with the concurrence of 1st respondent's counsel conceded that the only issue properly before the court is issue No.2 which was distilled from the first ground of appeal. Before I reproduce the surviving issue No.2, it is helpful to reproduce the first ground of appeal from which it is distilled.

E The first ground reads:

"1. The Court of Appeal erred in law when it held as follows:

I agree with the appellant's counsel that the learned Judge based his decision on grounds other than any specified in the statement F accompanying the application. This is a serious infringement of the provisions of Order 43 rule 6(1).'

PARTICULARS

(a) The High Court had in his RULING set down Halsbury's Laws of England 4th Edition Volume 11 page 818 paragraph 1559 where it is said G inter alia:

'Where certiorari is sought on the ground of absence or excess of jurisdiction, bias by interest, fraud or breach of the rules of natural justice, extraneous evidence of these matters will be admissible, and indeed H necessary, if they are not apparent on the face of the record.'

The High Court also sought and had support in the Supreme Court Practice 1976 page 798 where it is stated thus:

The most important function of the (certiorari) order is that by it,

in exercise of the supervisory capacity of the High Court over inferior court judgments, orders, convictions (other proceedings of inferior courts, whether civil or criminal, made without or in excess of jurisdiction may be removed into the High Court to be quashed.

‘Excess of jurisdiction is not shown merely because the inferior court has decided contrary to the facts or without evidence to justify the decision but only where in the circumstances it had no jurisdiction, for example, where the court acquits a defendant having already convicted him or had imposed maximum or where there has been a disregard of the fundamental conditions of the administration of justice as where there is a real likelihood of bias or prejudice on the part of the tribunal.’

The High Court further relied on the case of *Egware v. Governor Bendel State* (1991) 3 NWLR(Pt. 178) 199 at 209.

(b) There was no appeal that the High Court as a Court of Equity lacked the power of jurisdiction to seek in his aid the above provisions to do justice in deciding the matter before him particularly in his supervisory jurisdiction over inferior courts.

(c) These authorities took the High Court far beyond the provisions of Order 43 Rule 6(1) of the Rules of the High Court.

(d) The High Court having armed himself as he did proceeded to review the entire evidence before the customary court and to see whether certiorari could apply.

(e) The High Court, therefore, was no longer limited or to confine himself to what was only brought before him under and by virtue of Order 43 Rule(6) (1) by the Applicant.”

When the above ground of appeal is scrutinized, it is apparent and beyond argument that the complaint of the appellant is that the court below in its judgment erred in law by taking the view that the High Court could only confine itself to the grounds for seeking an order of certiorari as set out in the amended statement filed in support of the application for ceitiorari. The issue formulated on the first ground reads:

“Whether the High Court in his (sic) supervisory capacity over inferior courts (in an application for certiorari,) was limited to consider the record of the inferior court as a whole to see whether there is error or

a jurisdictional defect or irregularity which must be corrected by quashing the record of the inferior court.”

The court below in its judgment took the view that the High Court should have had itself confined only to the grounds raised in the amended statement accompanying the application for certiorari. There is ample support in the ruling of the High Court that it undertook a whole comprehensive review of the proceedings before the Isiokpo Customary Court. At the conclusion of the exercise, the trial Judge held that the customary court had:

1. disallowed one of the 1st respondent’s witnesses from testifying.

2. called a host of witnesses, and

3. exhaustively cross-examined those witnesses.

The court below accepted the respondent’s argument before it that as the appellant had not made any such complaints in its application for certiorari, the High Court was wrong to consider or raise grounds which he did not himself bring forward. The court below at page 153 of the record said:

“As has been seen, the 1st respondent did not specify any of these facts in his accompanying statement or the supporting affidavit as being his grounds for alleging bias against the court. In the circumstances, I must answer the question I posed earlier in the negative. I agree with the appellant’s counsel that the learned Judge based his decision on grounds other than any specified in the statement accompanying the application. This is a serious infringement of the provisions of Order 43, Rule 6(1).”

It seems to me that the court below was right to reason in the manner it did above. Adjudicatory justice has at its foundation the concept of fair hearing. The fairness of a trial can be tested by the maxim *audire alteram partem*. A party cannot be expected to prepare for the unknown. Any procedure which short changes a party and prevents him from knowing the case to be met at hearing and thus prepare against must be condemned. See *George v. Dominion Flour Mills* (1963) 1 All NLR 71.

Order 43 rule 6(1) of the High Court of Rivers State Civil Procedure Rules, dealing with the contents of a statement accompanying an applica-

tion for certiorari, provides:

“6(1) Copies of the statement in support of an application for leave under rule 3 shall be served with copies of the notice of motion or summons and, subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.” B

The complaint made against the chairman and members of the Isiokepo Customary Court was that they were biased in their judgment and that they had failed to consider necessary evidence for the just determination of the suit. This complaint only permitted the High Court to look at the judgment of the customary court in order to determine if ex facie it shows bias, and further if the court had failed to consider necessary evidence. The nature of the complaint made did not permit the High Court to undertake in a comprehensive manner the total proceedings of the customary court and the manner in which witnesses were heard. This simple constraint arises from the necessity to hold parties to the case they had made before the court. To do otherwise is to deny to the respondent a knowledge of the case he was to meet and prepare for at the trial. Parties cannot be permitted to create for each other, in a court hearing, booby traps and ambushes. Parties must know the case they are to meet at the trial. This is an elementary principle of justice. The trial Judge in this case would appear to have deviated from the case made by the appellant in his amended statement. This is impermissible. The court below was therefore correct in its views and conclusion in the matter. C D E F

It is for the above and fuller reasons in the judgment of my learned brother, Kalgo, JSC., that I would also dismiss this appeal with N10,000.00 costs in favour of the 1st respondent against the appellant. G