

**SUPREME COURT OF NIGERIA**

27TH JANUARY, 2006. SC. 84/2001

**CORAM:- S. U. ONU, A. O. EJIWUNMI, D. MUSDAPHER, I. C.  
PATS-ACHOLONU, S. A. AKINTAN, JJSC**

1. ATTORNEY-GENERAL ADAMAWA STATE
  2. ADAMAWA EMIRATE COUNCIL ..... APPELLANTS
  3. MALLAMHAMMA ADAMA ARDOLAWAL
- AND
1. MR. JONAH JAURO WARE
  2. MALLAM USMAN NJIDDA DAPANTI ..... RESPONDENTS
  3. MR. JAURO GANWAKA
- [SUING FOR THEMSELVES AND ON  
BEHALF OF YANDANG COMMUNITY]
- 

APPEALS - Grounds of appeal - Competence - Objection to some grounds  
- For raising new issues of law without leave - Is not substantiated (H1)

STATUTES - Amendment - Duty of Court - Is to give effect to every  
existing statute - And amendment thereto - Court of Appeal misinterpreted  
the statute in issue - By ignoring the amendment (H2)

CHIEFTAINCY MATTERS - Selection of chief - Where a traditional  
method exists under a statute - Proof of non compliance with that law -  
Is the plaintiffs' duty (H3)

CHIEFTAINCY MATTERS - District Head - Procedure adopted in  
appointing 3rd appellant - As the District Head - Was as provided by s. 7(1)  
of the 1992 Law (H4)

CHIEFTAINCY MATTERS - Selection of chief - Village heads - Function  
of - Is to nominate 3 candidates under the law - While Emirate Council will  
nominate one of them - For the Governor's appointment - Lower court  
acted per incuriam - In holding otherwise (H5)

### **FACTS**

Before the Yola High Court of Adamawa State the plaintiffs/respondents filed an action for themselves and on behalf of their Yandang community against the defendants/appellants. It was their contention that the selection of the 3rd appellant as the District Head is unconstitutional, irregular, void and of no effect whatsoever. They sought an injunction to restrain him from parading himself as the District Head of Bajama District, and an order directing 2nd appellant to conduct a fresh selection or appointment for the position of the District Head in accordance with the provisions of the Adamawa State Creation of Districts Law, 1992, as amended. After the exchange of pleadings the parties called various witnesses and tendered some documents as exhibits.

The trial court after receiving the address of counsel dismissed the respondents' case in its entirety. They felt aggrieved and appealed to the Court of Appeal which allowed their appeal. The lower court failed to consider the Amendment to the 1992 Districts Law that was operational at the time of filing of this suit. Being dissatisfied, the defendants/appellants have now appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*Whether having regards to the provisions of the Adamawa State Districts Creation Law 1992, and the evidence led before the trial court, the lower court was right in holding, that the 3rd appellant was not duly appointed as the District Head of Bajama District”.*

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

### ***Grounds of appeal - Competence***

1. Without much ado, I am of the view, that objection is not made out. The respondents are merely objecting to the complaints of the appellants that the Court of Appeal did not in its consideration of the case before it apply the provisions of the Amended law. It is common ground that the Adamawa State Districts Creation Law 1992 was amended in the same year.

As mentioned above the law was deemed to have come into force

on 2/5/1992 but some far reaching amendments were made in October, 1992. It is clearly wrong of the learned counsel for the respondents to argue that the amendment made to the law which came into force in October, 1992, before the action was filed was a fresh issue. (p. 204 D)

***STATUTES - Amendment - Duty of Court***

2. The only possible and rational explanation one can make is that if the lower court did not advert its mind to the amendment, the lower court clearly erred in law by ignoring the amendment. It is the duty of every court to give effect to an existing statute whether cited by counsel or not.

In my view, when the Court of Appeal interpreted the provisions of the law under reference without considering the amendment made in a later law, the Court merely misinterpreted the provisions or interpreted the provisions of non existent provisions. The case of the respondent was based on the law as amended and when lower court failed to take into consideration, the amendment, the lower court merely erred in law. The issue cannot be said to be a fresh issue. I accordingly reject the objection. (p. 204 F)

***Selection of chief - Where a traditional method exists***

3. From the pleadings and the evidence, it is common ground that a customary and traditional method exists for the selection and appointment of the District Head of Bajama District. Therefore it is section 7(1) of the Law that applies and the respondents as the plaintiffs were duty bound to show in what respect or respects there were non-compliance with the provisions of section 7(1) of the Law. (p. 208 A)

***District Head - Procedure adopted in appointing***

4. Section 7(1) of the Law, as amended had introduced far reaching changes in the procedure, the village Heads are merely to nominate only 3 persons and submit the names to the Emirate Council, who shall elect only one of the three and recommend his name to the Governor for appointment. In my view, it is the function of the electoral college of the village Heads to nominate 3 people, while the Emirate Council shall

consider and deliberate on the 3 people and recommend only one name to the Governor, who may appoint the recommended name as the District Head. This, in my view, is what occurred in this case. In my view the instructions given to the village Heads on 15/10/1992, to consult amongst themselves, after retiring, and present 3 names to the representative of the Emirate Council satisfies the requirement of voting under section 7 of the Law. I am of the view that the entire process in the appointment of the 3rd defendant/appellant was done in a manner substantially regular and in accordance with the provisions of the section 7(1) of Adamawa State Creation of District Law 1992 as amended. (p. 208 E)

***Village heads - Function of***

5. I am finally, of the view, that the lower court acted and reached its decision per incuriam when it held that the Emirate Council wrongfully usurped the function of the village Heads by “*reducing them to mere nominators*” instead of “*electors*” or “*selectors*”, Section 7 of the Law as amended, clearly made the Village Heads mere nominators. They were only to nominate 3 persons and pass the names to the Council. The Emirate Council shall then consider the three names nominated by the Village Heads and recommended only one name to the governor who will appoint as the District Head.

The function of the electoral college formed by the Village Heads is clearly to “*nominate*” while the recommendation and the eventual appointment is left to the Emirate Council and the governor respectively. The Court of Appeal by failing to be guided by the clear provisions of Section 7 as amended acted wrongly. (p. 209 B)

**NOTABLE POINTS OF INTEREST**

**PATS-ACHOLONUJSC**

*1. Need for Supreme Court to begin to reject frivolous appeals*

I cannot but comment on the nature of cases that now inundate the Supreme Court. That this Apex Court which ordinarily should confine itself dealing with important cases more particularly Constitutional matters would now be crowded with non-descript pedestrian cases like deciding

on who should be a Chief in a village or community. This Court should borrow a leaf from the U.S. Supreme Court where that Court on its own turns its back and refuses to handle some matters which they in their wise discretion and wisdom regard as frivolous or would not advance the growth of jurisprudence. Such banal, dreary and utterly vapid cases ought to end in the Court of Appeal and this Court should on its own decide whether some cases filed in this Court should necessarily be heard by this Court. To my mind it is the duty of this Court to reject entoto an application for appeals in a matter where (a) there have been concurrent findings of facts in the lower Courts and no Constitutional issue of law is involved unless in a case where this Court is of the view that it has to depart from some precedents hitherto resorted to because we inherited them from English report (b) Cases which Counsel took up because they want to use it to advance or increase the number of cases they handle in the Supreme Court for the purpose of application for SAN.

Of course novel cases that have arisen in the lower Courts could of necessity find their way in this Court for final determination. That is what this Court is instituted for, not for ordinary drab, dull and strictly non contentious issues where Counsel merely wish to make themselves heard. (p. 210 D)

### **AKINTANJSC**

*2. S.149(d) EA is not against failure to present a particular evidence or witness*

The position of the law is that the provisions of section 149(d) of the Evidence Act is that the presumption applies only to cases of failure to lead evidence in support of a pleaded fact. It does not mean that a particular witness must be called. What is therefore required before the presumption could apply is failure to call any evidence on the pleaded fact and not failure to call a particular witness.

In the instant case, the documents complained about were actually tendered by the appellants at the trial. They were in fact admitted as Exhibits E and El. The learned Justices of the court below were therefore in error when they held that the said documents were wrongly withheld.

The provisions of section 149 (d) of the Evidence Act are therefore inapplicable.

On the question whether the provisions of section 7(2) of the Adamawa State District Creation Law 1992 were complied with, there is  
B credible evidence on record in support of the conclusion reached by the learned trial Judge that the provisions of the law were duly followed. I therefore hold that the Court of Appeal had no basis for setting aside the decision of the trial court. (p. 213 G)

C    **REPRESENTATION**

Yakubu S. Ngbale DCL “with him S.L. Kyanson PSC 11  
for the 1st and 2nd Appellant  
Eyitayo Jegede for the 3rd Appellant.

D Chief L. Dan Nzadon for the 1st and 2nd Respondents.

**CASES REFERRED TO**

AJAYI VS. MILITARY ADM. OF ONDO STATE [1997] 5 NWLR (Pt  
E 504) 237  
ODUA INVESTMENT LTD. VS. TALABI (1997) 10 NWLR (Pt. 523)  
ROSSEK VS. ACB (1993) 8 NWLR (Pt 382) 493  
AFRICAN NEWSPAPERS VS. FEDERAL REPUBLIC OF NIGERIA  
F (1985) 2 NWLR (Pt 6) 137  
Onwujuba & Ors. v. Obienu & Ors. (1991) 4 NWLR (Pt. 183) 16  
Nigerian Airforce v. Obiosa (2003) 4 NWLR (Pt. 810) 233  
Babuga v. State (1996) 7 NWLR (Pt. 460) 279  
Mandilas & Karaberis Ltd. v. I.G.P. (1958) 3 FSC 20  
G

**STATUTES REFERRED TO**

Adamawa State Creation of Districts Law 1992 ss. 7 & 8  
Evidence Act s 149(d)

H

**LEAD JUDGMENT BY MUSDAPHER JSC**

The respondents as plaintiffs before the High Court of Adamawa State, holden at Yola, Bansi C.J commenced these proceedings for

themselves and on behalf of the Yandang community of Mayo-Belwa Local Government Area of Adamawa State, against the appellants herein as the defendants, claiming as follows:-

*“(1) A declaration that the selection, election and/or appointment of the 3rd defendant as the District Head of Bajama District is altogether B unconstitutional, irregular, invalid, null and void and of no effect whatsoever for offending the provisions of Adamawa State Districts Creation Law 1992 [as amended].*

*(2) (In the alternative to 1 above). A declaration that the selection C process for the position of the District Head of Bajama District was manipulated by the 2nd defendant for purely sectional, parochial and ethnic reasons.*

*(3) An injunction to restrain the 3rd defendant by himself through D his servants, agents howsoever from parading himself for continuing to parade himself as the District Head of Bajama District.*

*(4) An Order directing the 2nd defendant/appellant to conduct fresh selection/election and or appointment for the position of the’ District E Head of Bajama District in accordance with the Provisions of the Adamawa State Creation of Districts Law, 1992 [as amended].*

*(5) Further and better reliefs as the court may deem fit to make.”*

Pleadings were ordered filed exchanged and issues joined for trial. The plaintiffs called 4 witnesses and tendered 3 exhibits while the F defendants called 5 witnesses and tendered 1 exhibit. After the address of counsel and in his judgment delivered 16th January, 1966. Bansi C.J dismissed in its entirety the case of the plaintiffs. The plaintiffs felt unhappy with the dismissal of their claims and filed an appeal to the Court of Appeal, Jos Division. In its judgment, the Court of Appeal, on the 8th G February, 2000, unanimously allowed the plaintiffs’ appeal and granted all the reliefs, the plaintiffs claimed.

The defendants with the leave of this court filed an appeal against the decision of the Court of Appeal. The 3rd defendant who desired to H engage a counsel and fight separately his appeal, applied for and was granted leave to appeal on the 19th of November, 2003. Now the defendants shall hereinafter be referred to as the appellants and the

plaintiffs as the respondents.

It is convenient at this stage to set out the background facts as revealed by the pleadings and the evidence. In my view the fundamental facts are not in the main disputed. A vacancy arose for the post of the District Head of Bajama District under the Adamawa Emirate Council. On the 26/12/1991 an election was held in an attempt to fill the vacancy. At the election, the first respondent won the majority of the vote cast at the election by the village heads. The nomination/election was cancelled because (a) there were many petitions against it. (b) the first respondent who won the nomination did not come from any recognized ruling house and (c) Jereng village forming part of the district was not represented at the election. In 1992, the Adamawa State Districts Creation Law was promulgated and was deemed to have come into operation on the 2nd of May, 1992. The Law, which was later amended, was designed to create and regulate the appointment, selection and election of District Heads in Adamawa State. On the 15/10/1992 another attempt was made to fill the vacant position of the District Head of Bajama District, it was to be conducted under the provisions of the new law as amended. The 2nd appellant sent its agents to come to Bajama District to conduct the selection. They explained to the populace the underlying reasons for the revisitation of the exercise. The representatives of the Adamawa Emirate Council directed the 8 Village Heads, the electoral college, to retire and present 3 names out of which one will be appointed as the District Head. The Village Heads retired and eventually came out with the names of the 2nd respondent herein, the third appellant and one Halilu Chiroma as the three nominated candidates. It was on the 1/2/1993, that the name of the 3rd appellant herein, Hamman Adama Bello Ardo Lawal, was announced as the District Head of Bajama District. The respondents representing the Yandang community, pursuant to section 8(1) of the Adamawa State Districts Creation Law 1992 as amended, petitioned the 2nd appellant, the Adamawa Emirate Council, over the appointment. When nothing was heard from the Emirate Council the respondents commenced these proceedings.

Now, as mentioned above the respondents lost at the High Court but

won in the Court below and the defendants are now the appellants. The first and 2nd appellants in their brief of argument have identified and formulated the following issues arising for the determination of the appeal:-

“1. Whether the court below was justified in invoking the provisions of section 149 [a] of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990. B

2. Whether the conclusion of the Court below that, the appointment of the 3rd defendant/appellant was not done in accordance with the provisions of the Adamawa State Creation of Districts Law 1992, can be supported, having regard to the established evidence before it in relation to the provisions of section 7 of the said law as amended? Or in the alternative: C

3. Whether the decision of the court below in construing section 7 of the law in question without any regard to the subsequent amendment was not reached per incuriam? D

As mentioned above, the 3rd appellant filed with leave of Court separate Notice of Appeal, and in his brief has submitted the following 4 issues for the determination of the appeal :- E

1. Whether going by the State of the pleadings, the conclusion of the lower appellate court that the appellants/defendants admitted most of the facts of the plaintiffs/respondents was justified and whether such conclusion did not occasion a miscarriage of justice to the Appellant.- F

2. Whether the defendant/appellant pleaded native Law and custom or tradition relating to the position of District Head of Bajama. G

3. Whether the lower appellate court correctly interpreted the provisions of the amended Adamawa State Districts Creation Law 1992. G

4. Whether the Court of Appeal was right in its conclusion on the state of evidence and application of section 149 (a) of the Evidence Act in relation to the minutes of the meeting of 15/10/1992. G

In their respondents’ brief filed in answer to the both briefs of the appellants, the respondents, only submitted one issue for the determination H of the appeal. The issue reads:-

Whether having regards to the provisions of the Adamawa State Districts Creation Law 1992, and the evidence led before the trial court,

*the lower court was right in holding, that the 3rd appellant was not duly appointed as the District Head of Bajama District”.*

But before the examination of the issues for the determination of the appeal, it shall be necessary first to deal with Preliminary Objection to competence of the appeals raised in the respondents’ brief.

In the aforesaid Notice of Preliminary Objection, the respondents object to grounds 1, 2, 3 contained in the Notice of Appeal of 21/2/2000 and grounds 4 and 5 contained in the Notice of Appeal filed on the 19/11/2003. The ground of objection is that the issue being canvassed in the grounds is an issue of law which was not raised or tried before the lower court. It is argued that no leave was sought or obtained to canvass the issue. It is settled law that it is not competent to raise a fresh issue of law in an appeal without leave. See A.I.C Ltd vs. NNPC (2005)5 SCNJ 316.

**Without much ado, I am of the view, that objection is not made out. The respondents are merely objecting to the complaints of the appellants that the Court of Appeal did not in its consideration of the case before it apply the provisions of the Amended law. It is common ground that the Adamawa State Districts Creation Law 1992 was amended in the same year.**

As mentioned above the law was deemed to have come into force on 2/5/1992 but some far reaching amendments were made in October, 1992. It is clearly wrong of the learned counsel for the respondents to argue that the amendment made to the law which came into force in October, 1992, before the action was filed was a fresh issue. **The only possible and rational explanation one can make is that if the lower court did not advert its mind to the amendment, the lower court clearly erred in law by ignoring the amendment. It is the duty of every court to give effect to an existing statute whether cited by counsel or not. See AJAYI VS. MILITARY ADM. OF ONDO STATE [1997] 5 NWLR (Pt 504) 237. See also ODUHA INVESTMENT LTD. VS. TALABI (1997) 10 NWLR (Pt. 523) where it was held that a statutory provision cannot be waived. In my view, when the Court of Appeal interpreted the provisions of the law under reference without considering the amendment made in a later law,**

**the Court merely misinterpreted the provisions or interpreted the provisions of non existent provisions. The case of the respondent was based on the law as amended and when lower court failed to take into consideration, the amendment, the lower court merely erred in law. The issue cannot be said to be a fresh issue. I accordingly reject the objection.** B

Now returning to the issues for determination. In my view, the issue posed by the respondents is more apt and covers all the other issues formulated by the appellant. The issue is whether on the state of the pleadings, the evidence and the provisions of the law, the 3rd appellant was properly appointed as the District Head of Bajarna. C

Now, the learned trial judge made these findings of fact:

*"1. That on the 26/12/1991 there was an election held for the District Headship of Bajama where the first plaintiff and two others contested but the said election was cancelled because -* D

*(a) There were many petitions against it;*  
*(b) The first plaintiff did not come from any ruling house, and*  
*(c) Jereng village was not represented when the election was conducted.* E

*2. That the selection on 15/10/92 was done in accordance with the provisions of the Adamawa State Districts Creation Law 1992.*

*3. That Bajama District has been in existence 10 years after the white-man settled at Yola or since 1911.* F

*4. That there are ancient traditions and customs for appointing District Head in Bajama. Maye - Farang or Nassarawa - Jereng District and that has not been abolished by any legislation.*

*5. That the tradition and customs came into being 10 years after the settlement of the white-man at Yola or 1911.* G

*6. That the third defendant was properly appointed being one of the descendants of Ardo Lawal the first District Head of Bajama who was appointed 10 years after the settlement of the white-man in Yola."* H

Thus the claims of the respondents were dismissed by the trial court. The Court of Appeal on the other hand in its judgment per AKPABIO JCA of blessed memory and concurred to by OMOREN and MANGAJI

also of blessed memory JJ.C.A opined as follows:-

“But in the 1992 exercise, the village Heads were not allowed to vote. They were merely asked to give names of three persons whom they considered suitable for appointment as District Head, and they did so without actually voting for a district head. The representative, of the 2nd respondent then took the three names to the Emirate Council at Yola. It is reasonable to say that it was the officials of the Emirate Council at Yola which ultimately did the selection or election of the 3rd respondent and then forwarded his name to the governor for approval. It is significant to note that even up till the time of writing this judgment, there has been no evidence as to the number of votes scored by the 3rd appellant, at the purported election to qualify him to be the District Head of Bajarna district.

From the foregoing, it becomes clear that the eight village heads were not allowed to carry out their statutory function of being the “selectors” or “electors” of the District Head of Bajarna they were reduced to being mere “nominators” while the Emirate Council officials usurped the functions of being the “selectors” or electors. This, in my view-was clearly wrong and against the spirit and intendment of the Adamawa State Creation of District Law, 1992 xxxxxxxxxx.

The wrongful usurpation of the functions of the village heads by the officials of the Emirate Council must therefore be set aside and a new election ordered as claimed by the appellants.”

Thus the claims of the plaintiffs, the respondents were found to have been proved and were granted in their entirety. The crux of the judgment was that the village heads who constituted the electoral college were not allowed to carry out their statutory functions of being the ‘selectors’ and or “electors” of the district head, but were merely reduced to being “nominators.” Now, the question is whether, the exercise by the village heads on the 15/10/1992 in the nomination of the three persons was done in accordance with the provisions of the law or not. Now, section 7 of the Adamawa State Districts Creation Law 1992, as amended, provides:

“7(1) The procedure for the selection or election and appointment

*of District Head shall be in the following manner where traditional or customary methods of selecting District Head exist.*

*(a) Selection shall be done in accordance with tradition and custom of the area constituting the District and under the supervision of a representative of the Council and such security agents as the Council may require.*

*(b) The representative of the Council shall within one week make a report in writing to the Council of the result of selection and submit same indicating the first three names who have the required number of votes set down by the Council.*

*(c) On receipt of the report, the Council shall deliberate on the report and shall recommend one person to the Governor for approval as the District Head of the District concerned.*

*(d) The Council shall within one month of approval take necessary steps to perform Turbaning Ceremony.*

*2. Where no traditional methods of selecting District Heads exist:*

*(a) where a vacancy exists and applications are received by the Council, the Council shall arrange for the election at any appropriate date and time and save for security reasons the election shall be conducted at the Headquarters of the District.*

*(b) The village Heads shall be the selection*

*(c) The election shall be conducted under the supervision of a representative of the Council and such number of security agents as may be required by the Council to keep the peace and issue a separate report on the election.*

*(d) The representative of the Council shall within one week, make a report in writing to the Council of the election, and submit same indicating the first three persons who have scored the required number of votes as set down by the council.*

*(e) On receipt of the report and comments, the Council shall deliberate on the report and comments and recommend only one person to the Governor for approval as the District concerned.*

*(f) The Council shall within one month of the Governor's approval take the necessary steps and perform the turbaning."*

**From the pleadings and the evidence, it is common ground that a customary and traditional method exists for the selection and appointment of the District Head of Bajama District. Therefore it is section 7(1) of the Law that applies and the respondents as the**  
B **plaintiffs were duty bound to show in what respect or respects there were non-compliance with the provisions of section 7(1) of the Law.**

The respondents in paragraphs 26 - 28 of the Amended Statement of Claim, averred thus:-

C 1. There was electoral college of 8 village heads of Bajama District who were to select the District Head.

2. That on the date of the election, the representative of the council in the presence of the security agents and Local Government officials directed the village heads to select the names of three persons whom they  
D wanted to fill the vacancy of the District Head of Bajama.

3. The village Heads retired and on their own presented the names of three persons they nominated or selected whom they wanted to fill the position of the District Head of Bajama. The names were given to the  
E representative of the Council who took them to Yola.

4. That without determining the number of votes scored by each of the three persons, the appellants/defendants decided to appoint the 3rd defendant/appellant as the District Head of Bajama.

F **Section 7(1) of the Law, as amended had introduced far reaching changes in the procedure, the village Heads are merely to nominate only 3 persons and submit the names to the Emirate Council, who shall elect only one of the three and recommend his**  
G **name to the Governor for appointment. In my view, it is the function of the electoral college of the village Heads to nominate 3 people, while the Emirate Council shall consider and deliberate on the 3 people and recommend only one name to the Governor, who may appoint the recommended name as the District Head. This, in my**  
H **view, is what occurred in this case. In my view the instructions given to the village Heads on 15/10/1992, to consult amongst themselves, after retiring, and present 3 names to the representative of the Emirate Council satisfies the requirement of voting under section 7**

of the Law. I am of the view that the entire process in the appointment of the 3rd defendant/appellant was done in a manner substantially regular and in accordance with the provisions of the section 7(1) of Adamawa State Creation of District Law 1992 as amended.

**I am** finally, of the view, that the lower court acted and reached its decision per incuriam when it held that the Emirate Council wrongfully usurped the function of the village Heads by “*reducing them to mere nominators*” instead of “*electors*” or “*selectors*”, Section 7 of the Law as amended, clearly made the Village Heads mere nominators. They were only to nominate 3 persons and pass the names to the Council. The Emirate Council shall then consider the three names nominated by the Village Heads and recommended only one name to the governor who will appoint as the District Head.

I have referred to the judgment of the Court of Appeal where in his judgment AKPABIO JCA reproduced and interpreted the old S. 7(2) of the law, which was clearly amended as I have reproduced the same in this judgment. **The function of the electoral college formed by the Village Heads is clearly to “*nominate*” while the recommendation and the eventual appointment is left to the Emirate Council and the governor respectively. The Court of Appeal by failing to be guided by the clear provisions of Section 7 as amended acted wrongly.** See ROSSEK VS. ACB (1993) 8 NWLR (Pt 382) 493, AFRICAN NEWSPAPERS VS. FEDERAL REPUBLIC OF NIGERIA (1985) 2 NWLR (Pt 6) 137.

On the state of the law and the facts, this appeal succeeds and is allowed by me. The judgment of the lower court is accordingly set aside and the judgment of the trial court is restored. The appellants are entitled to costs both in the lower court and in this court assessed at N7,000.00 and N10,000.00 respectively.

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ONUJSC

Having been privileged to read before now the judgment just

delivered by my learned brother Dahiru Musdapher, JSC I am in entire agreement with him that the appeal is meritorious and ought therefore to be allowed.

I make similar award as to costs as contained in the lead judgment.

B \_\_\_\_\_

### **EJIWUNMIJSC**

C I have had the privilege of reading in its draft form the judgment just delivered by my learned brother, Musdapher JSC. For the reasons given in the said judgment for upholding this appeal, the appeal is also allowed by me. I also abide with the orders made as to costs.

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### **D PATS-ACHOLONU JSC**

I have read the judgment of my learned brother Musdapher JSC and I agree with him. I cannot but comment on the nature of cases that now inundate the Supreme Court. That this Apex Court which ordinarily should E confine itself dealing with important cases more particularly Constitutional matters would now be crowded with non-descript pedestrian cases like deciding on who should be a Chief in a village or community. This Court should borrow a leaf from the U.S. Supreme Court where that Court on F its own turns its back and refuses to handle some matters which they in their wise discretion and wisdom regard as frivolous or would not advance the growth of jurisprudence. Such banal, dreary and utterly vapid cases ought to end in the Court of Appeal and this Court should on its own decide G whether some cases filed in this Court should necessarily be heard by this Court. To my mind it is the duty of this Court to reject entoto an application for appeals in a matter where (a) there have been concurrent findings of facts in the lower Courts and no Constitutional issue of law is involved unless in a case where this Court is of the view that it has to depart from H some precedents hitherto resorted to because we inherited them from English report (b) Cases which Counsel took up because they want to use it to advance or increase the number of cases they handle in the Supreme Court for the purpose of application for SAN.

Of course novel cases that have arisen in the lower Courts could of necessity find their way in this Court for final determination. That is what this Court is instituted for, not for ordinary drab, dull and strictly non contentious issues where Counsel merely wish to make themselves heard.

I allow the appeal and set aside the judgment of the lower Court. I abide by the orders in the leading judgment.

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### AKINTAN JSC

I have had the privilege of a preview of the lead judgment just delivered by my learned brother, Musdapher, JSC, and I am in complete and total agreement with the reasons he adduced in coming to the conclusion he reached in the case. I also hereby adopt same as mine.

The dispute that led to the institution of this case at Yola High Court in Adamawa State was over the appointment and installation of the 3rd appellant as the District Head of Bajama District. The respondents were dissatisfied with the appointment and they commenced the action as plaintiffs against the present appellants as defendants. Their claim was, inter alia, for a declaration that the selection of the said 3rd defendant was unconstitutional, irregular, invalid, null and void; a declaration that the selection process was manipulated by the 2nd defendant; an injunction restraining the 3rd defendant from parading himself as the District Head of Bajama District; and an order directing the 2nd defendant to conduct fresh selection/election for the said position of District Head of Bajama. The trial took place before Bansi, J. At the conclusion of the trial, the learned trial Judge dismissed the plaintiffs' claim in its entirety. But on appeal to the court below, their appeal was allowed. The present appeal by the defendants is against the decision of the Court of Appeal allowing the defendants' appeal.

Three briefs of argument were filed in this court. Two of them were filled by the appellants while the third was filed jointly by the respondents. The two questions raised in the appellants' briefs which I will like to further expatiate on, in addition to the views ably expressed in the lead judgment, are whether the lower court was right in invoking section 149 (d) of the

Evidence Act; and whether the lower court was right in construing section 7 of the Adamawa State Districts Creation Law 1997. That law came into force on 2nd May, 1992 and the selection in the instant case was made on 15th October, 1992 in accordance with the provision of the said 1992 law.

B Section 7 of the Adamawa State Districts Creation Law provides as follows:

*“7 (1) The procedure for the selection or election and appointment of District Heads shall be in following manner.*

C *Where a traditional or customary methods of selecting District Head exist:*

*(a) Selection shall be done in accordance with tradition and custom of the area constituting the District and in the presence of a representative of the Council and such security agents as the Council may request.*

D *(b) The representative of the Council shall within one week make a report in writing to the Council of the result of the selection and submit same indicating the person who has been duly selected;*

E *(c ) On receipt of the report the Council shall deliberate on the report and shall make its aforesaid own comments and transmit same to the Governor for approval of the appointment;*

*(d) The Council shall within one month of approval take necessary steps and perform the turbaning ceremony;*

F *2. Where no traditional methods of selecting District Heads exist:*

*(a) Where a vacancy exists and applications are received by the Council, the Council shall arrange for the election at an appointed date and time and save for security reasons the elections shall be conducted at the Headquarters of the District.*

G *(b) The village Heads shall be the selectors and the person who scored the highest number of votes shall be returned as the duly elected District Head.*

H *(c ) The election shall be conducted under the supervision of a representative of the Council and such number of security agents as may be required by the council to keep the peace and issue a separate report of the election;*

*(d ) The representative of the Council shall within one week make*

*a report in writing to the Council of the result of the election and submit same indicating the person who has been duly elected;*

*(e) On receipt of the report and comments, the Council shall deliberate on the report and comments and transmit same to the Governor for approval of the Appointment;*

*(f) The Council shall within one month take necessary steps and perform the turbaning ceremony.”*

It was the case of the parties that the vacant Bajama District Head is one in which there was no existing traditional or customary methods of selection. The procedure to be followed, therefore, is as set out section 7 (2) of the Adamawa State Districts Creation Law 1992. It is the contention of appellants that the required procedure was duly followed.

One of the reasons given by the learned Justices of the court below in setting aside the judgment of the learned trial court which dismissed the claim was that the plaintiffs (now appellants) failed to produce and tender the report of the selection made on 15th October, 1992 which they pleaded. It is this said failure that led the lower court to invoke the provisions of section 149 (d) of the Evidence Act. Section 149 (d) of the Evidence Act provides as follows:

*“149. The court may presume the existence of any fact it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume-*

*(d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”*

The position of the law is that the provisions of section 149(d) of the Evidence Act is that the presumption applies only to cases of failure to lead evidence in support of a pleaded fact. It does not mean that a particular witness must be called. What is therefore required before the presumption could apply is failure to call any evidence on the pleaded fact and not failure to call a particular witness: See Onwujuba & Ors. v. Obieniu & Ors. (1991) 4 NWLR (Pt. 183) 16; Nigerian Airforce v. Obiosa (2003) 4 NWLR (Pt. 810) 233; Babuga v. State (1996) 7 NWLR (Pt. 460) 279; and Mandilas

& Karaberis Ltd. v. I.G.P. (1958) 3 FSC 20.

In the instant case, the documents complained about were actually tendered by the appellants at the trial. They were in fact admitted as Exhibits E and EI. The learned Justices of the court below were therefore  
B in error when they held that the said documents were wrongly withheld. The provisions of section 149 (d) of the Evidence Act are therefore inapplicable.

On the question whether the provisions of section 7(2) of the  
C Adamawa State District Creation Law 1992 were complied with, there is credible evidence on record in support of the conclusion reached by the learned trial Judge that the provisions of the law were duly followed. I therefore hold that the Court of Appeal had no basis for setting aside the decision of the trial court.

D     In conclusion, and for the reasons given above, and the fuller reasons given in the lead judgment, I also allow the appeal and restore the verdict of the trial High Court. I abide with the orders on costs made in the leading judgment.

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