

SUPREME COURT OF NIGERIA

12th JANUARY, 2007 SC. 160/1995

**CORAM:- S. M. A. BELGORE CJN, S. U. ONU, D. MUSDAPHER,
A. M. MUKHTAR, W. S. N. ONNOGHEN JJSC**

OBA ADEBANJO MAFIMISEBI 3RD DEFENDANT/APPELLANT
/CROSS - RESPONDENT

CHIEF FRANCIS OMOTUNDE
EWARAWON Substituted by Order 7th DEFENDANT/APPELLANT
of Court 2/5/2006 /CROSS - RESPONDENT

AND

1. PRINCE MACAULAY EHUWA
2. PRINCE ETHIOPIA EYIWUMI OKIKI PLAINTIFFS/RESPON
3. PRINCE EPHRAIM O. OMOTOYE -DENTS/CROSS -
4. PRINCE ALBERT S. EBIGBEMI APPELLANTS

AND

1. THE MILITARY GOVERNOR OF ONDO STATE
2. THE SECRETARY, ILAJE/
ESE-ODO LOCAL GOVERNMENT DEFENDANTS/RESPON
3. THE ATTORNEY-GENERAL -DENTS/CROSS-
OF ONDO STATE RESPONDENTS

AND

1. HIGH CHIEF S. A. ADUGBEN DEFENDANTS/RESPON
2. HIGH CHIEF A. M. AGBARO -DENTS/CROSS-
RESPONDENTS.

WORDS & PHRASES - Null and void - Set aside - Legal effect - Something declared null and void - Ceases to be in existence - Just as something set aside - As such both concepts - Are the same in law (H1)

APPEALS - Issues - Not appealed against - But pronounced on - By intermediate appeal court - Such issues cannot be subject of further appeal - And remain open to argument - As points of law to any further appeal (H2)

CUSTOMARY LAW - Chieftaincy declarations - Promulgation of - Powers of court - Courts cannot promulgate chieftaincy declarations - But may pronounce - On validity of such declarations - On the basis of prevailing customary law (H3)

EVIDENCE - Evaluation of - Duty of court - Court has a duty - To evaluate all evidence - Relevant to an issue - Before resolving the issue - Failure to so do - Amounts to breach of fair hearing (H4)

COURTS - Appeals - Retrial - Propriety of - Where an appellate court - Finds that trial court failed - To consider relevant and available evidence - It should consider the evidence - And make proper finding - Rather than remit case back for retrial (H5)

FACTS

The Plaintiffs/Respondents/Cross-Appellants sued the Defendants/Appellants/Cross-Respondents and the Defendants/Respondents/Cross-Respondents and Defendants/Appellants/Cross-Respondents in the High Court of Ondo State. Plaintiffs claim were for several Declarations and Orders challenging the validity of the Registered Declarations of Ugbo Chieftaincy on the ground that the said Declaration, Exhibit 'A', did not correctly represent the chieftaincy tradition of Ugbo people. Consequently, plaintiffs further challenged everything purportedly done pursuant to Exhibit 'A' such as the appointment of the 3rd Defendant as the Olugbo elect as null and void. It is the case of the plaintiffs that Exhibit 'A' was

made on wrong recommendations by the Morgan panel, in that the evidence led before that panel on the customary law and traditions of the people concerning chieftaincy were disregarded by the panel. It is common ground that Ojadele, the ancestor of the ruling house in Ugbo had two wives, each of which had two sons for him. Plaintiffs allege that there are two branches of the Ojadele which take the throne in rotation between them, representing the two wives of Ojadele. Further, that it was the turn of their own branch of the ruling house now to produce the Olugbo and not that of the Defendants.

On the other hand, Defendants contend that succession to the Olugbo stool is from father to son and that there was no rotation. This is despite the pertinent fact that on each occasion a vacancy occurs in the stool, there were always many contestants against the son of deceased Oba. In the face of all the foregoing, Exhibit 'A' posits that there is only one Ruling House, Ojadele, without stating whether or not the Ruling House has two branches, though this point was in evidence before the Morgan panel. At the end of trial, the learned trial judge dismissed in their entirety the claims of the Plaintiffs. Plaintiffs appealed to the Court of Appeal which ultimately allowed the appeal on the ground that trial judge failed to consider certain relevant and available evidence. That court therefore ordered a retrial of the matter before another judge of the Ondo State High Court. Some of the Defendants were unhappy and so appealed against that judgment of the Court of Appeal, to the Supreme Court. Plaintiffs also cross-appealed to the Supreme Court against the order of the Court of Appeal remitting the matter back for a retrial.

ISSUES FOR DETERMINATION

(a) Whether the learned justices of the Court of Appeal were right in holding that Exhibit "A" which is the registered declaration of the Olugbo chieftaincy can be set aside having not been proved to be illegal, unlawful and or null and void.

(b) Whether Exhibit J series are inconsistent with the content of Exhibit "A".

(c) Whether Exhibit J series which are records of Boards of Enquiry of various strives by aspirants to the stool Olugbo in 1950s can be

issued to alter, amend or modify the contents of a validly made chieftaincy declaration.”

“Whether the Court of Appeal is not empowered by section 16 of the Court of Appeal Act cap 75 Laws of the Federation 1990 to rehear this case as if it were the Court of first instance and made necessary orders, directives and or ascribe probative value to evidence of facts like Exhibit J, J1, J2 and J4 not bordering on demeanor which were not considered, appraised reviewed by the trial court instead of ordering a retrial De Novo.”

HELD (Unanimously dismissing the main appeal and allowing the cross-appeal per **MUSDAPHER JSC**)

WORDS & PHRASES - Null and void

1. On the question, whether the plaintiffs asked for the relief of setting aside the declaration in Exhibit A by asking for a declaration that it is null and void, it is submitted that the defendants are merely engaged in semantics. It is submitted that when Exhibit “A” is declared as null and void, it means it is no longer in existence.

Now dealing with this issue, in my view, the plaintiffs by asking for a declaration that Exhibit “A” is null and void, they also mean that Exhibit “A” does not really exist, if it exists, it should be set aside. I agree, it is a matter of semantics and it is a distinction without difference. A careful study of the pleadings of the plaintiffs clearly show that plaintiffs wanted to have the declaration in Exhibit “A” set aside, since it did not truly represent the customary law of the people. The learned trial judge had no difficulty in finding that the plaintiffs wanted the declaration in Exhibit “A” merely set aside. (p. 555 D)

Issues - Not appealed against

2. Clearly, it is not the Court of Appeal that made this important statement on the power of the court to intervene and to declare as invalid and set aside a chieftaincy declaration, but the trial court. See pages 399 - 400 of the printed record. There is no appeal against the decision of the trial court. The Court of Appeal merely restated what the trial judge has stated.

This court, cannot therefore in this matter reopen the decision of the trial judge without any appeal to the Court of Appeal on the matter.

In the case of ODIASE VS. AGHO [1972] 3 SC 73, at page 78, LEWIS JSC.

“Normally if there is an appeal against a judgment on one point then the appeal stands or falls on that one point. When we give judgment on that point we have not pronounced on this point not argued and, though they rest as part of the decision of the High Court, they remain open to argument as point of law to any other future appeal before us unfitted by any pronouncement of this court as to their validity.”

In other word the fact that the Court of Appeal reechoed, the statement made by the learned trial judge which was not appealed against, it cannot be a subject of a further appeal without an appeal on that point to the Court of Appeal. This court clearly has no jurisdiction to entertain an appeal direct from the trial High Court. The complaint under this head is in my view incompetent. (p. 556 G)

Chieftaincy declarations - Promulgation of

3. The learned trial judge held that the courts have the jurisdiction to intervene and decide whether Exhibit “A” truly represents the customary law and traditions of the Ugbo people. There is no doubt that the court cannot promulgate a chieftaincy declaration see the judgment of ONU JSC in the case of AJAKAIYE VS. IDEHAI supra pages 532-533 in which he cited the case of EGUMWENSE VS. AMAGHIZENWEN [1993] 9 NWLR (Pt 315) 1 at 41 where it was stated, that the court has no business to promulgate declaration of customary law, but all the authorities are one in that the courts have the competence to see whether a chieftaincy declaration such as Exhibit A is really in conformity with prevailing customary law. And accordingly declare it invalid if does not. I accordingly resolve issue A against the 3rd defendant/appellant, that the courts have the competence of setting aside Exhibit “A” if found to be contrary to the proved customary law and practice of the people. (p. 557 H)

EVIDENCE - Evaluation of - Duty of court

4. In his judgment, the learned trial judge as shown above, said he would consider all the evidence adduced before him in order to find whether the existing customary law of Ugbo people in relation to the succession of the Olugbo is in conformity with Exhibit “A”. He was to look into all the “evidence adduced” he failed to consider these pieces of evidence in his determination of the correct customary law of the Ugbo people. He also accused the plaintiffs of not supplying corroborative evidence on the issue of for example the rotational nature of the accession to the Olugbo throne at page 414 of the printed record.

The corroborative evidence if corroboration was necessary was the evidence contained in Exhibits J series and the other documents which the learned trial judge said he was going to consider to find out whether Exhibit A truly represent the customary law and practices of the Olugbo people. His failure to clearly determine the issue in controversy between the parties by not considering all the evidence adduced before him, the learned trial judge had failed in his duty of just fair adjudication.

The learned trial judge was wrong to have failed to consider the evidential values of the documents. I accordingly resolve issue (B) and (C) against the 3rd defendant/appellant. (p. 559 B/ F/ 560 A)

Appeals - Retrial - Propriety of

5. In its judgment the Court of Appeal at page 638 in the lead judgment stated:

The general conclusion in Exhibit J was that the “Olugbo stool is NOT HEREDITARY,” and that’ it was NOT YET the turn of Napoleon Mafimisebi [i.e. the father of the 3rd defendant] to be an Olugbo.

In my view, it is quite clear with the above findings by the Court of Appeal on the evidence in the Exhibits J series, there is absolutely no need to remit the case back to the High Court for retrial.

I will apply section 22 of the Supreme Court Act and Order 6 rule 12(2) and (5) of the Supreme Court Rules to enter judgment in favour of the plaintiffs. This is merely to ensure the final determination on the merits the real questions in controversy between the parties. This is clearly

within the general powers of the court to do justice without any undue regard to technicalities. (p. 562 E/ H/ 563 B/ D)

NOTABLE POINTS OF INTEREST

BELGORE CJN

1. Exhibit A is not the correct customary practice as it is ambiguous

The Declaration, Exhibit A, is not the correct customary practice of selecting Olugbo. By saying there is only one Ruling House, Ojedele, it has created a serious ambiguity because it never made mention of the fact that Ojedele had two wives whose children had from time to time alternated as Olugbo.

It is this ambiguity that emboldened the third defendant and his supporters to claim succession is from father to son. In other words, an attempt to perpetuate Olugboship in one section with Mafimisebi's being dominant. Whatever the good intention of Ondo Government in making Exhibit A, it has turned out to be a great albatross because it can perpetuate injustice. (p. 565 A)

ONNOGHEN JSC

2. There is no claim for setting aside of Exhibit "A"

On the other side of the coin are the submissions of learned senior advocate for the plaintiff/respondents to the effect that a claim for declaration that exhibit A is null and void is the same thing as a claim for setting aside exhibit A. Citing and relying on the cases of Adegun vs A-G of Oyo State (1987) 1 NWLR (pt. 53) 678 and Aku vs Aneku (1991) 8 NWLR (pt. 209) 280 learned senior counsel submitted that the court can set aside chieftaincy declaration which does not correctly declare the chieftaincy law and tradition of the area in issue.

To begin with, I do not agree with the submission of learned Senior Advocate for the plaintiffs/respondents/cross appellants that a claim for declaration of a right is the same as a claim to set aside what had been found to have been wrongly done. Looking closely at the reliefs claimed in the action and which have earlier been reproduced in the judgment, it is clear that there is no claim for setting aside the chieftaincy declaration,

exhibit “A” and I so hold. (p. 574 D)

3. Once a registered declaration is validly made, it is the duty of Courts to apply same

B It is now settled law that where a declaration in respect of a recognized chieftaincy is validly made and registered, the matter therein stated shall be deemed to be the customary law regulating the selection of a person to be the holder of the recognized chieftaincy to the exclusion of any other customary usage or rule. The registered declaration is therefore a declaration of the tradition, customary law and usages pertaining to the selection and appointment to a particular chieftaincy stool which necessarily dispenses with the need of proof by oral evidence of such tradition, custom and usages each time the need arises to determine the matter. The duty of the court in such circumstance - of a registered declaration - is to apply the provisions of a chieftaincy declaration to the facts of the case as established by evidence particularly as the court has no power to assume the functions of the chieftaincy committee as regards the making or amendment of customary law governing the selection and appointment of traditional chiefs in such relevant case but it is the business of the court to make a finding of what the customary law is and apply the law for the purpose of the claims for declaration. (p. 575 G)

F *4. Courts can set aside registered declarations not validly made*

In *Obala of OTAN Aiyegbaju vs Adesina* (1992) 2 NWLR (pt. 590) 163 this court also held that the court can set aside a registered declaration. The competence of the court to set aside or declare a registered declaration null and void is therefore settled and is beyond doubt irrespective of whether the said declaration enjoys the status of a subsidiary legislation or statutory instrument particularly as the court has the vires to declare invalid an Act of the National Assembly, talk less of a statutory instrument. The importance of the statement of the law lies in the apparent misconception that once a registered declaration is made it cannot be set aside or declared invalid. It can, where for instance it offends any constitutional provision or Act or Law etc. (p. 576 H)

5. Whether retrial order is appropriate always depends on circumstances of each case

The principle guiding the court in ordering a retrial of a suit have been stated in various cases as being dependent on the circumstances of a particular case. Generally it is agreed that an appellate court will be reluctant to order a retrial where:-

- (a) the plaintiff has established his case by raising the probabilities in his favour; or
- (b) the order of retrial will enable the defendant to improve his position during retrial to the prejudice of his opponent; or
- (c) the litigation will be unnecessarily prolonged; or
- (d) the proceedings are conducted by the trial court largely in conformity with rules of evidence and procedure; or
- (d) there was no substantial irregularity in the conduct of the case.

It is settled that an order of retrial will not be made in any of the above stated circumstances so as to avoid injustice. (p. 582 B)

REPRESENTATION

Chief A. A. Adeniyi, Adetunji Ojo with him for the 3rd Defendant/Cross Respondent.

Chief Wole Olanipekun SAN with him A. A. Malik, O. Abiodun for the 7th Defendant/Appellant/Cross Respondent.

Chief Afe Babalola SAN, with him Adebayo Adenipekun SAN, Sesun Dada, Remi Awe-Osho (Mrs.) Miss P. A. Balogun Akinyemi Aremu Obinna Dunmaguma, Miss Mary Ekpere for the Plaintiffs/Respondents/Cross Appellants.

A. Akindele Director Public Defender, C. K. Akinrinsola, DCL Ondo for the 1st, 2nd and 4th Defendant/Respondents/Cross Respondents.

CASES REFERRED TO

Ijale v. Leventis [1959] 4 FSC 108

Aiyegbaju vs Adesina (1992) 2 NWLR (pt. 590) 163

Oshodi v. Eyifunmi [2000] 13 NWLR (Pt 684) 298

Fasade vs Babalola (2003) 11 NWLR (pt. 830) 25

Odiase v. Agho [1972] 3 SC 73, pg 78

Egumwense v. Amaghizenwen [1993] 9 NWLR (Pt 315) 1 at 41

A-G Oyo State v. Fairlakes Hotels Ltd. [1988] 5 NWLR (Pt 92) 1 at 50

B Dantata v. Mohammed [2000] 7 NWLR (Pt 664) 176

Oladele vs Aromolarain 11 (1996) 6 NWLR (pt. 453) 180

Ikiwe vs Edijero (2001) 18 NWLR (pt. 745) 446 at 478 - 479

Adigun vs A-G Oyo-State (1987) 1 NWLR (pt. 53) 678

C **STATUTES & RULES REFERRED TO**

Supreme Court Act, s.22

Supreme Court Rules, O.6, r.12

Chieftaincy Edict of Ondo State No. 11 1984 s. 5(2)

D

LEAD JUDGMENT BY MUSDAPHER JSC

In the High Court of Ondo State of Nigeria in the Okiti-pupa Judicial Division and in suit No. HOK/7/84, the plaintiffs who are the respondents and the cross-appellants herein commenced this action on the 14/6/1984. In their Further Further Amended Statement of Claim as per paragraph 36 thereof, they claimed against all the defendants therein, that is the appellants/cross-respondents and the respondents/cross-respondents herein the following declarations and reliefs:-

F “(i) *Declaration that the Registered Declaration of Ugbo Chieftaincy are (sic) defective and inexhaustive of the customs and traditions of Ugbo chieftaincy and therefore null and void.*

G (ii) *Declaration that under the traditions and customs of the Ugbo people regarding Ugbo chieftaincy the appointment of an Olugbo is by rotation between AGBEDUN/OJOGO and OYETAYO/ATARIOYE section of OJADELE ruling house since the demise of OJADELE.*

H (iii) *Declaration that the Registered Declaration of the Ugbo Chieftaincy to the extent that it fails to provide for rotation between AGBEDUN/OJOGO and OYETAYO/ATARIOYE sections of OJADELE Ruling house is defective, inequitable, invalid, null and void.*

(iv) *Declaration that the findings and recommendations of Mor-*

gan Chieftaincy Review Commission of 1981 relating to the Olugbo of Ugbo Chieftaincy in Ondo State and the Government White Paper issued on it are invalid null and void on the following grounds:-

(a) *That the findings and the recommendations of the said commission on which the 1st Defendant based its decision are contrary to law having disregarded vital evidence placed before it.* B

(b) *That the findings and the recommendations of the said commission which the 1st defendant based its decision are contrary to law having taken into consideration extraneous matters.*

(v) *Declaration that under the customs and traditions of the Ugbo people, the head of the OJADELE ruling house must present candidates aspiring to the OLUGBO Stool physically for screening and selection before the kingmakers at the meeting where a candidate will be appointed.* C

(vi) *Declaration that the 7th defendant is not a kingmaker of the Olugbo of Ugbo in Ilaje/Ese-Odo of Ondo State.* D

(vii) *Declaration that the purported appointment and approval of the candidature of the 3rd defendant as the Olugbo by the 4th - 7th and 1 to 2nd defendant respectively is irregular, illogical, uncustomary, invalid, null and void and of no effect whatsoever.* E

(viii) *An Order of perpetual injunction restraining the 1st, 2nd, 4th, 5th and 7th defendants by themselves or through their servants, agents or privies, or otherwise howsoever from taking any steps or actions in relation to or in furtherance of the purported appointment of the 3rd defendant as the Olugbo elect.* F

(ix) *An Order setting aside the purported appointment of the 3rd defendant as the Olugbo elect.*

(x) *An Order of perpetual injunction restraining the 3rd Defendant from further presenting or parading himself or holding out himself or allowing himself to be held out as the Olugbo and from exercising any right or performing any functions ascribed to an Olugbo.”* G

Pleadings were filed, exchanged and amended. At the trial the parties gave evidence, and called other witnesses and documentary evidence were tendered. At the conclusion of the trial, in his judgment delivered on the 7th day of June 1990, the learned trial judge dismissed in their entirety H

that single issue and ordered retrial before another judge. Some of the defendant that is the appellants herein felt disgruntled with the decision and have now appealed to this court. The plaintiffs also cross-appealed to this court against the order remitting the case back for an order of retrial and contend that this court should look into the evidence and decide the matter on the narrow issue as set out by the Court of Appeal. B

But before the examination of the Notices of Appeals, and the various issues for determination identified formulated and submitted to this court, it is desirable at this stage to state the background facts of the dispute herein. The facts put very briefly is that the plaintiffs took this C action complaining that the Olugbo Chieftaincy Declaration tendered in the proceedings as Exhibit “A” was made on wrong recommendations by the Morgan panel, in that the evidence led before that panel on the customary law and the traditions of the Olugbo people concerning the D Olugbo chieftaincy were disregarded by the panel. It is also alleged that the panel based its finding on extraneous matters. It was said to be common ground, that the late Olugbo, Oba Napoleon Mafimisebi III took a memorandum based on agreement by the entire members of the ruling E house, all the descendants of the Ojadele to Morgan Commission. The memorandum contained a number of recommendations including order of rotational succession, to the Olugbo stool. While giving evidence before the panel, the Oba, the father of the 3rd defendant, urged the panel F to recognize two ruling houses viz Agbedun/Ojogo and Oyetayo/Atarioye. Because, according to him, their ancestor, Ojadele had two wives and each of the wives had two sons. The plaintiffs in the main allege that chieftaincy declaration in Exhibit “A” does not correctly represent the G customary law and traditions of the Ugbo people in relation to the succession to the Olugbo stool. The plaintiffs also averred that there were many irregularities in the nomination, selection and the purported appointment of the 3rd defendant sufficient to vitiate the whole selection exercise, e.g. the secretary to the local Government conspired with the H kingmakers to conduct the nomination and the selection exercise behind the back of the members of the ruling house and especially behind the back of the other stool contestants and the wrong membership of the

Caleb Kalejaiye [now substituted] to the council of kingmakers. It was averred that he was never appointed Asogba and was therefore not a kingmaker and he had no right to take part in the nomination or selection of an Olugbo.

B The defendants disagreed with the plaintiffs in a number of points, but it is common ground that on each occasion a vacancy in the stool of Olugbo arose, there were always many contestants against the son of deceased Oba even though the 3rd defendant and witnesses testified that the succession to the Olugbo stool is from father to son and that there was no rotation. This latter position of dependants was disbelieved by trial judge.

From the pleadings and the evidence adduced, it appears that both the plaintiffs and the 3rd defendant and his witnesses are agreed that Exhibit “A” did not truly represent the customary law and tradition of the Ugbo people in relation to the succession of the stool of Olugbo. The plaintiffs pleaded and led evidence that succession to the Olugbo stool was by rotation see paragraphs 13, 14, 15, 16 of the Further Further Amended Statement of Claim. The 3rd defendant by paragraph 7 of the Amended Statement of Defence pleaded and in his evidence stated that the succession to the Olugbo throne is from father to son and he is the only qualified candidate amongst the six contestants that vied for the Olugbo throne which was vacant then. While it is clear that Exhibit “A” limits the succession to the Olugbo to male descendants of Ojadele only.

Faced with this situation, the learned trial judge after discussing the legal status of Exhibit “A” and the circumstances when it can be successfully challenged in a court, referred to the case of ADIGUN VS. A-G OF OYO STATE [1987] 1 NWLR (Pt. 53) 678 at 717 and said at page 400 of the printed record:-

“xxxxxxxxxxxxx This court has jurisdiction to look into the existing declaration Exhibit “A” and if, from the adduced evidence, I find that it does not represent the true customary law of the Olugbo chieftaincy or that the Morgan Chieftaincy Commission was in breach of the rules of natural justice or that the Morgan Commission had acted on extraneous consideration xxxxxxxxxxxx I shall set Exhibit “A” aside and

declare what the true position is as regards the customary law of the Olugbo chieftaincy.”

It was after the purported consideration of the evidence adduced by both parties that the learned trial judge said in part of his judgment, See page 413 of the printed record:-

“I must say it is not terribly important for the sake of this suit to find out which of the two versions is correct because Exhibit “A” i.e the Registered Chieftaincy Declaration is not inconsistent with either version.”

Thus the learned trial judge found there was no inconsistency from the stand of the plaintiffs who averred succession by rotation, the 3rd defendant who averred succession from father to son and Exhibit “A” which simply stated succession, to the male descendants of Ojadele.

Again the learned trial judge proceeded to consider whether the plaintiffs have adduced any credible evidence to entitle them to have the declarations sought by them. He concluded thus:-

“Apart from the oral evidence of the plaintiffs and their witnesses that the chieftaincy had been in rotation among the 4 children of Ojadele since the death of Ojadele there is no other corroborative evidence which can support this claim. On the other hand there is overwhelming evidence to support the claim of the 3rd defendant that the chieftaincy has been hereditary since the death of Ojadele.”

Thus, as mentioned before, the learned trial judge found the customary law and tradition of the Ugbo people to be hereditary as against Exhibit “A” which leaves succession to all the male descendants of Ojadele. He yet proceeded to dismiss the plaintiffs’ claims. Also as mentioned above, the plaintiffs appealed to the Court of Appeal and mainly complained that the learned trial judge did not properly appraise and analyze all the evidence led before him. It was claimed that the learned trial judge failed to refer or be guided by Exhibits J series, if he had done so he would find the corroboration in the evidence of the plaintiffs on the question of rotation. It was on that narrow ground that the Court of Appeal allowed the plaintiffs’ appeal and set aside the dismissal of the plaintiffs’ case by the trial court. I shall now discuss the appeal of the 3rd defendant,

then the appeal of the 7th defendant and finally the cross-appeal of the plaintiffs. It appears to me that the other defendants, i.e. the king makers, the secretary to the local Government and the Government officials though sometimes referred to as appellants, they did not file any appellants' brief, even if they filed Notice of appeal, they merely filed respondents' or cross-respondents brief.

The appeal of the 3rd defendant

In his Notice of appeal, the 3rd defendant has filed 4 grounds of appeal and distilled from the grounds, the learned counsel appearing for him has identified, formulated and submitted to this court, the following issues for the determination of the appeal. The issues are:-

(a) Whether the learned justices of the Court of Appeal were right in holding that Exhibit "A" which is the registered declaration of the Olugbo chieftaincy can be set aside having not been proved to be illegal, unlawful and or null and void.

(b) Whether Exhibit J series are inconsistent with the content of Exhibit "A".

(c) Whether Exhibit J series which are records of Boards of Enquiry of various strives by aspirants to the stool Olugbo in 1950s can be issued to alter, amend or modify the contents of a validly made chieftaincy declaration."

ISSUE (a)

This issue mostly focuses on the question whether the courts have the competence or the jurisdiction set aside or declare null and void Exhibit "A" the chieftaincy declaration made lawfully in accordance with the provisions of the relevant chiefs' law. It is argued that the Court of Appeal was in error to have held that it has the power to set aside a subsidiary legislation such as Exhibit A. Learned counsel referred to the case of *OBALA OF OTAN AIYEGBAJU VS. ADESINA* [1992] 2 NWLR (Pt. 590) 163 at 181. It is further argued that the courts are not empowered to amend the Olugbo chieftaincy. Declaration see *AJAKAIYE vs. IDEHAI* [1994] 8 NWLR (Pt. 364) 504. It is further contended that the plaintiffs did not claim a relief for the setting aside of Exhibit A, the

plaintiffs merely wanted the court to declare Exhibit “A” as null and void.

The learned counsel for 1st, 2nd and 4th defendants argued and submitted that the function of the court is *jus dicere* and not *jus dare*, the court cannot assume the role of the legislature to amend or alter a legislation and that the court has no jurisdiction to invalidate a Registered B Chieftaincy Declaration such as Exhibit “A” unless it violates the State’s Chief Law and counsel referred to and cited *AYOADE VS. GOVERNOR OF OGUN STATE* [1993] 8 NWLR (Pt 309), *OYEFOLU VS. DUROSINMI* [2001] 16 NWLR (Pt 738) 1.

For the plaintiffs, the learned senior counsel representing them argued, that the courts have the power and the jurisdiction to invalidate any chieftaincy declaration once it becomes apparent, that the declaration does not properly represent the customary laws and traditions of the people. Learned counsel referred to the case *ADIGUN VS. A-G OYO D STATE* [1987] 1 NWLR (Pt 53) 678 and also the case of *AJAKAIYE VS. IDEHAI* (supra) *AKU VS. ANEKU* 1991 8 NWLR (Pt 209) 280.

On the question, whether the plaintiffs asked for the relief of setting aside the declaration in Exhibit A by asking for a declaration that it is null and void, it is submitted that the defendants are merely engaged in semantics. It is submitted that when Exhibit “A” is declared as null and void, it means it is no longer in existence. E

Now dealing with this issue, in my view, the plaintiffs by asking F for a declaration that Exhibit “A” is null and void, they also mean that Exhibit “A” does not really exist, if it exists, it should be set aside. I agree, it is a matter of semantics and it is a distinction G without difference. A careful study of the pleadings of the plaintiffs clearly show that plaintiffs wanted to have the declaration in Exhibit “A” set aside, since it did not truly represent the customary law of the people. The learned trial judge had no difficulty in finding H that the plaintiffs wanted the declaration in Exhibit “A” merely set aside. See from pages 397 to 402 in the printed record where the learned trial judge dealt with the legal status of Exhibit “A”.

Now, to the main question what is the legal status of Exhibit “A”.

Do the courts have the competence to set aside, the registered declaration? The learned trial judge in his judgment answered the question he stated at page 398 of the printed record:-

B *“The question whether the High Court has jurisdiction to make a declaratory order, such as ones sought by the Writ of Summons and Statement of Claim in this case is well discussed in the case of ADIGUN VS. A-G OF OYO STATE [1987] 1 NWLR (Pt 53) 678. xxxxxxxxxxxxxxxx The Supreme Court held that it does xxxxxxxxxxxx”*.

C The learned trial judge cited the statement of ESO JSC at page 717 of the report, thus:

D *“xxxxxxxxxxxxx The effect of such a declaratory Order of the court would be that any declaration made and registered under the Chiefs Law as to the customary law prevailing which was not in line with the declaratory order of the court as to the existing customary law would be void xxxxxxxxxxxx.”*

In the same case Justice Obaseki JSC also observed:-

E *“xxxxxxxxxxxxx It cannot, in my view, be correctly and legally argued that the High Court cannot entertain and adjudicate on such a claim in the exercise of its unlimited jurisdiction vested in it by section 236(i) of the Constitution of the Federal Republic of Nigeria 1979.”*

Applying the above principle, the learned trial judge continued-

F *“xxxxxxxxxxxxx I will from the evidence adduced In this court, ascertain and find whether there is customary law on the Olugbo chieftaincy, what it is and then decide whether on the evidence Agbedun/Ojoga and Oyetayo/Atarioye are the two ruling houses xxxxxxxxxxxxxxxx The court can intervene to declare the existing*
G *Chieftaincy Declaration valid or invalid.”*

So, clearly, it is not the Court of Appeal that made this important statement on the power of the court to intervene and to declare as invalid and set aside a chieftaincy declaration, but the H trial court. See pages 399 - 400 of the printed record. There is no appeal against the decision of the trial court. The Court of Appeal merely restated what the trial judge has stated. This court, cannot therefore in this matter reopen the decision of the trial judge with-

out any appeal to the Court of Appeal on the matter. See IJALE VS. LEVENTIS [1959] 4 FSC 108; OSHODI VS. EYIFUNMI [2000] 13 NWLR (Pt 684) 298.

In the case of ODIASE VS. AGHO [1972] 3 SC 73, at page 78, LEWIS JSC.

“Normally if there is an appeal against a judgment on one point then the appeal stands or falls on that one point. When we give judgment on that point we have not pronounced on this point not argued and, though they rest as part of the decision of the High Court, they remain open to argument as point of law to any other future appeal before us unfitted by any pronouncement of this court as to their validity.”

In other word the fact that the Court of Appeal reechoed, the statement made by the learned trial judge which was not appealed against, it cannot be a subject of a further appeal without an appeal on that point to the Court of Appeal. This court clearly has no jurisdiction to entertain an appeal direct from the trial High Court. The complaint under this head is in my view incompetent.

Be that as it may, the Court of Appeal held at page 631 of the printed record that it had power to set aside a registered declaration which does not correctly “*declare the chieftaincy custom and tradition of the area concerned.*” Is this correct? In my view, all the authorities seem to support the view. See sections 5(ii) and 5(2) of the Chieftaincy Edict of Ondo State, Edict No. 11 of 1984. See FASADE VS. BABALOLA [2003] 11 NWLR and the ADIGUN case (Pt. 830) p. 25 (supra).

In the instant case Exhibit A was frontally attacked by all the parties as soon as it was made. The parties clearly stated their different versions of the customary law relating to the chieftaincy. None of them agreed with the provisions contained in Exhibit A. According to the 3rd defendant and his witnesses, the customary law of the chieftaincy is that succession to the throne is from father to son. The plaintiffs on the other hand pleaded and gave evidence that it is rotational while Exhibit “A “states” that ascension to throne is a free affair to all the male descendants of Ojadele. Faced with this conflicting situation, **the learned trial judge**

held that the courts have the jurisdiction to intervene and decide whether Exhibit “A” truly represents the customary law and traditions of the Ugbo people. There is no doubt that the court cannot promulgate a chieftaincy declaration see the judgment of ONU JSC in the case of AJAKAIYE VS. IDEHAI supra pages 532-533 in which he cited the case of EGUMWENSE VS. AMAGHIZENWEN [1993] 9 NWLR (Pt 315) 1 at 41 where it was stated, that the court has no business to promulgate declaration of customary law, but all the authorities are one in that the courts have the competence to see whether a chieftaincy declaration such as Exhibit A is really in conformity with prevailing customary law. See AKU VS. ANEKWU supra and accordingly declare it invalid if does not. I accordingly resolve issue A against the 3rd defendant/appellant, that the courts have the competence of setting aside Exhibit “A” if found to be contrary to the proved customary law and practice of the people.

ISSUE (B)

This issue is concerned with the question whether Exhibit “J” series are inconsistent with Exhibit “A” thus necessitating that they should be considered to impeach and or infract Exhibit “A”. It is submitted that Exhibit J series are archival records of reports of various Boards of Enquiry set up to look into the Olugbo chieftaincy disputes. The learned counsel for the 3rd defendant concedes that the learned trial judge did not evaluate or make reference to them, but the learned counsel argued that the documents were inadmissible and that they were not in any event inconsistent with Exhibit “A”. The learned counsel for the 1st, 2nd and 4th defendant have virtually the same argument against Exhibits J series.

The learned counsel for the plaintiffs on the other hand argues that the issue of admissibility of Exhibit J series is a fresh issue on which there was no appeal against their admissibility either in this court or in the court below, and no leave was obtained to raise the issue on which there was no appeal against their admissibility. It is further argued that the exhibits were tendered without objection at the trial and it is too late now to object to their admissibility. It is again argued that the exhibits J series are relevant to show the customary law and traditions of the Ugbo people

and there is nothing in the Evidence Act preventing their admissibility. It is submitted that the failure to consider the exhibits by the learned trial judge was fatal to his decision.

Now, there is no dispute whatever that the learned trial judge had failed to evaluate, appraise the documentary evidence as contained in Exhibit J series which were admitted in evidence mostly without any objection. **In his judgment, the learned trial judge as shown above, said he would consider all the evidence adduced before him in order to find whether the existing customary law of Ugbo people in relation to the succession of the Olugbo is inconformity with Exhibit "A". He was to look into all the "evidence adduced" he failed to consider these pieces of evidence in his determination of the correct customary law of the Ugbo people. He also accused the plaintiffs of not supplying corroborative evidence on the issue of for example the rotational nature of the accession to the Olugbo throne at page 414 of the printed record.** The learned trial judge said:-

"However, I should resolve the issue as to what this court feels about the evidence led here about rotation of the chieftaincy without any prejudice to what the appropriate authority may likely do in the future. Apart from the oral evidence of the plaintiffs and their witnesses that the chieftaincy has been in rotation among the few children of Ojadele since the death of Ojadele there is no other corroborative evidence which can support this claim."

The corroborative evidence if corroboration was necessary was the evidence contained in Exhibits J series and the other documents which the learned trial judge said he was going to consider to find out whether Exhibit A truly represent the customary law and practices of the Olugbo people. His failure to clearly determine the issue in controversy between the parties by not considering all the evidence adduced before him, the learned trial judge had failed in his duty of just fair adjudication.

It is common ground that Exhibit J series were proceedings of enquiries made as the result of protests always occurring when a new Olugbo was to be appointed. The plaintiffs claim that the Exhibits contain

evidence of customary law relating to the chieftaincy. The documents were pleaded and tendered and there was only one in which the defendants lamely and unsuccessfully objected.

The learned trial judge was wrong to have failed to consider the evidential values of the documents. I accordingly resolve issue (B) and (C) against the 3rd defendant/appellant.

There are the 3 issues argued in the 3rd defendant's/appellant's brief. These issues having been resolved against the 3rd defendant, his appeal is accordingly dismissed by me.

Appeal of the 7th Defendant as substituted by High Chief Francis Omotunde Ewarawon

The 2nd appellant herein is the predecessor of the 7th defendant in these proceedings. He was the deceased High Chief Caleb Kalejaiye. He died during the tendency of these proceedings and was substituted by an order of this court with High Chief Francis Omotunde Ewarawon. He filed a brief as an appellant in this matter and in it, the learned counsel for him has identified and formulated one issue for the determination of his appeal. The issue reads:-

“Considering the circumstances of this case, the painstaking and thorough manner with which the trial court considered and evaluated relevant evidence placed before it and came to a decision and in view of exhibits “A”, “C” and “S” whether the lower court was not patently wrong in ordering retrial based on the fact that the trial Court did not pronounce of exhibits “J”, “J1” “J2” ‘J3” and ‘J4’.

The learned counsel for the plaintiffs filed and relied on a preliminary objection, that the appeal of the 7th defendant was earlier on struck out by this court for failure to file brief. I am not prepared to make a decision one way or the other because the above issue raised by the 7th defendant is covered by the issues contained in the appeal of the 3rd defendant. I do not see the need for me to repeat what I discussed in the appeal of the 3rd defendant. Suffice it for me to only hold that the issue is also resolved against the 7th defendant appellant and consequently his appeal is also rejected by me.

Plaintiffs Cross-appeal:

The Court of Appeal and all the parties concerned including the 3rd defendant are one in that the learned trial judge did not evaluate, the evidence contained in Exhibit J series when he decided to consider all the evidence “adduced” to find out whether Exhibit “A” truly represent the customary law and practice of the Ugbo people. The Court of Appeal B remitted the matter back to the High Court for a new trial when the documents will be fully evaluated before a decision is made on the validity or otherwise of Exhibit “A”. The plaintiffs cross-appealed against the order remitting case back to the High Court. Two grounds of appeal C were filed and distilled from the grounds, the learned counsel for the plaintiffs/cross-appellants has submitted the following issue for the determination of the cross-appeal:-

“Whether the Court of Appeal is not empowered by section 16 of the Court of Appeal Act cap 75 Laws of the Federation 1990 to rehear D this case as if it were the Court of first instance and made necessary orders, directives and or ascribe probative value to evidence of facts like Exhibit J, J1, J2 and J4 not bordering on demeanor which were not considered, appraised reviewed by the trial court instead of ordering a retrial E De Novo.”

It is submitted that since it is common ground and all the parties agree that the learned trial judge had failed to evaluate appraise all the evidence adduced before him e.g. the Exhibit J series, the lower court F was competent to intervene to evaluate appraise the evidence and make proper inference and ascribe probative value to the evidence as a matter of duty to minimize cost, expenses and time of litigation. It is submitted that the Court of Appeal was in error to have remitted the case back to the trial court for a new trial. It is submitted that the crux of the dispute G between the parties is whether the succession to the Olugbo chieftaincy of Ugbo land is hereditary i.e. from father to son as claimed by the 3rd defendant or is it by rotation as claimed by the plaintiffs. It is submitted that the evidence contained in Exhibit J series, which are archival materials, H tendered at the trial firmly and completely established the rotational nature of the Olugbo succession which was completely ignored by the learned trial judge. It is submitted that the lower court by virtue, of sec-

tion 16 of the Court of Appeal Act is empowered to use the evidence and to make proper findings on the matter. The learned counsel relied on the following cases FATAYINBO AND OTHERS VS. ABIKE WILLIAMS AND OTHERS 1956 SC NLR 274, LAVAL DAWODU 1972 ANLR 707, B SHELL BP PETROLEUM DEV CO. [NIG] LTD VS. PERE COLE 1978 3 SC, FATUNDE VS. ONWOAMANAM [1990] 2 NWLR (Pt 132) 330, MAJA VS. STOCOO 1968 NMLR 372.

The learned counsel for the plaintiff further argued that the Court of Appeal had clearly evaluated the evidence as contained in the Exhibit J series and had made findings on the issue of the dispute between the parties and it needed merely to enter judgment in favour of the plaintiffs. Most of the argument of counsel for the cross-respondents go to the admissibility of the Exhibits J series or are merely repetitive of their arguments under issue (B) of the main appeal and having regards to the answers I gave while considering Issue (B) I see no need to repeat the arguments or my reaction to them. D

Now, with reference to the evaluation of the evidence as contained in the Exhibit J series. **In its judgment the Court of Appeal at page 638 in the lead judgment stated:**

“At the High Court the appellants as plaintiffs produced and tendered inter alia a series of five documents from the National Archives F which were admitted as Exhibits J, J1, J2, J3, and J4. (They will herein-after be referred to as Exhibit J series). It is unnecessary to produce any of them here, as they are rather lengthy. The important thing however, setting up the Morgan Commission, and the making of Exhibit “A”. These exhibits all showed that the appointment of Oba Mafimisebi III as G the successor to his late father Oba Mafimisebi II. Exhibit “J” for instance was the Report of Board of Enquiry set up to enquire into the Olugbo chieftaincy dispute held in 1953. They contained the evidence of few supporters of the Oba who sought to show that succession was hereditary, while the vast majority testified that it was originally rotational H and sought to restore it. The general conclusion in Exhibit J was that the “Olugbo stool is NOT HEREDITARY,” and that’ it was NOT YET the turn of Napoleon Mafimisebi [i.e. the father of the 3rd defendant]

to be an Olugbo. Exhibit J1 was also a record of proceedings of another enquiry set up in January, 1954. Exhibit J2 was the report of District Officer Okitipupa Division on the same subject matter. All the other Exhibit J series dealt with the best method of succession to the throne by rotation."

In my view, it is quite clear with the above findings by the Court of Appeal on the evidence in the Exhibits J series, there is absolutely no need to remit the case back to the High Court for retrial. These pieces of evidence was the evidence the trial judge was looking for when he said apart from their oral evidence the plaintiffs failed to show any corroborative evidence of rotation to the stool of Olugbo. The evidence is there is Exhibit J series which he failed to utilize. It is very important to bear in mind that the cross respondents did not appeal against the finding by the Court of Appeal after evaluating Exhibit J series, that there was overwhelming evidence that the method of succession to the Olugbo is by rotation.

I will apply section 22 of the Supreme Court Act and Order 6 rule 12(2) and (5) of the Supreme Court Rules to enter judgment in favour of the plaintiffs. See A-G OF OYO STATE VS. FAIRLAKES HOTELS LTD [1988] 5 NWLR (Pt 92) 1 at 50, DANTATA VS. MOHAMMED [2000] 7 NWLR (Pt 664) 176. **This is merely to ensure the final determination on the merits the real questions in controversy between the parties. This is clearly within the general powers of the court to do justice without any undue regard to technicalities.**

In their pleadings and evidence, the plaintiffs alleged that Exhibit "A" the Registered chieftaincy Declaration did not truly represent the customary law and practice, and in view, the other disputants, especially the third defendants who also did not accept totally the provisions of Exhibit "A" when he claimed succession is hereditary, from father to son as against being free to all male descendants of Ojadele as contained in Exhibit "A". In their attempt to prove their contention, the plaintiffs gave evidence of the rotational nature of the succession and also tendered Exhibit J series which were ignored by the learned trial judge but which on appeal were evaluated and appraised by the Court of Appeal. The

Court of Appeal found that Exhibit J series proved the question of rotation, but failed to enter judgment in favour of the plaintiffs but remitted the case back to the trial court for trial de novo. In my opinion, the single issue posed by the plaintiffs/cross appellants is resolved in their favour and consequently the cross-appeal is allowed by me.

In the result the decision of the Court of Appeal remitting the case back to the trial court for a trial de novo is set aside. In its place, I enter judgment in favour of the plaintiffs as per paragraph 36 of the Further Amended Statement of Claim reproduced at the beginning of this judgment.

The plaintiffs are entitled to costs assessed at N10,000.00 against each set of the appellants/defendants and the defendants/cross respondents.

BELGORE CJN

The issues between the contending parties to Olugbo stool is whether the stool is rotational or hereditary. All the parties contesting for the Stool agree that the Olugbo Chieftaincy Declaration, Exhibit A, does not represent the custom for succession to the Stool. They also agree that all the contending parties descend from Ojedele, who they contend had two wives each of whom had two sons. Where they differ is the mode of succession.

For the 3rd Defendant, it was contended that succession is hereditary in form of son succeeding the father and gave example of successions from Mafimisebi I to the 3rd Defendant as succession from father to son. The third defendant is the grandson of Mafimisebi I, his father was Mafimisebi II. But in line of successions for past twenty-three Olugbos succession has not been from father to son. It was always rotational from two sections of Ojedele's descendants; i.e. Agbedun/Ojogo and Oyetayo/Atarioye. Oba Mafimisebi II, the father of third Defendant, while giving evidence before Morgan Commission, admitted so much. Thus, Exhibit A, the Chieftaincy Declaration, is not the correct statement of the custom of selecting the Olugbo. This is the contention of the Plaintiffs/

Respondents.

Thus, the Declaration, Exhibit A, is not the correct customary practice of selecting Olugbo. By saying there is only one Ruling House, Ojede, it has created a serious ambiguity because it never made mention of the fact that Ojede had two wives whose children had from time to time alternated as Olugbo. B

It is this ambiguity that emboldened the third defendant and his supporters to claim succession is from father to son. In other words, an attempt to perpetuate Olugboship in one section with Mafimisebi's being dominant. Whatever the good intention of Ondo Government in making Exhibit A, it has turned out to be a great albatross because it can perpetuate injustice. C

It is for the above reasons and fuller reasons in the judgment of my learned brother, Musdapher, J.S.C. that I also dismiss this appeal. D

Court of Appeal in setting aside the judgment of trial High Court ordered the trial Court to consider the effect of Exhibits J, J1, J2 and J4 and the whole J series of exhibits. This is the ground for Cross-Appeal before us. To send the case back for trial de novo will be time wasting E and unnecessary. All Exhibit J series are documents tendered as evidence which trial court admitted but never adverted to in judgment. Court of Appeal ought to have looked at the documents and juxtapose them with the overwhelming evidence in favour of rotation on the written record F before it. This would have been in accordance with Section 16 of Court of Appeal Act. Sending the case back for trial de novo will serve no useful purpose. Section 22 Supreme Court Act allows this Court to look at them. These documents from the National Archives clearly show the history of Olugbo Stool and successions over the years. It is amazing the trial court never adverted to them. In this light the cross-appeal succeeds. All the prayers of the Plaintiffs are granted as in the judgment of Musdapher J.S.C. I award the same costs. G

H

ONU JSC

Having been privileged to read before now the judgment of my

learned brother Dahiru Musdapher, JSC just delivered, I entirely agree with him that this appeal be and it is hereby allowed.

In suit No.HOK/7/84 in the High Court of Ondo State in the Okitipupa Judicial Division on 4/6/1984 by the plaintiffs who are the respondents/cross-appellants herein, in their Further Amended Statement of Claim as per their paragraph 36 thereof, claimed against all the defendants therein, that is the appellants/cross/respondents and the respondents/cross-respondents herein, the following declarations and reliefs:

C “(i) *Declaration that the Registered Declaration of Ugbo Chieftaincy are defective and in exhaustive of the custom and tradition of the Ugbo chieftaincy and therefore null and void.*

D (ii) *Declaration that under the tradition and customs of Ugbo people regarding Ugbo chieftaincy, the appointment of an Olugbo is by rotation between AGBEDU/OJOGO and OYETAYO/ATARIOYE sections of OJADELE Ruling House since the demise of Ojadele.*

E (iii) *Declaration that the Registered Declaration of Ugbo chieftaincy to the extent that it fails to provide for rotation between Agbodun/Ojogo and Oyetayo/Atarioya sections of Ojadele ruling House is defective, inequitable, invalid null and void.*

F (iv) *Declaration that the findings and recommendations of Morgan Chieftaincy Review Commission of 1981 relating to Olugbo of Ugbo Chieftaincy in Ondo State and Government White Paper issued on it are invalid, null and void on the following grounds: -*

G (a) *That the findings and recommendations of the said commission which the 1st Defendant based on its decision are contrary to law having disregarded vital evidence placed before it.*

(b) *That the findings and recommendations of the said commission which the 1st defendant based its decision are contrary to law having taken into consideration extraneous matters.*

H (v) *Declaration that under the customs and traditions of the Ugbo people, the head of the OJADELE ruling house must present candidates aspiring to OLUGBO stool physically for screening and selection before the kingmakers at the meeting where a candidate will be appointed.*

(vi) *Declaration that the 7th defendant is not a kingmaker of Olugbo*

of Ugbo in Ilaje/Ese-Olodo of Ondo State.

(vii) Declaration that the purported appointment and approval of the candidature of the 3rd defendant as Olugbo by the 4th to 7th and 1st to 2nd defendants respectively is irregular, illogical, uncustomary, invalid, null and void and of no effect whatsoever.

(viii) An order of perpetual injunction restraining the 1st, 2nd, 4th, 5th and 7th defendants by themselves or through their servants, agents or privies, or otherwise howsoever from taking any steps or actions in relation to or in the furtherance of the purported appointment of the 3rd defendant as the Olugbo elect

(ix) An order setting aside the purported appointment of the 3rd defendant as Olugbo-Elect.”

(x) An order of perpetual injunction restraining the 3rd Defendant from further presenting or parading himself or holding out himself or allowing himself to be held out as the Olugbo and from exercising any right or performing any functions ascribed to an Olugbo.”

The case went to trial after pleadings and amended pleading at the conclusion of which the learned trial Judge on 7th June, 1990 dismissed the Plaintiff's case in its entirety the declarations, injunctions, reliefs and injunctions sought. Aggrieved by the said decision, the plaintiff appealed to the Court of Appeal (coram: Akpabio, Ogebe and Ubaezonu JJ.CA) on one original and with leave, thirteen additional grounds. The court below held, inter alia, as follows: -

“I have carefully considered all the issues formulated by all the parties above and find that the most important question for determination in this appeal is whether the Registered chieftaincy Declaration of Olugbo, Exhibit “A” correctly represents the Chieftaincy custom or tradition of the Ugbo people xxxxxxxxxxxxxxxxx I consider this question most crucial because if at the end we find the chieftaincy declaration, Exhibit “A” did not correctly represent the chieftaincy tradition of the Ugbo people as they exist on the ground, this Court will not hesitate to declare it invalid and set it aside xxxxxxxxxxxxxxxxx If exhibit “A” is set aside, then clearly all other things done under it, such as the appointment of the 3rd respondent as the Olugbo of Ugbo elect must also be set aside as null and void.”

The court then proceeded to conclude as follows: -

"I have carefully considered all the evidence adduced in this case and find that the evaluation of evidence, and the ascription of probative value thereto, are matters peculiarly within the province of the trial court B and not that of the Court of Appeal.

xxxxxxxxxxxxxxxxxxxx In the instant case where the learned trial Judge had failed to make any reference or pronouncement at all on exhibit "J" series xxxxxxxxxxxxxxxxxxxx Justice therefore demands that this case C should be sent back to the court below for a fresh trial before another Judge of Ondo State High Court."

In allowing the appeal of the plaintiffs on that single issue the court below ordered a trial de novo of the case before another Judge. Before I proceed further one may ask, what do Exhibit "A" and Exhibit D "J" connote in the context of the case under consideration? Exhibit "A" is a chieftaincy declaration made under Ondo State Chiefs Edict of Ondo State; it assumes the status of a subsidiary legislation having been registered as such. Exhibit J. series on the other hand, consist of reports of E various enquiries set up to look into strives arising from contests to the Olugbo throne. Should Exhibit J series, it may be further asked, be used as touchstones to challenge the legality of Exhibit 'A'? In other words, which of the two versions, (i) Father to son succession (i.e. hereditary) F or (ii) whether rotation of succession, is consistent with Exhibit "A"?

(a) Exhibit "A" makes succession to Olugbo of Ugbo throne open to all princes of the OJADELE ruling house.

(b) Rotational succession which also allows all princes to aspire to become Olugbo whenever a vacancy occurs. G

(c) Father to son succession allows only immediate direct descendants.

The main appeal involving Chief A. A. Adebisi for the 3rd Defendant/Cross-Respondent and Chief Wole Olanipekun SAN for 7th Defendant/Appellant/Cross-Respondent was argued next. The oral argument proffered by the 3rd Defendant/Cross-Respondent's: counsel (Chief Adebisi) was: H

(a) Whether the learned Justice of the Appeal court was right in

holding that Exhibit “A” which is the registered declaration of the Olugbo chieftaincy can be set aside having not been proved to be illegal, unlawful and/or null and void.

(b) Whether Exhibit J series which are records of Boards of Enquiry of various strives by aspirants to the stool of Olugbo in the 1950’s B can be used to alter, amend or modify the contests of a validly made chieftaincy declaration.

Chief Wole Olanipekun, SAN raised a lone issue on behalf of 7th Appellant (who died during the pendency of this appeal but substituted C by Chief Francis Omotunde Ewarawon) which contends:

“Considering the circumstances of this case, the painstaking and thorough manner with which the trial court considered and evaluated relevant evidence placed before it and came to a decision and in view Exhibits “A”, “C” and “S” whether or not the lower court was not D wrong in ordering a retrial based on the fact that the trial court did not pronounce on Exhibits “J”, “J1”, “J2”, “J3” and “J4”.

Instead of remitting this case to the court below for trial de novo or for hearing vide *Lawal v. Dawodu* (1972) ANLR 707, *Fatunde v. E Onwoamanam* (1990) 2 NWLR (Pt. 132) 330 and *Maja v. Stocco* (1968) NMLR 372 my learned brother, Dahiru Musdapher JSC, has applied the provisions of section 22 of the Supreme Court Act under general powers as well as Order 6 Rule (6)(1) of the Supreme Court Rules to enter F judgment in favour of the Plaintiffs. See *A-G of Oyo State v. Fairlakes Hotel Ltd* (1988) 5 NWLR (Pt.92) 1 at 50 and *Dantata v. Mohammed* (2000) 7 NWLR (Pt.664) 176 with which I am in entire agreement.

In the result, I too allow the appeal, enter judgment in favour of G the Plaintiffs as per paragraph 36 of their Further Amended Statement of Claim as set out in the lead judgment of my learned brother Dahiru Musdapher, JSC along with the consequential orders inclusive of those as to costs set out therein.

H

MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment

delivered by my learned brother Musdapher, JSC. I agree that the main appeal fails and the cross-appeal succeeds. I abide by the consequential orders made in the lead judgment.

B

ONNOGHENJSC

This is an appeal against the judgment of the Court of Appeal holden at Benin City in appeal No. CA/B/52/91 delivered on the 14th day of June, 1995 in which it allowed the appeal of the present respondents but remitted the case to the High Court of Ondo State holden at Okitipupa “for retrial and pronouncement on exhibit J series by another judge.....” The present appellants are dissatisfied with that judgment and have appealed to this court while the plaintiffs/respondents cross-appealed against the order of retrial.

The facts of the case include the following. By paragraph 36 of the Further Amended Statement of Claim, the plaintiffs/respondents claim the following reliefs against the appellants at the High Court of Ondo State:-

(i) *Declaration that the Registered Declaration of Ugbo Chieftaincy are defective and inexhaustive of the custom and tradition of Ugbo Chieftaincy and therefore null and void.*

(ii) *Declaration that under the tradition and customs of Ugbo people regarding Ugbo Chieftaincy, the appointment of an Olugbo is by rotation between Agbedun/Ojogo and Oyetayo/Atarioye sections of Ojadele Ruling House since the demise of Ojadele.*

(iii) *Declaration that the Registered Declaration of Ugbo Chieftaincy to the extent that it fails to provide for rotation between Agbedun/Ojogo and. Oyetayo/Atarioye sections of Ojadele Ruling House is defective, inequitable, invalid, null and void.*

(iv) *Declaration that the findings and recommendations of Morgan Chieftaincy Review Commission of 1981 relating to Olugbo of ugbo Chieftaincy in Ondo State and the Government White Paper issued on it are invalid, null and void on the following grounds:-*

(a) *that the findings and recommendations of the said Commis-*

sion on which the 1st defendant based its decision are contrary to law having disregarded vital evidence placed before it.

(b) that the findings and recommendations of the said Commission which the 1st defendant based its decision are contrary to law having taken into consideration extraneous matters. B

(v) Declaration that under the customs and traditions of the Ugbo people, the Head of Ojadele Ruling House must present candidates aspiring to Olugbo stool physically for screening and selection before the Kingmakers at the meeting where a candidate will be appointed. C

(vi) Declaration that the 7th defendant is not a Kingmaker of Olugbo of Ugbo in Ilaje/Ese-Odo of Ondo State.

(vii) Declaration that the purported appointment and approval of the candidature of the 3rd defendant as Olugbo by the 4th to 7th and 1st to 2nd defendants respectively is irregular, illogical, unc customary, invalid, null and void and of no effect whatsoever. D

(viii) An order setting aside the purported appointment of the 3rd defendant as Olugbo-Elect.”

The case of respondents/cross appellants in support of the reliefs reproduced supra is simply that only one Ruling House exists for the Olugbo of Ugbo chieftaincy to which they and the 3rd appellant belong traceable to Ojadele who had two sons from two wives thereby creating two branches of the said Ojadele Ruling House; that prior to the advent of the three Mafimishebis’ from Agbedun branch of Ojadele Ruling House and who succeeded each other from father to son, other Olugbos from the other branch had ruled Ugbo; that the father to son succession that has come to characterize the reign of the Mafimishebis was unsatisfactory and resulted in agitations which led to a unanimous decision that the chieftaincy be rotated between the two branches, resulting in the Morgan Review Commission of Inquiry but which refused to incorporate that said agreement into the Chieftaincy Declaration resulting from that exercise. The Morgan Commission clearly left the issue of succession to the Olugbo Chieftaincy open to all male Ojadele descendants since they constitute a Ruling House. E
F
G
H

It was on the basis of that Declaration that the 3rd appellant who

comes from the Agbedun branch of Ojadele Ruling House that have arrogated to themselves the sole right to the Olugbo was nominated and eventually elected Olugbo of Ugbo, again to the dissatisfaction of the respondents who therefore instituted the action resulting in the instant appeal.

B The case of the appellants is that there is only one Ruling House and that succession to the Olugbo of Ugbo is always from father to son, not rotational, as canvassed by the respondents/cross appellants and that the appointment of the 3rd appellant is regular, valid and in accordance
C with the Olugbo of Ugbo Chieftaincy Declaration.

There are, in effect, two main appeals and a cross appeal in the instant appeal. The main appeals by the 1st appellant OBA ADEBANJO MAFIMISISEBI, represented by CHIEF A. A. ADENIYI, and the one by
D the 6th Defendant/appellant, HIGH CHIEF FRANCIS OMOTUNDE EWARAWON represented by CHIEF WOLE OLANIPEKUN, SAN.

The issues for determination as identified by learned counsel for the 1st appellant, CHIEF A. A. ADENIYI in the appellant's brief of argu-
E ment filed on 9/12/03 are as follows:-

“(a) *Whether the learned justice of the Appeal of Court was right in holding that Exhibit “A” which is the registered declaration of the Olugbo Chieftaincy can be set aside having not been proved to be ille-
F gal, unlawful and or null and void.*

“(b) *Whether Exhibit “J” series are inconsistent with the content of Exhibit “A”.*

“(c) *Whether Exhibit ‘J’ series which are records of Boards of En-
G quiry of various strives by aspirants to the stool of Olugbo in the 1950s can be used to alter, amend or modify the contents of a validly made chieftaincy declaration.”*

On his part, learned counsel for the 6th defendant/appellant identi-
fied a single issue for determination as follows:-

H (1) *Considering the circumstances of this case, the painstaking and thorough manner with which the trial court considered and evaluated relevant evidence placed before it and came to a decision and, in view of exhibits “A”, “C” and “S” whether or not the lower court was*

not wrong in ordering a retrial based on the fact that the trial court did not pronounce on Exhibits “J”, “J2”, “J3” and “J4” - Grounds 1, 2, 3, and 4.”

On the other hand, learned senior counsel for the plaintiffs/respondents, CHIEF AFE BABALOLA, SAN in the brief of argument filed B on 18/1/05 in reaction to the 1st appellant’s brief identified the following two issues for determination, namely:

“(i) Whether or not the Court of Appeal had the competence and the jurisdiction to set aside Exhibit “A” when the said exhibit was found C to be contrary to the native law and customs of Olugbo of Ugbo Chieftaincy as pleaded by the parties to the case? Grounds (I), (III) and (IV).

(ii) Whether Exhibit J series which are historical records relating to the chieftaincy are not admissible to invalidate the content of Exhibit D “A”.”

The above issues were adopted by learned senior counsel in the respondents’ brief of argument to the 6th defendant/appellant’s brief, deemed filed on 19/10/06. In order words and according to the learned senior counsel, both appeals in effect have the same substratum and I E tend to agree with him. As regard the cross appeal, a single issue is identified in the cross appellants’ brief filed on 6/11/97 to wit:-

“Whether the Court of Appeal is not empowered by section 16 of the Court of Appeal Act, Cap. 75 Laws of the Federation 1990 to re-hear F this case as if it were the Court of first instance and make necessary orders, directives and or ascribe probative value to evidence of facts like exhibits “J”, “J1”, “J2” and “J4” not bothering on demeanor which were not considered, appraised or reviewed by the trial court instead of G ordering a retrial De-novo.”

I hold the view that the two issues formulated by learned senior counsel for the plaintiffs/respondents/cross appellants constitute the real issues in controversy in this appeal but the main issue remains issue H No. 1 -

“Whether or not the Court of Appeal had the competence and jurisdiction to set aside Exhibit “A” when the said exhibit was found to be contrary to the Native law and customs of Olugbo of Ugbo chief-

taincy as pleaded by the parties to the case”

The arguments from the two appellants on issue No. 1 boil down to a submission that the court of trial, granted that it found that exhibit A, the chieftaincy declaration, was defective and inexhaustive of the customs of Olugbo of Ugbo chieftaincy the court would be without jurisdiction to set same aside granted further that there was a relief of setting same aside pleaded by the respondents; that since the relief of setting aside of Exhibit ‘A’ was not pleaded, the court is incompetent to grant same; the following cases were cited and relied upon: Igbe vs Efeki (2000) 10 NWLR.(Pt. 674) Ekpenyong vs Nyong (1975) 2 SC. 71; Obioma vs Olowu (1978) 3 SC. 1; Okoya vs Santili (1991) 7 NWLR (pt. 206) 753. Another reason given for the absence of competence in the court to set aside exhibit A is that it is a subsidiary legislation and that the duty of the court is to interpret it and that the court can only invalidate a chieftaincy declaration if it violates the Chiefs Law or Edict of the state, definitely not when it fails to accommodate a customary law or usage.

On the other side of the coin are the submissions of learned senior advocate for the plaintiff/respondents to the effect that a claim for declaration that exhibit A is null and void is the same thing as a claim for setting aside exhibit A. Citing and relying on the cases of Adegun vs A-G of Oyo State (1987) 1 NWLR (pt. 53) 678 and Aku vs Aneku (1991) 8 NWLR (pt. 209) 280 learned senior counsel submitted that the court can set aside chieftaincy declaration which does not correctly declare the chieftaincy law and tradition of the area in issue.

To begin with, I do not agree with the submission of learned Senior Advocate for the plaintiffs/respondents/cross appellants that a claim for declaration of a right is the same as a claim to set aside what had been found to have been wrongly done. Looking closely at the reliefs claimed in the action and which have earlier been reproduced in the judgment, it is clear that there is no claim for setting aside the chieftaincy declaration, exhibit “A” and I so hold. The issue therefore as can be seen from the pleadings is whether the court can order the declarations sought in view of exhibit A. In other words is the court competent to declare exhibit A null and void as claimed by the plaintiffs/respondents/cross appellants.

It is settled law that it is the claim of the plaintiff that determines the jurisdiction of the court to entertain same; see *Barclays Bank vs Central Bank* (1976) 6 SC. 175; *Adeyemi vs Opeyori* (1976) 9-10 SC. 31. In the instant case and as can be seen from the pleadings and reliefs claimed, the claim of the plaintiffs/respondents/cross appellants is substantially declaratory apart from the few injunctive reliefs thrown in for good measure. It is also settled law that an action for declaration is a useful and important procedural method or means of ascertaining and deciding a point of law or the construction of a document or deciding the existence of a right or obligation of a party as well as the determination of the validity of orders or decisions of inferior courts or tribunals or administrative bodies. In short, it is a very useful tool in a great variety of ways and circumstances including resolution of disputes as to title to land or chieftaincy.

It is also settled that the issue as to who is qualified to ascend to any traditional stool or throne is subject to the customary law and traditions of the people concerned which is in turn a question of fact to be proved by calling evidence unless frequent proof of same has made it to attain the legal status of notoriety so as to be judicially noticed, see *Oluwu vs Olowu* (1985) 3 NWLR (pt. 3) 372; *Agbai vs Okogbue* (1991) 7 NWLR (pt. 204) 391. It is to avoid the problem of calling evidence each time a particular native law and custom needs to be established in relation to chieftaincy in the former Western Region of Nigeria that gave rise to the attempt at codification of the relevant customary laws and traditions of the relevant people in relation to particular chieftaincies otherwise known as Chieftaincy Declarations. Therefore the purpose of registered chieftaincy declaration is to embody in a legally binding written statement of fact of the state government concerned and is usually exercised by a chieftaincy committee on behalf of that government.

It is now settled law that where a declaration in respect of a recognized chieftaincy is validly made and registered, the matter therein stated shall be deemed to be the customary law regulating the selection of a person to be the holder of the recognized chieftaincy to the exclusion of any other customary usage or rule. The registered declaration is there-

fore a declaration of the tradition, customary law and usages pertaining to the selection and appointment to a particular chieftaincy stool which necessarily dispenses with the need of proof by oral evidence of such tradition, custom and usages each time the need arises to determine the matter, see *Oladele vs Aromolarain* 11 (1996) 6 NWLR (pt. 453) 180. The duty of the court in such circumstance - of a registered declaration - is to apply the provisions of a chieftaincy declaration to the facts of the case as established by evidence particularly as the court has no power to assume the functions of the chieftaincy committee as regards the making or amendment of customary law governing the selection and appointment of traditional chiefs in such relevant case but it is the business of the court to make a finding of what the customary law is and apply the law for the purpose of the claims for declaration:- see *Ikiwe vs Edijero* (2001) 18 NWLR (pt. 745) 446 at 478 - 479; *Adigun vs A-G Oyo-State* (1987) 1 NWLR (pt. 53) 678.

In the case of *Afolabi vs Governor of Oyo State* (1985) 2 NWLR (pt. 9) 734 at 738 this court stated that:-

E “A Chieftaincy Declaration made under the Chiefs Law, 1978 is the customary law in force in the area which it covers. By section 4(2) of the Chiefs Law 1978 such Declaration continues to have effect until it is amended and the amended Declaration is registered.”

F In the case of *Adigun vs A-G of Oyo State* (1987) 1 NWLR (pt. 53) 678 this Court held that the making of a chieftaincy declaration is purely an administrative act, not a function exercisable by the court and that where there is a registered chieftaincy declaration in relation to a particular chieftaincy, the production of the declaration would suffice but where in the process of the making of the said declaration those who ought to be heard were not so heard or where the making of that declaration is in breach of the right to fair hearing the court can interfere as the administrative body is bound to observe the rules of fair hearing.

H In *Obala* of *OTAN Aiyegbaju vs Adesina* (1992) 2 NWLR (pt. 590) 163 this court also held that the court can set aside a registered declaration. The competence of the court to set aside or declare a registered declaration null and void is therefore settled and is beyond doubt

irrespective of whether the said declaration enjoys the status of a subsidiary legislation or statutory instrument particularly as the court has the vires to declare invalid an Act of the National Assembly, talk less of a statutory instrument. The importance of the statement of the law lies in the apparent misconception that once a registered declaration is made it cannot be set aside or declared invalid. It can, where for instance it offends any constitutional provision or Act or Law etc. In the most recent decision of this court in the case of Fasade vs Babalola (2003) 11 NWLR (pt. 830) 25 this court, par UWAIFO, JSC stated the law as follows:

“..... where a declaration has been validly made in respect of a recognized chieftaincy and registered, it represents the applicable customary law regulating the selection and appointment of a candidate to a vacant chieftaincy; and the provisions of such a registered declaration should prevail until amended; see *Ogundare vs Ogunlowo* (1997) 6 NWLR (pt. 509) 360. The registered declaration is the admissible and subsisting declaration. See *Adigun vs A-G Oyo State* (1987) 1 NWLR (pt. 53) 678, (1987) 3 SC. 250; *Oladele vs Aromolaran II*; its existence from the relevant chiefs law has statutory force. See *Ayoade vs Military Governor, Ogun State*, (1993) 8 NWLR (pt. 309) 111.” Emphasis supplied.

The question that naturally follows and on which lies the resolution of the appeal is whether Exhibit A qualifies as one of those to be declared null and void. The case of the plaintiffs/respondents/cross appellants is that exhibit A is defective and in exhaustive of the customs and traditions of Ugbo chieftaincy and that by the tradition and customs of the people, the appointment of the Olugbo is by rotation which exhibit A failed to recognize and provide for and consequently null and void. From the pleadings of the parties, two versions of the custom relevant to the Olugbo Chieftaincy were pleaded and testified to by the parties to the action, these are rotational succession by the plaintiffs/respondents/cross appellants and father to son otherwise called hereditary succession pleaded and testified to by the 3rd defendant/1st appellant. It is to be noted that the Morgan Commission whose recommendations led to the production of exhibit A never adopted either of the two versions hence the continuation of the dispute as to the correct mode of succession to the Olugbo of

Ugbo chieftaincy. Rather than adopt either of the versions the commission and the government in their wisdom threw the issue wide open to any male descendant of Ojadele Ruling House. It did not solve the problem hence the continuation of the agitation with each party sticking to its version even in the court. It has been argued that exhibit A is consistent with the two versions. I do not agree. If it were, there would have been no further need for the agitation particularly for the appellants insisting that succession to the throne in issue is from father to son, which is to the exclusion of the other members of the Ruling House. It is therefore very clear to me that the parties to the action are clearly not satisfied with exhibit A as representing the customary law relevant to the chieftaincy in issue hence the action for declaratory reliefs. I hold the view that the claims as couched - being declaratory in nature are within the jurisdiction or competence of the court to grant if there are facts to support same. The court is not being called upon to make a chieftaincy declaration for the people neither is it to amend the existing declaration. I hold the considered view that just as the court has the vires to declare or set aside a registered declaration found to be unconstitutional or contrary to the provisions of any Act or Law including the Chieftaincy Law under which it was made, the court equally has the competence to declare same null and void when from the evidence, it is clear that the said declaration does not truly represent the customary law it professes to restate. The above position was recognized by the learned trial judge as being the true position of the law on the matter when he stated at page 400 of the record thus:-

“This court has jurisdiction to look into the existing declaration Exhibit “A” and if, from the adduced evidence, I find that it does not represent the true customary law of the Olugbo Chieftaincy or that the Morgan Chieftaincy Commission was in breach of the rules of natural justice or that the Morgan Commission had acted on extraneous consideration I shall set Exhibit “A” aside and declare what the true position is as regards the customary law of the Olugbo Chieftaincy.”

From the above position taken by the trial judge which was never challenged on appeal, it is clear that no proper decision can be taken in relation to the issue stated by that court without a proper and exhaustive

appraisal or evaluation of the totality of the evidence produced before the court by the parties in support of their contending versions. It is the case of the plaintiffs/respondents/cross appellants that in an attempt at resolving the issue the learned trial judge failed to evaluate the exhibit J series tendered in support of their case and the lower court agreed with that submission and proceeded to order a retrial. It has to be noted that the issue of admissibility of exhibit J series as raised and argued by learned counsel for the appellants is misconceived as the documents were admitted without objection and the issue is being raised for the first time in this court without leave there being no appeal on the issue before the lower court.

The trial court at page 414 found, inter alia, as follows:-

“Apart from the oral evidences of the plaintiffs and their witnesses that the chieftaincy has been in rotation among the few children of Ojadele since the death of Ojadele there is no other corroborative evidence which can support this claim.”

The above finding is crucial in that if proved wrong, it gives credence to the complaint of the respondents/cross appellants that the trial court failed to evaluate the exhibit J series in its judgment and that if it had done so it would have arrived at a contrary conclusion. The lower court agreed with the respondents on the matter particularly as that court in quoting from the contents of exhibit J at page 638 of the record stated that “the general conclusion in Exhibit J was that the “Olugbo stool is NOT HEREDITARY” and that it was NOT YET the turn of Napoleon Mafemisebi to be an Olugbo.” The above finding clearly demonstrates the corroboration which the trial court had said does not exist in the evidence before it. There is therefore the evidence in support of the plaintiffs/respondents’ case that the customary law applicable to Olugbo of Ugbo stool is rotational succession rather than hereditary succession as contended by the appellants. To that extent it is unsafe to say that exhibit A which neither advocates the rotational succession nor the hereditary succession is a true reflection of the applicable customary law of the people concerned that being the case, it is liable to be declared null and void ab initio.

It is settled law that the evaluation of evidence and the ascription of probative value thereto reside within the province of the trial court that saw, heard and assessed the witnesses and that where a trial court unquestionably evaluates the evidence and justifiably appraises the facts, B it is not the business of the appellate court to substitute its own views for the view of the trial court but the court can intervene, where there is insufficient evidence to sustain the judgment, or where the trial court fails to make proper use of opportunity of seeing, hearing and observing, C the witnesses or where the findings of fact of trial court cannot be regarded as resulting from the evidence or where the trial court has drawn wrong conclusion from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings are perverse in the D sense that they do not flow from accepted evidence or are not supported by evidence before the court - see *Akinloye vs Eyiola* (1968) NMLR 92, *Enang vs Adu* (1981) 11 - 12 S.C 25; *Woluchem vs Gudi* (1981) 5 S.C 291; *Akpagbu vs Ogu* (1976) 6 S.C 63; *Odojin vs Ayool* (1984) 11 S.C 72; *Amadi vs Nwosu* (1992) 5 NWLR.(pt 2421) 273; *Okpiri vs E* *Jonah* (1961) 1 SCNLR 174; *Maja vs Stocco* (1968) 1 All NLR 141; *Ike vs Ugboaja* (1993) 6 NWLR (pt. 301) 539; *Ebba vs Ogodo* (1984) 1 SCNLR 372.

However where the issue before the court centers on the assessment or consideration of documentary evidence tendered in the proceedings as distinct from the credibility of witnesses as in the instant case where the issue is the evaluations non evaluation of the exhibit J series, the appellate court is not for closed by the views of the learned G trial judge on the said documentary evidence from evaluating and making its own findings thereon; that is also settled law. See *Absi vs Ekwealor* (1993) 6 NWLR (pt. 302) 643; *Adeyemi II vs Atanda* (1995) 5 NWLR (pt. 397) 512 at 529.

H At page 638 of the record, the lower court therefore appraised exhibit J series and stated as follows:-

“At the High Court the appellants as plaintiffs produced and tendered inter alia a series of five documents from the National Archives which were admitted as Exhibit J, J1, J2, J3 and J4 (They will hereinafter

be referred to as Exhibit J series). It is unnecessary to reproduce any of them here, as they are rather lengthy. The important thing however, setting up the Morgan Commission, and making of Exhibit A". These exhibits all showed that the appointment of Oba Mafimisebi III as the successor to his late father Oba Mafimisebi II. Exhibit J for instance was the report of Board of Enquiry set up to enquire into the Ohigbo chieftaincy dispute held in 1953. They contained the evidence of few supporters of the Oba who sought to show that succession was hereditary, while the vast majority testified that it was originally rotational and sought to restore it. The general conclusion in Exhibit J was that the "Olugbo Stool is NOT HEREDITARY," and that it was NOT YET the turn of Napoleon Mafimisebi (i.e. the father of the 3rd defendant) to be an Olugbo. Exhibit J1 was also a record of proceedings of another enquiry set up in January, 1954. Exhibit J2 was the report of District Officer Okitipupa Division on the same subject matter. All the other Exhibit J series dealt with the best method of succession to the throne by rotation." Emphasis Supplied. I hold the view that the lower court having come to the conclusion that the trial judge did not evaluate the exhibit J series has the duty to evaluate same and come to a conclusion thereon, which was done in this case particularly as the principle is that an appeal is a rehearing of the matter before the appellate court.

I have carefully gone through the exhibit J series and at page 468 of the record is part of Exhibit J., which states the following:

"Finding of Olugbo Chieftaincy Disputes Board of Enquiry 10th July - 17th

(a) Napoleon Mafimishebi:

Olugbo stool is not HEREDITARY. He is not the only son of Agbodun the descendant of Ojadele his great grand father.

(b) He is the grand son of Ogundere the Olugbo who was the father of Mafimishebi I from whom Mafimishebi II came out and begat Napoleon Mafimishebi the "Contestant."

Conclusion: It is not yet his turn."

The Committee concluded at page 470 thus:-

“The Committee hereby recommends Chief Josiah Nana Aiyemobuwa (Chief Ojomo of Ugbo) the Olubo of Ugbo this day: the 17th July, 1953 unanimously....”

B He was not from the same branch with Mafimishebi. He came from Ojogo branch.

However despite the finding by the lower court as reproduced supra, the court went on to order a retrial of the case before another judge with a directive to evaluate and appraise the exhibit J series.

C The principle guiding the court in ordering a retrial of a suit have been stated in various cases as being dependent on the circumstances of a particular case. Generally it is agreed that an appellate court will be reluctant to order a retrial where:-

(a) the plaintiff has established his care by raising the probabilities D in his favour; or

(b) the order of retrial will enable the defendant to improve his position during retrial to the prejudice of his opponent; or

(c) the litigation will be unnecessarily prolonged; or

E (d) the proceedings are conducted by the trial court largely in conformity with rules of evidence and procedure; or

(d) there was no substantial irregularity in the conduct of the case.

F It is settled that an order of retrial will not be made in any of the above stated circumstances so as to avoid injustice.

In the instant case the Court of Appeal in the passage reproduced supra evaluated the exhibit J series and in fact came to some definite conclusions on them as underlined supra. That clearly show that the said exhibits support the case of the plaintiffs/respondents/cross appellants G that succession to the throne in question is rotational not hereditary as found by the learned trial judge. This finding goes to reinforce the claim of the plaintiffs/respondents/cross appellants that exhibit A does not reflect the true position of the customary laws of the people as regard the H Olugbo of Ugbo Chieftaincy. Exhibit A simply says that every member of Oladele Ruling House is competent to contest the Olugbo Chieftaincy.

It is settled law that where a trial court failed in its primary duty of making findings of facts on issues joined on the pleadings and the evi-

dence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, an order of retrial is the proper order the appellate court should make - see *Kareem vs UBA Ltd* (1996) 5 NWLR (pt. 451) 634; *Okeowo vs Migliore* (1979) 11 S.C 138; *Bakere vs Apena* (1986) 4 NWLR (pt. 33) 1; *Awote vs Owodunni* (No.2) (1987) 2 NWLR (pt. 52) 366; *Adeyemo vs Arokopo* (1988) 2 NWLR (pt. 79) 703; *Osolu vs Osolu* (2003) 11 NWLR (pt. 832) 608.

However in the instant appeal the evidence found not to have been evaluated by the trial court is documentary and do not depend on the demeanor of the witnesses which would have confined evaluation strictly to the domain of the trial court. The evidence involved in the instant case is documentary which the court has held time without number that an appellate court has as much right or duty to appraise same as the trial court and the lower court did avail itself of that opportunity as evidenced in the passage in its judgment earlier reproduced.

The unfortunate thing that happened in the instant case is that after making the evaluations and coming to the conclusions or findings as underlined supra the lower court erroneously ordered a retrial contrary to the principle of law that where an appellate court decides to make an order for retrial, it should desist from making statement that may tend to prejudice the new trial. It is therefore any considered view that the lower court having come to the conclusion it did in relation to the exhibit J series erred in ordering a retrial instead of granting the reliefs as claimed by the plaintiffs/respondents/cross appellants. The order of retrial is in the circumstances liable to be set aside and I hereby order accordingly.

From the facts of this case and the relevant law I agree with my learned brother MUSDAPHER, JSC that the appeals have no merit and are accordingly dismissed by me while the cross appeal is allowed. The reliefs claimed by the plaintiffs/respondents/cross appellants in paragraph 36 of the Further Amended Statement of Claim earlier reproduced in this judgment are hereby granted as prayed. With the grant of relief 36(ix) and the order of injunction prayed for in paragraph 36(x) supra coupled with the declaration of nullity of Exhibit A, it becomes apparent that exhibit A is without validity and in effect does not exist neither does it

require a formal order of court setting same aside in the circumstance of this case.

Appeals dismissed. Cross appeal allowed.

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