

SUPREME COURT OF NIGERIA
18TH JANUARY, 2008, SC.249/2002
CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, P. O. ADEREMI, JJSC

1. CYRIACUS NNADOZIE
2. OKORO NNADOZIE APPELLANTS
3. ALUSIOBI OBIWURU
4. SAMUEL OBIWURU
AND
NZE OGBUNELU MBAGWU RESPONDENT

APPEALS - Retrial - Five guiding principles governing the order - As enunciated in Abodundu case - Include error in law or irregularity in procedure (H1)

APPEALS - Retrial - Discretion - Since the order of retrial is discretionary - The five guiding principles or any past decisions - Are not binding precedents (H2)

APPEALS - Retrial - Propriety of the order - Is where trial court failed to evaluate evidence on vital issues - And appeal court cannot adequately embark on evaluation from the printed records (H3)

COURTS - Evidence - Evaluation - Where trial court failed to evaluate evidence - Whose character is oral involving demeanour - Appellate courts are ill equipped to determine credibility of witnesses (H4)

APPEALS - Retrial - Discretion - Circumstances of present case justify retrial order - Discretion of Customary Court of Appeal in ordering retrial - Will not be interfered with - There being no good cause (H5)

FACTS

Before the Customary Court of Imo State holden at Nnenasa, Isu Local Government Area, the plaintiff/respondent filed an action in a representative capacity against the defendants/appellants. Respondent claimed a declaration that his family is entitled to the Customary Right of Occupancy over the land in dispute. He also claimed

perpetual injunction and N1,000.00 damages for trespass. The trial court had to determine whether appellants' held the land by reason of a customary pledge which respondent is entitled to redeem. Respondent was at pains to prove that the parties made recourse to and consulted the Chukwu Oracle which proclaimed in his favour. Appellants vehemently denied this proclamation. Trial Customary Court which listened to the parties' witnesses and visited the locus in quo failed to evaluate other relevant evidence before it. But merely accepted respondent's evidence on consultation with the Oracle which formed the kernel of its decision in respondent's favour.

Appellants' appeal to the Customary Court of Appeal was allowed as the judgment of the trial court was declared null and void and a retrial was ordered. Not being satisfied with the retrial order, they appealed to the Court of Appeal which dismissed their appeal. Still dissatisfied, appellants have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether, having regard to the peculiar facts and circumstances of this case the order of retrial is the most appropriate.

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

Retrial - Five guiding principles governing the order

1. This leads to a consideration of principles governing an order of retrial, the locus classicus on the point being *Yesufu Abodundu & Ors v. The Queen* (1959) SCLR 162. In that case, the following guiding principles in deciding an order of retrial were laid down:

(a) That there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice.

(b) That, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the Appellant.

(c) That there are no special circumstances as would render it oppressive to put the Appellant on trial a second time.

(d) That the offence or offences of which the Appellant was convicted or the consequences to the Appellant or any other person

of the conviction or acquittal of the Appellant are not merely trivial, and

(e) That to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it.

Still on the guiding principles, the Federal Supreme Court per Abbott, F.J. at page 166 said:

"In formulating these principles we do not regard ourselves as deciding any question of law or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise, and it may be that further experience will lead us to formulate additional principles or to modify those we have formulated in this judgment. We wish to make it clear that the court will be free to do this without infringing the doctrine of judicial precedent." (p. 183 C)

APPEALS - Retrial - Discretion

2. The five guiding principles formulated above on order of retrial are not decisions laying down legal principles binding on lower courts to follow, since the decision whether or not to order a retrial in a given case is discretionary depending on the peculiar facts and circumstances of each case. And since the decision so to order is the result of the appellate court's exercise of its discretion, no one decision is a binding precedent on subsequent decisions. It follows therefore that the five principles formulated in Abodundu's case are not exhaustive. (p. 184 C)

Retrial - Propriety of the order

3. Thus, it has been settled that where appraisal and evaluation of evidence on vital issues has been left undetermined by the trial court and the appeal court is not in a position to adequately embark upon the evaluation from the printed record the proper order to make is one for a retrial. Where however it is manifest from the record that the plaintiff's case has failed in toto and there is no manifest irregularity of a substantial nature, a retrial order which will be tantamount to giving the Plaintiff another bite at the cherry ought not to be made. (p. 184 E)

Evidence - Evaluation

4. It is clear that the trial customary court failed totally to evaluate the legal evidence against the background of what I consider to be the powerful submission of defence/appellants' counsel.

B The contention of learned senior counsel for the defendants/appellants is that the two appellate courts below and indeed this court ought to re-evaluate the evidence on the printed record and dismiss the claim. Attractive as the submission is, it failed to take cognisance
C of the character of the legal evidence on the printed record. The entire evidence is oral, there being no documentary evidence. It is such evidence that may necessarily involve demeanour and the determination of credibility of witnesses. Questions of demeanour and the determination of the credibility of witnesses are exclusively pre-
D served for the trial court. An appellate court, not having the privilege of watching and hearing the witnesses testify is, by reason of that handicap, not in a position to determine the credibility of witnesses. The result is that the two appellate courts below and indeed this court are ill equipped to determine the credibility of witnesses. That func-
E tion belongs properly to the trial customary court. (p. 187 B/E)

Circumstances of present case justify retrial order

5. Considering all the facts and circumstances of this case, I am firmly
F of the view that there are sufficient materials for the discretionary order of retrial. Further more, since the discretion as to whether or not to order a retrial in this case is exclusively that of the Customary Court of Appeal both the court below and this Court would not ordinarily interfere. And so neither the Court of Appeal nor this court can
G interfere with that court's exercise of its discretion unless there is good cause so to do. In this case there is no manifest good cause for such interference. (p. 188 A)

NOTABLE POINTS OF INTEREST**H *TOBI JSC***

1. Duty on a party who alleges misconception of case by the court

When a party alleges that a court of law misconceived the case of a party, he means or should be taken to mean that the court had a

wrong conception or wrong idea or understanding of the case of the party as presented in court. By the allegation, the party is attacking the court of grave wrong doing because the court, as a matter of law, must give judgment in the light of the facts as in the proceedings and the submissions of counsel or the parties as the case may be.

The burden is on the party alleging the misconception to prove it on appeal. And the only way to prove is to call the attention of the appellate court to the cold record before it. An appellant cannot move out of the record in search of evidence of misconception because there cannot be such evidence outside the record.

An appellant who alleges misconception has a duty to go into the specific details of the case of the parties and compare same with the evaluations and or conclusions of the court. The duty of an appellant is so specific that a wild-goose, generic or vague approach to the allegation will not be of help to him. An appellant must pin-point where and how the misconception arose. (p. 190 C)

2. Evaluation of evidence - Duty of trial and appellate court

The duty of a trial Judge is to evaluate the evidence before him to arrive at a decision. The duty of an appellate court, such as the Court of Appeal, is to go into the evidence evaluated by the trial Judge to see whether there was any perversity in the findings. And in the course of carrying out this duty, an appellate court will also go into the evidence and come to a conclusion one way or the other. A conclusion arrived at by an appellate court on the strength of the evidence at the trial court based on analysis of the evaluation of the evidence by the trial court, cannot be said to be a new case. In the course of evaluating evidence, a court of law is entitled to make deductions here and there from the evidence before the court, and deductions which result in conclusions cannot be said to be new case. (p. 193 B)

3. Null and erroneous judgment - The difference

While I concede to him that there is a world or wall of difference between the words "null" and "erroneous", it is my humble view that the judgment of the Customary Court is a nullity and based on that it is wrong and not correct. I think "erroneous" conveys both meanings of wrong and not correct. In conveying the legal status or posi-

tion of a judgment, "null" is stronger than "erroneous". I say this because a judgment which is wrong or not correct may not necessarily be a nullity.

I entirely agree with both the Customary Court of Appeal and the Court of Appeal that the judgment delivered by the Customary Court was a nullity and the only order available to the two appellate courts was one of a retrial. They correctly made that order.
(p. 195 B)

OGUNTADE JSC

4. Court not to resolve dispute by reliance on dictates of an oracle
The trial Customary Court fell into the error of determining the ownership of the land in dispute by reference to an alleged decision made between the parties by the Chukwu oracle. There is no doubt that the practice of referring disputes to oracles was greatly followed in several parts of Eastern Nigeria. Social development which has greatly impacted on the law has resulted in the situation where such practice has fallen into disfavour and this has in turn led to its prohibition by law. The contemporary practice is that disputes should be resolved with reference to the evidence brought before a court by parties: not by reliance on the dictates of some oracles. (p. 195 G)

ADEREMI JSC

5. Agreement rooted in illegality cannot be enforced by court
Even if both parties mutually agreed to consult "Chukwu Oracle" for divination and determination of the genuine owner of the land in dispute, they both must be ascribed with the knowledge that the performance of that agreement would necessarily involve the commission of an act which is a crime. I say so because every citizen is always fixed with the knowledge of the law. And ignorance of the law is no excuse. The law is that a contract or an agreement rooted in illegality must not be pleaded and if pleaded, it cannot be enforced by any court of law. In other words, an agreement is illegal if the consideration or the promise involves doing something illegal or contrary to public policy. The court below is therefore right, in law, in refusing to give the result of consultation of Chukwu oracle any legal recognition. That act would then be good as having not been done.

(p. 200 G)

6. Error of trial court justifies order of retrial in this case

In land matter, which this case is, if a plaintiff fails to prove the root of his title, it is trite that his case stands dismissed in toto. In the instant case, evidence of pledge was led, but there is nothing on the record to show that the evidence so led was ever considered by the trial court. Would it then be right for any court of law faced with the facts of this case to say that the plaintiff/respondent has failed to prove his case and therefore proceed to dismiss it as canvassed by the appellants while urging that their appeal be allowed? I think not. There has been or has occurred a fundamental error in law, in the sense that there was no evaluation of evidence of pledge. It is therefore my view that to refuse an order for a retrial of this case would occasion a greater miscarriage of justice than to grant it. (p. 201 C)

REPRESENTATION

Appellant absent and unrepresented

Chief C.A.B Akparanta, S.A.N., with him Robinson M. Emem, for the Respondent

CASES REFERRED TO

National Bank of Nigeria Ltd v. PB. Olatunde & Co (Nig.) Ltd (1994) 3 NWLR (Part 334) 512 at 526

Imonikhe v. A.G. Bendel State (1992) 6 NWLR (Part 248) 396 at 408

Onyiuke v. Okeke (1976) 10 N.S.C.C. 146

Onwuchekwa v. N.D.I.C. (2002) 5 NWLR (pt.760) 371

West Construction Co. Ltd. v. Batalha (2006) 9 NWLR (pt.986) 595 G

Abodundu & Ors v. The Queen (1959) 4 FSC 70

Udogu v. Egwuatu (1994) 3 NWLR (Part 330) 120

Carribean Trading and Fidelity Corporation v. U.N.N.P.C. (1992) 7 N.W.L.R (Part 252) 161

E.F.I v. Enyinful (1954) 14 WACA 424

Ekpa & Ors v. Utong & Ors (1991) 6 NWLR (Part 197) 258 at 276 and 278

Yesufu Abodundu & Ors v. The Queen (1959) SCLR 162

Olatunji v. Adisa (1995) 2 NWLR (Part 376) 107

Chief Asuquo Oko & Ors v. Chief James Ntukidem & Ors (1993) 2 NWLR (Part 274) 124

Okoduwa v. The State (1988) 2 NWLR (Part 76) 333

B

LEAD JUDGMENT BY TABAI JSC

This suit was initiated at the Customary Court of Imo State holden at Nnenasa, Isu Local Government Area of Imo State on or about the 9/6/92. The plaintiff therein is the respondent in this appeal and shall herein after be simply referred to as the respondent. While the defendants therein are the appellants herein and shall herein after be simply referred to as the appellants. The respondent sued for himself and as representing the Mbagwu family of Umuḡḡḡ Ekwe Isu Local Government Area. The substance of the claim was for a declaration that he and his Mbagwu family were entitled to the Customary Right of Occupancy over the land in dispute. He also claimed for perpetual injunction and N1, 000, 00 damages for trespass.

The trial involved the testimony of a number of witnesses from both parties. The Court also visited the locus in quo. By its judgment on the 30/1/95 the trial Customary Court allowed the claim and granted the declaration and injunction sought and awarded N500.00 costs against the appellants.

At the trial Customary Court, the main issue which fell for determination was whether the Appellants' holding of the land in dispute was by reason of a customary pledge and which therefore entitled the Respondent to its redemption. On this question of whether there was any customary pledge, the Respondent was at pains to prove that by a mutual agreement the parties made recourse to and consulted the Chukwu oracle which proclaimed in favour of the respondent. The appellants vehemently denied the alleged recourse to and proclamation by the Chukwu oracle. The trial Customary Court accepted the respondent's evidence of the parties recourse to the Chukwu Oracle and which indeed formed the kernel of its decision.

The appellants were aggrieved by the said decision and appealed to the Customary Court of Appeal. By its judgment on the 9th of July, 1996 the appeal was allowed. The judgment of the trial

Customary Court was declared null and void, set aside and a retrial ordered.

Still not satisfied, the Appellants went on appeal to the Court of Appeal. The appeal was dismissed. This was in the judgment on the 18th September, 2001.

The appellants are still aggrieved and have come on appeal to this court. The parties, through their counsel filed and exchanged their briefs of argument. The appellants' brief filed on the 2/4/03 was prepared by Livy Uzoukwu SAN. That of the respondent filed on the 15/1/04 was prepared by C.A.B. Aparanta & Co.

In the appellants' brief Livy Uzoukwu, SAN., formulated three issues for determination which he couched as follows:-

(1) Whether the Court of Appeal misconceived the respective cases of the parties ?

(2) Whether the Court of Appeal was right in determining the appeal based on issues raised suo motu by it and in respect of which parties did not address it.

(3) Whether the order of retrial made by the Court of Appeal was in law right.

On his part C.A.B. Akparanta. SAN identified only one issue for determination. The issue is

"whether the court below was right in confirming and affirming the judgment of the Customary Court of Appeal which set aside the judgment of the Customary Court of first instance given in favour of the plaintiff/respondent and instead ordered a retrial of the substantive suit at the Customary Court of first instance."

In the Course of his submissions learned senior counsel for the respondent proffered arguments in response to each of the Appellants' three issues.

In his argument learned, counsel for the Appellants made references to portions of the judgment of the Court of Appeal and submitted that there was a misconception of the cases of both the appellants and respondent. Having pleaded pledge, he argued, the Respondent had impliedly admitted the appellants' possession of the parcels of land in dispute and had the duty to prove the pledge which he failed to establish. Learned senior counsel also referred to the conclusion of the court below *"that the appellants obtained from the*

Customary Court of Appeal exactly what they asked for" and argued that the finding showed also a misconception of the appellants' case and thus perverse. The misconception of both cases, it was argued, occasioned a miscarriage of justice.

Under the Appellants' issue two, Learned Senior Counsel referred to the reasoning of the court below that the respondent did not go to the trial court to prove anew that there had indeed been a pledge and argued that the Respondent indeed alleged pledge but failed to prove it. He referred also to the finding by the court below that the appellants got from the Customary Court of Appeal exactly what they asked for and submitted that the two issues were raised suo motu by the court and had a duty to hear the parties before giving its decision based thereon. For this submission he relied on *Udogu v. Egwuatu* (1994) 3 NWLR (Part 330) 120; *Carribean Trading and Fidelity Corporation v. U.N.N.P.C.* (1992) 7 N.W.L.R (Part 252) 161. Learned senior counsel for the appellants further submitted that the court below read into the record what is not there. Under the appellants' third issue learned senior counsel repeated in greater details the arguments in issues one and two i.e. that the respondent failed to prove the alleged pledge and that the proper order is one for a dismissal of the case instead of an order of retrial. He urged finally that the appeal be allowed and the claim of the respondent dismissed.

Chief C.A.B. Akparanta, SAN., for the respondent argued as follows: He reiterated the principle that proceedings in Customary Courts are not bound by technical rules and the exactitude used in common law courts and that appellate courts have a duty therefore to look at the claim and evidence to determine the real issues in controversy between the parties. In support of this principle, he cited *E.F.I v. Enyinfu* (1954) 14 WACA 424 and *Ekpa & Ors v. Utong & Ors* (1991) 6 NWLR (Part 197) 258 at 276 and 278. He referred to the writ of summons and the evidence led and contended, as found by the Court of Appeal, that the real issues in controversy before the trial Customary Court were whether indeed the Chukwu oracle was consulted and if so whether the oracle declared in favour of the plaintiff/respondent. It was argued that recourse to the Chukwu oracle was proscribed by law and therefore that the trial Customary Court's

judgment based on the declaration by Chukwu oracle was null and void. It was the submission of learned senior counsel that the order of retrial was the logical and consequential order following the nullification voiding and setting aside of the judgment. In conclusion he urged that the appeal be dismissed.

I have given due consideration to the facts of the case, the decisions of the trial Customary Court, the Customary Court of Appeal, the Court of Appeal and the submission of learned senior counsel for the parties. What appears to be the crucial question is whether, having regard to the peculiar facts and circumstances of this case the order of retrial is the most appropriate. This is the all pervading issue and the whole appeal is dependent on its resolution.

This leads to a consideration of principles governing an order of retrial, the locus classicus on the point being Yesufu Abodundu & Ors v. The Queen (1959) SCLR 162. In that case, the following guiding principles in deciding an order of retrial were laid down:-

(a) That there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice.

(b) That, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the Appellant.

(c) That there are no special circumstances as would render it oppressive to put the Appellant on trial a second time.

(d) That the offence or offences of which the Appellant was convicted or the consequences to the Appellant or any other person of the conviction or acquittal of the Appellant are not merely trivial, and

(e) That to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it.

Still on the guiding principles, the Federal Supreme Court per Abbott, F.J. at page 166 said:

"In formulating these principles we do not regard our-

selves as deciding any question of law or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise, and it may be that further experience will lead us to
 B *formulate additional principles or to modify those we have formulated in this judgment. We wish to make it clear that the court will be free to do this without infringing the doctrine of judicial precedent."*

C The above shows that **the five guiding principles formulated above on order of retrial are not decisions laying down legal principles binding on lower courts to follow, since the decision whether or not to order a retrial in a given case is discretionary depending on the peculiar facts and circumstances of each**
 D **case. And since the decision so to order is the result of the appellate court's exercise of its discretion, no one decision is a binding precedent on subsequent decisions. It follows therefore that the five principles formulated in Abodundu's case are not exhaustive.** On this see Okoduwa v. The State (1988) 2 NWLR
 E (Part 76) 333. **Thus, it has been settled that where appraisal and evaluation of evidence on vital issues has been left undetermined by the trial court and the appeal court is not in a position to adequately embark upon the evaluation from the printed record the proper order to make is one for a retrial.**

F See Olatunji v. Adisa (1995) 2 NWLR (Part 376) 107; Chief Asuquo Oko & Ors v. Chief James Ntukidem & Ors (1993) 2 NWLR (Part 274) 124. **Where however it is manifest from the record that the plaintiff's case has failed in toto and there is no manifest**
 G **irregularity of a substantial nature, a retrial order which will be tantamount to giving the Plaintiff another bite at the cherry ought not to be made.** See Elias v. Disu (1962) 1 SCNLR 361; National Bank of Nigeria Ltd v. P.B. Olatunde & Co. Nig. Ltd (1994) 3 NWLR (Part 334) 512 at 533, Abilawon Ayisa v. Olaoye Akanji &
 H Ors (1995) 7 NWLR (Part 406) 129 Okeowo v. Migliore (1979) 11 SC 138; Awote v. Owodunni (1987) 2 NWLR (Part 57) 366; Sanusi v. Amayogun (1992) 4 NWLR (Part 237) 527.

Now on the question of whether the order of retrial is the most

appropriate in the circumstances of this case, let us examine the character of evidence and the procedure adopted by the trial Customary Court in the course of its judgment.

The judgment itself is at pages 61-72 of the record. From page 61 line 29 to page 62 line 26 the trial court gave a summary of the case of the plaintiff. That summary represents the legal evidence of the Plaintiff in the case. However from page 62 lines 26 to page 64 of the record the court veered into the controversial issue of the parties' recourse to the Chukwu oracle which, it thought, was fundamental to the proper determination of the case. The court came to the conclusion that the plaintiff and his four witnesses were consistent on this issue of visit to the Chukwu oracle. The Court reasoned and found as follows:

"Even though they told their stories of the dispute between the Plaintiff and Defendants from various perspectives, they were in perfect agreement on the following fundamental facts:

(1) That the matter was brought before Chief Osuchukwu Nwadike where the question of "chukwu" trip was decided upon;

(2) That the matter went to "Obi-Ezi-Okwu" association of Ekwe where the issue of going to chukwu to divine the ownership of the of the land was ratified;

(3) That both the plaintiff and the defendants agreed before the entire assembly of Umuduru Ekwe people to accept the outcome of the chukwu trip final and to abide by it;

(4) That all parties concerned sent their respective representatives to chukwu and that the chukwu trip was actually undertaken in the interest of justice and fair play;

(5) That the outcome of the chukwu trip was announced to a crowded assembly of Umuduru Ekwe people at their village square in the presence of the plaintiff and the defendants and all participants in the chukwu trip;

(6) That the "Chukwu" declared the plaintiff i.e. Mbagu family as the rightful owners of the land in dispute and ordered the defendants to release the land to them. That the proceeds from the Iroko tree sold was handed over to the plaintiff as the owner of the land."

At page 67 lines 5-7 of the record the trial Customary Court made some reference to the submission of learned counsel for the

defence to the effect that the plaintiff failed to discharge the onus on him to prove the alleged pledge which in my view was a powerful submission. Surprisingly the trial Customary Court reacted at page 67 lines 8-10 in the following terms:

B *"Going through the plaintiffs particulars of claims and his evidence one can observe that the plaintiff rested his case on the validity of the trip to "Chukwu oracle"*

And at the concluding part of its judgment the trial Customary Court said:

C *"Having thus evaluated the case for the plaintiff and that for the defendants what now remains is the question; is the decision of the Chukwu oracle binding on the defendants? The defendants like the Plaintiff vowed publicly before the Umuduru Ekwe people before the chukwu trip was undertaken to abide by the outcome of the*
D *declaration of chukwu oracle as final solution as to the ownership of the land in dispute. The court therefore holds that the defendants are bound by the "chukwu" oracle decision. The court believes the plaintiff and his witnesses as witnesses of truth in the testimony on the chukwu trip.."*

E *It is clear from the above that the trial customary court was mainly pre-occupied with ascertaining whether or not the parties had, by agreement, consulted the chukwu oracle and the "decision" of the said oracle. The court believed the evidence of the plaintiff and his*
F *witnesses that the parties by agreement opted to and consult the chukwu oracle which declared the land to be that of the plaintiff and held the defendants/appellants bound by the chukwu decision. Although the trial customary court embarked upon some appraisal of the legal evidence presented, it nevertheless completely disregarded*
G *that evidence and adopted, as it were, the so called decision of "chukwu oracle"*

H Both sides agree that the procedure was wrong. The Customary Court of Appeal, relying on the prohibition in section 207(2) of Witchcraft and Juju Orders in Council and Section 210(d) of the Criminal Code described the procedure as illegal, nullified the judgment and ordered retrial. The Court of Appeal endorsed the nullification and order of retrial. The pith of the submissions of learned senior counsel for the appellants is that on the printed record the

plaintiff/respondent failed to prove the alleged pledge and that in the circumstances the proper order should be one for the dismissal of the claim instead of an order for retrial. Earlier at the trial Customary Court learned counsel for the defendants/appellants proffered submissions to the effect that the plaintiff/respondent failed to discharge the burden of proving the alleged pledge. See page 54 of the record. B And as I stated earlier the trial customary court noted this submission at page 67 of the record. ***It is clear that the trial customary court failed totally to evaluate the legal evidence against the background of what I consider to be the powerful submission of defendant/appellants' counsel.*** C I have restated above some guiding principles for an appellate court in the exercise of its discretion to make an order of retrial. In the face of this total failure of evaluation of the legal evidence by the trial Customary Court was the Customary Court of Appeal right to order a retrial? D

I am not unmindful of the principle that where a plaintiff fails totally to establish his case and there is no manifest irregularity committed by the trial court, a retrial order ought not to be made as such an order will amount to giving the plaintiff another opportunity to prove his case. In this case however the irregularity committed by the trial customary court was substantial. The entire legal evidence before the court on which the dispute would have been determined was disregarded. ***The contention of learned senior counsel for the defendants/appellants is that the two appellate courts below and indeed this court ought to re-evaluate the evidence on the printed record and dismiss the claim. Attractive as the submission is, it failed to take cognisance of the character of the legal evidence on the printed record. The entire evidence is oral, there being no documentary evidence. It is such evidence that may necessarily involve demeanour and the determination of credibility of witnesses. Questions of demeanour and the determination of the credibility of witnesses are exclusively preserved for the trial court. An appellate court, not having the privilege of watching and hearing the witnesses testify is, by reason of that handicap, not in a position to determine the credibility of witnesses. The result is that the two appellate courts below and indeed this court are ill equipped*** E F G H

to determine the credibility of witnesses. That function belongs properly to the trial customary court.

Considering all the facts and circumstances of this case, I am firmly of the view that there are sufficient materials for the discretionary order of retrial. Further more, since the discretion as to whether or not to order a retrial in this case is exclusively that of the Customary Court of Appeal both the court below and this Court would not ordinarily interfere. And so neither the Court of Appeal nor this court can interfere with that court's exercise of its discretion unless there is good cause so to do. This is the principle in *National Bank of Nigeria Ltd v. P.B. Olatunde & Co (Nig.) Ltd* (1994) 3 NWLR (Part 334) 512 at 526; *Imonikhe v. A.G. Bendel State* (1992) 6 NWLR (Part 248) 396 at 408 and *University of Lagos v. Olaniyan* (1985) 1 NWLR (Part 1) 156. ***In this case there is no manifest good cause for such interference.***

On the whole I resolve this all pervading issue against the appellant. The appeal fails and is accordingly dismissed.

I assess the costs of this appeal at N10, 000, 00 in favour of the respondent.

TOBI JSC

This is yet another land dispute. It is between two families: Mbagwu and Nnadozie Nwanya. The respondent, the plaintiff in the Customary Court, is a representative of the Mbagwu family of Umuduru Ekwe. The appellants, the defendants, are the representatives of the Nnadozie Nwanya family. The land in dispute is Ala Uhu Nwaebo.

The case of the respondent is that Ala Uhu Nwaebo had been on a long standing pledge to the families of Nnadozie and Obiwuru. The land was split into two parts; one part pledged to each of the families. The two pieces of land which stood side by side are in fact one land split into two for the purposes of the pledge. The late father of the respondent made efforts to redeem the land from the pledgees, Nnadozie and Obiwuru, but to no avail. In an effort to settle the matter traditionally, consultations were made to "Chukwu", appar-

ently an oracle. The Chukwu declared that the respondent was the rightful owner of the land. The respondent went into the land and planted cassava and other crops. The appellants harvested the crops. That prompted the action in the Customary Court of Isu Local Government Area: Nnenasa.

The case of the appellants is that the 1st appellant, Cyriacus Nnadozie, inherited the land from his father, Nnadozie, Nnadozie from his father Nwanya, Nwanya from Ofoajoku, Ofoajoku from Duruegbuhuo, Duruegbuhuo from Ofoegbu, Ofoegbu from Duruegbula, etc. The land was never on pledge and there was no consultation to Chukwu.

The respondent, as plaintiff, filed an action at the Customary Court seeking a declaration that the Mbagwu family of Umuduru Ekwe are entitled to Customary Right of Occupancy, perpetual injunction and N1,000 general damages. The respondent gave evidence. He also called four other witnesses. The appellants called three witnesses.

The Customary Court gave judgment to the respondent. The court was satisfied with the evidence on the Chukwu oracle. The court said at page 71 of the Record:

"The defendants like the Plaintiff vowed publicly before the Umuduru Ekwe people before the Chukwu trip was undertaken to abide by the outcome of the declaration of Chukwu Oracle as final solution as to the ownership of the land dispute. The court therefore holds that the defendants are bound by the Chukwu oracle decision. The court believes the plaintiff and his witnesses as witnesses of truth in their testimony on the Chukwu trip. The court further holds that the plaintiff has proved his case on the preponderance of truth and evidence. According to the evidence adduced at the hearing of this case the court declares that the piece of land held by Cyriacus Nnadozie which he calls Uhu Nwanya and the adjoining piece of land held by Samuel Obiwuru which he calls Uhu Ama Onyeike are one and the same land which the plaintiff called Uhu Nwaedo hereby stands redeemed."

On appeal, the Customary Court of Appeal allowed the appeal and ordered a retrial. On a further appeal to the Court of Appeal, that court dismissed the appeal and confirmed the order of the

Customary Court of Appeal for a retrial.

Dissatisfied, the appellants have come to this court. As usual, briefs were filed and duly exchanged. The main plank of the submission of the appellants is that the Court of Appeal misconceived the cases of the parties. The brief examined the issue of pledge and submitted that it was clearly an issue in the matter. It questioned the right of the Court of Appeal in determining the appeal on issues raised suo motu by the court. It is the case of the appellants that the order of retrial is wrong.

The respondent, understandably, takes the opposite position. He does not see where the Court of Appeal misconceived the cases of the parties. He justified every bit of the judgment of the Court of Appeal.

When a party alleges that a court of law misconceived the case of a party, he means or should be taken to mean that the court had a wrong conception or wrong idea or understanding of the case of the party as presented in court. By the allegation, the party is attacking the court of grave wrong doing because the court, as a matter of law, must give judgment in the light of the facts as in the proceedings and the submissions of counsel or the parties as the case may be.

The burden is on the party alleging the misconception to prove it on appeal. And the only way to prove is to call the attention of the appellate court to the cold record before it. An appellant cannot move out of the record in search of evidence of misconception because there cannot be such evidence outside the record.

An appellant who alleges misconception has a duty to go into the specific details of the case of the parties and compare same with the evaluations and or conclusions of the court. The duty of an appellant is so specific that a wild-goose, generic or vague approach to the allegation will not be of help to him. An appellant must pin-point where and how the misconception arose.

I realize that the allegation of misconception is based essentially, if not crowded, on the pledge affair and the Chukwu oracle and the slant of its illegality. Counsel attacked the following dictum of the Court of Appeal:

"... he (the respondent) did not go before the trial Customary Court to prove anew that there had indeed been a pledge. His case

was that the issue of pledge had earlier been investigated by a traditional arbitral panel, whose decision was binding on him and the defendants, and that the issue had been resolved in his favour. All that he asked the court to do was to determine the validity of this claim."

Is the above a misconception of the case of the respondent? I think not. On the contrary, the above is an accurate and correct statement of the case of the respondent. In my view, before the parties consulted the Chukwu oracle, the case was predicated on the pledge. After the consultation, the main issue in the case was what the Chukwu oracle said in respect of the pledge. That became the central issue and the pledge issue was relegated to the background. The evidence of PW1 justifies the position I have taken. Let me quote part of it from pages 8 and 9 of the Record:

"The Chiefs and Nzes of Umuduru asked us if we would accent their decision to find out the actual owner of the land. All of us unanimously agreed, that is, all the parties to this dispute. We performed all the necessary formalities for consulting the juju oracle there and then and our opponents performed theirs too... After all the necessary ceremonies for the Chukwu oracle, the delegation departed... In the presence of all and sundry, the delegates swore by the bag of Nnadozie to show that they were going to say the truth... He told the entire congregation that the oracle proclaimed the children of Mbagwu the rightful owners of the land, all the delegates echoed his report as the message from Chukwu oracle to which they were sent. Then the Chiefs and elders of Umuduru and Ekwe in general called upon Chief Osuchukwu Nwadike to produce the money from the sale of the iroko tree and he did so. On that same day, they handed the money over to us. It was One Thousand Two Hundred Naira (N1.200.00). He asked Umuduru his commission for keeping safe the above amount for a long time and they took one hundred Naira (N100.00) and gave it to him. Then we all dispersed. The oracle ordered us to refund the pledge to them before entering the land (redemption fees) amounting to (a) Two Naira (N2.00) and (b) N2.90 Two Naira ninety kobo respectively. The sums of money lay in the hands of the Chiefs and elders. Then they ordered us to enter the lands and farm them. We planted cassava on the land. When the cassava was ready, they

harvested it. Then I had to sue them to court claiming damages as per writ."

It is clear to me from the above that the pledge issue was no more a live issue. The customary law arbitration settled it by the refund of the monetary value of the pledge. Thereafter the chiefs and elders asked the respondent to enter the land. The respondent sued when the appellants protested.

I am in complete agreement with the Court of Appeal that the issue of pledge had earlier been investigated by a traditional arbitral panel and all that the respondent asked the court to do was to determine the validity of that claim. There was no misconception by the Court of Appeal of the case of the respondent.

I turn to the submission that the case of the appellants was misconceived. Learned counsel attacked the following dictum of the Court of Appeal at page 180 of the record:

"Another reason why I think this appeal lacks merit is that the appellants obtained from the Customary Court of Appeal exactly what they asked for and what that court did is not illegal and cannot adversely affect the competence of the court or render its decision defective."

In response to the above, learned counsel called in aid additional issue No 7 formulated in the Court of Appeal where appellants questioned the legality of the decision of Chukwu oracle. As there is no such issue directly formulated by the appellants in this court, I will not go into the matter of illegality of the Chukwu oracle. The issue may arise later, probably in respect of issue No 3. I think I have done enough on Issue No 1. It remains for me to say that the issue has no merit. It therefore fails.

I go to issue No 2. Learned counsel for the appellants submitted that the Court of Appeal formulated a new case for the respondent, when the court came to the conclusion that the respondent did not go before the trial court to prove anew that there had indeed been a pledge and the appellants obtained from the Customary Court of Appeal exactly what they asked from the court. To learned counsel, the issues were raised suo motu by the Court of Appeal and that court ought to hear the parties before giving its decision.

A new case is a case which was not existing before. A new case

is a different case, different from the original case. A new case is a fresh case. A new case is a case which the court is just beginning to know about for the first time in the judicial process. If my definitions are right, and I think they are, where is the new case counsel is talking about? Was the issue of pledge not in existence in the Customary Court? Was the issue of Chukwu oracle not in existence in the Customary Court? B

The duty of a trial Judge is to evaluate the evidence before him to arrive at a decision. The duty of an appellate court, such as the Court of Appeal, is to go into the evidence evaluated by the trial Judge to see whether there was any perversity in the findings. And in the course of carrying out this duty, an appellate court will also go into the evidence and come to a conclusion one way or the other. A conclusion arrived at by an appellate court on the strength of the evidence at the trial court based on analysis of the evaluation of the evidence by the trial court, cannot be said to be a new case. In the course of evaluating evidence, a court of law is entitled to make deductions here and there from the evidence before the court, and deductions which result in conclusions cannot be said to be new case. D

The issue of pledge is in paragraph 23 of the particulars of claim. It reads: E

"3. The plaintiff and the entire Mbagwu family of Umuduru Ekwe are the rightful owners of the pieces or parcel of land known as and called "Ala Uhu Nwaedo - subject matter of this suit, situate at Umuduru Ekwe within the jurisdiction of this court. Sometime ago, Nwaedo (now late) an uncle to the plaintiff pledged out portion of this piece of land to late Nwaya Ofoajoku - grand father to... The 1st and 2nd defendants redeemable at the sum of £1.45 translation in Igbo, "Ego nu ehi no Ogodo ano": i.e. N2.40. The remaining portion he pledged to late Onwuka Duruamuka, the grand-father of the 3rd and 4th defendants redeemable at the sum of £1 -translation in Igbo "Ego nu ihe", i.e. N2.0." F

The second conclusion complained of by counsel for the appellants is a clear conclusion from the evidence adduced by the parties. In my view, the Court of Appeal did not raise issue or issues suo motu which required response by the appellants. The issue therefore fails. H

The third and final issue is the order of re-trial confirmed by the Court of Appeal. The order of retrial emanated from the Customary Court of Appeal. Delivering the judgment of the court, Iwuagwu, J.C.C.A., said at pages 123 to 125 of the record:

"The government of Nigeria by the Witchcraft and Juju Orders in Council Cap. 43 Laws of the Federation of Nigeria 1958 prohibited/banned the worship or invocation of Chukwu or the long juju at Arochukwu among others... Clearly that court's decision was based on an illegal act, and the respondent cannot gain from an act that was illegal. It then follows that the judgment was a nullity because it was based on an illegal act of litigants. The effect is that there was no judgment of that court based on the evidence before it, rather it adopted an illegal judgment of Chukwu oracle. Even though no application was made to the lower court to set aside its judgment voided by illegality, this court as an appellate court also has the power to set aside such a null decision. In the finality this appeal succeeds. There is no need to treat the other issues for determination; and I make the following orders: 1. The judgment of the Isu Customary Court Nnenasa in suit No CC/NN/34/94 dated 30th January, 1995 is hereby set aside.

2. There shall be a re-hearing of the said suit at the same Customary Court as there is now a new panel thereat."

The Court of Appeal, sustaining the order of a re-trial by the Customary Court of Appeal, said at page 180 of the record:

"By complaining that the court should have gone ahead to dismiss the plaintiff/respondent's claim before the trial court, the appellants appear to me to be trying to eat their cake and still have it in their hands. It is trite that a void judgment cannot have the effect of enabling a court to allow or dismiss a claim. The effect of it is to leave the dispute between the parties has remained unresolved. In the circumstances, it is my view that consequential order for retrial is a mere matter of course, which the interest of the parties demanded."

Learned counsel for the appellants did not argue that a court of law lacks the competence to give a consequential order of retrial. As no statute or rule of law can take away from a court of law the competence to give a consequential order of retrial in appropriate cases, counsel has it correctly. His argument however is that the Cus-

tomary Court of Appeal misunderstood the distinguishing factors between a null judgment and a judgment that is erroneous. Unfortunately, learned counsel did not assist this court with the distinction. He did not even say whether the judgment of the Customary Court was a nullity or merely erroneous. I have the impression that, to him, the judgment is not a nullity but erroneous. I have my doubts whether I have the competence to speculate, the judge that I am. I have taken a view. While I concede to him that there is a world or wall of difference between the words "null" and "erroneous", it is my humble view that the judgment of the Customary Court is a nullity and based on that it is wrong and not correct. I think "erroneous" conveys both meanings of wrong and not correct. In conveying the legal status or position of a judgment, "null" is stronger than "erroneous". I say this because a judgment which is wrong or not correct may not necessarily be a nullity.

I entirely agree with both the Customary Court of Appeal and the Court of Appeal that the judgment delivered by the Customary Court was a nullity and the only order available to the two appellate courts was one of a retrial. They correctly made that order.

It is for the above reasons and the more detailed reasons given by my learned brother, Tabai, J.S.C, that I too dismiss the appeal. I abide by his orders as to costs.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai J.S.C. He has fully discussed the facts of the dispute leading to this appeal and the applicable principles of law. I entirely agree with him.

The trial Customary Court fell into the error of determining the ownership of the land in dispute by reference to an alleged decision made between the parties by the Chukwu oracle. There is no doubt that the practice of referring disputes to oracles was greatly followed in several parts of Eastern Nigeria. Social development which has greatly impacted on the law has resulted in the situation where such practice has fallen into disfavour and this has in turn led to its prohibition by law. The contemporary practice is that disputes should

be resolved with reference to the evidence brought before a court by parties: not by reliance on the dictates of some oracles.

The Customary Court of Appeal, in my view, correctly reversed the judgment of the trial Customary Court in favour of the plaintiffs/appellants. The court below saw no reason to overrule the decision of the Customary Court of Appeal. In this Court, I also do not see why the parties should not go back to have the dispute between them resolved only on evidence brought forward as to the true ownership of the land in dispute.

I agree with the lead judgment by Tabai J.S.C. I would also dismiss this appeal with N10, 000.00 costs in favour of the respondent.

MOHAMMED JSC

I have had the privilege of reading before today, the judgment just delivered by my learned brother, Tabai, J.S.C dismissing this appeal. For the reasons amply set out in his judgment, I will also dismiss the appeal. This is because the appeal is against concurrent decisions of the Imo State Customary Court of Appeal and the court below ordering a retrial of the appellants' case at the trial court. In the absence of any complaint from the appellants that the decisions of the courts below are perverse or occasioned a miscarriage of justice to the appellants, I see no merit in this appeal which I hereby dismiss with N10, 000.00 costs to the respondent.

ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal (Port Harcourt Division) in Appeal No CA/PH/7/98: Cyriacus Nnadozie & Ors v. Nze Ogbunaelu Mbagwu, delivered on the 18th of September, 2001. The court below had affirmed the judgment of the Imo State Customary Court of Appeal directing a re-trial of the case.

Briefly, the facts of the case leading to this appeal are as follows: the case was initiated before the Customary Court of Imo State of Nigeria Isu Local Government Area sitting at Nnenasa. The respondent, as plaintiff before that court, had claimed against the ap-

pellants, as defendants in the same court, jointly and severally as follows: -

"(1) A declaration that the plaintiff and the entire Mbagwu Family of Umuduru Ekwe are entitled to customary Right of Occupancy in piece or parcel of land known as and called "Ala Uhu Nwaedo".

(2) A perpetual injunction restraining the defendants, their children, heirs servants and privies from further act of trespass.

(3) N1, 000.00 (one thousand naira) only being damages for economic crops destroyed therein."

The case proceeded to trial before the trial court. The respondent as plaintiff gave evidence and called five witnesses in support of his case. The 1st appellant/defendant, the 4th appellant/respondent on behalf of himself and his brother the 3rd appellant/respondent and two other witnesses testified on the side of the defence. The chairman and members of the trial customary court evaluated the pieces of evidence led by both sides and found in favour of the plaintiff/respondent. In so doing, they held inter alia: -

"The defendants like the plaintiff vowed publicly before the Umuduru Ekwe people before the Chukwu trips (sic) was undertaken to abide by the outcome of the declaration of Chukwu (sic) oracle as final solution as to the ownership of the land in dispute. The court therefore holds that the defendants are bound by the "Chukwu" oracle decision. The court believes the plaintiff and his witnesses as witnesses of truth in their testimony on the "Chukwu" trip. The court further holds that the plaintiff has proved his case on the preponderance of truth and evidence. According to the evidence adduced at the hearing of this case the court declares that the piece of land held by Cyriacus Nnadizie which he calls "Umu Nwanya" and the adjoining piece of land held by Samuel Obiwuru which he calls "Uhu Ama Onyeike" are one and the same land which the plaintiff called "Uhu Nwaedo" hereby stands redeemed. The plaintiff shall withdraw the sums of N2.40 and N2.00 respectively from the Obi Okwu Association of Ekwe and deposit same with the Customary Court Registry, Nnenasa for collection by the defendant."

Aggrieved by the above judgment of the trial customary court, the defendants now the appellants, appealed to the Customary Court of Appeal, Imo State holden at Owerri. The Appellate Customary Court, after listening to the parties, allowed the appeal and ordered a

re-hearing of the case. Again, being dissatisfied with the judgment of the appellate customary court, the appellants appealed from the judgment of that court delivered on the 9th of July, 1996 to the Court of Appeal (Port Harcourt division). The court below (the Court of Appeal - Port Harcourt division), after hearing the arguments of the parties' respective counsel on the respective briefs of the parties before it, in a reserved judgment delivered on the 18th of September 2001, dismissed the appeal, and in so doing the court below held inter alia:

"The main issues before the trial Customary Court were whether indeed the oracle was consulted and, if so, whether the oracle declared for the plaintiff's family as the plaintiff claimed. While the plaintiff maintained the affirmative of the two questions, the defendants maintained the negative

.....
The Customary Court of Appeal agreed with the submission put forward under this ground. It noted that indeed the trial Customary Court had come to its decision complained of based on the declaration made by the oracle. It held that the trial court adopted an illegal procedure in arriving at its decision complained of. In its view "the respondent cannot gain from an act that was illegal." It then come to the ultimate conclusion that the judgment was a nullity because it was based on an illegal act of the litigants by complaining that the court should have gone ahead and dismissed the plaintiff/respondent's claim before the trial court, the appellants appear to be trying to eat their cake and still have it in their hands. It is trite that a void judgment cannot have the effect of enabling a court to allow or dismiss a claim. The effect of it is to leave the dispute between the parties has remained unresolved. In the circumstance, it is my view that the consequential order for retrial is a mere matter of course, which the interest of the parties demanded

This appeal is totally devoid of merit and should never been brought at all. If anything, the order for re-trial appeared more beneficial to the appellants than to the respondent.

.....
In the final result, this appeal fails and is accordingly dismissed."

It is against the judgment of the court below that an appeal has

been lodged to this court by the appellants. Both sides filed and exchanged their briefs of argument. When this appeal came before us on the 22nd of October 2007 for argument, the appellants were not represented, but having filed their brief of argument, they were deemed under the rules of court, to have argued their appeal in line with the submissions made in their brief. Chief Akparanta learned senior counsel for the respondent, who was present in court, referred to, adopted and relied on the brief of his client and he urged us to dismiss the appeal. The appellants, in their brief of argument filed on the 2nd of April 2003, raised three issues for determination; and as set out in the said brief, they are as follows: -

"(1) Whether the Court of Appeal misconceived the respective cases of the parties?"

(2) Whether the Court of Appeal was right in determining the appeal based on issues raised suo motu by it and in respect of which parties did not address it.
and

(3) Whether the order for re-trial made by the Court of Appeal was, in law, right?"

The respondent raised a single issue for argument before us and as set out in this brief, it is as follows: -

"Whether the court below was right in confirming and affirming the judgment of the Customary Court of Appeal which set aside the judgment of the Customary Court of first instance given in favour of the plaintiff/respondent and instead ordered a re-trial of the substantive suit at the Customary Court of first instance."

I have carefully read the three issues raised by the appellants and the only issue identified by the respondent together with the parties' briefs of arguments on them. It is my view that the only issue raised by the respondent encapsulates the fundamental issue in this appeal even the three issues raised by the appellant are subsumed in that singular issue raised by the respondent. It is that singular issue that will form the basis of my discourse of this appeal. While the respondent as the plaintiff before the trial court had, with all force, submitted in that court, that he and the appellants as defendants before that court, had initially agreed to consult the Chukwu oracle for the determination of who between the two parties, was the genu-

ine owners and that the pronouncement of the Chukwu oracle would be acceptable to both side, the defendants denied any such agreement between them. The trial court, after reviewing the evidence before it, held that the defendants (now appellants) are entitled by the Chukwu oracle decision which was in favour of the plaintiff and consequently entered judgment in his favour. On appeal to the Customary Court of Appeal, that appellate court upheld the appeal while holding that consultation with Chukwu Oracle for the determination of the ownership of the land was an illegal procedure. A retrial was ordered. Suffice it to say that the plaintiff/respondent had initially, in his particulars of claim, averred that he would be relying on pledge in proof of ownership of the land. Even though the plaintiff led evidence of proof of pledge before one Chief Osuchukwu Nwadike's court, the Umuduru people, after listening to the evidence of both parties sent the matter to Chukwu oracle for divination and determination of who the real owner of the land was. It is therefore clear that the evidence in support of pledge was never considered. A further appeal to the court below (Court of Appeal) did not change the fate of the appellants for the court below dismissed the appeal on the same ground, upheld the decision of the Customary Court of Appeal remitting the case for re-trial. As I have said, it is the decision of the court below that is on appeal before us. It is beyond any dispute that "Chukwu Oracle" had long been proscribed by law in the East. Section 210 (d) of the Criminal Code Laws of 1958 reads: -

"Any person who -
 (a)(c)
 (d) directs or controls or presides at or is present at or takes part in the worship or invocation of any juju which is prohibited by an order of the State Commissioner,
 is guilty of a misdemeanour, and is liable to imprisonment for two years."

Even if both parties mutually agreed to consult "Chukwu Oracle" for divination and determination of the genuine owner of the land in dispute, they both must be ascribed with the knowledge that the performance of that agreement would necessarily involve the commission of an act which is a crime. I say so because every citizen is always fixed with the knowledge of the law. And ignorance

of the law is no excuse. The law is that a contract or an agreement rooted in illegality must not be pleaded and if pleaded, it cannot be enforced by any court of law. See *Onyiuke v. Okeke* (1976) 10 N.S.C.C. 146; *Onwuchekwa v. N.D.I.C.* (2002) 5 NWLR (pt.760) 371 and *West Construction Co. Ltd. v. Batalha* (2006) 9 NWLR (pt.986) 595. In other words, an agreement is illegal if the consideration or the promise involves doing something illegal or contrary to public policy. The court below is therefore right, in law, in refusing to give the result of consultation of Chukwu oracle any legal recognition. That act would then be good as having not been done.

In land matter, which this case is, if a plaintiff fails to prove the root of his title, it is trite that his case stands dismissed in toto. In the instant case, evidence of pledge was led, but there is nothing on the record to show that the evidence so led was ever considered by the trial court. Would it then be right for any court of law faced with the facts of this case to say that the plaintiff/respondent has failed to prove his case and therefore proceed to dismiss it as canvassed by the appellants while urging that their appeal be allowed? I think not. There has been or has occurred a fundamental error in law, in the sense that there was no evaluation of evidence of pledge. It is therefore my view that to refuse an order for a retrial of this case would occasion a greater miscarriage of justice than to grant it. See *Abodundu & Ors v. The Queen* (1959) 4 FSC 70. The judgment of the court below therefore seems to me unassailable.

For the little I have said above but most especially for the detailed reasoning contained in the lead judgment of my learned brother, Tabai J.S.C, I will also dismiss the appeal while I affirm the decision of the court below. I abide by all other orders including the order as to costs contained in the leading judgment.