

**SUPREME COURT OF NIGERIA**  
8TH FEBRUARY, 2008. SC. 365/2002  
**CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR, M. MO-  
HAMMED, F. F. TABAI, C. M. CHUKWUMA-ENEH, JJSC**

ALHAJI ISAH T. SOKWO

(Suing for himself and on behalf of ..... APPELLANT  
Akuba and Edigeshi Ruling houses)

AND

1. JOSEPH DAKU KPONGBO

2. BASSA AREA TRADITIONAL COUNCIL

3. KOGI STATE COUNCIL OF CHIEFS ..... RESPONDENTS

4. KOGI STATE GOVERNMENT

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APPEALS - Interference - Concurrent findings - Will not be disturbed  
save shown to be perverse - Or not the result of discretion properly  
exercised (H1)

COURTS - Evidence - Appraisal of - Is trial court's duty - But issue of  
inference from proved facts - Can be handled by appellate court -  
Unto reversing findings of fact not supported by evidence (H2)

CHIEFTAINCY MATTERS - Creation - Of the chieftaincy in dispute -  
was by the colonial government - And not from custom - As rightly  
found by trial Court - Supported by appellant's evidence under cross  
examination (H3)

CHIEFTAINCY MATTERS - Proof - Appeals - Custom of exclusive-  
ness of stool - Was not proved by appellant - Present appeal is de-  
void of substance (H4)

CHIEFTAINCY MATTERS - Appointment of chief - Applicable stat-  
ute - Appointment of 1st respondent as the Aguma of Bassa Kwomo  
- Was properly done in accordance with s. 4(2) of the Kogi State Law  
1992 (H5)

APPEALS - Decisions - Hypothetical matters - That have no bearing

with the case in issue - Are not decided by the Supreme Court (H6)

### **FACTS**

Before the Kogi State High Court sitting at Dekina, plaintiff/appellant for himself and on behalf of two ruling houses filed an action against defendants/respondents. He claimed inter alia, a declaration that 1st respondent's appointment (by the 2nd to 4th respondents) as the Aguma of Bassa Kwomo land is unlawful, unconstitutional, null and void, and of no effect. Appellant sought to establish that by the custom of his people, there are only two recognized ruling houses. Appellant claimed that it is his own ruling house that is entitled to produce a candidate for the chieftaincy stool in dispute and that he is the one entitled to be appointed to hold that office. Appellant alleged that the stool of Aguma of Bassa Kwomo was a creation of Bassa Kwomo native law and custom. But appellant failed to prove this assertion. His own testimony under cross examination supported respondents' claim that the stool was a creation of the colonial government.

Respondents contended that the stool is not an exclusive preserve of two ruling houses but that all the five clans of Bassa Kwomo are eligible to fill the vacant stool. The trial court partly found in appellant's favour. He appealed to the Court of Appeal while respondents cross appealed. The lower court dismissed the appellant's appeal and allowed the respondents' cross appeal. Still dissatisfied, appellant has further appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*"1. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the trial court that the Chieftaincy of Aguma is entirely the creation of the colonial government and not a creation or evolution from native law and custom (hence rules of native law and custom do not apply) thereby refusing to disturb the findings of facts and conclusion of law made by the trial court on the ground that they were based on sound legal principles.*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)  
**APPEALS - Interference - Concurrent findings**

1. This court has been invited in this issue to reverse the findings of

fact of the two courts below that the chieftaincy of Aguma is entirely a creation of the colonial government or Administration and not a creation or evolution from native law and custom. There is the well settled presumption of law regarding the correctness of the findings of fact of courts below and the presumption must be displaced to reverse the findings of fact. It is equally well settled that this Court will not lightly interfere with the concurrent findings of fact of the Courts below. In *Ogundipe v. Awe & Ors.* (1988) 1 NWLR (Pt. 68) 118 at 125, this court per Obaseki, JSC., affirmed its often repeated proposition that it will not interfere where there have been concurrent findings of fact by the courts below unless such findings are shown to be perverse or not the result of a proper exercise of discretion. (p. 893 H)

### ***COURTS - Evidence - Appraisal of***

2. Let me further emphasize that it is not the primary function of this or any appellate court for that matter, to make findings of fact or to appraise evidence. Also where the findings of fact are based entirely on the credibility of the witness, this court will be reluctant to interfere. The duty to make primary findings of fact by the evaluation of the evidence before it by the additional advantage of watching the demeanour of witnesses is essentially preserved for the trial Court. However, where the issue relates to the proper inference to be drawn from the facts proved, the court of Appeal and of course this court, is in as good a position as the court of trial, and will draw the proper inference naturally flowing from the facts so proved. An appellate court will also reverse the findings of fact if in its opinion, it is not supported by the evidence. I shall not forget to remind myself also that this Court will not reverse the findings of fact of Courts below merely because the Court would have found differently. (p. 894 D)

### ***Creation - Of the chieftaincy in dispute***

3. Having examined very closely the record of this appeal particularly the pleadings of the parties, the oral and documentary evidence placed before the trial court, I am fully satisfied that the findings of fact by the learned trial Judge that the Chieftaincy of Aguma is en-

tirely a creation of the colonial government or Administration and not a creation or evolution from Native Law and Custom, is well supported by the evidence before the trial Court. I may add here that even the evidence of the Appellant himself who is now disputing the findings of the trial court, actively contributed to the findings when he said under cross-examination at page 137 of the record as follows

*"I am aware of the Bassa Kwomo Native Authority. I do not know when it was created. I know it was created because the people from that area wanted to be governed by themselves. It was created by the colonial government. The 1st Aguma of Bassa Kwomo was appointed by the colonial government in 1931. Bassa Kwomo Native Authority was in existence before the appointment of the 1st Aguma of Bassa Kwomo in 1931. (p. 894 H)*

**D Custom of exclusiveness of stool**

4. Therefore, the appellant having woefully failed to prove his claim that the chieftaincy of Aguma is entirely a creation of Native Law and Custom which exclusively reserved the stool in rotation between the appellant's Akuba clan and Edigeshi clan, his entire appeal against the findings of fact of the two Courts below on the procedure adopted for the selection and appointment of the 1st respondent as the Aguma of Bassa Kwomo is entirely without merit. This situation coupled with the abysmal failure of the Appellant to prove the custom of exclusiveness of the stool to his named clans completely destroyed the appellant's case. In other words there were no inadequacies in my view, in the conclusions arrived at by the court below in dismissing the appellant's appeal and in allowing the cross-appeal of the respondents. As the appellant has failed to show that the two courts below had failed to make necessary inference from the proved and accepted facts in the instant case, the entire appeal is completely devoid of substance. (p. 895 G)

**H Appointment of chief - Applicable statute**

5. Quite contrary to the claim of the Appellant, the appointment of the 1st respondent was made in accordance with the requirements of the Kogi State Law, No. 7 of 1992 on the Appointment and Deposition of Chiefs. There being no native law and custom applicable to

the appointment or approval of the 1st respondent as the Aguma of Bassa Kwomo at the time the appointment was made, there was no breach of any native law and custom claimed by the appellant under Section 3(2) of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Council) Law No. 7 of 1992. This is in line with the findings of the court below that the Aguma of Bassa Kwomo chieftaincy not being a creation of native law and custom, is not governed by the provisions of Section 3(2) of the Kogi State Law No. 7 of 1992 but by the provisions of Section 4(2) of the same law, as the chieftaincy in dispute was the creation of colonial government or Administration. Section 4 of this law, it is observed, is concerned with the appointment of chiefs otherwise than in accordance with native law and custom. Thus, the appointment of the 1st respondent having been made in accordance with the procedure prescribed under Section 4 of the Chiefs Law, No 7 of 1992 of Kogi State, was quite in order under the law. (p. 896 G)

### ***APPEALS - Decisions - Hypothetical matters***

6. The law is well settled that this court is not given to make moot decisions or decide hypothetical matters which have no bearing with the case the court is called upon to decide which in this case is whether grounds exist to warrant interfering with the concurrent findings of fact of the two courts below. (p. 897 G)

### ***NOTABLE POINTS OF INTEREST*** ***MUKHTAR JSC***

#### ***1. He who asserts must prove***

It behoves the appellant to give testimony in support of the pleadings if he wanted to succeed in his case. A cardinal principle of law is a plaintiff who asserts must prove his case with credible and unchallenged evidence. See Section 135 of the Evidence Act. In civil cases a party who wishes to succeed in obtaining judgment in his favour must adduce such credible evidence, for such cases are decided on preponderance of evidence and balance of probability. It is after a plaintiff has proved his case in this manner that the burden of proof shifts. The pertinent question at this juncture is, did the appellant meet the above requirement of the law vide his evidence?

**CHUKWUMA-ENEH JSC**

*2. Existence of custom - How proved in law*

B It is a settled principle of law that customary law is a question of fact  
to be proved by evidence. The onus is on the party alleging the  
existence of a particular custom. He must call credible evidence to  
establish the existence. Although, it is also settled that where a cus-  
tom has been sufficiently decided upon by the court, judicial notice  
C of the same can be taken and the court will not require further proof  
of the same custom. See Section 14 of the Evidence Act and see also  
Agbai v. Okagbue (1991) 9-10 SCNJ 49. (p. 906 D)

*3. Appeal against findings of fact - Burden on the appellant*

D Thus *"to succeed in any appeal against findings of fact, it must be  
shown that in the performance of its primary duties of appraisal of  
oral evidence and ascription of probative values to such evidence,  
that the court of first instance made imperfect use or improper use of  
the opportunity of hearing and seeing the witness or has drawn wrong  
E conclusion from accepted or proved facts which those facts do not  
support or indeed has approached the determinations of the those  
facts in a manner which these facts cannot or do not in themselves  
support"* per Obaseki, JSC. See: Fashanu v. Edo (1971) ANLR 282  
F at 259. The appellant in my view has not come to grips with the  
burden cast on him as per the foregoing principles established in the  
above cited cases. (p. 908 B)

**REPRESENTATION**

G A.I. Kehinde (with him, J.A. Ogunbajo, J.A. Akubo, Benjamin Igbedi,  
E.I.J. Edekpomwen) For the Appellant  
Funsho Agbanah (with him, James Olowoyo) For the 1st Respon-  
dents  
G.O. Salihu (Director Court Litigation Ministry of Justice, Kogi State)  
H For the 2nd - 4th Respondents

**CASES REFERRED TO**

Njoku v Eme (1973) 5 S.C. 293 at 306; 211

- Chinwendu v Mbamali (1980) 3-4 S.C. 31 at 75, 21  
 Nnorodim v Ezeani (2001) 2 S.C. 145; (2001) 2 SCNJ 1 at 5  
 Olujinle v Adeagbo (1988) 2 N.W.L.R. (Pt. 75) 238 at 255; 1  
 Sanyaolu v The State (1976) 5 S.C. 37; 21  
 Ibrahim Barde (1996) 12 S.C.N.J. 1  
 Ahmed v. The State (1999) 5 S.C. (pt.11) 39; (1999) 69 B  
 Williams v Johnson (1937) 2 W.A.C.A. 253  
 Kponuglo v Kodafa (1932) 2 W.A.C.A. 24  
 Egri v Ukperi (1974) 1 N.M.L.R. 22  
 Akesse v Akpabio (1935) 2 W.A.C.A. 264 C  
 Ogundulu v Philips & Ors. (1973) N.M.L.R. 267  
 Abidoye v Alawode (2001) 6 NWLR part 709 page 463

### **STATUTES REFERRED TO**

- Evidence Act, Cap. 112 of 1990, LFN s. 135 D  
 Kogi State Chiefs (Appointment, Deposition and Establishment of traditional Council) Law, No. 7 1992 ss. 3 (2), 4 (1), (2), 14 (2) (b)

### **LEAD JUDGMENT BY MOHAMMED JSC**

This appeal is against the judgment of the Court of Appeal, E  
 Abuja Division delivered on 26th March, 2002. In the judgment the  
 Court of Appeal dismissed the appeal by the Appellant, who was also  
 the appellant in that court and allowed the cross-appeal of the re- F  
 spondents, who were also the respondents in that court. The appellant's  
 appeal at the court below was against the judgment of the High Court  
 of Justice of Kogi State sitting at Dekina, delivered on 12th June, 2000. The appellant who was the plaintiff at the trial court suing for  
 himself and on behalf of Akuba and Edigeshi Ruling Houses had  
 brought an action against the respondents who were the defendants, G  
 claiming the following:-

*"(a) A declaration that the appointment of the 1st defendant  
 by the 2nd to 4th defendants as the Aguma of Bassa Kwomo land is  
 unlawful, unconstitutional, null and void and of no effect, the 1st  
 defendant not being from any of two ruling Clans/Houses entitled to H  
 the stool nor was he adopted by the Akuba clan, who it is its turn to  
 produce the Aguma after the death of Aguma Joseph D. Alagani  
 (that is the immediate past Aguma of Bassa) and more so that the*

*appointment patently violated provisions of law No 7 1992 of Kogi State on Appointment and Deposition of Chiefs.*

*(b) A declaration that only the Akuba and Edegeshi Clans/ Ruling Houses are entitled by rotation to the stool of Aguma of Bassa Kwomo in Bassa Local Government Council.*

B *(c) A declaration that by the custom and tradition of the Akuba and Edegeshi clans, it is Akuba Clan/Ruling house that should produce the present Aguma following the demise of late Joseph D. Alagani who was adopted as Edegeshi candidate even though he was/is not from Edegeshi clan.*

C *(d) A declaration that the plaintiff is the one entitled to be appointed as the Aguma of Bassa having come from Akuba clan and duly nominated by the elders of the ruling house in line with custom of Bassa Kwomo.*

D *(e) A declaration that the plaintiff is entitled to be appointed as the Aguma of Bassa Kwomo and that the 2nd - 4th defendants recommend, appoint and recognise the plaintiff as such.*

E *(f) A declaration that the 2nd and 3rd defendants' failure without just cause to consider the plaintiff's application for the stool of Aguma and recommend him for appointment is unreasonable, illegal, unconstitutional and against the rule of natural justice.*

F *(g) A perpetual injunction to restrain the 1st defendant from parading himself or holding himself out as the Aguma of Bassa Kwomo or from performing the function of Aguma of Bassa and the 2nd to 4th defendants from recognising him or treating him as such."*

G At the hearing of this action, the appellant testified in support of his claims and also called two other witnesses. In the course of their evidence, documents totalling twenty-one were tendered and admitted in evidence. The 1st respondent however called seven witnesses and tendered two documents in evidence, while the 2nd, 3rd and 4th respondents called no oral evidence, but relied on two documents in their defence.

H The case of the appellant as plaintiff is that he is the only candidate entitled to be appointed as the Aguma of Bassa Kwomo after the death of the immediate occupant of that stool, Joseph Dodo Alagani, having been selected by his Akuba ruling house. The appellant contended that the filling of the vacant stool of Aguma of Bassa

Kwomo, is the exclusive preserve of the members of the Akuba and Edegeshi ruling houses on the demise of the late Aguma Joseph Dodo Alagani. That Edegeshi ruling house having served its turn through the late Joseph Dodo Alagani, it was then the turn of the Appellant's Akuba ruling house to produce the successor to the throne because the 1st respondent who is neither a member of Akubo clan nor that of the Edegeshi clan, was not eligible since the stool of Aguma of Bassa Kwomo was a creation of Bassa Kwomo native laws and custom. B

The case of the respondents as defendants at the trial court was that the stool of Aguma of Bassa Kwomo is not an exclusive preserve of Akuba and Edegeshi clans but that all members of the five clans of Akuba, Edegeshi, Arishamishi, Asheshama and Ozongulo, are eligible to be considered to fill the vacant stool. That the 1st respondent being a member of the Ozongulo clan, was rightly nominated and appointed to succeed late Joseph Dodo Alagani, asserting that the stool of Aguma of Bassa Kwomo was not a creation of Bassa Kwomo native law and custom but the creation of the colonial Government. C

At the conclusion of the trial, the learned trial Judge in his judgment delivered on 12th June, 2000, found in favour of the appellant as plaintiff granting him part of the relief (a) claimed to the extent that the appointment of the 1st respondent/defendant by the 2nd, 3rd and 4th respondents/defendants as Aguma of Bassa Kwomo, was declared unlawful, unconstitutional, null and void and of no effect on the ground of the appointment having been made in violation of the provisions of Section 3(2) of Law No 7 of 1992 of Kogi State on the Appointment and Deposition of Chiefs. The trial Court also proceeded and granted the appellant the injunctive relief (g) sought by him against the respondents restraining the 1st defendant/respondent from parading himself or holding himself out as the Aguma of Bassa Kwomo or from performing the function of Aguma of Bassa Kwomo and the 2nd, 3rd and 4th defendants/respondent from recognising him or treating him as such. The trial court however, refused to grant second part of the declaratory relief sought in relief (a), as well as other reliefs sought in (b), (c), (d) and (f) earlier quoted in full in this judgment. E  
F  
G  
H

Apparently, all the parties were not happy with the judgment of the trial court resulting in the appellant as plaintiff appealing against it and the respondents who were the defendants also cross-appealed against it to the Court of Appeal Abuja which in its judgment delivered on 26th March, 2002, dismissed the appellant's appeal and allowed the respondents' cross-appeal.

The instant appeal is by the plaintiff/appellant who was not satisfied with the dismissal of his appeal by the court below.

In accordance with the rules of this court, the appellant filed his appellant's brief of argument. A reply brief each in response to the 1st respondent's briefs and the 2nd - 4th respondents' brief of argument, were also duly filed and served. In the appellant's brief of argument, the following issues were raised for determination.

*"1. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the trial court that the Chieftaincy of Aguma is entirely the creation of the colonial government and not a creation or evolution from native law and custom (hence rules of native law and custom do not apply) thereby refusing to disturb the findings of facts and conclusion of law made by the trial court on the ground that they were based on sound legal principles (Grounds of appeal 7 and 1).*

*2. Whether the learned Justices of the Court of Appeal were correct in their interpretation and application of Section 14(2)(b) of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Council) Law, No 7 1992 on the issue of quorum of the Kogi State Council of Chiefs vis a vis Exhibit 21 (Ground of appeal 2).*

*3. Whether the learned Justices of the Court of Appeal were correct in their resolution of the issue of fair hearing against the appellant as it affects Exhibits P2, P7, P8, P9, P10 and P11 (Grounds 3 & 8).*

*4. Whether having raised the issue of Section 4(1) and (2) of Law No 7 1992 suo motu, and without according the appellant the opportunity to address the court, the learned Justices were correct in their interpretation and application of the said Section to the exclusion of Section 3(2) of Law No 7 of 1992 thereby faulting the trial court for invoking Section 3(2) (supra) (Grounds of appeal 4, 5 &*

6).

5. *Whether upon a careful examination of the evidence and issues raised in the appeal, the learned justices of the Court of Appeal were right in dismissing the appeal of the appellant in its entirety.*

6. *Whether the learned Justices of the Court of Appeal were right in allowing the cross-appeal on the ground that it had merit thereby reversing and setting aside that part of the judgment of the trial court nullifying the appointment of the 1st respondent as the Aguma of Bassa Kwomo and also setting aside the order of injunction (ground of appeal 10)."*

Although five issues for determination were identified in the 1st respondent's brief of argument, all the five issues were fully covered by the six issues raised in the appellant's brief of argument. The learned counsel to the 2nd - 4th respondents however is of the view that only three issues are deriveable from the grounds of appeal filed by the appellant. Therefore in the 2nd - 4th respondents' brief of argument, the following issues were formulated.

"1. *Whether the lower court was right in holding that the findings of facts and conclusion of law made by the trial court were based on sound legal principles (distilled from grounds of appeal 1 and 7).*"

2. *Whether the lower court was right in its interpretation and application of Section 14(2) (b) of the Kogi State (Chiefs Appointment, Deposition and Establishment of Traditional Council) Law, 1992 otherwise Known as Law No 7 to hold that the 3rd respondent conveyed for the purpose of consideration the appointment of the 1st respondent (distilled from ground of appeal 2).*

3. *Was the Appellant denied fair hearing by the 2nd respondent and the lower court viz the Court of Appeal (Distilled from Grounds of appeal 3, 4, 5, 6 and 8)."*

Taking into consideration that the appellant went to the trial court principally to challenge the appointment of the 1st respondent as the Aguma of Bassa Kwomo on the ground that the stool was not entirely the creation of colonial government but a creation or evolution from native law and custom which reserved the stool for rotation between the appellant's Akuba clan and Edegeshi clan to the complete exclusion of the 1st respondent's Ozongulo clan, the main issue for determination is issue one as formulated in the respective parties

briefs of argument.

This main issue cutting across the respective briefs of argument of the appellant and the respondents, is whether the court below was right in affirming the decision of the trial court in its findings that the chieftaincy of Aguma, is entirely a creation of the colonial government and not a creation or evolution from native law and custom hence rules of Native Law and Custom do not apply thereby refusing to disturb the findings of fact and conclusion of law made by the trial court on the ground that they were based on sound legal principles. Appellant's counsel in his argument in support of this issue lamented that the court below went ahead to affirm the findings of the trial court in spite of the extensive arguments marshaled by the appellant to warrant the setting aside of the findings. Learned counsel went ahead to probe into the oral and documentary evidence led at the trial court and maintained that there was enough evidence to support the appellant's case that the Aguma of Bassa Kwomo Chieftaincy is deeply rooted in Native Law and Custom, rather than the child of the colonial government as found by the trial court and affirmed by the court below. While conceding that this court seldom interferes with concurrent findings of fact supported by sufficient evidence as laid down in several decisions of this Court such as, *Njoku v. Eme* (1973) 5 S.C. 293 at 306; 211, *Chinwendu v. Mbamali* (1980) 3-4 S.C. 31 at 75, 21 and *Abidoye v Alawode* (2001) 3 S.C. 1; (2001) 6 NWLR (pt. 700) 463 at 473, learned counsel stressed that the present case is within the few recognized exceptions to the basic principle of law. One of such exceptions, according to counsel, is where the issue in controversy between the parties is simply a matter of inference that can be drawn from established facts on record as was the case in *Nnorodim v. Ezeani* (2001) 2 S.C. 145; (2001) 2 SCNJ 1 at 5. Relying on a number of cases including *Abidoye v. Alawode* (supra) and *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt. 75) 238 at 255; learned counsel submitted that the concurrent findings of the two courts below are manifestly perverse, patently erroneous or incongruous and that with proper exercise of judicial discretion, there exists special circumstances warranting interference with the concurrent findings. The alleged secrecy surrounding the nomination and selection of Joseph Alagani as Aguma in 1968 and the fact

as found by the trial court that Kwanaki, who was the first indigenous Bassa Kwomo Chief, hailed from Akuba Clan being the largest of the clans which had produced more Agumas, were identified as such reasons justifying this court to disturb the concurrent findings of the two lower courts.

For the 1st respondent, it was submitted that the Appellant has failed to show the existence of the necessary conditions to justify this court disturbing the concurrent findings of the trial court and the Court of Appeal in the instant case if decisions in the cases of Sanyaolu v The State (1976) 5 S.C. 37; 21, and Ibrahim Barde (1996) 12 SCNJ 1, are taken into consideration. Learned counsel stressed that the findings of fact made by the learned trial Judge that the stool of Aguma of Bassa Kwomo was the brain child of the colonial Administration in Bassa Kwomo land and not at the instance of any of the clans in that land is unassailable based on the state of pleadings, documentary and oral evidence before the trial Court. Therefore there is no legal basis or justification for the Court of Appeal to disturb the findings. After referring to specific paragraphs in the pleadings of the parties and going through the oral and documentary evidence on record culminating in reliance on the decisions in Ahmed v. The State (1999) 5 S.C. (pt.11) 39; (1999) 69 L.R.C.N. 1403, Asanya v. The State (1991) 4 S.C. 42; (1991) 3 N.W.L.R. (pt. 180) 422 and Dogo v. The State (2001) S.C.(pt.11) 30; (2001) 83 L.R.C.N. 197 at 202, learned counsel urged this court not to interfere with the concurrent findings of fact by the courts below.

The arguments of the learned counsel to the 2nd - 4th respondents on this whole embracing issue, are virtually the same as those proffered by the 1st respondent. Learned counsel therefore further emphasised that the court below did not disturb the findings of the trial court because they were not perverse as claimed by the appellant. After calling in aid the decisions in Biariko & Ors. v. Ede-ogwuile & Ors. (2001) 4 S.C. (pt.11) 96; (2001) 4-5 S.C.N.J. 332 at 347 and Agbaje & Ors. v Agba Akin (2002) 1 S.C. 1; (2002) 1 S.C.N.J. 64 at 80 - 82, learned counsel urged this court not to disturb the concurrent findings of fact by the two courts below.

***This court has been invited in this issue to reverse the findings of fact of the two courts below that the chieftaincy of***

**Aguma is entirely a creation of the colonial government or Administration and not a creation or evolution from native law and custom. There is the well settled presumption of law regarding the correctness of the findings of fact of courts below and the presumption must be displaced to reverse the findings of fact.** See Williams v. Johnson (1937) 2 W.A.C.A. 253. **It is equally well settled that this Court will not lightly interfere with the concurrent findings of fact of the Courts below. In Ogundipe v. Awe & Ors. (1988) 1 NWLR (Pt. 68) 118 at 125, this court per Obaseki, JSC., affirmed its often repeated proposition that it will not interfere where there have been concurrent findings of fact by the courts below unless such findings are shown to be perverse or not the result of a proper exercise of discretion.**

**Let me further emphasize that it is not the primary function of this or any appellate court for that matter, to make findings of fact or to appraise evidence. Also where the findings of fact are based entirely on the credibility of the witness, this court will be reluctant to interfere.** See Kponuglo v Kodafa (1932) 2 W.A.C.A. 24. **The duty to make primary findings of fact by the evaluation of the evidence before it by the additional advantage of watching the demeanour of witnesses is essentially preserved for the trial Court.** See Egri v Ukperi (1974) 1 N.M.L.R. 22. **However, where the issue relates to the proper inference to be drawn from the facts proved, the court of Appeal and of course this court, is in as good a position as the court of trial, and will draw the proper inference naturally flowing from the facts so proved.** See Akesse v Akpabio (1935) 2 W.A.C.A. 264. **An appellate court will also reverse the findings of fact if in its opinion, it is not supported by the evidence.** See Lengbe v Imale (1959) WRNLR. 325. **I shall not forget to remind myself also that this Court will not reverse the findings of fact of Courts below merely because the Court would have found differently.** See Ogundulu v. Philips & Ors. (1973) NMLR 267.

**Having examined very closely the record of this appeal particularly the pleadings of the parties, the oral and documentary evidence placed before the trial court, I am fully sat-**

**isfied that the findings of fact by the learned trial Judge that the Chieftaincy of Aguma is entirely a creation of the colonial government or Administration and not a creation or evolution from Native Law and Custom, is well supported by the evidence before the trial Court. I may add here that even the evidence of the Appellant himself who is now disputing the findings of the trial court, actively contributed to the findings when he said under cross-examination at page 137 of the record as follows -**

***"I am aware of the Bassa Kwomo Native Authority. I do not know when it was created. I know it was created because the people from that area wanted to be governed by themselves. It was created by the colonial government. The 1st Aguma of Bassa Kwomo was appointed by the colonial government in 1931. Bassa Kwomo Native Authority was in existence before the appointment of the 1st Aguma of Bassa Kwomo in 1931.***

*The 1st Aguma of Bassa Kwomo was appointed for the whole clans in Bassa Kwomo land."*

Since the appellant himself seemed to have agreed to the existence of the Bassa Kwomo Native Authority which was part of the colonial government for which the 1st Aguma of Bassa Kwomo was appointed in 1931 presumably by the same colonial government, there is no basis whatsoever for the Appellant to dispute the findings of fact that the Aguma Chieftaincy was in fact the creation of colonial government. It is for the same reason that the findings of fact by trial court as subsequently affirmed by the court below, flowing directly from the evidence on record, cannot be described as perverse to justify any interference by this court. On this main issue for determination therefore, the appeal must fail.

**Therefore, the appellant having woefully failed to prove his claim that the chieftaincy of Aguma is entirely a creation of Native Law and Custom which exclusively reserved the stool in rotation between the appellant's Akuba clan and Edigeshi clan, his entire appeal against the findings of fact of the two Courts below on the procedure adopted for the selection and appointment of the 1st respondent as the Aguma of Bassa**

***Kwomo is entirely without merit.*** This is because all the remaining issues in this appeal are also based strictly on findings of fact of the two Courts below to which clear provisions of Sections 3, 4 and 14 of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Council) Law No 7 of 1992, were appropriately applied. In particular, the issue of custom relating to the ascension or succession to the stool of Aguma of Bassa Kwomo, the findings made by the trial court and upheld by the court below are quite valid having regard to the state of pleadings and evidence adduced before the trial court. ***This situation coupled with the abysmal failure of the Appellant to prove the custom of exclusiveness of the stool to his named clans completely destroyed the appellant's case. In other words there were no inadequacies in my view, in the conclusions arrived at by the court below in dismissing the appellant's appeal and in allowing the cross-appeal of the respondents. As the appellant has failed to show that the two courts below had failed to make necessary inference from the proved and accepted facts in the instant case, the entire appeal is completely devoid of substance.*** See *Olale v Ekwelendu* (1989) 4 N.W.L.R. (pt. 115) 326 at 347.

Further more, as all the claims of the appellant as plaintiff at the trial court were dismissed by the court below in allowing the cross-appeal of the respondents and dismissing the appellant's appeal on the strong ground that the appellant had failed to prove the Native Law and Custom of the Aguma Chieftaincy of the rotation of the stool of Aguma of Bassa Kwomo between the Akuba and Edegeshi clans as having originated from any Native Law and Custom of Bassa Kwomo Local Government Area, all the remaining issues raised by the appellant in this appeal which are clearly rooted in the existence of the supposed Native Law and Custom relied upon by the appellant, must also collapse with the 1st issue for determination. This is because ***quite contrary to the claim of the Appellant, the appointment of the 1st respondent was made in accordance with the requirements of the Kogi State Law, No. 7 of 1992 on the Appointment and Deposition of Chiefs. There being no native law and custom applicable to the appointment or approval of the 1st respondent as the Aguma of Bassa Kwomo at the time***

***the appointment was made, there was no breach of any native law and custom claimed by the appellant under Section 3(2) of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Council) Law No. 7 of 1992. This is in line with the findings of the court below that the Aguma of Bassa Kwomo chieftaincy not being a creation of native law and custom, is not governed by the provisions of Section 3(2) of the Kogi State Law No. 7 of 1992 but by the provisions of Section 4(2) of the same law, as the chieftaincy in dispute was the creation of colonial government or Administration. Section 4 of this law, it is observed, is concerned with the appointment of chiefs otherwise than in accordance with native law and custom. Thus, the appointment of the 1st respondent having been made in accordance with the procedure prescribed under Section 4 of the Chiefs Law, No. 7 of 1992 of Kogi State, was quite in order under the law.***

In any case since all the remaining issues 2, 3, 4, 5 and 6 in the appellant's brief of argument are predicated on the appellant's assertion that the nomination and recommendation for appointment to fill the vacant stool of Aguma of Bassa Kwomo are governed by native law and custom under Section 3(2) of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Council) Law No 7 of 1992, whether the Court below was correct in its interpretation and application of Section 14(2) of the law in the selection and appointment of the 1st respondent, or whether the appellant was given a fair hearing in the process which was not under native law and custom, or that the Appellant was not heard on the application of Section 4 of the 1992 law rather than Section 3 which he claimed applied; or that his appeal and the cross-appeal were rightly dismissed and allowed respectively by the court below are of no moment since the Appellant had not made out a case to justify this court looking into the concurrent findings of fact of the two courts below to give life to the said issues. ***The law is well settled that this court is not given to make moot decisions or decide hypothetical matters which have no bearing with the case the court is called upon to decide which in this case is whether grounds exist to warrant interfering with the concurrent findings of fact of the two***

**courts below.** See Ikenye Dike & Ors. v Obi Nzeka II & Ors. (1986) 4 N.W.L.R. (pt. 34) 144; Saude v Abdullahi (1989) 4 N.W.L.R. (Pt. 116) 387; Kosile v Folarin (1989) 3 N.W.L.R. (Pt. 107) 1 at 8 and Adewunmi v Attorney-General Ekiti State & Ors. (2002) 2 N.W.L.R. (Pt. 751) 474 at 525.

B In the result this appeal fails and it is hereby dismissed for lack of merit. The judgment of the court below is affirmed. There shall be N10,000.00 costs to the respondents against the appellant.

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### KATSINA-ALU JSC

C I have had the advantage of reading in draft the judgment delivered by my learned brother Muhammed J.S.C. I am in complete agreement with his reasoning and conclusion. I would also dismiss the appeal. I also abide by the order as to costs.

D

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### MUKHTAR JSC

The pivot of this appeal in my view is mainly premised on pleadings evidence and findings of the courts below, as is manifested in issue (1) in the appellant's brief of argument, which was distilled from grounds (1) and (7) of the grounds of appeal, the issue being:-

*"Whether the learned Justices of the Court of Appeal were right in affirming the decision of the trial court that the chieftaincy of Aguma is entirely a creation of the colonial government and not a creation or evolution from native law and custom (hence rules of Native Law and Custom do not apply) thereby refusing to disturb the findings of facts and conclusion of law made by the trial court on the ground that they were based on sound legal principles".*

G I will particularly examine paragraphs (7) and (8) of the plaintiff's amended statement of claim which are crucial averments that state the root of this case, and I will reproduce them hereunder: They read:-

H *"7. The name Aguma is the name of the stool of the paramount ruler of the Bassa Kwomo people of who came to settle in the present place about 1860 A.D. The plaintiff shall rely and lead evidence to this fact at the hearing of this case.*

*8.(a) The plaintiff avers that from 1860 A.D. to date even though*

*there are five clans in Bassa Kwomo land out of which only two clans take the stool of Aguma of Bassa Kwomo by rotation (sic). This is right from the inception of the stool of Aguma of Bassa Kwomo land. The five clans are Akuba and Edegeshi (who are the only royal/ruling houses), Arisamishi, Ozongulo and Ashashama who are not ruling houses/clans to the stool. The plaintiff shall rely and lead evidence to this fact at the hearing of this case.* B

*(b) The following documents relating to the history and creation of the stool of Aguma of Bassa and the succession thereto are hereby pleaded and shall be relied upon at the hearing of this suit inter alia .....* C

*In his statement of defence the 1st defendant made the following averments:-*

*"15. The first defendant further states that with the creation of a single Native Authority for the Bassa Kwomo in 1931, the stool of Aguma Uto (Senior Chief) graded fourth class were still allowed to operate but then under the control of the Aguma Uto.* D

*16. In further answer to paragraph 8 and in answer to paragraph 9 of the statement of claim, the first defendant avers that since the creation of a single Bassa Kwomo Native Authority, each of the five clans constituting Bassa Kwomo Native Authority has a right to the title of Aguma of Bassa Kwomo; and each has been taken (sic) its turn at the title to rotate from one clan to the other.* E

*17. The first defendant avers that the stool of Aguma Uto of Bassa Kwomo created in 1931 by the Colonial Authority was to be rotational amongst the five clans of Edigeshi, Akuba, Ozongulo, Arisamishe and Ashashama but the order of rotation and the rotational arrangement was not written down."* F

With the above averments it became clear that issues were joined on the origin of the stool of Agumo Uto of Bassa Kwomo, and it was for the plaintiff to prove his own case on the history of the stool and its creation. I will not however lose sight of the fact that the plaintiff filed a reply to the 1st defendant's statement of defence where he particularly denied the above averments as follows:- G

*"5. (j) It is not true that Bassa Kwomo Native Authority was created in 1931 by the existing clans then neither did the stool of Aguma-Uto ever existed in Bassa Kwomo land from time immemo-* H

rial till date. However, Akuba clan have maintained the lead position of producing senior chief of Aguma of Bassa Kwomo.

(k) In further reply to paragraphs 16 and 17 of the defence, the plaintiff says that Bassa Native Authority if any as at 1931 was a creation of the colonial authority meant to assist in the proper administration of Bassa Kwomo land and not for the purpose of appointing Aguma of Bassa Kwomo."

It behoves the appellant to give testimony in support of the pleadings if he wanted to succeed in his case. A cardinal principle of law is a plaintiff who asserts must prove his case with credible and unchallenged evidence. See Section 135 of the Evidence Act Cap. 112 of 1990 Laws of the Federation of Nigeria. Elias v Disu (1962) 1 All NLR page 214, and Arase v Arase (1981) 5 SC page 33. In civil cases a party who wishes to succeed in obtaining judgment in his favour must adduce such credible evidence, for such cases are decided on preponderance of evidence and balance of probability. See Elias v Omo-Bare (1982) 5 SC. 25, and Woluchem v Gudi (1981) 5 SC. Page 291. It is after a plaintiff has proved his case in this manner that the burden of proof shifts. The pertinent question at this juncture is, did the appellant meet the above requirement of the law vide his evidence? I will now examine the evidence of the plaintiff and possibly reproduce the relevant excerpts.

The appellant who testified as PW3 in his examination in chief said inter alia thus:-

*"The stool of the Aguma of Bassa came into existence from the year 1930. Then one Kpanaki was appointed as the first Aguma of Bassa Kwomo."*

Then in the course of cross-examination he testified as follows:-

*"I did not tell this court in my examination in chief that the stool of Aguma of Bassa Kwomo was created in 1931. I do not know when the stool of Aguma of Bassa Kwomo was created. The first Aguma was Kpanaki from Akuba clan. He became the Aguma of Bassa Kwomo in 1931. It is not true that prior to 1931, the five clans in Bassa Kwomo land ruled themselves independently of one another. Prior to 1931, all the clans in Bassa Kwomo land were ruled by Chief (sic) of Nupe and Kankada and Hausa origins. I am aware of the Bassa Kwomo Native Authority. I do not know when it was*

*created. I know it was created. I know it was created because the people from that area wanted to be governed by themselves. It was created by the colonial Government. The 1st Aguma of Bassa Kwomo was appointed by colonial Government in 1931. Bassa Kwomo Native Authority was in existence before the appointment of the 1st Aguma of Bassa Kwomo in 1931."* B

It is instructive to note that the appellant was not consistent in his evidence, as he developed the habit of approbating and reprobating, which no court will tolerate. His evidence cannot therefore be described as credible and reliable for they were also full of contradictions. As a matter of fact, by that evidence he has not proved his pleadings in accordance with the law of evidence, not even his averments in the plaintiffs reply to the 1st defendant's statement of claim which I have reproduced above. In fact I would say his evidence supported the case of the respondents. In this wise, the case of the plaintiff/appellant was like a train without an engine. On this score, the learned trial court was on firm ground when it dismissed the appellant's case, and the affirmation by the lower court of that dismissal was not in error, I have taken a vital aspect of this appeal to highlight in this contribution because it forms the bedrock of the appeal. This court cannot and will not interfere with the concurrent findings of the lower courts, as they were not perverse, having been supported by evidence before the trial court. Authorities abound that this court or the Court of Appeal will not ordinarily disturb findings of facts unless the appellate court can be convinced that such findings are not supported by evidence, and this has occasioned a miscarriage of justice, which is not the situation in the instant appeal. See *Abidoye v Alawode* (2001) 6 NWLR part 709 page 463, *Lauwers Import and Export v Josebson Industries Ltd* (1988) 3 NWLR part 83 page 429, and *Enang.v Adu* 1981 11 - 12 S.C. page 25. D E F

I have read in advance the lead judgment of my learned brother Mohammed, J.S.C., and I am in complete agreement with the reasoning and conclusion reached therein. For the reasons in my judgment and the fuller ones in the lead judgment, I also dismiss the appeal in its entirety. I abide by the order as to costs. H

**TABAI JSC**

I had a preview of the leading judgment prepared by my learned brother Mohammed J.S.C. I agree entirely with his reasoning and conclusion. I do not see any cause for interference with the concurrent judgments of the two courts below. I hold that the appeal has no merit and same is accordingly dismissed. I abide by the costs as assessed on the leading judgment.

**CHUKWUMA-ENEH JSC**

This action brought by the plaintiff (that is appellant in this court) in a representative capacity commenced at the Kogi State High Court sitting at Dekina. The plaintiffs paragraph 29 at pages 86-87 of the record as per the amended statement of claim dated 17/6/1999 has set out the following reliefs:-

*"(a) A declaration that the appointment of the 1st defendant by the 2nd to 4th defendants as the Aguma of Bassa Kwomo land is unlawful, unconstitutional, null and void and of no effect, the 1st defendant not being from any of two ruling Clans/Houses entitled to the stool nor was he adopted by the Akuba clan, who it is its turn to produce the Aguma after the death of Aguma Joseph D. Alagani (that is the immediate past Aguma of Bassa) and more so that the appointment patently violated provisions of law No 7 1992 of Kogi State on Appointment and Deposition of Chiefs.*

*(b) A declaration that only the Akuba and Edegeshi Clans/ Ruling Houses are entitled by rotation to the stool of Aguma of Bassa Kwomo in Bassa Local Government Council.*

*(c) A declaration that by the custom and tradition of the Akuba and Edegeshi clans, it is Akuba Clan/Ruling house that should produce the present Aguma following the demise of late Joseph D. Alagani who was adopted as Edegeshi candidate even though he was/is not from Edegeshi clan.*

*(d) A declaration that the plaintiff is the one entitled to be appointed as the Aguma of Bassa having come from Akuba clan and duly nominated by the elders of the ruling house in line with custom of Bassa Kwomo.*

*(e) A declaration that the plaintiff is entitled to be appointed as*

*the Aguma of Bassa Kwomo and that the 2nd - 4th defendants recommend, appoint and recognise the plaintiff as such.*

*(f) A declaration that the 2nd and 3rd defendants' failure without just cause to consider the plaintiff's application for the stool of Aguma and recommend him for appointment is unreasonable, illegal, unconstitutional and against the rule of natural justice.* B

*(g) A perpetual injunction to restrain the 1st defendant from parading himself or holding himself out as the Aguma of Bassa Kwomo or from performing the function of Aguma of Bassa and the 2nd to 4th defendants from recognising him or treating him as such."* C

Thereafter, parties filed and exchanged their pleadings and led evidence at the hearing of the matter. The aggregate of the plaintiff's case as per his pleading and evidence boils down to the contention that the Stool of Aguma of Bassa Kwomo is exclusive to the Akuba and Edegeshi clans and that the other three clans namely Arishamishi, D Ashashama and Ozongulo clans are not entitled to the Stool of Aguma. He has also contented denial of fair hearing by 2nd and 3rd defendants as his application for appointment to the said Stool was not considered.

The defendants (that is, the respondents in this court) broke E into 2 sets, that is, the 1st defendant on the one hand and 2nd - 4th defendants on the other; they have vehemently denied the plaintiffs claim. The basis of their contention is that the Stool of Aguma of Bassa Kwomo is not exclusive to Akuba and Edegeshi clans but that F each of the clans in Bassa Kwomo is entitled to the Stool which they take in rotation, one after the other. On these issues the matter went to trial.

The trial court in a well considered judgment granted the 1st relief and injunction but refused to grant the rest of the reliefs claimed G by the plaintiff. In other words, the reliefs sought by the plaintiff were granted in part. Aggrieved by a part of the decision of the trial court, the plaintiff appealed to the Court below (that is, as the appellant) so also the 1st defendant/respondent as a cross-appellant. In the court H below (that is, Court of Appeal) parties filed and exchanged their respective briefs of argument. The court below heard the appeal and cross appeal on the briefs of argument filed and exchanged between the parties and in its judgment dismissed the main appeal in its en-

tirety and allowed the cross appeal thereby reversing the appointment of the 1st respondent and the injunction.

The appellant in the court below still dissatisfied by the decision of the court below has now appealed to this court as per the Notice of Appeal filed on 17/6/2002 containing 10 grounds of Appeal; six issues for determination have been distilled from these grounds of Appeal. They are:-

(1) Whether the learned Justice of the Court Appeal were right in affirming the decision of the trial court that the Chieftaincy of Aguma is entirely a creation of the colonial government and not creation or evolution from native Law and custom (hence rules of Native Law and custom do not apply) thereby refusing to disturb the findings of fact and conclusion of Law made by the trial Court on the ground that they were based on sound legal principles (Grounds 7 and 1)

(2) Whether the Learned Justices of the Court of Appeal were correct in their interpretation and application of section 14 (2) (b) of the Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional council) Law No 7 1992 on the issues of quorum of the Kogi State council of Chiefs vis a vis Exhibit 21 (Ground 2)

(3) Whether the Learned Justices of the Court of Appeal were correct in their resolution of the issue of fair hearing against the Appellant as it affects Exhibits P2, P7, P8, P9, P10, and P11 (Grounds 3 and 8).

(4) Whether having raised the issue of Section 4(1) & (2) of Law No 7 1992 suo motu, and without according the Appellant the opportunity to address the court, the Learned Justices were correct in their interpretation and application of the said Section to the exclusion of Section 3 (2) of Law No 7 of 1992 thereby faulting the trial court for invoking Section 3(2) (supra) (Grounds 4, 5 and 6).

(5) Whether upon a careful examination of the evidence and issues raised in the appeal, the Learned Justices of the Court of Appeal were right in dismissing the Appeal of the appellant in its entirety (Ground 9)

(6) Whether the Learned Justices of the Court of Appeal were right in allowing the Cross-Appeal on the ground that it had merit thereby reserving and setting aside that part of the Judgment of the trial Court nullifying the appointment of the 1st respondent as the

Aguma of Bassa Kwomo and also selling aside the order of injunction (Ground 10)

The 2nd and 4th respondents raised three issues for determination, to wit:

(1) Whether the lower court was right in holding that the findings of facts and conclusion of law made by the trial court were based on sound legal principles (Distilled from grounds 1 and 7) B

(2) Whether the lower court was right in its interpretation and application of Section 14 (2) (b) of the Kogi State Chief Appointment, Deposition and Establishment of Traditional Council law, 1992 otherwise known as law No 7 to hold that the 3rd respondent conveyed for the purpose of considering the appointment of the 1st respondents. (Distilled from Ground 2) C

(3) Was the appellant denied fair hearing by the 2nd respondent and the lower court via the Court of Appeal D

The 1st respondent has in his brief of argument raised 5 issues determination, to wit:

*"(1) Whether the Learned Justices of the Court of Appeal were right in sustaining the finding of the trial High Court that the chieftaincy of Aguma of Bassa Kwomo is entirely a creation of Colonial Administration and not a creation or evolution from native law and custom and no rules of native law and custom stricto sensu are applicable.* E

*(2) Whether the Court below was right in upholding the interpretation given by the trial court to Section 4 (2)(b) of the Kogi State Chief (Appointment, Deposition and Establishment of Traditional Council) Law No 7 of 1992 as regards the quorum of Kogi State Council of Chiefs vis-a-vis Exhibit 21.* F

*(3) Having regard to the circumstances of this appeal whether the Court of Appeal was not right in the exercise of its appellate power to disturb the wrong conclusion reached the trial Court after the learned trial Judge has made a detailed and meticulous finding of fact that the chieftaincy of Aguma of Bassa Kwomo is entirely a creation of Colonial Administration and not a creation or evolution from native law and custom and no rules of native law and custom. stricto sensu are applicable.* G

*(4) Whether the learned Justices of Court of Appeal were right in their resolution of the issue of fair hearing as it affects Exhibits P2* H

,P7, P8, P9, 10 and P11

(5) *Whether the Court below was right to have dismissed the substantive appeal and to have allowed the cross-appeal."*

I have set out the foregoing in order to enable one put the respective cases of the parties in a relative context and in understanding their cases and put my reasoning hereunder in perspective. Having perused the evidence both oral and documentary particularly Exhibits P18, P19, and P20 and P21 and on the backdrop of the issues for determination raised on this matter, I am in complete agreement with the cogent findings of fact made by the trial court as set out hereunder. In a nutshell, the crux of this case is whether the Stool of Aguma is a creature of Bassa Kwomo native law and custom dating back to the period before the coming of the Colonial Administration in which case it is the exclusive preserves of members of the Akuba and Edegeshi clan Ruling Houses only or that the said stool is a creature of the colonial government. As an adjunct to the foregoing proposition, it is a settled principle of law that customary law is a question of fact to be proved by evidence. The onus is on the party alleging the existence of a particular custom. He must call credible evidence to establish the existence. Although, it is also settled that where a custom has been sufficiently decided upon by the court, judicial notice of the same can be taken and the court will not require further proof of the same custom. See Section 14 of the Evidence Act and see also Agbai v. Okagbue (1991) 9-10 SCNJ 49. It is to be seen anon the appellant's case vis-a-vis the principles of law on customary law stated above.

The trial court after a painstaking examination of the evidence given and tendered in the parties' respective cases rightly in my view found as follows that, to wit:

1. The Stool of the Aguma of Bassa Kwomo was the brain child of the colonial administration in Bassa Kwomo land and not at the instance of any of the clans in that land.
2. As at the time of its creation or inception, there was no ruling house to the stool that is, the stool of Aguma of Bassa Kwomo was not specifically meant for any particular community in Bassa Kwomo land.
3. Some Hausas and Nupes have been appointed by the Co-

lonial administration in 1930 as an Etsu.

4. Upon the assassination of Kwanaki in 1931, Tamaji, the head of Digeshi (Edigeshi) clan was unanimously selected and accepted by the clan elders as the successors to Kwanaki and so Tamaji was appointed as the first Aguma of Bassa Kwomo and installed as such with a 4th class staff of office in August, 1932. B

5. The appointment of Aguma Tamaji was based upon his personal merit and acceptability by the Bassa Kwomo community and not upon any custom or ruling house arrangement.

6. Between 1934 and 1950, there was no single chief of the Bassa Kwomo as each of the five clans were made independent Native Authorities, hence Bongera and Gberugu both from Akuba clan were never at any time appointed as Aguma of Bassa Kwomo. C

7. The next Aguma of Bassa Kwomo after Tamaji was Sokwo (Kurubwa) from Akuba clan who was appointed with a single Bassa Kwomo Native Authority constituted and consisting two members from Akuba for being the single largest clan and the clan heads of the other four clans. D

8. The Aguma of Bassa Kwomo stool in not alternated between Akuba and Edegeshi clans, so the stool is not exclusive to them E

9. The colonial Administrator who initiated and/or instituted the said stool did not limit ascension or succession to the stool to any one or two clans nor was any of the clans in the Bassa Kwomo land disentitled to the stool. F

10. Late Aguma Joseph Dodo Alagani was selected and appointed in 1968 in his own right having hailed from Arisanshi clan and not upon an alleged adoption by Edegeghi clan. F

11. Exhibit D1, ex-facie does not show any fact of adoption of the late J.D. Alagani by Edigeshi clan. G

12. The Aguma of Bassa Kwomo since the inception of the stool with a 4th class staff of office in 1932, were;

- (i) Tamaji from Edegeshi clan;
- (ii) Sokwo Kurubwa from Akuba clan
- (iii) J.D. Alagani from Arishamishi H

In addition on the question of whether customarily the Stool of Aguma of Bassa Kwomo is rotated amongst the 5 clans, the trial court, again rightly on the evidence before it found that the five clans

in Bassa Kwomo has a say in the selection and appointment processes and that the same rotate not in any particular order from one clan to the other. These findings of fact are solid. The appellant has an uphill task in trying to upset them. The onus is on the appellant to show that they are perverse and consequently have led to a miscarriage of justice has failed. See *Adeyeye v Ajoboye* (1987) 3 NWLR 432. Decided cases are clear on the burden on the appellant as pronounced in the case of *Okolo v Uzoka* (1978) 4 SC 77 at 86; thus *"to succeed in any appeal against findings of fact, it must be shown that in the performance of its primary duties of appraisal of oral evidence and ascription of probative values to such evidence, that the court of first instance made imperfect use or improper use of the opportunity of hearing and seeing the witness or has drawn wrong conclusion from accepted or proved facts which those facts do not support or indeed has approached the determinations of the those facts in a manner which these facts cannot or do not in themselves support"* per Obaseki, JSC. See: *Fashanu v. Edo* (1971) ANLR 282 at 259. The appellant in my view has not come to grips with the burden cast on him as per the foregoing principles established in the above cited cases. He failed woefully to show that they are perverse and have led to a miscarriage of justice.

The ultimate conclusion deducible from these findings is that there are no bases for bring to bear on this matter question of customary law when the Stool of Aguma of Kwomo has been of recent institution by the Colonial Administration. The trial court finding on this point has remained unshaken. On this conclusion the case of the appellant collapses like a pack of cards.

The court below rightly has accepted these findings of fact on having found that they are not perverse. I also so hold. These findings if I must repeat, have not occasioned any miscarriage of justice in this matter.

I have read before now the said judgment of my learned brother Mohammed J.S.C and I agree with him that there is no merit whatsoever on this appeal. I also dismiss it and I abide by the orders contained therein.