

COURT OF APPEAL
COURT OF APPEAL (JOS DIVISION)
12TH JULY, 2005. CA/J/159/2000
CORAM:- A. SANUSI, I. C. NZEAKO, M. L. TSAMIYA, JJCA

1. YAKUBU GAGARAU
2. CHAIRMAN, BASSA L.G.C. APPELLANTS
3. THE ATTORNEY GENERAL
AND COMMISSIONER FOR
JUSTICE, PLATEAU STATE
AND
HAUSA DANBOYI PASHIRI RESPONDENT

CONSTITUTIONAL LAW - Judgments - Period of delivery - Legal implications - Where delivered outside the 90 days constitutional provision - Setting it aside will be based on a party - Having suffered miscarriage of justice (H1)

JUDGMENTS - Period of delivery - 90 days constitutional limitation period - Though not complied with - Trial court's judgment will not be nullified - As no miscarriage of Justice was occasioned (H2)

PLEADINGS - Averments - Evidence - Chieftaincy - Failure to plead names of selectors of the chief - Will not warrant expunging that evidence - As fact giving rise to those names was pleaded (H3)

CHIEFTAINCY MATTERS - Pleadings - Averments - Failure to plead names of selectors of the chief - Will not warrant expunging that evidence - As fact giving rise to those names was pleaded (H3)

CROSS EXAMINATION - Reliance - Pleadings - Amendment - Evidence extracted during cross examination - Where not pleaded - Plaintiff should amend his pleadings - Before he can rely on it (H4)

PLEADINGS - Traverse - Propriety of - Chieftaincy - Goriola case relied upon by trial court - To fault the traverse in issue is not applicable - As the traverse in that case was general - While the one here being

specific is proper (H5)

EVIDENCE - Contradictions - Relevance - The law does not forbid immaterial discrepancy in evidence - But contradiction in issue here is material - As it relates to a relevant question (H6)

EVIDENCE - Contradictions - Pleadings - Chieftaincy selection - Where there is material inconsistency - In the testimony of respondent's witnesses - The pleaded fact should be regarded as not proved (H7)

FACTS

Before the High Court Jos, plaintiff/respondent filed a chieftaincy action against the defendants/appellants, claiming declaratory reliefs, an order and an injunction. He claimed inter alia, an order setting aside election of 1st appellant as village head of Kwafa and directing 2nd and 3rd appellants to install him (respondent) as the village head. Respondent sought to establish that only two ruling houses were eligible for producing the village chief. That he was duly selected vide the usual customary procedure and presented with traditional symbol of authority, rings, bangles, etc., upon the death of the incumbent chief. That he suddenly came to know about the selection of the 1st appellant who is not from any of the ruling houses, and then commenced this litigation.

Appellants denied the claim, and specifically traversed some averments in the statement of claim. There were some material contradictions in respondent's evidence who thereby did not prove his claim. But the trial court still found in his favour and granted all the reliefs claimed. The judgment was delivered 48 days after the mandatory 90 days period provided in s. 258 of the 1979 Constitution. Aggrieved, appellants have now appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

(1) Whether the decision of the learned trial Judge is not a nullity having been delivered without jurisdiction having regard to the provision of section 258 of the Constitution of the Federal Republic of Nigeria 1979 as amended.

(2) Whether in the circumstances of this case there is legally admissible evidence to justify the conclusion reached by the learned

trial Judge that the respondent was properly selected as the village head of Kwafa having regard to the state of pleading.

(3) Whether the learned trial Judge was right when he relied on the unresolved contradictory account of the testimony of the respondent and his witnesses to grant the reliefs sought in this case.

HELD (Unanimously allowing the appeal per **TSAMIYA JCA**)

Judgments - Where delivered outside the 90 days provision

1. I think it is desirable to point out that, any judgment of a court established under the Constitution, delivered outside the period of 90 days after the conclusion of evidence and final addresses, was delivered in contravention of the provisions of the Constitution. See sections 258(1) and 294(1) of the Constitutions of the Federal Republic of Nigeria, 1979 and 1999 respectively. The provisions of section 258(1) of the Constitution of Nigeria was introduced into our legal system for the first time in 1979. It was a device introduced to curb the excess of or excesses of inordinately long adjournments before delivering judgment by courts. It is specifically intended to curb the excesses of long adjournments after the conclusion of evidence and final addresses by counsel. By the Constitution (Suspension and Modification) Amendment Act No: 17 of 1985, amendment was made by introducing subsection (4) to the original section 258 of the Constitution. The amendment is to the effect that a decision/judgment delivered in contravention of the provisions of the original section 258(1) shall not be set aside or treated as a nullity, unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice. Before the said amendment however, judgments/decisions delivered in contravention of that original section 258(1) of 1979 Constitution were set aside or declared a nullity. In *Chief Sodipo v. Lemminkainen O.Y. & Ors.* (1985) 2 NWLR (Pt. 8) 547 at 557, it was decided that, there is no doubt it is mandatory for a High Court and all other courts established by the Constitution to deliver its or their judgment(s) in writings not later than 90 days from the date of the conclusion of evidence and final addresses of the counsel. That however, is not and is never intended to be a license for courts to deliver judgments after conclusion of evidence and final addresses at

their own convenience.

Therefore, the amendment to the original section 258 of the Constitution (supra) has to be construed in a manner that would not defeat the objective of fair and speedy trial which the said section 258(1) is intended to achieve. (pp. 3147 H/3148 E)

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JUDGMENTS - 90 days period - Though not complied with

2. Moreover, it should be noted that the original provisions of the section as, and has been regarded simply as a mandatory constitutional directives to the courts to ensure delivering of judgments within the stipulated time. There was not any saving grace for non-compliance. See *Otumba Owoyemi v. Prince Adekoya & 2 Ors.* (2003)18 NWLR (Pt. 852) 307. It should be remembered that it was the hardship likely to be suffered by either party from a strict interpretation of that provision of the Constitution 1979 that gave rise to the amendment. Since the appellants did not and could not show to our satisfaction what miscarriage of justice they suffered as a result of non-compliance with the provisions of the section, this court will not declare the judgment a nullity on this ground. In the instant case, though the trial court did not deliver its judgment in compliance with the provisions of section 258(1) of the 1979 Constitution, but that has not been shown to have occasioned miscarriage of justice. (p. 3150 D)

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PLEADINGS - Averments - Evidence - Chieftaincy

3. It is now well known that cases in the High Court which are fought on the pleading must be conducted in accordance with the averments contained in such pleadings. Any evidence led in the course of any trial, as to any fact, not pleaded goes to no issue and must be ignored. If such evidence is wrongly admitted in the proceeding in the High Court, the Court of Appeal will always ignore such evidence, and it will cause it to be expunged from the record.

The respondent did not plead the names of his selectors from the two ruling houses. But the mere failure to include the names of his selectors in the pleading should not be so important. The facts pleaded in paragraph 12 of the amended statement of claim stating, “that members of the plaintiff’s ruling house met, and unanimously se-

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lected the plaintiff (now respondent)“.... is enough to cover such piece of evidence to touch the names of selector. The mere mentioning the names of the members who selected the respondent is an explanation in evidence led to prove facts pleaded in paragraph 12 thereof. Accordingly, that piece of evidence in my view, is in order. (p. 3152 A/B/D) B

CROSS EXAMINATION - Reliance - Pleadings - Amendment

4. From the record of this appeal, it is clear that the learned trial Judge not only made a reference to such piece of evidence but also based his decision on it. (See page 54 of the record of appeal). C

Therefore, the trial court ought not have used that extracted evidence. It is trite law that evidence led on matters not pleaded really goes to no issue and a trial court should not allow such evidence to be given. D

As I said above, the piece of evidence, being challenged by the appellants, was an evidence extracted in the course of cross-examination. If a party extracts in the course of cross-examination evidence, which if accepted could decide the issue between the parties, then if he wishes to use it he should amend his pleadings. (See the decision of the Supreme Court in, Slee Transport Ltd. v. Oladipo Oluwasegun & Anor. (1973) 3 E.C.S.L.R. (Pt.11) p. 1176. In that case a police witness for the plaintiff had admitted during cross-examination that there were no skid marks at the scene of accident but the plaintiff's driver during his evidence-in-chief had said that there were skid marks. No mention of skid marks however was made in the pleading of the parties. Commenting on this, Sowemimo, J.S.C. (as he then was) said at 1183; E F

"The presence or absence of a skid mark was not an issue G before the learned trial Judge and indeed the appellants who called the policeman as a witness did not ask him about any skid mark because it was not pleaded nor made part of their case. It was the counsel for the respondent who raised the matter under cross-examination. If the counsel for the respondent thought that the matter H of a skid mark was relevant and material to the issue... it was for him to plead it and lead evidence on it." (p. 3153 B)

PLEADINGS - Traverse - Propriety of

5. With due respect to the learned trial Judge, this finding in my view was wrong, because the principles of law relied on or applied by him is not applicable to this case. In the case referred, the traverse therein was a general one, while the traverse in this case under consideration is specific and effective. The traverse contained under paragraph 7 thereof was effectively traversed and evidence must be led to prove that the respondent was legally selected in accordance with native law and customs. Any averment which is not proved by evidence is deemed to be abandoned.
- The case of Oba Goriola (supra) is not applicable in this circumstance. In that case, it was a general traverse, while in this case the appellants' traverse cannot be regarded as general traverse because in paragraph 7 it was stated thus:
- "7. The defendants (now appellants) deny paragraphs 10 - 12 of the claim and put the plaintiff to the strict proof of the averments contained therein."*

The above traverse of the facts pleaded in the named paragraphs of the respondent's amended statement of claim, in my view, amounts to proper traverse. I am therefore of the view that the learned trial Judge was wrong to hold that the pleadings in paragraph 7 of the appellant's statement of defence which says: "The defendants deny paragraphs 10, 11 and 12 of the claim and put the plaintiff to the strictest proof of the averments contained therein" was not effectively and successfully traversed, and as such evidence ought to be led to prove the facts contained therein. The respondent did not, in my view, satisfy the trial court that he had been legally and in accordance with the native law and customs of the Rabina people presented with the traditional symbol of authority of village head of Kwafa in Bassa Local Government Area, and I so hold.

(pp. 3154 C/3157 B)

EVIDENCE - Contradictions - Relevance

6. In any case, the law does not say there should be no contradiction in the evidence of witnesses, what it says is that, the contradictions/ discrepancies should not be material.

In consideration of conflict of evidence of witnesses of the par-

ties, it is material contradiction especially where the evidence is based on traditional history that is relevant.

Since the issue under consideration at the trial court involves as to who was validly selected and presented with the traditional symbol of authority, exhibits 1-3 become relevant then the question as to how the respondent got them to become the new village head of Kwafa, to my mind, is relevant and material. Therefore, the inconsistency in the evidence of witnesses of the respondent, amounts to material contradiction. (pp. 3155 H) B

Contradictions - Pleadings - Chieftaincy selection C

7. Looking at the above pieces of evidences, it could be said that they were in conflict or contradictory and both were accepted without resolving the manifest conflict in the testimonies of respondent and that of Gauza Ahmadu on the issue. The inconsistent and contradictory testimonies were on material facts as to who was validly selected between respondent and the 1st appellant in accordance with the Native Law and Custom of Kwafa people and the learned trial Judge should have regarded respondent's evidence on the issue as unreliable and reject it as what he pleaded was not proved. Further reliance was put on the case of Adebayo v. Ighodalo (1996) 5 SCNJ p. 23 at 31; (1996) 5 NWLR (Pt. 450) 507, cited at p. 9 of the appellants brief of argument, that as the evidence of witnesses for the plaintiff clearly contradicted one another it ought to be rejected or regarded as not established. (p. 3158 C) D
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REPRESENTATION

S. P. Gang, P.S.C., Ministry of Justice, Plateau State for the Appellants
E. O. Akhayere, Esq. (with him, M. D. Karshima, Esq.) for the Respondent G

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, ss. 258(1) & (4) H
Constitution of the Federal Republic of Nigeria, 1999, S. 294(1) & (5)

LEAD JUDGMENT BY TSAMIYA JCA

This appeal is against the judgment of the (High Court of Justice Plateau State sitting in Jos) wherein the court granted all the four reliefs sought by the plaintiff (herein referred to as the respondent) in this suit. The action which is the subject of this appeal, was commenced by the respondent at the High Court of Justice, Plateau State in Jos, claiming declaratory reliefs and injunction against the selection of the 1st defendant by 2nd and 3rd defendants (herein referred to as 1st, 2nd and 3rd appellants respectively).

Pleadings were ordered, filed and exchanged by parties which were later amended with the leave of the court. The respondent joined issues with the appellants, in the later' amended statement of claim. It follows that at the close of pleadings, the respondent relied upon his amended statement of claim, and on the other hand, the case for the appellants is as postulated in their joint amended statement of defence.

The reliefs sought by the plaintiff/respondent as per his amended statement of claim are set out below:

“(a) A declaration that the 2nd and 3rd defendants cannot lawfully appoint and recognize the 1st defendant as the village head of Kwafa as he is not from any of the Ruling Houses.

(b) A declaration that the purported election/selection of the 1st defendant is contrary to the customs and tradition of the Ribina people as such it is null and void;

(c) An order setting aside the election of the 1st defendant as village head of Kwafa and directing the 2nd and 3rd defendants to install the plaintiff as the village head of Kwafa, with all the rights and perquisite pertaining thereto;

(d) A perpetual injunction restraining 1st defendant from parading himself as the village head of Kwafa, and the Bassa Local Government Council and Plateau State Government from recognizing him as such.”

In proof of his claims and to justify grant of the reliefs sought, the plaintiff/ respondent called 2 witnesses, and the defendants/appellants called 3 witnesses in support of their defence to the claim of the respondent. Both respondent and 1st appellant gave evidence. Some documents were also tendered and admitted as exhibits in the

course of the trial. The 2nd and 3rd defendants did not testify at the trial.

The facts that led to the decision of the trial court which ultimately gave rise to this appeal are not so complicated. The facts may be summarised as follows: The death of Najuya Sakon Allah, the last village head of Kwafa signaled the race for his successor to the village headship of Kwafa. It is also pertinent to state that it is common ground between the parties that their dispute arose from the selection and installation of the 1st appellant as the new village head of Kwafa in Bassa Local Government Area of Plateau State.

The case as made out by the respondent was that, Kwafa village headship is a chieftaincy stool in Kwafa village in Bassa Local Government Area in respect of which the two ruling houses are entitled to present a candidate. The respondent's case postulates a line of succession from an original ancestor named by the respondent as Pashiri and Hore by which the two existing ruling houses are known as Pashiri ruling house and Hore ruling house. The last village head-Najuyan Sakon Allah who died in 1989 was from Hore ruling house and it then became the turn of respondent's ruling house i.e. Pashiri ruling house - to present a candidate. The procedure for selecting a new candidate for the village headship which was asserted by the respondent in this action is said to involve the two ruling houses summoning a meeting of 6 members (three from each Ruling house) at which a candidate shall be nominated or selected. After such selection, the candidate would be presented to the kingmakers for approval, and installation and later to be followed by formal presentation of traditional symbol of authority which include rings, hand bags or bangles, horns and calabash. Even if the king makers did not approve the selection it matters not.

It was the respondent's case that he was duly selected at a meeting of the members of the two ruling houses. He however did not state which member of the two ruling houses presided over the meeting. The respondent was also said to have been formally selected by the 6 members/representatives of the two ruling houses (though he did not say who have formally presented him to the committee or king makers for appointment and installation). The respondent alleged that he suddenly came to know about the selection of

the 1st appellant and that he petitioned the Local Government Chairman, and the Chairman advised him to go to court. The respondent also alleged that he did not know who elected the 1st appellant to the village headship. He further alleged that the election and appointment of the 1st appellant were made in breach of the Native Law
B and Custom of Rabina people in appointing the successor to the village head of Kwafa. That under the custom, anyone not from any of the two ruling houses cannot be selected or elected to fill the vacant post of village head. A candidate must be a descendant of the
C either Pashiri or Hore ruling house. That the 1st appellant is not from either of the two ruling houses and as such he is not qualified to contest for the race. The respondent claimed that the election/selection and installation of the 1st appellant were illegal, and against the custom of Rabina people of Kwafa village. He further claimed that as
D he was interested, legally nominated/selected and installed, he was wrongly and illegally denied the opportunity to be the new village head/successor to the stool.

The appellants admitted the existence of two ruling houses, as entitled to present a candidate for the filling of the vacancy in Kwafa
E village headship.

They also admitted that Hore was one of the ruling houses but named the 2nd ruling house as Kijiki. The parties also agreed that the post is on rotational basis. The appellants also gave a genealogical
F account of the Kijiki ruling family from the 1st appellant ancestor to the time the two ruling houses were established. The appellant admitted the death of Najuya Sakon Allah sometimes in 1989 but insisted that it then became the turn of Kijiki ruling house to present a candidate. The appellants stated further, that the 1st appellant was
G selected by the king makers whose names he gave as Galadima, Chiroma, Sarkin Pada and Madaki, and they all died except Madaki. It was these king makers that selected his immediate predecessor in the method the 1st appellant was also selected. That they denied the
H fact that the king makers only play their role as king makers and select a new village head when there is dispute.

In his judgment, the learned trial Judge clearly adverted his mind, first, to the differences of the existence of the two ruling houses of the two parties. He pointed out that by paragraph 5 of the

respondent's amended statement of claim and paragraph 3 of the appellants' joint statement of defence both parties agreed that there were two ruling houses and Hore was one of the two houses at Kwafa village and he so held. With regard to the question of which is the 2nd ruling house- Pashiri or Kijiki, the learned trial Judge also held that the second ruling house is Pashiri and not Kijiki. The learned trial Judge relied on the evidence adduced before him in reaching his decision to grant the reliefs sought. B

It is against this judgment that the appellants have appealed to this court filing four grounds of appeal in their amended notice of appeal which was filed with leave of this court granted on 23/5/2001. C

In accordance with the rules of this court, briefs of argument were filed and exchanged. At the hearing of the appeal, the learned counsel for the parties, adopted and placed reliance on their respective briefs of argument. Issues for determination of this appeal were set out in each of the briefs filed by learned counsel. In the brief filed on behalf of the appellants, three (3) issues were identified for the determination of the appeal, and the respondent also identified three (3) issues in his brief of argument. D

The issues for determination proposed by both parties are reproduced below, starting with the three issues raised by the appellants which read thus: E

(1) Whether the decision of the learned trial Judge is not a nullity having been delivered without jurisdiction having regard to the provision of section 258 of the Constitution of the Federal Republic of Nigeria 1979 as amended. F

(2) Whether in the circumstances of this case there is legally admissible evidence to justify the conclusion reached by the learned trial Judge that the respondent was properly selected as the village head of Kwafa having regard to the state of pleading. G

(3) Whether the learned trial Judge was right when he relied on the unresolved contradictory account of the testimony of the respondent and his witnesses to grant the reliefs sought in this case. H

On the part of the respondent, the issues he distilled from the 4 grounds of appeal are as below:

a. Whether the judgment of the lower court is a nullity merely because it was delivered outside the three months period prescribed

by section 258 of the 1979 Constitution of the Federal Republic of Nigeria without more,

b. Whether the finding by the lower court that the 1st defendant i.e. 1st appellant is from Chiroma house and that the said house is not a ruling house in Kwafa is correct having regard to the pleadings and the evidence adduced at the trial.

c. Whether the lower court was right in granting the reliefs claimed by the plaintiff having regard to the pleadings and the evidence adduced at the trial.

C On a careful perusal of the two sets of issues for determination set out above it is crystal clear that they are substantially similar hence I intend to be guided by the issues proposed by the appellants in treating this appeal.

Issue No: 1

D In the brief, the learned counsel for the appellants stated that issue No. 1 relates to ground 1 of their grounds of appeal. They complained that the learned trial Judge delivered his judgment in this case 48 days beyond the period prescribed by the provisions of section 258 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended). That the judgment appealed against having been delivered outside the period prescribed by the section of the Constitution (supra) is a clear contravention of the mandatory requirement of the provisions of that section. That before the amendment effected, that counsel contended, judgment delivered in contravention of the section is a nullity. It was the appellants' contention that the judgment being delivered 48 days after the conclusion of evidence and final addresses of counsel there was a prolonged and inordinate delay and this court being an appellate court, is entitled to presume that a miscarriage of justice is occasioned. It is only by this presumption that courts can give effect to the provision of the section, otherwise the provisions of the section would be rendered ineffectual by the amendment. The learned counsel submitted in his brief that it is not sufficient to merely establish contravention of the section but also, H it must be shown that a miscarriage of justice was suffered on account of that contravention, and the case of *James Ogundele v. Dare Julius Fasu* (1999) 9 SCNJ 105; (1999) 12 NWLR (Pt. 632) 662 was cited in support of this. The learned counsel further submitted that this

case now on appeal, as presented in the trial court disclosed conflicting versions on the question of eligibility and method of selection of the village head of Kwafa, and the resolutions of these questions is dependent on the credibility of witnesses then the demeanour of witnesses becomes relevant. Consequently, this delay affected a proper recollection of the demeanour of witnesses and that the appellants suffered miscarriage of justice. A reference to the case of Odofin & Ors. v. Mogaji & Ors. (1978) N.S.C.C. 275 was made. Having the judgment being delivered outside the mandatory period prescribed by the section, the counsel contended, it is a nullity bearing in mind the circumstances of this case, and he urged this court to so hold and resolve this issue in favour of the appellants. B C

In reply thereto, the learned counsel for the respondent submitted that the decision of the trial court is not a nullity notwithstanding the fact that it was delivered outside the three months period prescribed by section 258 of the Constitution (supra) (as amended) because, for it to be a nullity it must be proved to the satisfaction of this court that the appellants have suffered a miscarriage of justice. He further submitted, to be satisfied, the record of appeal must be examined thoroughly to see whether the findings of fact made by the lower court were right having regard to the pleadings and the evidence adduced in support thereof. The learned counsel further submitted that going through the record of appeal there is nothing to show that the appellants suffered any miscarriage of justice. Not only that, the learned counsel added, the appellants have not shown how and what miscarriage of justice was suffered by them as a result of the non-compliance with the said provision of section 258 of the Constitution (supra). The counsel in support of his submissions cited the case of Ogundele v. Dare Julius Fas (supra) and particularly paragraphs (a-b) on page 3114 of that Supreme Court judgment. The counsel prayed that this issue be resolved in favour of the respondent and that ground No: 1 of the grounds of appeal be dismissed. E F G

In view of the very well articulated submissions made by the learned counsel for the two parties in respect of the question raised under issue No: 1, ***I think it is desirable to point out that, any judgment of a court established under the Constitution, delivered outside the period of 90 days after the conclusion of evi-*** H

dence and final addresses, was delivered in contravention of the provisions of the Constitution. See sections 258(1) and 294(1) of the Constitutions of the Federal Republic of Nigeria, 1979 and 1999 respectively. The provisions of section 258(1) of the Constitution of Nigeria was introduced into our legal system for the first time in 1979. It was a device introduced to curb the excess of or excesses of inordinately long adjournments before delivering judgment by courts. It is specifically intended to curb the excesses of long adjournments after the conclusion of evidence and final addresses by counsel. By the Constitution (Suspension and Modification) Amendment Act No: 17 of 1985, amendment was made by introducing subsection (4) to the original section 258 of the Constitution. The amendment is to the effect that a decision/judgment delivered in contravention of the provisions of the original section 258(1) shall not be set aside or treated as a nullity, unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice, see section 258(4) and section 294(5) of the two Constitutions of 1979 and 1999 respectively. See also the case of James Ogundele v. Dare Julius Fasu (1999) 9 SCNJ 105; (1999) 12 NWLR (Pt. 632) 662. Before the said amendment however, judgments/decisions delivered in contravention of that original section 258(1) of 1979 Constitution were set aside or declared a nullity. In *Chief Sodipo v. Lemminkainen O.Y. & Ors.* (1985) 2 NWLR (Pt. 8) 547 at 557, it was decided that, there is no doubt it is mandatory for a High Court and all other courts established by the Constitution to deliver its or their judgment(s) in writings not later than 90 days from the date of the conclusion of evidence and final addresses of the counsel. That however, is not and is never intended to be a license for courts to deliver judgments after conclusion of evidence and final addresses at their own convenience.

Therefore, the amendment to the original section 258 of the Constitution (*supra*) has to be construed in a manner that would not defeat the objective of fair and speedy trial which

the said section 258(1) is intended to achieve.

In the case now on appeal, judgment was delivered 48 days later than the 90 days statutory period prescribed. The learned counsel ... (sic) inordinate delay, as in this case, this appellate court is entitled to presume that a miscarriage of justice is occasioned, and this is the only way by which our courts can give effect to the provisions of section 258(1) of the Constitution (supra), otherwise the provisions of section 258(1) would be rendered ineffectual by the amendment introduced as subsection (4) thereof. The counsel submitted that the decision is a nullity and urged me to hold it so for non-compliance with the said provision of section 258(1) of the Constitution (supra).

With profound respect to the learned counsel for the appellants, I cannot accept that once delay is established, an appeal becomes liable to succeed. No doubt, delay and or long intervals between the reception of the evidence of witnesses in the proceedings and the delivery of judgment, there can be ipso facto raised before an appellate court, strong presumption that the trial Judge may not have made use of his advantage of seeing and observing the demeanour of the witnesses who testified before him. The matter, however does not end there. No, the matter must go further than that. For, it must be noted that the presumption that attaches to proof of non-compliance with the provisions of the said section i.e. inordinate delay is neither a presumption of law nor is it irrebuttable. In appropriate cases, the presumption may be rebutted, in which case the delay complained of would not have occasioned any miscarriage of justice, and must consequently be regarded as inconsequential. In the case of *Dibiamaka & 2 Ors. v. Osakwe & Anor.* (1989) 3 NWLR (Pt. 107) 101 at 114 -115, where the delay was 9 months and the Supreme Court - per- Oputa, JSC (as he then was) had this to say; at p. 114;

“And the law is that if inordinate delay between the end of the trial and the writing of the judgment apparently and obviously affected the trial Judge’s perception, appreciation and evaluation of the evidence so that it can be easily seen that he has lost the impressions made on him by the witnesses, then in such a case, there might be some fear of a possible miscarriage of justice and there, but only there, will an appellate court intervene. The emphasis is not on the

length of time simpliciter but on the effect it produced in the mind of the trial Judge.”

Compare this case with the case of *Emenimaya & Ors. v. Okorji & Ors.* (1987) 3 NWLR (Pt.59) 6, where the delay in delivering the judgment was more than one (1) year after the final addresses, it was held that the trial Judge, must have lost the grip over the whole case that it could not properly be evaluated by him. That the inordinate delay between the hearing of the case and the delivery of the judgment thereof would have blurred the memory of the learned judge and militated against his coming to the right decision.

From the submissions of the counsel for the appellants on this issue I have not been convinced that the appellants have suffered any miscarriage of justice as a result of non-compliance with the said provisions of section 258(1) of the Constitution (supra).

Moreover, it should be noted that the original provisions of the section as, and has been regarded simply as a mandatory constitutional directives to the courts to ensure delivering of judgments within the stipulated time. There was not any saving grace for non-compliance. See *Olumba Owoyemi v. Prince. Adekoya & 2 Ors.* (2003) 18 NWLR (Pt. 852) 307. It should be remembered that it was the hardship likely to be suffered by either party from a strict interpretation of that provision of the Constitution 1979 that gave rise to the amendment. Since the appellants did not and could not show to our satisfaction what miscarriage of justice they suffered as a result of non-compliance with the provisions of the section, this court will not declare the judgment a nullity on this ground. In the instant case, though the trial court did not deliver its judgment in compliance with the provisions of section 258(1) of the 1979 Constitution, but that has not been shown to have occasioned miscarriage of justice.

Accordingly, this issue cannot be answered in favour of the appellants, and it fails as well as the ground of appeal it relates.

Issue No. 2

The issue argued before us under this, was whether in the circumstances of this case there is legally admissible evidence to justify the conclusion reached by the learned trial Judge that the respon-

dent was properly selected as the village Head of Kwafa having regard to the state of pleadings.

The learned counsel for the appellants contended in their joint brief before us, that the learned trial Judge's conclusion reached was unjustified as the evidence relied upon to reach at that conclusion was not pleaded. The learned trial Judge in his judgment held that the respondent was rightly and properly selected as the new village head of Kwafa. Consequent upon this conclusion, the learned trial Judge granted a mandatory order that the respondent be so installed. (See p. 54 of the record of appeal).

In the course of evaluating the evidence adduced at the trial, the learned trial Judge, according to submission of the appellants' counsel acted on the evidence that states the respondent was selected village head of Kwafa by Yaro Danboyi Pashiri, Gawusa Ahmadu Bume Babuja from the Pashiri Ruling House while Yohanna Adungai and Kyauta Sakon Allah are from Hore Ruling House. (See p. 38 of the record of appeal). This piece of evidence was not pleaded in the respondent's amended statement of claim as contained on pages 1 - 3 of the record of appeal. The learned counsel submitted having not been pleaded, parties did not join issues on this.

In his response, the respondent's counsel adverted his mind only to issue as to which of the two Ruling Houses is the 2nd Ruling House in Kwafa village rather than tackle this issue of pleading and relying on evidence of facts not pleaded.

In his second complaint on this issue No: 2, the learned counsel submitted that the learned trial Judge acted on the evidence, which states, "that Danbazara was once the Chiroma of Kwafa. That Danbazara was succeeded as Chiroma by Abachiki, and Abachiki was succeeded by Almagini. That all these people were from the 1st defendant's (now 1st appellant's), House of Chiroma of Kwafa.

That each kingmaker has his own house quite different from the Ruling Houses of Kwafa". (See p. 40 of the record of appeal).

The learned counsel submitted that this piece of evidence was not also pleaded by the respondent and issues on these facts were not joined by the parties and so he urges us to expunge these two pieces of evidence from the record of this appeal and resolve issue No: 2 in favour of the appellant and allow the appeal on this issue

and the grounds No: 2 and 3 of the appellant's grounds of appeal.

It is now well known that cases in the High Court which are fought on the pleading must be conducted in accordance with the averments contained in such pleadings. Any evidence led in the course of any trial, as to any fact, not pleaded goes to no issue and must be ignored. See *Isiaku Seidu & 3 Ors. v. A.-G., Lagos State & 3 Ors.* (1986) 2 C.A. (Pt. I)...; (1986) 2 NWLR (Pt. 21) 165, ***if such evidence is wrongly admitted in the proceeding in the High Court, the Court of Appeal will always ignore such evidence, and it will cause it to be expunged from the record***, see *George & ors, v. Dominion Flour Mills Ltd.* (1963) 1 All N.L.R. 71 at 77; (1963) 1 SCNLR 177 and *Emegokwue v. Okadigbo* (1973) 4 S.C. 113.

Looking at the amended statement of claim of the respondent from paragraphs 1-21 (a-d) dated 29th day of January, 1997 filed 7th day of April, 1997 appear to bear out that nowhere was the names of the respondents selectors from the two ruling houses pleaded. The respondent did not say anything about their names in his amended statement of claim. ***The respondent did not plead the names of his selectors from the two ruling houses. But the mere failure to include the names of his selectors in the pleading should not be so important. The facts pleaded in paragraph 12 of the amended statement of claim stating, "that members of the plaintiff's ruling house met, and unanimously selected the plaintiff (now respondent)".... is enough to cover such piece of evidence to touch the names of selector. The mere mentioning the names of the members who selected the respondent is an explanation in evidence led to prove facts pleaded in paragraph 12 thereof. Accordingly, that piece of evidence in my view, is in order.***

With regard to the second piece of evidence touching the position of Danbazara etc., it is true that this piece of evidence was nowhere pleaded and it is true that the issues were not joined by the parties to this case. However, from the record of this appeal, it is shown that such evidence was extracted in the course of cross-examination of the 1st appellant, In fact, it is true that the question of whether the 1st appellant is from Danbazara house, and that

Danbazara had been a kingmaker was never an issue between parties as can be seen by reference to the relevant portions of the pleadings. Whether or not the 1st appellant was from or was related to Danbazara, and who Danbazara was has not been an issue between the parties in the pleadings. One of the issues before the trial court was which of the two parties was legally selected in accordance with the native law and customs of Kwafa people. B

From the record of this appeal, it is clear that the learned trial Judge not only made a reference to such piece of evidence but also based his decision on it. (See page 54 of the record of appeal). C

Therefore, the trial court ought not have used that extracted evidence. It is trite law that evidence led on matters not pleaded really goes to no issue and a trial court should not allow such evidence to be given. See Chief Abah Ogboda v. Daniel Adulugba (1971) 1 All NLR 68. D

As I said above, the piece of evidence, being challenged by the appellants, was an evidence extracted in the course of cross-examination. If a party extracts in the course of cross-examination evidence, which if accepted could decide the issue between the parties, then if he wishes to use it he should amend his pleadings. (See the decision of the Supreme Court in, Slee Transport Ltd. v. Oladipo Oluwasegun & Anor. (1973) 3 E.C.S.L.R. (Pt. II) p. 1176. In that case a police witness for the plaintiff had admitted during cross-examination that there were no skid marks at the scene of accident but the plaintiff's driver during his evidence-in-chief had said that there were skid marks. No mention of skid marks however was made in the pleading of the parties. Commenting on this, Sowemimo, J.S.C. (as he then was) said at 1183; E

"The presence or absence of a skid mark was not an issue before the learned trial Judge and indeed the appellants who called the policeman as a witness did not ask him about any skid mark because it was not pleaded nor made part of their case. It was the counsel for the respondent who raised the matter under cross-examination. If the counsel for the respondent thought that the matter of a skid mark was relevant F

and material to the issue... it was for him to plead it and lead evidence on it."

(Italics mine).

Still on issue No: 2, looking at paragraphs 10 - 12, particularly paragraph No: 12 of the amended statement of claim, and paragraph 7 of the joint amended statement of defence, as well as pages 53 -54 of the record of appeal, appear to hear out the reasons for the finding of the learned trial Judge for granting all the reliefs sought by the respondent, and finally decided that only the respondent was properly selected and installed as Chief of Kwafa. His other reason was that paragraph 12 thereof was not effectively traversed by paragraph 7 of the appellant's statement of defence.

With due respect to the learned trial Judge, this finding in my view was wrong, because the principles of law relied on or applied by him is not applicable to this case. In the case referred, the traverse therein was a general one, while the traverse in this case under consideration is specific and effective. The traverse contained under paragraph 7 thereof was effectively traversed and evidence must be led to prove that the respondent was legally selected in accordance with native law and customs. Any averment which is not proved by evidence is deemed to be abandoned.

With regard to the learned trial Judge's reliance on ineffective traverse in paragraphs 10 - 12 of the amended statement of claim and paragraph 7 of the joint amended statement of defence of the appellants. I maintain the view, that the learned trial Judge was wrong.

Based on what I said above, the second piece of evidence complained of by the appellant in his issue No: 2, which relates to grounds 2 and 3 of their grounds of appeal ought to be expunged. Consequently, the conclusion reached by the trial Judge based thereon is wrong. My answer to issue No: 2 is in the negative and is resolved in favour of the appellant.

Issue No: 3

The other vital issue contended vigorously in the parties briefs of argument is the way in which the learned trial Judge treated exhibits 1 - 3, the traditional symbols of authority of the village head of Kwafa to find for the respondent and grant the reliefs sought. The

learned trial Judge among other reasons mentioned above, relied on the principle of law stated in the case of Oba Goriola Oseni & 14 Ors. v. Yakubu Dawodu & 2 Ors. (1994) 4 SCNJ 197 at 217 paras. 23 - 33; (1994) 4 NWLR (Pt. 339) 390, and held that the averments contained in paragraphs 10, 11 and 12 of the respondent's amended statement of claim dated the 29th January, 1997 were deemed admitted by the appellant and so he held. The plaintiff (now respondent) was accepted and was presented with the traditional symbols of authorities of the office of Chief of Kwafa which include exhibits 1-3. In paragraph 7 of the joint amended statement of defence of the appellants, they replied inter-alia, that *"defendants (now appellants) deny paragraph 12 of the claim and put the plaintiff (respondent) to the strict proof of the averments contained therein."*

In order to lead evidence to show how he got them, the respondent in his testimony (on p. 9 of the record of appeal) testified that they were given to him by the two ruling houses that sat together and made him the village head. The respondent described them (i.e. items forming exhibits 1-3) as, the horn, the calabash, and the bangle. PW1 (Gauza Ahmadu) called by the respondent, testified (p. 21 of the record of appeal) to the fact that exhibits 1-3 were given to the respondent by one Wakili, but he later changed his mind and said it was Madaki who handed over exhibits 1-3 to the respondent. On the other hand, PW2 (Yaro Pashiri) also called by the respondent stated (p. 22 of the record) under cross-examination that the respondent got exhibits 1-3 from the Hore ruling house. In his evidence-in-chief, the same PW2 told the trial court that it was one traditional chief priest (un-named) in their village who had the exhibits.

The appellants' counsel contended that these pieces of evidences are materially contradictory to each other and the contradictions affect the credibility of the witnesses and exhibits 1-3 were pleaded, tendered and admitted in evidence through the respondent, because one of the most important issue between the parties is, who was validly selected and presented with the traditional symbol of authority i.e. exhibits 1-3. ***In any case, the law does not say there should be no contradiction in the evidence of witnesses, what it says is that, the contradictions/discrepancies should not be material.*** See Enahoro v. Queen (1965) 1 All NLR 125; (1965)

In consideration of conflict of evidence of witnesses of the parties, it is material contradiction especially where the evidence is based on traditional history that is relevant. See Chief Whyte & 5 Ors. v. Chief Jack & 2 Ors. (1996) 2 NWLR (Pt. B 431) 407.

Since the issue under consideration at the trial court involves as to who was validly selected and presented with the traditional symbol of authority, exhibits 1-3 become relevant then the question as to how the respondent got them to become the new village head of Kwafa, to my mind, is relevant and material. Therefore, the inconsistency in the evidence of witnesses of the respondent, amounts to material contradiction.

D From the foregoing testimonies of witnesses of the respondent as well as the respondent's pleadings contained in paragraph 12 of his amended statement of claim, there are series of material contradictions especially in the testimonies of PW1 on one part as against respondent, (himself) and that in the testimony, PW2 whose evidences
E on the other hand were ad-idem that the respondent was given exhibits 1-3 by the members of the two ruling houses contrary to the evidence of PW2 who stated that exhibits 1-3 were given to the respondent by the Hore ruling house. It is common ground that the
F Hore and Pashiri are the two district ruling houses while Wakili or Madaki could not be and had not been a member of the two ruling houses. The trial Judge did resolve the material contradictions in the testimonies of respondent, PW1 and PW2. The contradictions are so crucial and incurable notwithstanding the finding of the learned trial
G Judge that paragraph 7 on the amended joint statement of defence did not effectively deny the averment in paragraph 12 of the amended statement of claim of the respondent. The complaint of the appellants on the material contradictions as to which were the two ruling houses (i.e. Wakili or Hore) presented exhibits 1-3 to the respondent
H was justified to make the presentation of the said exhibits.

However, the trial Judge in reviewing the evidence of both parties on this issues of eligibility and presentation of the traditional symbol of authority (i.e. exhibits 1-3) held that paragraphs 10-12 of

the respondent's amended statement of claim was not a proper traverse of the facts pleaded by paragraph 7 of the appellants joint amended statement of defence and relied on same in coming to that conclusion. By the principles of law enunciated in the Oba Goriola's case (supra) and with greatest respect to the learned trial Judge, I disagree with his view on that point. ***The case of Oba Goriola (supra) is not applicable in this circumstance. In that case, it was a general traverse, while in this case the appellants' traverse cannot be regarded as general traverse because in paragraph 7 it was stated thus:***

"7. The defendants (now appellants) deny paragraphs 10 - 12 of the claim and put the plaintiff to the strict proof of the averments contained therein."

The above traverse of the facts pleaded in the named paragraphs of the respondent's amended statement of claim, in my view, amounts to proper traverse. I am therefore of the view that the learned trial Judge was wrong to hold that the pleadings in paragraph 7 of the appellant's statement of defence which says: "The defendants deny paragraphs 10, 11 and 12 of the claim and put the plaintiff to the strictest proof of the averments contained therein" was not effectively and successfully traversed, and as such evidence ought to be led to prove the facts contained therein. The respondent did not, in my view, satisfy the trial court that he had been legally and in accordance with the native law and customs of the Rabina people presented with the traditional symbol of authority of village head of Kwafa in Bassa Local Government Area, and I so hold. Complaints of another unresolved/unexplained contradiction on a material point can be found in the testimonies of respondent and Gauza Ahmadu (PW1). The learned counsel submitted on behalf of the appellants that respondent in his own testimony at the trial court said that Gauza Ahmadu (PW3) is from the Pashiri ruling house and was on the college of selectors that selected him as village head of Kwafa, while the said Gauza Ahmadu, on the other hand testified that he is not from any of the ruling houses. That, throughout his testimony in the trial court, said the learned counsel, the said Gauza Ahmadu did not say he played any role or participated in the

selection of the respondent as village head, (p. 21 of the record of appeal).

I have gone through the testimonies of both respondents (p. 9 last paragraph on the record of appeal) and Gauza Ahmadu (PW1) as contained on page 21 of the record of appeal, and observed that
 B the respondent in order to lead evidence to prove his averment on paragraph 12 thereof, gave the names of his selectors which included the name of Gauza Ahmadu (PW1) as one of his selectors from Pashiri ruling house. The said Gauza Amadu in his evidence- in-chief denied
 C ever being a member of any of the two ruling houses, let alone Pashiri ruling house which the respondent testified that he came from or belongs to.

***Looking at the above pieces of evidences, it could be said that they were in conflict or contradictory and both were
 D accepted without resolving the manifest conflict in the testimonies of respondent and that of Gauza Ahmadu on the issue. The inconsistent and contradictory testimonies were on material facts as to who was validly selected between respondent and the 1st appellant in accordance with the Native Law
 E and Custom of Kwafa people and the learned trial Judge should have regarded respondent's evidence on the issue as unreliable and reject it as what he pleaded was not proved.*** See *Mogaji & Ors. v. Cadbury Nigeria Ltd.* (1985) 2 NWLR (Pt. 7) p. 393 ratio 6; and *Ike v. Ofokojia* (1992) 9 NWLR (Pt. 263) p. 42 ratio 9. ***Further
 F reliance was put on the case of Adebayo v. Ighodalo (1996) 5 SCNJ p. 23 at 31; (1996) 5 NWLR (Pt. 450) 507, cited at p. 9 of the appellants brief of argument, that as the evidence of witnesses for the plaintiff clearly contradicted one another it
 G ought to be rejected or regarded as not established.*** On the above premise, issue No:3 must be and is hereby resolved in favour of the appellants and the question raised therein is answered in the negative. The foregoing, the conclusion and finding of fact made by the trial Judge, and his declaration that the respondent was legally
 H and rightly selected as the Chief of Kwafa village in accordance with the Native Law and Custom of Kwafa people, were not borne out from the evidence presented before the trial court and are therefore perverse.

The attitude of the appellate court towards the findings of fact and evaluation of evidence by the trial court is well settled, that a Court of Appeal should be reluctant to interfere with or reverse findings of fact made by a trial court unless such findings are perverse. Indeed, the Court of Appeal should not disturb a finding of fact unless that it is satisfied that such finding is unsound. It is in the process of deciding whether the finding is sound or not that the Court of Appeal (because as appellate court did not see, hear, or watch the witnesses) is left only to examine the grounds that led to the conclusion of the trial court. In the instant case, the findings of fact made by the learned trial Judge based on the testimonies and demeanour of the witnesses on the traditional customary law on the testimony of the respondent whose evidence was materially in conflict with PW1 and PW2 were not aptly justifiable thereby rendering the evidence to be perverse, hence this court has the liberty to interfere, see *Ebba v. Ogoto* (1984) 1 SCNLR 372 and *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643 at 672, all applied and followed in *Nwokoro v. Nwosu* (1994) 4 NWLR (Pt. 337) 172. Applying, the principles of law enunciated in the above mentioned decided authorities to the instant appeal as adumbrated above, the attack and the complaint against the judgment of the learned trial Judge is justifiable and valid having shown that the findings of facts by the trial court were perverse.

In the result, issue No; 3 raised in appellants' brief of argument is resolved in favour of the appellant and answered in the negative. After careful consideration of the issues raised in this appeal, the submissions of learned counsel and having considered the legal authorities referred above, I come to the irresistible conclusion that this appeal must succeed and I so hold. It is accordingly allowed. The judgment of M. Oyetunde, J., in suit No: PLD/J68/89 delivered on the 30th March, 1998 is hereby set aside. Costs is assessed at N 10,000.00 and is awarded in favour of the 1st appellant only and against the respondent.

SANUSI JCA

I am in entire agreement with the Judgment of my learned brother Tsamiya, JCA. I have nothing more to add. I endorse all the orders made therein, that on costs inclusive.

NZEAKO JCA

I agree with my learned brother, Tsamiya, JCA, that this appeal has merit and should be allowed. I agree with the orders made in his leading judgment including the order as to costs.

B Appeal allowed.

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