

SUPREME COURT OF NIGERIA
10TH JULY, 2009. SC. 365/2001
CORAM:- N. TOBI, I. F. OGBUAGU, J. O. OGEBE,
J. A. FABIYI, O. O. ADEKEYE, JJSC

1. OTUNBA ADESESAN OGUNTAYO APPELLANT
(ORADEREMO OF IJEBU-IFE)

AND

1. PRINCE FATAI ADELAJA
2. CHIEF A. DUDUYEMI ODUNUGA
(JEW OLU OF IJEBU-IFE)
3. CHIEF SEGUN OSIBOTE
(ALORAN OF IJEBU-IFE)
4. CHIEF F. JAIYEOLA ADEKOYA
(ODELE OF IJEBU-IFE)
5. CHIEF B. ADELEYE OSIBADEJO
(OLIWO OF IJEBU-IFE) RESPONDENTS
6. CHIEF AJADI OGUNDEKO
7. CHIEF SHOSE
(AGBON OKE-IFE OF IJEBU-IFE)
8. THE MILITARY ADMINISTRATOR
OF OGUN STATE
9. THE ATTORNEY-GENERAL AND
COMMISSIONER FOR JUSTICE,
OGUN STATE

APPEALS - Issues - Relevance - Issue 1 of appellant - Is irrelevant to the appeal and liable to be discountenanced - As it is based on a misunderstanding of the findings - Of the Court of appeal - On the question of descent (H1)

EVIDENCE - Documents - Withdrawn upon objection - Action by court - In view of the withdrawal - Without replying to the objection - Trial court was wrong to have marked it rejected (H2)

EVIDENCE - Documents - Objection - Failure to reply - Effect - Failure of 1st respondents's counsel to reply - Meant he conceded the objection - It was an abandonment of his right to reply (H3)

EVIDENCE - Taken in earlier proceedings - Relevancy - To later proceedings - It is irrelevant - Except for purpose of discrediting the particular witness - In cross examination - And for that purpose only (H4)

EVIDENCE - Documents - Withdrawn at trial - Admissibility at Supreme Court - Since 1st respondent's counsel did not press for its admission in trial court - It cannot be admitted at Supreme Court level (H5)

APPEALS - Concurrent findings of fact - Interference with - Unless shown to be perverse - Which is not the case herein - The Supreme Court will not interfere therewith (H6)

FACTS

The plaintiff/1st respondent/cross-appellant sued the rest of the parties as defendants before the high court claiming sundry reliefs by which he contested the nomination, selection and appointment of the appellant as the Ajalorun of Ijebu-Ife. The basis of 1st respondent's claim was that appellant being a Kingmaker, by virtue of the registered chieftaincy declaration for Ajalorun, was not eligible to be nominated, selected or appointed as such. 1st respondent raised another point that appellant being of the male line of the ruling house was not qualified for the stool of Ajalorun. This point was however not contained in his pleadings.

During trial, 1st respondent's counsel wanted to tender proceedings in an earlier suit to show that appellant had testified therein that he was of male descent. Objections were raised to the admissibility of the document to which counsel did not reply. Instead, he applied to withdraw both the document and the witness, whereupon the court marked the document as rejected. Eventually, the court dismissed the 1st respondent's claim. Aggrieved, he appealed to the Court of Appeal which allowed the appeal on the basis of the action of trial court in marking the document as rejected when 1st respondent's counsel did not address the court on its admissibility. Consequently, Court of Appeal ordered a retrial. Dissatisfied, appellant has brought this appeal against the judgment of Court of Ap-

peal. 1st respondent cross-appealed that appellant being the head of King makers could not contest for the office of Ajalorun.

ISSUES FOR DETERMINATION

"(a) Whether having regard to the pleadings and evidence, the Court of Appeal was right in overturning the decision of the trial Court by which that Court held that the 1st Defendant did not descend .from the male line of the Afurukeregboye Ruling House.

(b) Whether in the face of the provisions of Section 34 of the Evidence Act and the evidence before the trial Court, the Court of Appeal was right in holding that the learned trial Judge breached the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No. HCJ/6/85 in evidence.

(c) Whether in all the circumstances of the case, the Court of Appeal was right in ordering a re-trial of the case?

"(1) Having regard to the Ajalorun Chieftaincy Declaration, whether the 1st respondent can validly contest for the office of Ajalorun and whether the 1st respondent's selection was not fraught with irregularities which vitiate the entire exercise.

(2) Whether the learned justices of the court below were not in error in holding that the 1st respondent was qualified to contest for the office of Ajalorun without evaluating or properly evaluating the crucial effect which the proceedings in HCJ/6/85 have on the qualification of the 1st respondent.

(3) Having regard to the totality of the evidence before the court below, whether it was fair and unconscionable for the 1st respondent to be chosen as the Ajalorun and whether the court below was right not to have found for the plaintiff as per his statement of claim."

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

APPEALS - Issues - Relevance

1. The 1st issue raised in the appellant's brief showed that the learned counsel for the appellant misunderstood the findings of the Court of Appeal on the question of the appellant's descent from the male line of the AFURUKEREGBOYE RULING HOUSE. The Court of appeal did not overturn the decision of the trial court that the appellant did not descend from the male line.

It follows therefore that the appellant's first issue is not relevant to this appeal and I discountenance it. (pp. 1966 B / 1967 G)

Documents - Withdrawn upon objection - Action by court

2. It is clear from the proceedings that P.W.2 Kolawole Olufowobi a High Registrar of the High Court of Ijebu Ode was only called to tender the proceedings in case No. HCJ/6/85. The defendant's counsel objected to its admissibility. The plaintiff's counsel Chief Coker chose not to reply to the objection even though he had ample opportunity to do so. Instead he applied to withdraw the evidence and the witness. What the trial court ought to have done was to have asked him to reply to the objection so that it could properly rule on the admissibility of the document or the court would have granted the request to withdraw the evidence and the witness. The trial court was clearly wrong in marking the document rejected when argument had not been concluded on its admissibility. (p. 1969 E)

Documents - Objection - Failure to reply - Effect

3. The Court of Appeal misunderstood the purport of the proceedings sought to be tendered and wrongly castigated the trial court for denying the 1st respondent's counsel the opportunity to reply to the objection to the admissibility of that document. The learned counsel for the 1st respondent who tendered the document heard the objection and had every opportunity to reply to it. For reasons best known to him, he refused to reply. To my mind this was abandonment of his right to reply. Not only that he then withdrew both the document and the witness which meant that he conceded the objection. How else can one explain his withdrawal of both the document and the witness? (p. 1970 D)

EVIDENCE - Taken in earlier proceedings - Relevancy

4. It is trite law that evidence of a witness taken in an earlier proceedings is not relevant in a later trial except for the purpose of discrediting such a witness in cross-examination and for that purpose only.

In the present case the appellant did not testify on his own behalf and so he could not be contradicted by showing him the earlier proceedings. The learned counsel who sought to tender the proceedings, withdrew both the document and the witness. For all prac-

tical purposes that document ceased to be relevant in the case even if it was not marked rejected since the learned counsel who tried to tender it, had withdrawn it. If he tried to tender it again he would be met with the same objection as he had withdrawn the only witness through whom it could be tendered. (p. 1970 G / 1971 F)

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Documents - Withdrawn at trial - Admissibility

5. The learned counsel for the 1st respondent submitted otherwise and urged this Court to admit the document under section 22 of the Supreme Court Act and use it in favour of the 1st respondent's claim.

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This submission is totally misconceived since the 1st respondent's counsel did not press for the admission of the document in the trial court but withdrew it. How can we now admit it at the Supreme Court level? I agree with the learned counsel for the appellant that the Court of Appeal was wrong in ordering a retrial as that document was no longer relevant. (p. 1972 B)

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Findings of facts - Concurrent findings - Interference with

6. The trial court found as a fact that the appellant/cross-respondent was properly nominated and appointed to the disputed stool in accordance with the relevant chieftaincy declaration exhibit 'TC1'. The Court of Appeal confirmed these findings of facts as I have shown earlier in this Judgment. This amounts to two concurrent findings of facts by the two lower courts and it is not for the Supreme Court to interfere with concurrent findings of facts of lower courts unless they are shown to be perverse and that is not the case in this appeal. I see no merit in the cross-appeal. (p. 1973 E)

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NOTABLE POINTS OF INTEREST

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TOBI JSC

1. Fair hearing - Court need only create the atmosphere

The respondent had the whole time and opportunity to reply to the objection of the document by the appellant. He failed to do so better still, he refused to do so. He was given a fair hearing. As I have said in previous cases, the duty of the court is to create the environment or atmosphere for the fair hearing of a case. The court has no duty to force the parties to take advantage of the environment or atmosphere created. That is left for the parties if they like, they can

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take advantage of the environment or atmosphere. If they like they can shut themselves out and ignore the environment or atmosphere created. I do not see in this appeal a situation where the learned trial Judge denied the respondent fair hearing. (p. 1982 A)

B 2. *Miscarriage of justice is justice misplaced*

Miscarriage of justice is a failure of justice. It is justice that finds itself in a wrong carriage, if I may say so on the lighter side. It is therefore injustice. Miscarriage of justice occurs when the court fails or refuses to follow its rules and arrives at a decision which is prejudicial or inconsistent with the legal rights of a party. In *Onagoruwa v The State* (1993) 7 NWLR (Pt. 303) 49, I said:

C “Miscarriage of justice means failure on the part of the court to do justice. It is justice misplaced, misappreciated or misappropriated. D It is an ill conduct on the part of the court, which amounts to injustice.” (p. 1982 C)

OGBUAGU JSC

3. *The document was yet to be tendered when rejected*

E I have already noted that when Mr. Olufowobi produced the said document, the learned counsel - Chief Coker, procedurally, did not seek the leave of the court, or apply to tender it, as an Exhibit before objection was taken or raised as to its admissibility. It is settled that the proper time for taking objection to the admissibility of a document, is F when it is sought to be tendered. I hold that Chief Coker was right, when he stated that the document cannot be marked rejected. (p. 1986 B)

G 4. *A withdrawn document is not before the court*

Where a document is tendered by a party, and an objection is taken or raised on its admissibility, after hearing arguments for and against by the learned counsel for the parties, and the learned trial Judge rules that such document, is inadmissible, the usual or normal order H to be made, is in these words “*the document is tendered but marked Rejected*”. But in the instant case, that stage had not been reached. As soon as objection was taken, the learned counsel for the Plaintiff/Respondent/Cross Appellant, withdrew both the document and the witness. The said document, naturally, was therefore, not before the

court below. (p. 1987 C)

5. Not every error vitiates judgment on appeal

Error of a trial or lower court in considering inadmissible evidence is ineffectual when there is some other evidence to justify the findings and conclusions on the affected issue. This is why it is also firmly established that it is not every mistake or error in a Judgment that will result in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an Appellate Court will and is bound to interfere. The Plaintiff/1st Respondent/Cross Appellant, has not stated or shown in his Brief, what miscarriage of justice has been occasioned to him by the said error or mistake of the trial court and I have seen none.(p. 1987 H)

REPRESENTATION

Mr. Bambo Adesanya (SAN) appears for the Appellant/1st Cross Respondent, Mrs. A. Oguntade and T. Alabi with him.

Mr. H.O. Afolabi appears for the 1st Respondent/Cross Appellant, Popoola, Ogun, Umoru and Oyeneyin with him

Mr. A. Osinuga appears for the 2nd- 7th Respondents.

CASES REFERRED TO

Agu v Nnadi (1991) 2 NWLR (Pt.589) 131

Duru v Nwosu (1989) 4 NWLR (Pt.1 13) 24

Ogunaike V. Ojayemi (1987) 1 NWLR (Pt 53)769

Oyewole v Oyekola (1999) 7 NWLR (Pt.612) 560

Odeneye v Efunuga (1990) 7 NWLR (Ft. 164) 635

Ogundare v Ogunlowo (1997) 6 NWLR (Pt.510) 360

Agbai & ors. v Okogbue (1991) 3 NWLR (Pt.204) 391

Ezeoke v Nwagbo (1988) 1 NWLR (Pt. 72) 616 at 629

Okonji v Njokanma (1999) 14 NWLR (Pt.638) at 280-281

MOJEKWU V. IWUCHUKWU (2004) 11 N.W.L.R. (Pt. 883) 196

Ariku V. Ajiwogbo (1962) 1 All NLR (Part 4) Page 629 at Page 631

Avoade v Military Governor of Ogun State (1993) 8 NWLR (Pt.309) H 111 at 127

STATUTE REFERRED TO

Evidence Act, ss. 33 & 34

LEAD JUDGMENT BY OGEBE JSC

The 1st Respondent in this appeal who was the plaintiff in the High Court of Ogun State sued the appellant and the other respondents claiming in his writ of summons as follows:

B *“1. A declaration that being a Kingmaker by virtue of the registered declaration for Ajalorun of Ijebu-Ife Chieftaincy, the 1st Defendant is not eligible to be nominated, selected or appointed, approved and installed as the Ajalorun of Ijebu-Ife in the Ijebu East Local Government Area of Ogun State.*

C *2. A declaration that being the Oraderemo of Ijebu-Ife the 1st Defendant is not eligible to be nominated selected or appointed, approved and installed Ajalorun of Ijebu-Ife.*

D *3. A declaration that the purported nomination of the 1st Defendant as a candidate by the Afurukeregboye House for the filling of the vacant stool of Ajalorun of Ijebu-Ife irregular, illegal, unconstitutional, null and void.*

E *4. A declaration that the purported selection or appointment of the 1st Defendant by the 2nd, 3rd, 5th, 6th and 7th Defendants as the Ajalorun of Ijebu-Ife is irregular, illegal, unconstitutional, null and void.*

5. An order setting aside the purported nomination, selection or appointment of the 1st Defendant as Ajalorun of Ijebu-Ife.

F *6. Perpetual injunction restraining the 8th and 9th Defendants from giving approval to the purported selection or appointment of the 1st Defendant as Ajalorun of Ijebu-Ife”.*

G Pleadings were exchanged between the parties and the matter went into full trial. The question turned on the eligibility of the appellant to be nominated and appointed the Ajalorun of Ijebu-Ife on the ground that as the head of the Kingmakers he was not qualified to take the title, and also as a descendant from the male-line he was not qualified. The 1st respondent did not raise the question of the appellant's descent from the male line in his statement of claim. He H only raised it in his reply to the appellant's Statement of Defence.

Witnesses were called on both sides but the appellant did not testify on his own behalf. During the course of the trial the 1st respondent's counsel sought to tender proceedings in suit No. SCJ/6/85 to show that the appellant had given evidence in the proceedings

that he was of male descent. There was objection to the admissibility of that document. The learned counsel for the 1st respondent failed to reply to the objection. Instead he applied to withdraw the document and the Higher Registrar of the High Court through whom he had tendered the document. The trial court marked the document rejected. B

At the conclusion of the case the trial court evaluated the evidence and dismissed the 1st respondent's claim. He was aggrieved by that decision and appealed to the Court of Appeal Ibadan Division which allowed the appeal and ordered a retrial of the case before another Judge mainly on the view of the Court of appeal that the 1st respondent was not given a fair hearing by the trial court before the proceedings in HCJ/6/85 was rejected. C

Dissatisfied with the decision the appellant appealed to this court and the 1st respondent also cross-appealed to this Court. Both of them exchanged briefs in respect of their respective appeal. It should be noted that all the other defendants/respondents have not shown interest in this appeal. The appeal is simply between the appellant and the 1st respondent. D

The learned counsel for the appellant in his brief of argument E formulated 3 issues for determination as follows:

"(a) Whether having regard to the pleadings and evidence, the Court of Appeal was right in overturning the decision of the trial Court by which that Court held that the 1st Defendant did not descend from the male line of the Afurukeregboye Ruling House. This issue is distilled from Ground 1 of the grounds of appeal. F

(b) Whether in the face of the provisions of Section 34 of the Evidence Act and the evidence before the trial Court, the Court of Appeal was right in holding that the learned trial Judge breached the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No. HCJ/6/85 in evidence. This issue is distilled from Grounds 2,3 and 4 of the grounds of appeal. G

(c) Whether in all the circumstances of the case, the Court of Appeal was right in ordering a re-trial of the case? This issue is distilled from ground 5 of the grounds of appeal. H

The learned counsel for the 1st respondent filed a brief and distilled 2 issues for determination as follows:

"1. Whether, having regard to the circumstance of this case,

the way and manner the proceedings in Suit No. HCJ/61/85 was rejected did not occasion a miscarriage of justice warranting the Court of Appeal to interfere with the decision of the trial court; and

2. whether the Court of Appeal was right in its decision ordering a new trial.

B In his brief the 1st respondent's counsel raised a preliminary objection to the competence of the appeal. During the oral hearing of the appeal he abandoned the objection and I hereby strike it out.

The 1st issue raised in the appellant's brief showed that the learned counsel for the appellant misunderstood the findings of the Court of Appeal on the question of the appellant's descent from the male line of the AFURUKEREGBOYE RULING HOUSE. The Court of appeal did not overturn the "decision of the trial court that the appellant did not descend from the male line."

The Court of Appeal at pages 335, 336, and 337 of the Record found exhaustively as follows:

"Whereas, it can be said, that it is doubtful that the appellant proved that the 1st Respondent is a member of the Afurukeregboye Ruling House on the male line, the 1st Respondent pleaded and proved that he is a member of the said house on the female line. In his statement of defence the following facts were averred -

With reference to paragraphs 17, 18 and 19 of the Statement of Claim, the 1st Defendant avers as follows:

(a) *That he is a member of the Afurukeregboye Ruling House of the female line.*

(b) *That his great paternal grandmother, Princess Adeite Adeoti was a daughter of Oba Olumona Afurukeregboye the 30th Ajalorun of Ijebu-Ife and his claim to the vacant stool of Ajalorun is through Princess Adeite Adeoti.*

A cousin of the 1st Respondent, Yekinni Adesanya Oguntayo gave evidence on the genealogy of the 1st Respondent, in a bid to support the supra averment, as follows:

H *"The 1st defendant is my 1st cousin. The 1st defendant and myself are related to Afurukeregboye through the female line. Olumona was the first to bear the name Afurukeregboye. No other Oba bore the name Afurukeregboye before Olumona. It is not possible that anyone can claim to belong to the Afurukeregboye Ruling*

House without being related to Oba Olumona. I know Adeiti. She is the daughter of Olumona. Adeiti Adeoti is the mother of Olufowobi Oguntayo and he begat Raji Osibade and he begat Adesesan Oguntayo the 1st defendant.”

Suffice to say that the above piece of evidence, even though not coming from the 1st respondent himself has established his claim that he is a member of the Ruling House by female line through Adeiti his great grand mother. B

Then there was the allegation of complaint of the eligibility of the 1st respondent on his descendancy by the Appellant and some other members of the Afurukeregboye Ruling House. In his evidence the Appellant testified that he thought his protest was recorded, but looking at the record of the meeting Exh. ‘C10’ the complaint on the genealogy of the 1st Respondent is not contained therein. The only protest recorded is in respect of the impropriety of the Oladeremo, the position he held, to be nominated or appointed as an Ajalorun. In fact the petition he wrote to the then Military Administrator of Ogun State Exh. ‘C’ did not raise any complaint or protest on the genealogy of the 1st respondent. The complaints on Exhibits ‘C10’ - are all in respect of the 1st respondent’s disqualification because he was an Oraderemo, a Kingmaker, who should not be nominated to fill the vacant stool of Ajalorun. It is as clear as crystal therefore that the Appellant has not established his claim and allegation that the 1st Respondent was not qualified or eligible to be nominated or appointed as the Ajalorin because he did not come within the category of those eligible as stated in the Declaration Exh, ‘L’. In the circumstance I fail to see that the first stage is irregular, illegal, unconstitutional null and void as professed in the Appellant’s brief of argument. I am satisfied therefore that the 1st Respondent was validly nominated, and so the argument canvassed in respect of a second stage of the appointment by the appellant is of no importance”. C D E F G

It follows therefore that the appellant’s first issue is not relevant to this appeal and I discountenance it.

The remaining two issues are identical with the two issues raised in the 1st respondent’s brief and I shall adopt them in this judgment. The learned counsel for the appellant submitted under the second issue that the trial court was right in rejecting the proceedings in suit No. HCJ/6/85 because its admissibility was objected to and the 1st H

Respondent's counsel who had an opportunity to reply to the objection failed to do so. Instead he withdrew both the document and the witness. The learned counsel submitted that that document could only be used to contradict the evidence of the appellant who in this case did not testify at all. The Court of Appeal was therefore wrong in
B holding that the rejection of the document amounted to denial of fair hearing resulting on miscarriage of justice.

The learned counsel submitted that the proceedings could not be admitted under section 34 of evidence Act as the whole purport
C of that document was to contradict the evidence of the appellant who as it turned out never testified in the case. He relied on the case of Ogunaiké V. Ojayemi (1987) 1 NWLR (Pt 53) 769

On this issue, the learned counsel for the 1st respondent submitted that the Court of Appeal was right in holding that the rejection
D of the proceedings .without, calling on the 1st respondent's counsel to reply to the objection to its admissibility amounted to denial of fair hearing and miscarriage of justice. He said that document was critical to the proof of the 1st respondent's claim.

For proper resolution of this issue it is necessary to quote what
E transpired in the High Court . It is at pages 90 - 92 of the record:-

"PW.2 - (He is not sworn). I am Kolawole Olufowobi, Higher Registrar, High Court of Justice, Ijebu-Ode. I live at 7, Lagos Road, Obalende, Ijebu-Ode. I have subpoena to tender the proceedings in HCJ/6/85 dated 28th March, 1989. Here is the Certified True Copy
F *of the Proceedings.*

Mr. AYANLAJA:

I object to the admissibility of this document. See Section 34 of the Evidence Act. It is evidence in a previous proceedings, it is
G *inadmissible in this proceedings. Lagos State Development and Property Corporation Vs. Adoldstamn Inter Nig. Ltd. (1994) 7 N.W.L.R. (Part 358) 545 at 561 C-D, F-G. Submits that in so far as the proceedings contravenes Section 34, it is irrelevant and inadmissible.*

MR. OSIMUGA:

I object to the admissibility. I associate myself with the submission of counsel.
H

MR. MABEKOJE.

I object to the admissibility of the document.

CHIEF COKER:

At this stage I withdraw the evidence and the witness.

MR. AYANLAJA:

The document should be marked rejected.

CHIEF COKER:

The witness is withdrawn (sic) the document cannot be marked rejected. B

COURT:

This document has already been tendered before an objection was raised on point of law. After the document and the witness were withdrawn by counsel for the plaintiff. Chief Coker submitted that since he had not addressed the court on the submission made by counsel for the 1st defendant, the court ought not to mark the document rejected. It is my view that in view of the facts already placed before this court, the fact that Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document. C D

In my view the document is not admissible. It is to be marked rejected.”

It is clear from the proceedings that P.W.2 Kolawole Olufowobi a High Registrar of the High Court of Ijebu Ode was only called to tender the proceedings in case No. HCJ/6/85. The defendant’s counsel objected to its admissibility. The plaintiff’s counsel Chief Coker chose not to reply to the objection even though he had ample opportunity to do so. Instead he applied to withdraw the evidence and the witness. What the trial court ought to have done was to have asked him to reply to the objection so that it could properly rule on the admissibility of the document or the court would have granted the request to withdraw the evidence and the witness. The trial court was clearly wrong in marking the document rejected when argument had not been concluded on its admissibility. E F G

But can it be said that the 1st respondent to this appeal was denied fair hearing as held by the Court of appeal? At pages 341 to 342 the Court of Appeal opined as follows: H

“That is a very wrong view, for the principle of fair hearing and audi alteram partem (sic) has been violated. When the Respondents gave their reasons for objecting to the admissibility of the document,

it was incumbent on the learned Judge to hear Appellant's Counsel's address on it. Equity and fair play demands that both parties be heard in order to ensure that justice prevails, for in depriving the other side the opportunity of being heard before rejecting the document in totality, a miscarriage of justice has been occasioned. See ;
 B *Olagunju V. Oyeniran (1996)6 NWLR part 453 page 127. The heavy weather made about the breach of the rule of audi alteram partem to my mind is warranted even if the evidence and witness were voluntarily withdrawn by learned counsel for the Appellant before the ruling. I refuse to endorse the argument of learned State Counsel that*
 C *the fact that the learned trial Judge failed to give reasons for rejecting the said document is immaterial. That he conceded that the document was inadmissible and withdrew it at that stage does not warrant the rejection of it at that stage, for by so doing the Appellant was*
 D *completely shut out as far as the record of proceeding of Suit No. HCJ/6/85 upon which he relied heavily was concerned. If it had not been marked rejected he would have found another avenue of tendering it."*

With the greatest respect, ***the Court of Appeal misunderstood the purport of the proceedings sought to be tendered and wrongly castigated the trial court for denying the 1st respondent's counsel the opportunity to reply to the objection to the admissibility of that document. The learned counsel for the 1st respondent who tendered the document heard***
 F ***the objection and had every opportunity to reply to it. For reasons best known to him, he refused to reply. To my mind this was abandonment of his right to reply. Not only that he then withdrew both the document and the witness which meant***
 G ***that he conceded the objection. How else can one explain his withdrawal of both the document and the witness?***

It is trite law that evidence of a witness taken in an earlier proceedings is not relevant in a later trial except for the purpose of discrediting such a witness in cross-examination and for that purpose only.
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See L.S.D.P. V. Adold/Stamm Int. Ltd. 1994 7 NWLR (Pt. 357) 545 at 561 - 562, and Okonji V. Njokanma 1999 14 NWLR (Pt. 638 at 280-281. the point was succinctly made in the case of Ogunaiké V. Ojayemi 1987 1 NWLR (Part 53) 769 in the following words:-

"In Ariku V. Ajiwogbo (1962) 1 All NLR (Part 4) Page 629 at Page 631 Ademola CJF delivering the judgment of the Supreme Court stated the law as follows:- This Court has frequently directed attention to The practice, now not uncommon, of making use of evidence of a witness in another case as if it were evidence in the case on trial. As was pointed out in Alade V. Aborishade 5 F.S.C. 167 at P. 171, this is only permissible under Section 33 or 34 of the Evidence Act. Where a witness in a former case is giving evidence in a case in hand his former evidence may be brought up in cross-examination to discredit him if he was lying, but evidence used for this purpose does not become evidence in the case in hand for any other purpose. There are also pre-requisites to the making use of the former testimony of a witness; for example, his attention must be called to the former case where such evidence was given and he should be reminded of what he had said on that occasion.

In this case at the trial, the respondent was never confronted with Exhibit "C" when she gave evidence and neither was her attention drawn to any specific portion of her testimony in Exhibit "C". In fact this could not have been possible as Exhibit "C" was tendered by 3D.W. towards the end of the case after the respondent and her witnesses had closed their case. In my view the Court of Appeal's criticism of the Appellate Judge's use of Exhibit "C" was justified. Accordingly this ground of appeal also fails".

In the present case the appellant did not testify on his own behalf and so he could not be contradicted by showing him the earlier proceedings. The learned counsel who sought to tender the proceedings, withdrew both the document and the witness. For all practical purposes that document ceased to be relevant in the case even if it was not marked rejected since the learned counsel who tried to tender it, had withdrawn it. If he tried to tender it again he would be met with the same objection as he had withdrawn the only witness through whom it could be tendered.

It can be seen from my analysis above that nobody violated the 1st respondent's right of fair hearing and no miscarriage of justice resulted from the rejection of the document.

On his 3rd issue the learned counsel for the appellant submit-

ted that the Court of Appeal was wrong in ordering a retrial just because the proceedings in suit No. HCJ/6/85 was marked rejected. He said that sending it back just because of that document which was withdrawn by the 1st respondent's counsel would not in any way help their case.

B ***The learned counsel for the 1st respondent submitted otherwise and urged this Court to admit the document under section 22 of the Supreme. Court Act and use it in favour of the 1st respondent's claim.***

C ***This submission is totally misconceived since the 1st respondent's counsel did not press for the admission of the document in the trial court but withdrew it. How can we now admit it at the Supreme Court level? I agree with the learned counsel for the appellant that the Court of Appeal was wrong in ordering a retrial as that document was no longer relevant.***

D The 1st respondent/cross-Appellant filed a cross-appellant's brief and identified 3 issues for determination as follows:

(1) Having regard to the Ajalorun Chieftaincy Declaration, whether the 1st respondent can validly contest for the office of Ajalorun and whether the 1st respondent's selection was not fraught with irregularities which vitiate the entire exercise; Grounds 2, 3 & 4.

(2) Whether the learned justices of the court below were not in error in holding that the 1st respondent was qualified to contest for the office of Ajalorun without evaluating or properly evaluating the crucial effect which the proceedings in HCJ/6/85 have on the qualification of the 1st respondent; (Ground 1)...; and

(3) Having regard to the totality of the evidence before the court below, whether it was fair and unconscionable for the 1st respondent to be chosen as the Ajalorun and whether the court below was right not to have found for the plaintiff as per his statement of claim -Grounds 5, 6 and 7."

The appellant/cross-respondent also filed a cross-respondent's brief and formulated 3 issues for determination as follows:

H ***"(a) Having regard to the Ajalorun Chieftaincy declaration, whether the 1st Defendant could validly contest for the office of the Ajalorun and whether the 1st Defendant's selection was tainted with irregularities capable of vitiating the selection process. (Grounds 2, 3 of the Grounds of Appeal).***

(b) *Whether having regard to its finding that the proceedings in HCJ/6/85 were wrongly rejected in evidence, the Court of Appeal was right in (a) ordering a retrial of the case (b) holding that the 1st Defendant is a member of Afurukeregboye Ruling House through (sic) the female line (Grounds 1 and 4 of the Grounds of Appeal).*

(c) *Whether the Lower Court was right in upholding the finding of the High Court that neither the allegation of undue influence on the part of the 1st Defendant nor likelihood of bias on the part of 2nd - 7th Defendants was substantiated. (Ground 5)."*

On these three issues the learned counsel for the cross-appellant submitted by way of summary that the Ajalorun Chieftaincy declaration is not exhaustive on the qualification of candidates into that office and by Native Law and Custom of Ijebu-lfe the 1st defendant as the head of kingmakers could not contest for that office and the court below was wrong in holding that he was qualified to contest.

The learned counsel for the cross-respondent submitted that the lower court was right in holding that the cross-respondent was properly nominated and selected as Ajalorun despite the fact he held the post of Orademe-mo and carried out certain procedural functions during the selection process.

The trial court found as a fact that the appellant/cross-respondent was properly nominated and appointed to the disputed stool in accordance with the relevant chieftaincy declaration exhibit 'TC1'. The Court of Appeal confirmed these findings of facts as I have shown earlier in this Judgment. This amounts to two concurrent findings of facts by the two lower courts and it is not for the Supreme Court to interfere with concurrent findings of facts of lower courts unless they are shown to be perverse and that is not the case in this appeal.

See MOJEKWU V. IWUCHUKWU (2004) 11 N.W.L.R. (Pt. 883) 196, AGBANA V. OWA (2004) 13 NWLR (Pt. 889) 1. ***I see no merit in the cross-appeal.***

Consequently, I see merit in the main appeal, and I allow it. I set aside the judgment of the Court of Appeal as it relates to its order of retrial and restore the judgment of the trial court. I dismiss the cross-appeal for lack of merit. I award costs of N50,000.00 in the main appeal in favour of the appellant and N50,000.00 in the cross-appeal in favour of appellant/cross-respondent.

TOBI JSC

This matter has to do with Chieftaincy title of Ijebu-Ife. The title is Ajalorun of Ijebu Ife in the Ijebu East Local Government Area of Ogun State. It became vacant on the demise of Oba Adebambo Oyenuga in 1992.

The plaintiff, who is the respondent in this court, asked for six reliefs, four declarations, one setting aside the nomination and one on perpetual injunction. While Reliefs 1 to 5 related to the appellant as 1st Defendant, Relief 6 on perpetual injunction was in respect of the 8th and 9th respondents.

The case of the plaintiff/respondent is that the appellant being a Kingmaker and the Oraderemo of Ijebu Ife is not entitled to be nominated, selected, appointed, approved and installed as Ajalorun of Ijebu-Ife. The learned trial Judge dismissed the case of the plaintiff. In dismissing the case the Judge said at page 212 of the Record:

“The battle has been well fought, but the conclusion I have reached is that the plaintiff has failed to prove his case. His case is dismissed in its entirety.”

Dissatisfied, the plaintiff as appellant, went to the Court of Appeal. That court ordered a retrial on the ground that there was a miscarriage of justice arising from the rejection of the Record of Proceedings in Suit No. HCJ/6/85

This is an appeal to this court challenging the decision of the Court of Appeal. Briefs were filed and exchanged. The appellant formulated three issues for determination:

“(a) Whether having regard to the pleadings and evidence, the Court of Appeal was right in overturning the decision of the trial Court by which that court held that the 1st Defendant did not descend from the male line of the Afurukeregboye Ruling House.

(b) Whether in the face of the provisions of Section 34 of the Evidence Act and the evidence before the trial court, the Court of Appeal was right in holding that the learned trial Judge breached the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No.HCJ/6/85 in evidence.

(c) Whether in all the circumstances of the case, the Court of Appeal was right in ordering a retrial of the case.”

The 1st respondent formulated two issues for determination:

“1. *Whether, having regard to the circumstance of this case, the way and manner the proceedings in Suit No.HCJ/61/85 was rejected did not occasion a miscarriage of justice warranting the Court of Appeal to interfere with the decision of the trial court; and*

2. *Whether the Court of Appeal was right in its decision ordering a new trial.*” B

There is also a cross appeal. The cross appellant has formulated three issues for determination:

“(a) *Whether having regard to the Ajalorun Chieftaincy, Declaration, whether the 1st respondent can validly contest for the office of Ajalorun and whether the 1st respondent’s selection was not tainted with irregularities which vitiate the entire exercise.*” C

(b) *Whether the learned justices of the court below were not in error in holding that the 1st respondent was qualified to contest for the office of Ajalorun without evaluating or properly evaluating the crucial effect which the proceedings in HCJ/6/85 have on the qualification of the 1st respondent.* D

(c) *Having regard to the totality of the evidence before the court below, whether it was fair and conscionable for the 1st respondent to be chosen as the Ajalorun and whether the court below was right not to have found for the plaintiff as per his statement of claim.*” E

The 1st defendant/cross respondent formulated three issues for determination:

“(a) *Having regard to the Ajalorun Chieftaincy declaration, whether the 1st Defendant could validly contest for the office of the Ajalorun and whether the 1st Defendant’s selection was tainted with irregularities capable of vitiating the selection process.*” F

(b) *Whether having regard to its finding that the proceedings’ in HCJ/6/85 were wrongly rejected in evidence, the Court of Appeal was right in (a) ordering a retrial of the case (b) holding that the 1st Defendant is a member of the Afurukeregboye ruling House though the female line.* G

(c) *Whether the lower court was right in upholding the finding of the High Court that neither the allegation of undue influence on the part of the 1st Defendant nor likelihood of bias on the part of 2nd - 7th defendants was substantiated.* H

Learned counsel for the appellant Mr. Bambo Adesanya sub-

mitted on Issue 1 that having regard to the pleadings and evidence the Court of Appeal was wrong in overturning the decision of the trial court by which that court held that the 1st defendant did not descend from the male line of the Afurukeregboye Ruling House. He cited the case of Lawal v Dawodu (1972) All NLR 707 at 722 and
 B *called the attention of the court to the judgment of the High Court and the Court of Appeal. He submitted that the Court of Appeal was in error in holding that there was no proper evaluation of the evidence adduced by both sides by the learned trial Judge and that the*
 C *learned trial Judge did not make proper use of the advantage of seeing and hearing the witnesses.*

Counsel submitted on Issue 2 that in the face of section 34 of the Evidence Act and the evidence before the trial court, the Court of Appeal was wrong in holding that the learned trial Judge breached
 D *the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No. HCJ/6/85. He cited L.S.D.P.C. v Adold/Stamm Int. Ltd (1994) 7 NWLR (Pt.357) 545 at 561; Okonji v Njokanma (1999) 14 NWLR (Pt.638) at 280-281; Ogunaikie v Ojayemi (1987) 1 NWLR (Pt. 53) 769.*

E *Learned counsel finally argued that the Court of Appeal was wrong in the circumstance of the case to order a retrial. He cited Ezeoke v Nwagbo (1988) 1 NWLR (Pt. 72) 616 at 629 and Saraki v Kotoye (1992) 9 NWLR (Pt.264) 156.*

F *Learned counsel for the 1st respondent, Mr. L. O. Fagbemi, SAN submitted on Issue 1 that the argument of counsel for the appellant on his Issue 1 seems to overlook the fact that the plaintiffs contention that appellant was not qualified to contest for the stool of Ajalorun, was not just put in a straight jacket. Rather, it was a conten-*
 G *tion predicated on a number of factors which are as follows:*

“1. 1st defendant is not a member of the Afurukeregboye ruling house.

2. 1st Defendant being a kingmaker, by virtue of his position as the Oraderemo, he is not competent-to contest for the stool of
 H *Ajalorun of Ijebu-Ife as under the native law and custom of Ijebu-Ife;*

3. 1st Defendant wrongly influenced the kingmakers to select him as the winner of the contest for the stool of Ajalorun of Ijebu-Ife;

4. 1st Defendant was not presented to the kingmakers in accordance with the Chieftaincy declaration which regulates selection

to the stool of Ajalorun of Ijebu-Ife.

5. *1st Defendant is not of female descend of the Afurukeregboye ruling house and he himself admitted that much in the proceedings in suit No. HCJ/6/85"*

Learned Senior Advocate argued that each of the above factors/grounds is exclusive of the other and each is enough to ground a claim of the plaintiff; and so if any of the grounds is established or resolved in favour of the plaintiff, it is capable of having the whole case resolved against the 1st defendant and in favour of the plaintiff.

On the rejection of the proceedings in Suit No. HCJ/6/85, learned Senior Advocate pointed out that counsel for the plaintiff never joined issues with the defendant's counsel on whether or not the proceedings in Suit No. HCJ/6/85 was admissible, rather he prayed to withdraw same and the learned trial Judge was wrong in rejecting the document without address by counsel. Counsel submitted that the appellant's right to fair hearing was breached in the way and manner the document was rejected and marked accordingly.

Counsel contended on Issue 2 that the Court of Appeal was correct in setting aside the decision of the trial Judge in the light of the fact that the plaintiff was denied fair hearing. Relying on section 22 of the Supreme Court Act, counsel argued that this court should give effect to the document. He finally urged the court to set aside the order for re-trial and hold that the proceedings in Suit No. HCJ/6/85 "being relevant and admissible, has proved conclusively that 1st defendant is not qualified to contest for the stool of Ajalorun.

Learned counsel for the 1st defendant/cross respondent submitted on Issue 1 that having regard to the Ajalorun Chieftaincy Declaration, the 1st defendant could validly contest for the office of Ajalorun and his selection was not tainted with irregularities capable of vitiating the selection process. He called the attention of the court to Exhibit L, sections 4, 9 and 14 of the Chiefs Law and the following cases: Ayoade v Military Governor of Ogun State (1993) 8 NWLR (Pt.309) 111 at 127; Ojo v Governor of Ogun State (1989) NWLR (Pt.95) 1, Olarewaju v Governor of Oyo State (1992) NWLR (Pt.265) 335; Daramola v Attorney General of Ondo State (2000) 7 NWLR (Pt..665) 440; Oyefolu v Durosinmi (2001) 16 NWLR (Pt.738) 1, Ogundare v Ogunlowo (1997) 6 NWLR (Pt. 510) 360. Ajuwon v Akanni (1993) 9 NWLR (Pt.316) Odeneye v Efunuga (1990) 7 NWLR (Pt. 164)

635 and *Ajakaiye v Idehai* (1994) 8 NWLR (Pt. 364) 504.

Learned counsel submitted on Issue 2 that if the proceedings in Suit Mo. HCJ/6/85 were admitted in evidence at the trial, the court could not have made any use of the evidence, as it would not be legal evidence. He submitted that there cannot be any miscarriage of justice in this matter as the acceptance of the proceedings would not afford the court the right to rely on the purported evidence of the 1st defendant, as the 1st defendant was not called as a witness. He relied on *Alade v Aborisade* (1960) SCNLR 398; *Ajeigbe v Odedina* (1988) 1 NSCC (Pt.I) 429; *Adekuro v Ogunniyi* (2000) 3 NWLR (Pt.647) 151 and section 34 of the Evidence Act.

Learned counsel submitted on Issue 3 that the Court of Appeal rightly held that no conflict of interest whatsoever was shown on the part of the 1st defendant by the singular act of sending a list of the nominated candidates to the Kingmakers. He also submitted that the court can only overturn concurrent findings of facts if (a) they are perverse, (b) not supported by the evidence, (c) reached as a result, of wrong approach to the evidence or, (d) as a result of a wrong application of a principle of substantive law or procedure. He cited *Ezeowu v Onyeahi* (1996) 3 NWLR (Pt.438) 499; *Ishola v SGB (Nig) Ltd* (1997) 2 NWLR (Pt.488) 405 and *Igwego v Ezeugo* (1992) 6 NWLR (Pt.249) 561. He contended that the allegation of undue influence and bias ought to be proved by the plaintiff who must do so on the balance of probability. He cited *Agu v Nnadi* (1991) 2 NWLR (Pt.589) 131; *Duru v Nwosu* (1989) 4 NWLR (Pt. 113) 24; *Oyewole v Oyekola* (1999) 7 NWLR (Pt.612) 560; *Nnamdi Azikiwe University v Nwafor* (1999) 1 NWLR (Pt.585) 116 and *Sha (Jnr) v Kwan* (2000) 8 NWLR (Pt.670) 685. He urged the court to dismiss the appeal.

Let me take the issue on eligibility of the 1st defendant to become the Ajalorun of Ijebu-Ife. The learned trial Judge said at page 210 of the Record:

“There is nothing in Exhibit ‘L’ which disentitles the Oraderemo or a kingmaker from becoming the Ajalorun of Ijebu-Ife. The submission of Chief Coker that the Chieftaincy Declaration Exhibit ‘L’ is an outline of the customary law regulating the selection of the Ajalorun of Ijebu-Ife is contrary to the provision of the law and decided cases. It is well settled that customary law is a question of fact to be

proved by evidence. Hence a person who alleged the existence of a particular custom must adduce sufficient evidence in support and establish its existence to the satisfaction of the court. Agbai & ors. v Okogbue (1991) 3 NWLR (Pt.204) 391. The customary law being adumbrated by the plaintiff that an Oraderemo or kingmaker cannot aspire to the throne of Ajalorun has not been established by evidence. It is not an existing customary law with regards to the selection and appointment of the Ajalorun of Ijebu Ife.” B

The Court of Appeal agreed with the learned trial Judge. Mukhtar, JCA, (as she then was) said at page 336 of the Record:.. C

“It is as clear as crystal therefore that the appellant has not established his claim and allegation that the 1st respondent was not qualified or eligible to be nominated or appointed as the Ajalorun because he did not come within the category of those eligible as stated in the Declaration Exhibit ‘L’. In the circumstance I fail to see that the first stage is irregular; illegal, unconstitutional null and void as professed in the appellant’s brief of argument. I am satisfied therefore that the 1st respondent was validly nominated, and so the argument canvassed in respect of a second stage of the appointment by the appellant is of no importance.” D E

Both the learned trial Judge and the Court of Appeal made use of Exhibit L, the Registered Declaration regulating the selection of the Ajalorun of Ijebu-Ife, Clause (iii) of the Declaration reads:

“The person who may be proposed as candidate by a Ruling House entitled to fill a vacancy in the Chieftaincy shall be: F

(a) member of the Ruling house and:

(b) of the female line, succession shall not at anytime devolve on the male line. If there is no suitable man from the female line, a woman from the female line shall be appointed.” G

Section 14 (1) of the Chiefs Law, provides as follows:

“A person shall, unless he is disqualified, be qualified to be a candidate to fill a vacancy in a recognized Chieftaincy if:

(a) he is proposed by the Ruling House or the persons having the right to nominate the candidate according to customary law; and H

(b) (i) he is a person whom the ruling House or the persons having the right to nominate candidates are entitled to propose, according to customary law, as a candidate; or

(ii) he is unanimously proposed as a candidate by the mem-

bers of the Ruling House or the persons entitled to nominate candidates.”

On the duties of the Oraderemo under the Declaration, Clause (5) of the Declaration reads:

B *“A candidate or candidates for the chieftaincy shall be nominated by the Ruling House at a family meeting to be convened by the Oraderemo and shall be presented to the kingmakers by the Oraderemo.”*

C In the light of Exhibit L and section 14(1) of the Chiefs Law, I hold that the 1st defendant was properly nominated and selected as the Ajalorun of Ijebu Ife.

That takes me to the 2nd Issue. It is on the rejection of the proceeding, of the High Court. The relevant proceedings are as follows:

D “PW.2 - (He is not sworn) I am Kolawole Olufowobi, Higher Registrar, High Court of Justice, ijebu-Ode. I live at 7 Lagos Road, Obalende, Ijebu-Ode. I have subpoena to tender the proceedings in HCJ/6/85 dated 28th March, 1989. Here is the Certified True Copy of the proceedings.

E MR. AYANLAJA

I object to the admissibility of this document. See Section 34 of the Evidence Act. It is evidence in a previous proceedings, .it is inadmissible in this proceedings. Lagos State Development and Property Corporation v. Adoldstamn Inter Nig. Ltd (1994) 7 NWLR F (Pt.358) 545 at 561 C-D, F.G. Submits that in so far as the proceedings contravenes Section 34, it is irrelevant and inadmissible.

MR OSINUGA

G I object to the admissibility. I associate myself with the submission of Counsel

MR MABEKOJE

Objects to the admissibility of the document.

CHIEF COKER

At this state, I withdraw the evidence and the witness.

H MR AYANLAJA

The document should be marked rejected.

CHIEF COKER

The witness is withdrawn, the document cannot be marked rejected:

COURT

"This document has already been tendered before an objection was raised on point of law.

After the document and the witness were withdrawn by Counsel for the plaintiff, Chief Coker submitted that since he had not addressed the Court on the submission made by Counsel for the 1st Defendant, the court ought not to mark the document rejected. It is my view that in view of the facts already placed before the court, the fact that Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document. In my view the document is not admissible. It is to be marked rejected" (emphasis supplied)."

It is clear from the above that the document was tendered by learned counsel for the plaintiff/respondent, and objected to by counsel for the appellant. It was on that circumstance, that the learned trial Judge rejected the document.

The Court of Appeal disagreed. The Court said at page 353 of the Record:

"I have observed in the earlier part of this judgment that the learned trial Judge erred in rejecting an exhibit proposed to be tendered in evidence, and this has occasioned a miscarriage of justice. In a situation such as this it is my belief that it will be in order to order a retrial of the case de novo"

With respect, I do not agree with the Court of Appeal. I agree with the High court In my view, the moment a document is tendered and its admissibility is opposed by the opponent, the party tendering the document should satisfy the court why the document should be admitted. If the party fails to so satisfy the court, the document can be rejected. This is what the learned trial Judge did and I cannot fault him.

In litigation, parties are required to place their case honestly, frankly and openly before the court. Parties are not expected to involve themselves in tricks or artifice to outsmart the opponent. The well settled principles of equity will not allow that. Litigation is not a forum for playing games. By applying to withdraw the witness and the document already tendered, the respondent exhibited some kind of smartness on the appellant. As he cannot eat his cake and still have

it intact in his hands, the learned trial Judge correctly marked the document rejected. The respondent had the whole time and opportunity to reply to the objection of the document by the appellant. He failed to do so better still, he refused to do so. He was given a fair hearing. As I have said in previous cases, the duty of the court is to
 B create the environment or atmosphere for the fair hearing of a case. The court has no duty to force the parties to take advantage of the environment or atmosphere created. That is left for the parties if they like, they can take advantage of the environment or atmosphere. If
 C they like they can shut themselves out and ignore the environment or atmosphere created. I do not see in this appeal a situation where the learned trial Judge denied the respondent fair hearing.

Miscarriage of justice is a failure of justice. It is justice that finds itself in a wrong carriage, if I may say so on the lighter side. It is
 D therefore injustice. Miscarriage of justice occurs when the court fails or refuses to follow its rules and arrives at a decision which is prejudicial or inconsistent with the legal rights of a party. In *Onagoruwa v The State* (1993) 7 NWLR (Pt. 303) 49, I said:

*“Miscarriage of justice means failure on the part of the court to
 E do justice. It is justice misplaced, misappreciated or misappropriated. It is an ill conduct on the part of the court, which amounts to injustice.”*

See further *Ojo v Anibire* (2004) 10 NWLR (Pt.882) 511. *Okonkwo v Udoh* (1997) 9 NWLR (Pt.519) 16 *Irolo v Uka* (2002) 14 NWLR
 F (Pt. 786) 195.

What constitutes miscarriage of justice varies from case to case, as the concept is denoted by the facts of the case. It is not determined in vacuo or in a vacuum but in the light of the peculiar facts of the
 G case. Applying the above principle, I do not see the facts of this case accommodating the concept.

In view of the fact that the main reason of the Court of Appeal allowing the appeal and ordering of retrial was the alleged rejection of the exhibit, I have no difficulty in allowing the appeal, as I have
 H held that the Court of Appeal wrongly so held.

In sum, I agree with my learned brother, Ogebe JSC that the appeal is meritorious. I allow it and dismiss the cross-appeal. I abide by all the orders made in the lead judgment by my learned brother on the cross appeal including the orders as to costs.

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Ibadan Division, (hereinafter called “*the court below*”) delivered on 24th January, 2000 allowing in part, the appeal by the Plaintiff/Respondent/Cross-Appellant, setting aside, the judgment of the trial court and ordering a retrial of the case before another Judge of the High Court of Justice of Ogun State. B

Dissatisfied with the said Judgment, the Appellant, has appealed to this Court on six (6) Grounds of Appeal and formulated three (3) issues for determination. The Plaintiff/Respondent/Cross-Appellant formulated two issues for determination. C

When this appeal came up for hearing on 28th April, 2009, the leading learned counsel for the Appellant/Cross-Respondent - Adesanya, Esqr., (SAN), adopted their main Brief and the Cross Respondent’s Brief. He urged the Court to allow their main appeal and dismiss the Cross-Appeal. Afolabi, Esqr., leading learned counsel for the 1st Respondent, adopted their Brief and the Brief in respect of their Cross Appeal. He withdrew their Preliminary Objection at pages 6 and 7 of their Brief. The said objection is hereby and accordingly struck out by me having been withdrawn. He urged the Court to dismiss the main appeal and allow the Cross Appeal. Osinuga, Esqr. learned counsel for the 2nd to 7th Respondents told the Court that they did not file any Brief. That they are not involved in the dispute. That they only played what he described as their Statutory role. Thereafter, Judgment was reserved till to-day. D E F

I had the privilege of reading before now, the lead Judgment of my learned brother, Ogebe, JSC just delivered. I agree with his conclusion that the main appeal is allowed while the Cross-Appeal fails and it is dismissed. However, for purposes of emphasis, I will make my own brief contribution. In doing so, I will deal with issues (b) and (c) of the Appellant and issues 1 and 2 of the Plaintiff/Respondent/Cross Appellant which are substantially the same although differently couched. Issues (b) and (c) of the Appellant read as follows: G H

“(b) *Whether in the face of the provisions of Section 34 of the Evidence Act and the evidence before the trial Court, the Court of*

Appeal was right in holding that the learned trial Judge breached the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No. HCJ/ 6/ 85 in evidence. This issue is distilled from Grounds 2.3 and 4 of the grounds of appeal.

B (c) *Whether in all the circumstances of the case the Court of Appeal was right in ordering a retrial of the case? This issue is distilled from ground 5 of the grounds of appeal”.*

Issues 1 and 2 of the Plaintiff/Respondent/Cross Appellant, read as follows:

C “1. *Whether having regard to circumstances of this case, the way and manner the proceedings in Suit No. HCJ/61 (sic)/85 was rejected did not occasion a miscarriage of justice warranting the Court of Appeal to interfere with the decision of he(sic) trial court; and*

D *2. Whether the Court of Appeal was right in its decision ordering a new trial”.*

I note that at page 90 of the Records, P.W.1 - Duduyemi Odunuga who did not testify on oath, told the trial court that he received a subpoena the previous day to tender document but that he did not have the original. He rather produced the copy. The leading learned counsel for the 1st defendant/Appellant - Mr. Ayanlaja stated thus:

F “*Since he cannot find the original, he has to lay foundation for the whereabouts of the original. That will be evidence. He has to be sworn”.*

The learned counsel for the Plaintiff/Respondent/Cross Appellant - Chief Coker then stated thus:

“*I do not want him to give evidence. I withdraw the document”.*

G I will pause here to state and this is settled that a witness called or subpoenaed, to come and only tender a document, need not be sworn.

H When the P.W.2. - The Higher Registrar of that court and who was not also sworn and who was also subpoenaed, came with the Certified True Copy of the said document in order to tender it, I note that the learned counsel for the Appellant, had not sought to tender the said document, when Mr. Ayanlaja, and his other learned colleagues - i.e. Osinuga, Esqr. and Mabekoje, Esqr. objected to the admissibility of the said document. I say so because, the following

appear in the Records:

"P.W.2 (he is not sworn) I am Kolawole Olufowobi, Higher Registrar, High Court of Justice, Ijebu-Ode. I live at 7, Lagos Road, Obalende, Ijebu-Ode. I have subpoena to tender the proceedings in HCJ/6/85) dated 28th March, 1989. Here is the Certified True Copy of the proceedings" B

Then, Chief Coker in re-action to the said objections, stated as follows:

"At this stage I withdraw the evidence and the witness".

"MR. AYANLAJA:

"The document should be marked rejected". C

"CHIEF COKER:

The witness is withdraw, (sic) the document cannot be marked rejected'.

The learned trial Judge, ruled on the matter thus; COURT: D

"This document has already been tendered before an objection was raised on point of law. After the document and the witness were withdrawn by counsel for the plaintiff (sic) Chief Coker submitted that since he had not addressed the court on the submission made by counsel for the 1st Defendant, the court ought not to mark the document rejected. It is my view that in view of the facts already placed before this court, the fact that Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document. E F

In my view, the document is not admissible. It is to be marked rejected".

[the underlining mine]

With profound respect and humility to the learned trial Judge, G I am constrained or obliged, to fault the above Ruling. Firstly, it is not true and cannot be true that the document, had already been tendered. The witness merely produced it for it to be tendered in evidence. Therefore, strictly speaking, he was not a witness so to say. I say so because, Section (192) now 193 of the Evidence Act provides H as follows:

"A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness"

[the underlining mine]

As a matter of fact, in my respectful view, both Duduyemi Odunuga and Kolawole Olufowobi should have not been regarded by the trial court as witnesses or branded PW.1 and PW.2. (i.e. Plaintiffs Witnesses 1 and 2).

B I have already noted that when Mr. Olufowobi produced the said document, the learned counsel - Chief Coker, procedurally, did not seek the leave of the court, or apply to tender it, as an Exhibit before Objection was taken or raised as to its admissibility.. It is settled
C that the proper time for taking objection to the admissibility of a document, is when it is sought to be tendered. See the case of *Lawson Jack v. The Shell Petroleum Development Company of Nigeria Ltd, (2002) 1 SCNJ. 121 @ 134-135*. I hold that Chief Coker was right, when he stated that the document cannot be marked rejected.

D Secondly, from the Records, there is no where Chief Coker made any submission.

“that since he had not addressed the court on the submission made by counsel for the 1st defendant, the court ought not to mark the document rejected”

E It need be stressed and this also settled that the Record of Proceedings bind both the parties, counsel and the court until the contrary is proved. See the case of *Sommer v. Federal Housing Authority (1992) 1 NWLR (Pt.219) 548: (1992) 1 SCNJ. 73*. Therefore, an
F Appellate Court, has no jurisdiction, to read into the Record, what is not there and equally, it has no jurisdiction to read out of the Record, what is there. An Appellate Court, must read the Record in the exact content and interpret it. See the cases of *Orugbu & anor. v. Bulara Una & 10 ors. (2002) 9 SCNJ, 12 @ 29-30; (2002) 9-10 S.C. 61; Chief Fubara & ors, v. Chief Minimah & ors. (2003) 5 SCNJ. 142 @ 168* and *Gonzee Nig. Ltd, v. Nigerian Education Research & Development Council & 2 ors. (2005) 6 S.C. (Pt. 1) 25 @ 31; (2005) All FWLR (Pt.274) 235 @ 245* just to mention but a few.

Thirdly, the learned trial Judge with respect, was in error, when
H he stated that,

“It is my view that in view of the facts already placed before this Court, the fact that Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document”

I have not seen from the Records, what facts had/have already been placed before the trial court that entitled him to rule on a document that had not been tendered in evidence and in fact, had been withdrawn by Chief Coker who unequivocally, in my view, told the learned trial Judge, that the document could not be marked rejected. This is because, the said document, was not, so to speak, before the trial court. There was nothing that justified the learned trial Judge in my respectful, view, on ruling on the “admissibility” of a document that was not before him. B

Where a document is tendered by a party, and an objection is taken or raised on its admissibility, after hearing arguments for and against by the learned counsel for the parties, and the learned trial Judge rules that such document, is inadmissible, the usual or normal order to be made, is in these words “the document is tendered but marked Rejected.” But in the instant case, that stage had not been reached. As soon as objection was taken, the learned counsel for the Plaintiff/Respondent/Cross Appellant, withdrew both the document and the witness. The said document, naturally, was therefore, not before the court below. C D

However, in spite of or not withstanding my above observations, I note that the trial court, decided the case based on other substantial and crucial facts or grounds before it. I find as a fact and hold that the learned trial Judge, in my respectful view, thoroughly evaluated and appraised the material evidence before him and came to the right decision. It is now settled that an Appellate Court, need to base its decision, on the correctness of the judgment of the trial court, and not on its reasons. In other words, what an appeal has to decide, is whether the decision of the trial court or court below, was/is right and not what the reasons were. See the cases of *Ukejiyanya v. Uchendu* G (1950) 13 WACA 45 @ 46; *Ayeni & ors. v. Sowemimo* (1982) 5 S.C. 60 @ 73-74; *Oladele v. Aromolaran II* (1996) 6 NWLR (Pt. 453) 180; (1996) 6 SCNJ. 1. *Odukira v. Ogunbiyi* (1998) 8 NWLR (Pt. 561) 339 @ 350 and *Integrated Timber & Plywood Products Ltd, v. Union Bank Nig. Plc.* (2006) 12 NWLR (Pt. 995) 483 @ 504; (2006) 5 H SCNJ. 289 just to mention but a few. F

In other words, error of a trial or lower court in considering inadmissible evidence is ineffectual when there is some other evidence to justify the findings and conclusions on the affected issue.

See the case of *Otunba Owoyemi v. Prince Adekoya & 2 ors*, (2003) 12 SCNJ, 131, This is why it is also firmly established that it is not every mistake or error in a Judgment that will result in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an Appellate Court will and is bound to interfere. See the cases of *Chief Oje & ors. v. Chief Babalola & 2 ors.* (1991) 4 NWLR (Pt.185) 267 @ 282 (1991) 5 SCNJ. 110; *Anyanwu v. Mbara & anor.* (1992) 5 NWLR (Pt. 242) 386 @ 400; (1992) 6 SCNJ. 22; *Ake v. Ugboaja* (1993) 6 NWLR (Pt.301) 539 @ 556 C. A, *Odukwe v. Mrs. Ethel N.Ogunbiyi* (1998) 8 NWLR (Pt..) 339 @ 351; (1998) 6 SCNJ 102 @ 113 and many others. The Plaintiff/1st Respondent/Cross Appellant, has not stated or shown in his Brief, what miscarriage of justice has been occasioned to him by the said error or mistake of the trial court and I have seen none.

Before concluding this Judgment, I will deal briefly with Section 34(1) of the Evidence Act as regards the tendering and the use of a previous proceeding or evidence by a party in a subsequent trial or proceeding. It provides as follows:

“Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the fact which is states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable: Provided -

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding”

[the underlining mine]

There is no evidence in the Record that any of the conditions, was present before the two persons appeared to testify. It is settled that the existence of such a condition or any of the conditions, must be given in evidence on oath, unless it is based on a Statutory provi-

sion. See the cases -of *Joseph Nahman v. J. A. Odutola* (1953) 14 WACA 381 @ 384; *Alade v. Aborishade* (1960) 5 FSC 167@ 171-173; (1960) SCNLR 398 *Sanyaolu v. Coker* (1983) 3 S.C. 124 @ 125; (1983) 1 SCNLR 168; *Ikenyi v. Ofune* (1985) 2 NWLR (Pt. 5) 1 @ 6-8; *Ayanwale & ors. v. Atanda* 8, anor. (1988) 1 SCNJ. 1 @ 6; *Obawole & anor. v. Williams & anor.* (1996) 10 NWLR (Pt.477) 146 B @ 163-164; (1996) 12 SCNJ 415 - per Oguntade, JSC and *Shanu v. Afribank Nig. Plc.* (2002) 17 NWLR (Pt. 786) 185 @ 222; (2002) 6 SCNJ. 454 (no. 2) just to mention but a few.

The law is settled that evidence of a witness given in an earlier proceeding, is not relevant in a later trial except for the sole purpose of discrediting such a witness on cross-examination. See the cases of *Ariku v. Ajiwogbo* (1962) 1 All NLR (Pt. 4) 629 @ 631 referred to in the case of *Ogunnaike v. Ojayemi* (1987) 1 NWLR (Pt. 53) 760 @ 769) (1987) 3 SCNJ. 69; *Nwangwuna & anor. v. Ikyoande* (1992) 8 D NWLR (Pt.258) 192 @ 194 CA; *Lagos State Development & Property Corporation v. Adold/Stamm International (Nig.) Ltd.* (1994) 1 NWLR (Pt.358) 545 @ 561 @ 562; (not (Pt. 357) as cited in the Appellant's Brief) no such page in that part. (1994) 7-8 SCNJ. 625 and *Otunba Owoyemi & Prince Adekoya & 2 ors.* (supra). E

With the greatest respect, the court below, was in error and misdirected itself, when it had found in favour of the Defendant/Appellant in respect of the findings of fact and holdings of the trial court; but in respect of the seventh issue of the Plaintiff/Respondent/Cross Appellant before it, it allowed the appeal in part but, turned round to order a retrial, based on the rejected document which had been withdrawn by the Appellant's learned counsel as afore-stated by me in this Judgment. It looked at the reliefs of 'the Plaintiff/Respondent/Cross Appellant and stated at page 353 of the Records G inter as follows:

"..... *It is my view that If we grant the reliefs sought In the Writ of Summons, then we are giving credence to the allegations that the 1st Respondent is not for certain eligible to be nominated or appointed the Ajalorun of Ijebu-Ife, which is In essence not the purport of the judgment I have observed in the earlier part of this judgment that the learned trial Judge erred in rejecting an exhibit proposed to be tendered in evidence, and this has occasioned a miscarriage of justice in a situation such as this, it is my belief that it will be in order to order a* H

retrial of the case de now.....”.

[the underlining mine]

I note that at page 336 of the Records, the court below, found as a fact ‘and held inter alia, as follows:

B “Suffice to say that the above piece of evidence, even though not coming from the 1st Respondent himself has established his claim that he is a member of the Ruling House by (sic) (meaning through female line through Adeiti his great grandmother”.

[the underlining mine]

C At page 338 thereof, it found as a fact and held that there was proper evaluation of the evidence on the genealogy of the Appellant as he is coming from the female line.

An Appellate Court, will order retrial, where the trial court failed .to determine vital issues by appraising and evaluating the evidence D before it. See the cases of *Total v. Nwako (1978) 5S.C. 1 @ 14; Ezeoke & 5 ors. v. Nwaqbo & anor. (1988) 1 NWLR (Pt. 72) 616 @ 629-630; (1988) 3 SCNJ. 37*, I note that after the two persons aforementioned had been withdrawn together with the Rejected document, four other witnesses including the Plaintiff/1st Respondent/Cross E Appellant (PW6), testified before his case, was closed. The Appellant never testified and so, there was no question of confronting him with the Rejected document under cross-examination. In other words, the parties had closed their respective case and their learned counsel, F addressed the court, before the Judgment in which the findings of fact and holdings on some other vital issues, were made in favour of the Appellant and these findings and holdings, were affirmed by the court below. Could the Appellant be forced or compelled by anybody or a trial court, to come to court in the ordered re-trial, to G testify? I or one may ask. I think not. So, in all the circumstances, with respect, an order for retrial, was futile, unnecessary, uncalled for and not justified. The vital issues, had been adequately appraised and evaluated by the trial court. I so hold. This is because, it is now firmly settled that an order of a retrial, is not appropriate, when, the plaintiff’s H case, has failed in toto (as in the instant case leading to this appeal). See the case of *Abibu v. Binitu (1988) 1 NWLR (Pt. 68) 57; (1988) 1 SCNJ. 70* referred to in the case of *Chief Odi & 5 ors. v. Chief Iyala & ors. v. Chief Offo & ors. (2004) 4 SCNJ. 35 @ 57*.

In the final analysis or conclusion, it is from the foregoing and

the said reasoning and conclusions in the said lead Judgment in respect of the said above issues, that I too, allow the main appeal and dismiss the Cross Appeal which with respect, is most unmeritorious. I abide by the consequential order in respect of costs.

B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Ogebe, JSC After a careful reflection, I agree that the main appeal should be allowed while the cross appeal should be dismissed.

C

It is my considered view that the manner in which the proceedings in HCJ/6/85 was marked ‘rejected’ by the trial judge, was done in a rather hasty fashion. As can be gleaned from what transpired at the trial court, as reproduced in the lead judgment, PW2 an unsworn witness, produced the proceedings dated 28th March, 1989. Indeed, he said here is the Certified True Copy of the proceedings.’

D

Even before Chief Coker applied to tender it as an exhibit, Mr. Ayanlaja raised objection. He was supported by Mr. Osinuga and Mr. Mabekoje. At that stage, Chief Coker the ‘withdrew the evidence and the witness. Mr. Ayanlaja urged that ‘the document should be marked rejected. Chief Coker, at that point, remarked that ‘the witness is withdrawn, the document cannot be marked rejected.’

E

The above scenario led to the ruling of the trial judge which reads as follows:-

F

“This document has already been tendered before an objection was raised on point of law. After the document and the witness were withdrawn by counsel for the plaintiff, Chief Coker submitted that since he had not addressed the court on the submission made by counsel for the 1st defendant, the court ought not to mark the document rejected, it is my view that in view of the facts already placed before this court, the fact the Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document.

G

In my view the document is not admissible. It is to be marked rejected.”

H

In my considered view, the hasty rejection of the document for

which no application had been made for its tendering, was not in order. Incidentally, the rejection of the stated exhibit was what propelled the court below— to order a retrial of the matter by another judge of Ogun State High Court.

B What then is the real essence and purport of section 34 of the Evidence Act? It is that the evidence of a witness taken in an earlier proceedings is not relevant in a later trial, except for the purpose of discrediting such a witness in cross-examination and for that purpose only. Refer to *LS.D.P. v. Adold/stamm Int. Ltd.* (1994) 7 NWLR (Pt. 357) 545 at 561 -562; *Okonji v. Njokanma* (1999) 14 NWLR (Pt. 638) 250 at 280 -28 *Ogunaike v. Ojayemi* (1987) NWLR (Pt. 53) 769 all cited in appellant's brief of argument.

In *Ariku v. Ajiwogbo* (1962) All NLR (Pt. 4) 629 at 631, this court, per Ademola, CJF pronounced as follows:-

D “This court has frequently directed attention to the practice, - now not uncommon, of making use of evidence of a witness in another case as if it were evidence in the case on trial. As was pointed out in *Alade v. Aborishade* 5 FSC 167 at page 171, this is only permissible under section. 33 or 34 of the Evidence Act. Where a
E witness in a former case is giving evidence in a case in hand his former evidence may be brought up in cross-examination to discredit him if he was lying; but evidence used for this purpose does not become evidence in the case in hand for any other purpose.”

F It is clear that the only use the rejected document could serve is to employ it to confront the 1st Defendant/appellant during cross-examination. As it turned out, the 1st Defendant did not give evidence at the trial. No subpoena was directed at him at the instance of the plaintiff. The document was not of any avail to the plaintiff. The
G holding of the court below that the *audi alteram partem* rule was breached has turned out to be of no moment. The order for retrial made by the court below cannot stand in the prevailing circumstance.

For the above reasons and the fuller ones set out in the lead judgment, I agree that the main appeal should be allowed. The cross
H appeal should be dismissed. I order accordingly. I endorse the order relating to costs.

ADEKEYE JSC

I read in draft the judgment just delivered by my learned brother J.O. Ogebe JSC. The judgment meticulously considered all the issues raised in the main appeal and cross/appeal. I agree with the reasoning and conclusion. I however wish to add a few words to issues 2 and 3 in the Appellant's brief in the main appeal. B

In the Appellant's Brief filed on 13/5/02 three issues were raised for the determination of this court as follows:-

"(a) Whether having regard to the pleadings and evidence, the Court of Appeal was right in overturning the decision of the trial Court by which that Court held that the 1st Defendant did not descend from the male line of the Afurukeregboye Ruling House. This issue is distilled from Ground 1 of the grounds of appeal." C

(b) Whether in the face of the provisions of section 34 of the Evidence Act and the evidence before the trial Court, the Court of Appeal was right in holding that the learned trial Judge breached the rule of natural justice and was wrong in law in rejecting the proceedings in Suit No.HCJ/6/85 in evidence. This issue is distilled from Grounds 2, 3, and 4 of the grounds of appeal."

(c) Whether in all the circumstances of the case, the Court of Appeal was right in ordering a re-trial of the case? This issue is distilled from ground 5 of the grounds of appeal. E

The fulcrum of issue 2 is the propriety of the learned trial judge's rejection of the record of proceedings in the suit HCJ/6/85 when the learned counsel for the plaintiff/Respondent attempted to tender it at the trial, and the Court of Appeal's reaction to the rejected document. In order to appreciate the scenario before the trial court on that particular day it is of prime importance to reproduce the full text of the court proceedings when the Certified True Copy of suit NO./ HCJ/6/85 was rejected. F

Pages 90 - 95 of the Record covered the proceedings before Hon. Justice Titilola Mabogunje on Thursday the 5th day of October, 1995 where the learned Trial judge recorded as follows:-

"The plaintiff, the 1st - 7th defendants are present. H

Chief Coker for the plaintiffs, Mr. Taju Okunsokan appears with him.

Mr. Ayanlaja for the 1st defendants,

Mr. T. Soremi and A. Adetunji appears with him,

Mr, Mabekoje for the 8th and 9th defendants.

Plaintiffs case opens:

PWI - Duduyemi Odunuga

B Chief Samson Adewale Duduyemi Odunuga. I live at No. 2 Iwajuta Court, Iwade Quarter, Ife-Ijebu. I received a subpoena yesterday to tender document. I do not have the original. This is the copy.

Mr. Ajanlaja

C Since he cannot find the original, he has to lay foundation for the whereabouts of the original. That will be evidence. He has to be sworn.

Chief Coker

"I do not want him to give evidence, I withdraw the document."

D PW.2 (He is not sworn) I am Kolawole Olufowobi, Higher Registrar, High Court of Justice, Ijebu-Ode. I live at 7, Lagos Road, Obalende, Ijebu-Ode. I have a subpoena to tender the proceedings in HCJ/6/85 dated 28th March, 1989/ Here is the certified True Copy of the proceedings.

E Mr. Ayanlaja -

F I object to the admissibility of the document. See section 34 of the Evidence Act. It is evidence in previous proceedings, it is inadmissible in this proceedings. Lagos State Development and Property Corporation v. Adoldstamn Inter Nig. Ltd. (1994) 7 NWLR (Part 358) page 545 at page 561 C-D, F - G. Submits that in so far as the proceedings contravan (sic) Section 34, it is irrelevant and inadmissible.

Mr. Osinuga

G I object to the admissibility. I associate myself with the submission of counsel.

Mr. Mabekoje

Objects to the admissibility of the document.

Chief Coker

H At this stage I withdraw the evidence and the witness.

Mr. Ayanlaja

The document should be marked rejected.

Chief Coker

The witness is withdraw (sic) the document cannot be marked

rejected.

Court.

"This document has already been tendered before an objection was raised on point of law. After the document and the witness were withdrawn by counsel for the plaintiff, Chief Coker submitted that since he had not addressed the court on the submission made by counsel for the 1st defendant, the Court ought not to mark the document rejected. It is my view that in view of the facts already placed before this court, the fact that Chief Coker had not replied to the objection raised by learned counsel for the 1st defendant does not preclude the court from making a ruling on the admissibility of the document. In my view the document is not admissible. It is to be marked rejected."

Signed.

The objection taken by all three counsel for the defendants was that the document could only be admitted pursuant to section 34 of the Evidence Act, and that in so far as the conditions stated in that section have not been met the document remain irrelevant and inadmissible.

Section 34 of the Evidence Act Cap E 14 Vol. 6 Laws of the Federation of Nigeria 2004 stipulates that:-

"34. Relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated.

(1) Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers-unreasonable.

Provided:-

(a) "That the proceeding was between the same parties or their representatives in interest.

(b) That the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) That the question in issue were substantially the same in the

first as in the second proceeding”

Generally speaking, the essence of section 34 of the Evidence Act is to allow the evidence of a witness taken in earlier proceedings which is not ordinarily relevant in a later trial to discredit such a witness in cross-examination and for that purpose only. This is meant to
 B test the credibility of such a witness and the veracity of his evidence. The evidence used for this purpose does not however become evidence in the latter case or for any other purpose. At such hearing his attention must be called to the former case where such evidence was
 C given and he should be reminded of what he had said on that occasion.

In the instant case, the Certified True Copy of the proceedings in HCJ/6/85 was meant to discredit the evidence of the 1st defendant at the trial court. In that case he testified that he belonged to
 D Afurukeregboye Ruling House from the male line, a fact which was inconsistent with his averments in the case before the trial court.

A plethora of cases established the pre-requisite to making use of a former testimony of a witness. It is imperative that the attention of the witness to be discredited must be called to the former case and
 E he should be reminded of his testimony on that occasion. The 1st defendant was not subpoenaed to give evidence and note worthy is the fact that he did not give evidence at all at the trial court.

The rejected document could only have been tendered to become admissible and relevant evidence if the 1st defendant had given
 F evidence and was confronted with his earlier evidence in HCJ/6/85 under cross-examination so as to test the veracity of his evidence.

I agree with my learned brother that the Court of Appeal was wrong their judgment when the learned justices expressed at page
 G 342 lines 11-35 of the Record that if the document had not been rejected the plaintiff could have had another opportunity of tendering the document to prove what is said to be the pivot of his case. The document could not be brought into evidence at a later stage in the proceedings because the 1st defendant was not called as a witness
 H and HCJ/6/85 can only become evidence in the instant suit through cross-examining him on the disputed issue of his lineage. In & view of the provisions of Section 34 of the Evidence Act, the proceedings in HCJ/6/85 cannot be useful for any other purpose in the suit before the trial court. The court of Appeal had obviously

misinterpreted section 34 of the Evidence Act. The “lower court equally decided that in -rejecting the document HCJ/6/85 the doctrine of audi alteram partem was breached by the learned trial judge. It is my candid view that the learned senior counsel for the plaintiff at the lower court had ample opportunity to reply to the issue of admissibility of the document after the learned senior counsel for the 1st Respondent applied for its rejection. I shall restate the portion of the proceedings for that day:-

Chief Coker

At this stage I withdraw the evidence and the witness.

Mr. Ayanlaja

The document should be marked rejected.

Chief Coker -

The witness is withdraw(sic). The document cannot be marked rejected.

The court proceeded to give what to me appears to be a bench Ruling and rejected the document. The learned senior counsel for the plaintiff on realising the futility of pressing home the application to tender HCJ/6/85 in view of the provision of section 34 of the Evidence Act, and non availability of the 1st Respondent for cross-examination, decided to withdraw the witness and the evidence. This plunged the plaintiff back to the stage before the application was made and the issue of the 1st Respondent belonging to the male line of Afurukeregboye Ruling House being limited to the averments in the pleadings of the plaintiff, with no evidence in support of it. The learned trial judge acted in haste to reject a document that was not before the court. The other counsel in the matter were not given an opportunity to react to the suggestion to reject the document spear-headed by the learned counsel for the 1st Respondent. However it is well established in our civil legal system that not every error or mistake by a trial judge in his judgment, will vitiate the said judgment or will result in the appeal being allowed.

Okonji v. Njokanma (1999) 11 NWLR pt 625 pg. 26

General Mohammadu Buhari v. Inec & 4 ors (2009) 3 SCLR pt 17, H pg 1 at Pg 178

Ukejianya v. Uchendu (1950) 13 WACA 45 at 46

Gwanto v. The State (1983)1 SCNNLR pg. 142 at pg. 152

Onajobi v. Olanipekun (1985) 4 SC. Pt 21 pg. 156.

Oladele v. Aromolaran 11 (1996) 6 NWLR pt 453 pg 180.

It follows however that a mistake or an error in a judgment is immaterial, unless the error is substantial, and it has occasioned a miscarriage of justice or injustice that the appellate court is bound to interfere;

^B Amoroti v. Agbeke (1991) 6 SCNJ 54 Ike v. Ugboaja (1993) 7 SCNJ 402 Alli v. Alesinloye (2000) 6 NWLR pt 660 pg 177(2000) SCNJ 264.

^C It is my conclusion that the learned trial judge did not breach the rule of natural justice. In litigation where the trial court refuses or fails to allow a party to present his case his constitutional right to fair hearing is obviously breached In this instant case the counsel were given opportunity to be heard, but the plaintiffs counsel failed to use same, he cannot now complain of breach of fair hearing. “In the case ^D of Darma v. Oceanic Bank Int’l Nig. Ltd. (2005) 4 NWLR pg, 391 at pg 408- paragraph E, 409 pare E, the Court of Appeal observed that a person who was not heard but was given ample opportunity of being heard which he failed to make use of cannot thereafter complain of a loss of fair hearing. Fair hearing is not a one-way affair. It ^E affects both parties”.

Inec v. Musa (2003) 3 NWLR pt 806 pg 72 Okoroke v. Igbokwe (2000) 14 NWLR, pt 688 pg 498 Otu v. Udonwa (200) 13 NWLR, pt 683 pg 157 Sky power Airways Ltd. v. Ohima (2005) 18 NWLR pt ^F 957 pg 334

^G The Court of Appeal held also that the proceedings in HCJ/6/85 was wrongly rejected by the trial court and had occasioned a substantial miscarriage of justice as the document was the pivot of the plaintiff’s case. Subsequently a retrial of the case was ordered at the High Court.

^H I have pointed out earlier on that the learned trial judge wrongly rejected a document that was technically not before the court. In the circumstance of the instant case the rejection of the document could not have occasioned miscarriage of justice, as it would not have served any useful purpose in the trial as long as the 1st defendant was not called as a witness.

Moreover it was not established that if the document had been admitted in evidence the result of the case would have been in favour of the plaintiff.

An appellate court, will exercise its discretion to order a retrial where:

(a) The trial court failed to determine vital or specific issues by appraising and evaluating the evidence before it. Total v. Nwako (1978) 5SC pg 14 Ezeoke & 5 ors v. Nwagbore & Anor. (1988) 1 NWLR pt 72 pg 616 @ pgs. 629 - 630 B

Chief Olufosoye & 2 ors v. Olorunfemi (1989) 1 NWLR pt 95 pg, 27

(b) There has been a serious irregularity in the trial court

(c) The trial court exercised its discretion on manifestly wrong principles and/or contrary to justice.

Chief Imonikhe & Anor. V. The A -G of Bendel State & ors. (1592) 7 SCNJ 197. C

(d) A trial judge fails to take advantage of his seeing and hearing the witnesses notwithstanding that the record shows there was ample evidence before him. Chief James Okpin v. Chief Igoni Jona D & ors (1972) 1 ALL NLR 226 Chief J.S. Ekpere & ors v. Chief O.Aferije & ors (1972) 1 All NLR pt 1 pg 220

I will adopt the reasoning of my Lord Ogbuagu JSC in the case Ukaegbu v. Nwokolo (2009) 1 NWLR pt 482 pg 2263 at pages 2,335 - 2336 paras. B-D that:- E

“However, an order for a retrial is not appropriate when the plaintiffs case has failed in toto (as in the instant case leading to the instant appeal) see the cases of Ayoola v. Adebayo (1961) 1 All NLR pt 159,162 per Coker JSC”

Abibu v. Binutu (1988) 1 NWLR (pt 68) pg 57 F

National Bank of Nigeria Ltd. vs. PB. Olatunde & Co. (Nig.) Ltd. (1994) 4 SCNJ (pt 1) pg 65.

In the case of Musa lyafi v. Sule Eyigebe (1987) 7 SCNJ 148, my Lord, Oputa JSC at page 534 had earlier made a similar pronouncement that:- G

“It is not in the interest of justice that a plaintiff who has failed to prove his case (as in the instant case in this appeal) should be given another chance to try again, for that will be unjust to the defendant” H

The Respondent lost the case at the trial court and his appeal was only allowed in part at the lower court. An order of retrial when there is no substantial reason, for it will only afford the Respondent in this appeal in hand an opportunity to rectify his mistake in a case he

had already lost at the trial court.

Moreover it is an abuse of judicial process for a plaintiff to relitigate an identical issue which had been decided against him

It is trite that no man should be vexed twice for the same cause of action.

B Oyeabuchi v. Inec (2002) 8 NWLR pt 769

Agwasim v. Ojichie (2004) 10 NWLR pt 882 pg 613 at pgs 622-624

Saraki v. Kotoye (1992) 9 NWLR pt 264 pg 150 Umeh v. Iwu (2007)

6 NWLR pt 1030 pg 416 Ogojeifo v. Ogojeifo (2006) 3 NWLR pt

C 966 pg 205

With fuller reasons given in the leading judgment, I also agree that there is merit in the main appeal and I allow it. I dismiss the cross-appeal for lack of merit.

D I adopt all the consequential orders in the leading judgment mine.

E

F

G

H