

SUPREME COURT OF NIGERIA
11TH DECEMBER, 2009 SC. 134/2004
CORAM:- D. MUSDAPHER, M. A. MUKHTAR,
I. F. OGBUAGU, M. S. MUNTAKA-COOMASSIE,
J. A. FABIYI, JJSC

1. BELLO OGUNDELE
2. AJIDE LODE ONIFARE APPELLANTS
(for themselves and on behalf
of ONIFARE Family Ila-Orangun)
AND
1. SHITTU AGIRI
2. LAWANI AGIRI RESPONDENTS
(for themselves and on behalf
of AGIRI Family of Ila Orangun)

APPEALS - Grounds - Whether law or fact - Where a ground reveals a misapplication of the law - To facts already proved or admitted - It is a ground of law (H1)

COURTS - Finding by trial court - False misrepresentation - Correctness - Respondents produced proceedings of 14/7/37 as final judgment - Instead of those of 5/10/38 - The finding was therefore correct (H2)

JUDGMENTS - Basis - Extraneous matters - Court of Appeal based its judgment on issues not raised by parties - Without affording them opportunity to address it on them - As such it is based on extraneous matters (H3)

FACTS

Before the Osogbo high court, plaintiffs/appellants sued defendants/respondents claiming an order that the judgment in Suit No. HOS/1/79 be set aside. Appellants also claimed damages for trespass and injunction in respect of the land in dispute in the said suit. Appellants' case was that the judgment was fraudulently procured by respondents on a purported basis of estoppel *per rem judicata* when respondents tendered the judgment given in Suit No. 1/

37 on 14/7/37 as the final judgment in that earlier suit, without revealing that said Suit No. 1/37 was subsequently reopened and a final judgment thereon given on 5/10/38.

After hearing, the learned trial judge gave judgment to appellants as prayed. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal on the ground that the certified true copy of the final judgment as tendered by appellants and relied upon by trial court was suspect in that there were discrepancies between the manuscript and the typewritten scripts (Exhibits B and B1 respectively) thereof. This was a ground neither raised nor canvassed by any of the parties. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal.

ISSUE FOR DETERMINATION

“Whether the respondents made a full disclosure of the proceedings of the Ila-Native Court before the High Court of Justice in suit No. HOS/1/79, that led to the judgment delivered in the said suit by the Hon. Justice S. A. Oloko on 23/1/81.....,”

HELD (Unanimously allowing the appeal per **MUNTAKA-COOMASSIE JSC**)

APPEALS - Grounds - Whether law or fact

1. The respondents challenged the competence of grounds I and 3 of the Notice of appeal on the ground that they were grounds of mixed law and fact, in respect of which the appellants did not obtain the leave of either the lower court or this court.

I have read the preliminary objection and carefully perused grounds 1 and 3 of the Notice of appeal, and applying the principles enunciated by this court in *Ogbechie v. Onechie* (1986) 2 NWLR (pt. 23) 484 at 491, I find no difficulty in holding that the resolution of these grounds of appeal will reveal a mis-application of the law to the facts already proved and admitted at the trial court. I therefore hold that the grounds complained against are grounds of law and not of mixed law and facts hence no leave of any court is required to file them before this court. The objection being misconceived is hereby over-ruled. (p. 2258 E)

Finding by trial court - False misrepresentation - Correctness

2. It is therefore not in doubt that the final judgment as to the extent

of the land of each of the parties was given on the 5/10/38 and not the order of 14:7:37.

In the case instituted by the respondents in suit No HOS/1/79 only the proceedings of 14:7:37 was produced before the court which led to the judgment delivered by the Hon. Justice S. A. Oloko.

With the greatest respect I am of the humble view that the trial court's findings on this issue were correct. If this proceedings of 5/10/38 has been produced before the court in suit No. HOS/1/79, the judgment of the Hon, Justice S. A. Oloko would have been different. This is a clear case of concealment or false misrepresentation. (pp. 2259 H/ 2260 B)

JUDGMENTS - Basis - Extraneous matters

3. I quite agree, with all sense of responsibility, with the submission of the learned counsel to the appellant that the lower court based its judgment on extraneous matters to wit - issue of custody, authenticity and /or discrepancies between exhibits B and Bl. These are issues not raised by the parties. The lower court was therefore in error to have raised them suo-motu without affording the parties the opportunity to address it on them. (p. 2260 C)

NOTABLE POINTS OF INTEREST

MUNTAKA-COOMASSIE JSC

1. Proceedings of customary courts to be liberally interpreted

Before I end this judgment, I also wish to comment on the strict interpretation placed on exhibits B and Bl by the court below. Exhibits B and Bl are record of proceedings of Ila Native Court, and as such the court below was in error to have strictly interpreted its proceedings knowing fully well that judges who presided were not legally trained lawyers. (p. 2261 C)

OGBUAGU JSC

2. An unregistered firm is not a legal practitioner per se

Before the reservation of the Judgment, I had drawn the attention of Mr. Ajibola off record, to the fact that their Brief was faulty in that it was signed by "Ajibola & Co." and there is/was no evidence that it is a firm duly registered as such. He did not respond to my observation. Even recently, in the case of *Okafor & ors. v. Nweke & Ors.*

(2007) 10 NWLR (Pt. 1043) 521; (2007) 3 *S.C. (Pt. II)* 55; (2007) *All FWLR (Pt. 368)* 1016, this Court -per Onnoghen, JSC, dealt with this issue or fact. A partnership or firm, unless duly registered as such, with respect, is not a legal Practitioner recognized by law or a person entitled to practice as a barrister and solicitor. (p. 2268 B)

B

3. *Court processes - It is a fundamental error to sign as an "& Co."*

If learned counsel who appear before this Court, persist in this practice of signing any process of this Court as & Co. without evidence of being duly registered as such, it may be obliged to disregard or discountenance, such process including Briefs. Such signing in my respectful but firm view, is NOT an irregularity as held by the Court of Appeal - per Allagooa, JCA in the case of *Unity Bank PLC v. Oluwafemi (2007)* *All FWLR (Pt. 382)* 1923 relying on the case of or decision in *D Cole v. Martins (1968) All NLR 161* (Lardner's case). It is a fundamental error. (p. 2268 F)

D

REPRESENTATION

Mr. T. O. Ajibola for the Appellants

E

Mr. O. Ojo for the Respondents.

CASES REFERRED TO

Utong (1900) L.R.C.N. 1473 at 1587

F

Adofin V. Oni (2001) 1 SCNJ 13 at 149

Ezanya V. Okeke (1995) 4 SCNJ 60 at 76

Oniah v. Onyiah (1989) 1 NWLR (pt.99) 514

Kuti v. Balogun (1978) 1 LR.N. 353 at page 357

Adeagbo (1988) 2 NWLR (pt.75) 238 at p. 251

G

Ogbelde V. Osijo (2007) *All FWLR* (pt. 365) 548

Nigeria Ltd V. Ozigi (1994) 3 NWLR (pt. 333) 385

Olusanya v. Olusanya 1983 1 SC NLR part 136 page 136

Okafor & ors. v. Nweke & Ors. (2007) 10 NWLR (Pt. 1043) 521

Union Bank of Nigeria Ltd V. Ozigi (1994) 3 NWLR (pt. 333) 385

H

Oyah & anor. v. Ikolide & 4 ors. (1995) 7 SCNJ. 122 @ 131 – 132

Salawu Ajao v. Karimu Ashiru & ors. (1973) 1 *All N.L.R.* (Pt. II) 51

STATUTE REFERRED TO

Legal Practitioners Act, Cap 207 L.F.N. 1990, ss. 2 (i) and 24

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The Appellants herein, who were the plaintiffs at the trial High Court Osogbo claimed against the respondents herein as follows:-

"(1) An order that the judgment of the Hon. Justice S. A. Oloko delivered on 23/1/81 in suit No. HOS 1/79 Muibi Agiri & Ors V. Kadiri Otun Imale & 2 others be set aside being tainted with fraud/ or misrepresentation.

(2) The sum of N3 Million being the general and special damages for trespass and conversion committed as a result of the said judgment obtained by the Defendants.

(3) INJUNCTION restraining the defendants, their servants or agent from committing further acts of trespass and conversion on the plaintiffs' farm land at Onifare village via Ila-Orangun in dispute in the said suit No HOS/1/79 Muibi Agiri and 2 others Vs. Kadiri & Otun Imale and 2 others"

The appellants in paragraphs 8 and 9 of his statement of claim pleaded the facts of the fraud as follows:-

"8. On comparing the contents of the proceedings tendered by the defendants (as plaintiffs?) in suit No. HOS/1/79 as Exhibit B and the certified true copy of the same proceedings obtained at the Archives by the plaintiffs in 1995, it was discovered that the contents were different in that only a part of the proceedings was procured and tendered by the defendants (as plaintiffs) while the remaining and concluding part was fraudulently left out or concealed".

PARTICULARS OF THE FRAUD OR MISREPRESENTATION

(i) That the defendants (as plaintiffs) fraudulently procured and tendered only the part of the proceedings in the case 1/37 favourable to them and left out the subsequent proceedings in the same case which was not favourable to them.

(ii) That the defendants (the plaintiffs) tendered only the proceedings of 26/6/37, 7/7/37 and 14/7/37 while the subsequent proceedings of 22/9/38, 28/9/38 and 5/10/38 were deliberately left out or concealed.

(iii) That the final judgment in the case was delivered on 5/10/38 and not on 14/7/37 as falsely misrepresented on the version tendered in HOS/1/79 and in their oral evidence in court.

(iv) That the defendants (as plaintiffs) know or ought to know

that after the proceedings of 14/7/37 there were further proceedings in the Native Court case involving an order of reopening of the case by the then “D. 0” on 22/9/38 and further order of Inspection before judgment was finally given on 5/10/38 as they fully participated in the proceedings. They intentionally misrepresented the facts to the court.

(v) That the defendants (as plaintiffs) deliberately procured the part of the proceedings favourable to them to enable them obtain judgment in their favour thereby deceiving and misleading the court in the said suit HOS/1/79.

(vi) That if the full record of proceedings of the Native court case had been tendered, the decision of the court in suit No. HOS/1/79 would have been different”.

“a) The whole Native Court proceedings in the case 1/37 referred to above is part of the records of proceedings of Native Courts in the former Western provinces of the then colony and protectorate of Nigeria which are now kept in the Archives at Professor H. A. Oluwasanmi Library at the O. A. U, Ile-Ife”.

In response to these averments, the respondents in paragraph 8 of their statement of defense pleaded as follows:-

“8. As regards paragraphs 8 (i) (ii) (iv) (v) (vi), 9, 11, and 12 of the statement of claim, the defendants aver that the plaintiffs have raised similar issues in their motion dated the 24th day of April 1995 filed on their behalf by Chief Oye Esan at the Court of Appeal Ibadan and to which the defendants filed a counter affidavit in similar vein to their statement of defense in this suit and which motion has been adjourned for hearing till the 21st day of May, 1997. The defendants will rely on the motion paper and the affidavit in support as well as the counter-affidavit and all relevant papers at the trial of this action”

At the trial both parties called their respective witnesses. The gist of this case is that there was a dispute over the land in dispute between the families of the parties in this case in 1937 before the ILA Native Court. On 14/7/37 judgment was delivered whereby the defendants, the predecessors of the appellants before that court were ordered to pay 20 shillings and to vacate the land.

However in 1938 the matter was ordered to be re-opened and a joint inspection of the land was ordered whereby both parties agreed to a common boundary and the court’s inspection team

planted “*peregun*” tree at the agreed boundary to demarcate the land, thereafter a judgment was finally delivered in terms of the mutual agreement. In 1979, the respondents filed a fresh action for declaration of title to the land, including the part that belonged to the appellants, and tendered the judgment delivered on 4/7/37 without averting the court with the proceedings that terminated in 1938. B

Based on the judgment of the Native Court delivered on 14/7/37. Hon Justice Oloko gave judgment for the respondents. The appellants appealed against the judgment but later abandoned it. Thereafter, the appellants filed this suit and claimed the reliefs earlier set out in this judgment. The judgement delivered in 1938 was tendered as Exhibits B and Bl. The learned trial judge, Justice R. O. Yusuf gave judgment for the plaintiffs; following the judgement of this court in Talabi V. Adeoye (1972) 8-9 SC 20 at 40, the learned trial Judge held as follows:- C D

“By this authority and contrary to Fabunmis submission, the plaintiff is on a firm wicket when it commenced this fresh action to challenge the judgment and after obtaining the complete record of the Ila-Orangun proceedings in 1/37 in 1995. The writ here was obtained in 9/8/86. The plaintiffs indeed were delighted. Thus the plaintiff employed the proper procedure to challenge the judgment procured by suppression of material fact and/or misrepresentation and this I hold amount (sic) to a fraud practiced by one of the parties on the court and to this extent that judgment cannot stand. It is hereby set aside”. E F

The respondents appealed against this judgment to the Court of Appeal, hereinafter called the lower court. The lower court allowed the appeal.

On the issue of fraud, the lower court held as follows:- G

“A critical examination of the supportive evidence albeit disjointed, adduced on behalf of the respondent on the fact in issue which is “fraud” is not only bare but also inadequate to meet the standard of proof which is very high. Thus the respondents rightly spelt out some particulars in their paragraph 8 of the statement of claim in the trial court. Those particulars were however in no way articulated in the evidence of the PW1 and PW2. Thus all the PW1 said is that he was in court to tender exhibits B and Bl without more. Whereas the averment is that the Hezekel oluwasanmi Library O. A. H

U. Ife from where they were procured now serves as Archives for records of proceedings of Native Courts in the defunct Western provinces of Nigeria.

The Pw2 simply alleged that the judgment of Ila Native Court marked Exhibit 2 is fraudulent. I am of the view that there is need for more aspersion to stigmatize that exhibit fraudulent. The respondents averments (supra) are in essence at variance with the supporting evidence.....”

In conclusion, the lower court held thus:-

“Apart from this observation, there are glaring omissions between exhibits B and B1 (being respectively the manuscript and type written scripts) which the learned trial judge made use of in his judgment. Without going into further details on discrepancies on exhibits B and B1, which were considered accurate in the lower court, I am of the view that they are replete with suspicions and largely incoherent. In these circumstances I am of the strong opinion that the high standard of proof to establish fraud which is beyond reasonable doubt was not established in the trial court. There was therefore with due regard, no basis at all for the learned trial judge to order setting aside the judgment in Suit No. HOS/1/97, on the averment of unsubstantiated fraud”.

Being dissatisfied with the judgment of the lower court, the appellants have appealed to this court. In accordance with the rules, both parties filed and exchanged their respective briefs of argument. The appellants in their Brief of argument dated 7/9/04 formulated two issues for determination as follows:-

- (1) Whether the lower court was right to have based its decision on proof of fraud upon extraneous matters.
- (2) Whether the lower court was right in its findings and decision that fraud was not proved.

Whilst the respondents in their brief of argument dated 19/6/08 formulated three issues for determination as follows:-

- “(i) Whether or not the decision of the court of Appeal that the Appellants did not establish beyond reasonable doubt that the Respondents obtained judgment in suit NO. HOS/1/79, namely Muibi Agric and Ors Vs Kadri Otun Imole and Ors by fraud Or misrepresentation was based on extraneous matter raised Suo-Motu by the Court of Appeal.*

(ii) Whether or not the Court of Appeal was right in its decision that the Appellants do not establish by evidence the averments of fraud pleaded in paragraphs 8 (i) - 8 (ii) of the appellants averment statement of claim.

(iii) Whether the Court of Appeal was right in setting aside the finding of the trial court that the Respondents obtained judgment in Suit NO. HOS.1.79 and holding that the Appellants did not establish fraud against the Respondents as pleaded in their statement”

At the hearing of this appeal, the learned counsel for the appellants adopted his brief of argument and urged this court to allow the appeal.

In respect of the issue one formulated by the appellants, it was the submission of the learned counsel that the judgment of the lower court was based on extraneous matters, to wit - the custody of exhibits B and Bl, the alleged discrepancies between Exhibits B and Bl which are issues not joined by the parties in their pleadings and not raised by either of the parties. These are issues raised suo-motu, and the parties were not given the opportunity of being heard on them, thus occasioning a miscarriage of justice. Plethora of authorities were cited amongst which are:-

(i) Olusanya V. Olusanya (1983) NSCC 97 at 102.

(ii) Iyaji V. Eyigebe (1987) 7 SCNJ 148 at 156.

The learned counsel submitted that the lower court was wrong with the strict manner it construed the proceedings of a Native Court, which requires a greater latitude and broader interpretation. He cited the cases of Adofin V. Oni (2001) 1 SCNJ 13 at 149, and Ezanya V. Okeke (1995) 4 SCNJ 60 at 76.

On the second issue, it was the submission of the learned counsel that the fact of the concealment of the Native Court's judgment delivered in 1938 from the trial court in suit No. HOS/1/79 is sufficient to prove the fact of the fraud committed; or the act of the false misrepresentation that gave birth to the judgment in suit No. HOS/1/79.

Learned counsel to the respondents at the hearing also adopted his brief of argument and urged this court to dismiss the appeal, on the 1st issue, it was the submission of the learned counsel that an appeal is by way of re-hearing and the court of Appeal was entitled to re-evaluate evidence before the trial court where the trial court

fails to properly evaluate the evidence adduced before it. It referred to paragraph 7 of the statement of defence and submitted the issue of custody, authenticity and discrepancies between the exhibits were not issues raised *suo-motu*, the case of *Dairo V. U. B. N. Plc* (2001) 11 MJSC 74 at 93 was cited.

B On the second issue, it was the submission of the learned counsel that the lower court was correct in holding that the ‘fraud’ was not proved. It was his submission that fraudulent conduct must be distinctly alleged and distinctively proved; fraud is certainly not allowable to be inferred from the facts of the case. The cases of:-

C (1) *Davy V. Garrelt* (1878) 7 CH. D. 473 and
 (2) *David Fabunmi V. Abigail Agbe* (1985) 3 SC 28 at 76 were cited in support.

Learned counsel then referred to the evidence of PW1 and
 D PW2 and submitted that the evidence was not sufficient to prove fraud; which is a criminal allegation, it is to be noted that no argument was proffered in support of the 3rd issue formulated by the respondent that issue is accordingly struck out. This is what had transpired in this appeal.

E Before I proceed with this judgment it is worthy of note to state that ***the respondents challenged the competence of grounds 1 and 3 of the Notice of appeal on the ground that they were grounds of mixed law and fact, in respect of which the appellants did not obtain the leave of either the lower court or this court.***
 F He therefore urged this court to strike out the said grounds of appeal.

I have read the preliminary objection and carefully perused grounds 1 and 3 of the Notice of appeal, and applying the principles enunciated by this court in Ogbechie V. Onechie (1986) 2 NWLR (pt. 23) 484 at 491, I find no difficulty in holding that the resolution of these grounds of appeal will reveal a mis-application of the law to the facts already proved and admitted at the trial court. I therefore hold that the grounds complained against are grounds of law and not of mixed law and facts hence no leave of any court is required to file them before this court. The objection being misconceived is hereby over-ruled.
 G
 H

In the determination of this case, I am of the humble view that

the sole issue that calls for determination in this appeal is-

“Whether the respondents made a full disclosure of the proceedings of the Ila-Native Court before the High Court of Justice in suit No. HOS/1/79, that led to the judgment delivered in the said suit by the Hon. Justice S. A. Oloko on 23/1/81.....,”

This is so, because if the full proceedings of the final judgment was not made available to the court in suit No. HOS/1/79 then something might have gone wrong. At this juncture, it is necessary to reproduce the contents of the proceedings of the Ila-Native Court. On the 14/7/37, the proceeding of the court reads:-

“Judgment: fined to lagbe deft 20 N for destroying the peregun trees in the boundary and to leave Yesufu Agiri land and let where the peregun trees of the 13years be remained as boundary and to pay cost Obale. His money.

14: 7: 37.

p. a. 20 - CR. No. 9821 of 14:7:37 case to be reopened and the boundaries of Yusufu Agiri’s farm land to be marked if he dissatisfied he P. T. O Made appeal to Orangui’s court and thence through the usual channels. See page 33.

Rev. Willes D. O”.

22:9:37.

Apparently, the decision of 14:7:37 was not final as to the boundary of the land in dispute. There was an order to re-open the case if there was no appeal to Orangun’s court. There was no appeal to Oraguns court, and in compliance with the order of 14:7:37, the case was re-opened in 1938, and it was recorded as follows:-
”suit No l/37

Re - open by the D. O’s Order Judgment was given on 5/10/38. Judgment for the defendant hold the left from the Peregun planted to boundary and Tolagbe on the right.

SGD.

Obale His Umaen

5/10/38”.

It is therefore not in doubt that the final judgment as to the extent of the land of each of the parties was given on the 5/10/38 and not the order of 14:7:37.

In the case instituted by the respondents in suit No HOS/1/79 only the proceedings of 14:7:37 was produced before

the court which led to the judgment delivered by the Hon. Justice S. A. Oloko. In this respect, the learned trial judge held as follows:-

"The Commission/suppression of the highlighted proceedings drastically misled or misrepresented the outcome of the Ila proceedings to the court in HOS/1/79 and what is more, the court relied on this to come to the conclusion".

With the greatest respect I am of the humble view that the trial court's findings on this issue were correct. If this proceedings of 5/10/38 has been produced before the court in suit No. HOS/1/79, the judgment of the Hon, Justice S. A. Oloko would have been different. This is a clear case of concealment or false misrepresentation. I quite agree, with all sense of responsibility, with the submission of the learned counsel to the appellant that the lower court based its judgment on extraneous matters to wit - issue of custody, authenticity and /or discrepancies between exhibits B and Bl. These are issues not raised by the parties. The lower court was therefore in error to have raised them suo-motu without affording the parties the opportunity to address it on them. See the cases of:-

- (a) Olusanya V. Olusanya Supra at 139;
- (b) Kuti V, Jibowu (1972) 1 All NLR (pt. 11) 80/192; and
- (c) Ajo V. Ashiru (1973) 1 All NLR (pt.11) 51/63.

At any rate, Exhibits B and Bl were duly certified by the authority that was in lawful possession.

The respondents in paragraph 7 of the statement of defence only claimed ignorance of their existence. Neither was any evidence led to show that these exhibits were forged. It is trite law that oral evidence is inadmissible to contradict the contents of a document. In other words oral testimony cannot be used to state the content of a document. S. 132 (1) of the Evidence Act; and no extraneous matter can be imported into the record of proceedings. See *Union Bank of Nigeria Ltd V. Ozigi* (1994) 3 NWLR (pt. 333) 385; see also *Nnubia V. A. G. Rivers State* (1999) 3 NWLR (pt. 593) 82.

This is so, because documents when tendered and admitted in court are like words uttered and do speak for themselves. They are more reliable and authentic than words from the vocal cord of man

as they are neither transient nor subject to distortion and miss-interpretation but remain permanent and indelible through the ages. See:-

1. Aiki V. Idowu (2006) 9 NWLR (pt 984) 50/65 per Alagoa JCA,

2. C. D. C. (Nig) Ltd V. SCOA (Nig) Ltd (2007) 6 NWLR (pt. 1030) 300. B

3. Ogbelde V. Osijo (2007) All FWLR (pt. 365) 548

What more, exhibits B and BI are public documents forming the records of the acts of judicial body i.e. Ila Native Court and duly certified in accordance with the provisions of Section 111 of the Evidence Act. C

Before I end this judgment, I also wish to comment on the strict interpretation placed on exhibits B and BI by the court below. Exhibits B and BI are record of proceedings of Ila Native Court, and as such the court below was in error to have strictly interpreted its proceedings knowing fully well that judges who presided were not legally trained lawyers. This court in the case of Odofin V. Oni (2001) 1 SCNJ 130 handed down the principles to be adopted in interpreting the records of proceedings of a Native or Customary Courts. At page 149 of the report Achike JSC of blessed memory stated the principles thus:- E

“In order to appreciate the real effect of the lower courts strong criticism of the statement of the customary court that the respondent “failed to prove ownership of the land in dispute” it is important to stress that greater latitude and broader interpretation must be accorded to decision of customary courts as it is trite that the proceedings in the customary courts are not subject to the application of the Evidence Act. It is important that superior appellant courts in relation to matters relating to customary courts should focus their attention to the substance of the judgments or decisions in those courts rather than the forms. This is so because customary courts be they Area Courts or whatever name they are christened in our judicial jurisdiction - are generally presided over by laymen without even rudimentary exposure to legal principles. An Appellate court should in all circumstances strive to get the bottom of the decision of a customary court. This can only be achieved by considering the input of a decision of a customary court not in fragments or in isolation of excerpts thereof but must be read harmoniously as a whole in order to cap- F G H

ture its imports. In other-words when greater latitude is accorded to the interpretation of the decisions of customary court it will be sufficient if such decisions are seen to accord with the view of person of good common sense and reason completely devoid of legalistic encrustments”.

B See also Ezeanya V. Okeke (1995)4 SCNJ 60/76. Where the Supreme Court made the following statement:-

“it is a matter of common knowledge that pleadings were not filed in the Native Courts and consequently the appellate courts have consistently held:-

C *(i) That it is not the form of an action in a Native tribunal that must be stressed where the issue involved is otherwise clear; it is the substance of such a claim that is the determinant factor.*

D *(ii) Proceedings in a Native Court have to be carefully scrutinized to ascertain the subject matter of the case and the issues raised therein.*

(iii) It is permissible to look at the claim, findings and even the evidence given in a native tribunal to find out what the real issue were.

E *(iv) In dealing with the proceedings from Native Courts, appellate courts must not be unduly too strict with regard to matters of procedure as the whole object of such trials is that the real dispute between the parties should be adjudicated upon.*

F *(v) As long as Native Courts acted in good faith, listened fairly to both sides and gave opportunity to the parties to present their case and correct or contradict any relevant statement prejudicial to their view, they cannot be accused of offending against the rules of natural justice and their decisions on the real issues between the parties ought*
 G *not to be disturbed without very clear proof that they are wrong”,*
 Per Iguh JSC at Page 76. Finally on this point is the case of Olujiule V. Adeagbo (1988) 2 NWLR (pt 75) 238 at 251".

H I quite agree with the above principles as enunciated by my learned brothers, Achike and Iguh JJSC, and applying them in the case at hand, I have no hesitation in holding that the lower court was in a grave error in the ways and manners it strictly interpreted..... The exhibits B and Bl in this matter. It is unnecessary and uncalled for. Finally, I hold that this appeal my lords has merit. The appellants have proved that the respondents falsely misrepresented the pro-

ceedings of Ila-Native Court in suit No HOS/1/79 by concealing the final judgment of that court, which led to the judgment delivered by the Hon. Justice S. A. Oloko in 1981. Consequently the judgment of the lower court is hereby set aside and in its place the judgment of the trial court delivered by Hon. Justice R. O. Yusuf on 13th day of October, 1998 is hereby restored. The appellants are entitled to costs both in the court below and this court assessed at N30,000.00 and N50,000.00 respectively.

MUSDAPHER JSC

I have read before now, the judgment of my Lord Muntaka-Coomassie, JSC just delivered with which I entirely agree. I too, allow the appeal, I set aside the decision of the Court of Appeal and restore the decision of the trial Court. I abide by the order for costs proposed in the aforesaid judgment.

MUKHTAR JSC

The claim of the plaintiffs (who are now the appellants) in the High Court of Oyo State against the defendants as per their statement of claim reads as follows:-

“15(1) An Order that the judgment of the Hon. Justice S. A. Oloko delivered at the High Court of Justice, Osogbo on 23/1/81 in Suit No. HOS/1/79, Muibi Agiri & 2 others Vs. Kadiri Otun Imole & 2 others be set aside being tainted with fraud and/or misrepresentation.

(2) The sum of N3 million being general and special damages for trespass and conversion committed as a result of the said judgment fraudulently obtained by the Defendants

(3)”

Yusuf J. of the Osun State High Court gave judgment in favour of the plaintiffs and awarded the reliefs sought. The orders read:-

“(1) Judgment in HOS/1/79 is hereby set aside and the judgment of Ila-Orangun in 1/37 of 5/10/38 is restored.

(2) Injunction restraining the defendants, their servants or agents from committing further acts of trespass and conversion of the plaintiffs claim land sic at Onifare Village via Ila-Orangun in dispute in the

said suit No. HOS/I/79 Muibi Agiri and others vs. Kadiri Otun Imole & 2 others is granted.

(3) N 150,000,00 as special damages for trespass and conversion committed as a result of the said judgment. ”

As they were not satisfied with the judgment, the defendants
B appealed to the Court of Appeal, which allowed the appeal. The
plaintiffs were aggrieved by the decision and they have appealed to
this court on three grounds of appeal. Learned counsel exchanged
briefs of argument which were adopted at the hearing of the appeal.
C The appellants’ brief of argument have in it the following issues for
determination:-

(1) Whether the lower court was right to have based its decision on proof of fraud upon extraneous matters?

(2) Whether the lower court was right in its findings and decision
D that fraud was not proved?

In respect of issue (1) supra, the appellants attacked the finding of the lower court which reads thus:-

“In these circumstances, I am of the strong opinion that the
high standard of proof to establish fraud which is beyond reasonable
E doubt was not established in the trial Court. There was therefore,
with due regard, no basis at all for the learned trial Judge to make an
order setting aside the judgment in Suit No. HOS/I/97 (sic) on the
avertment of unsubstantiated fraud.”

F It is on record that the plaintiffs/appellants in their statement of
claim pleaded thus:-

“8. On comparing the contents of the proceedings tendered
by the Defendants (as Plaintiffs) in Suit No. HOS/I/79 as Exhibit B
and the certified true copy of the same proceedings obtained at the
G Archives by the Plaintiffs in 1995, it was discovered that the contents
were different in that only a part of the proceedings was procured
and tendered by the Defendants (as Plaintiffs while the remaining
and concluding part was fraudulently left out or concealed.

Particulars of the Fraud or Misrepresentation

H (i) That the Defendants (as Plaintiffs) fraudulently procured
and tendered only the part of the proceedings in the case 1/37
favourable to them and left out the subsequent proceedings in the
same case which was not favourable to them.

(ii) That the Defendants (the Plaintiffs) tendered only the pro-

ceedings of 22/6/37; 7/7/37 and 14/7/37 while the subsequent proceedings of 22/9/38, 28/9/38 and 5/10/38 were deliberately left out or concealed.

(iii) That the final judgment in the case was delivered on 5/10/38 and not on 14/7/37 as falsely represented on the version tendered in HOS/I/79 and in their oral evidence in Court. B

(iv) That the Defendants (as Plaintiffs) knew or ought to know that after the proceedings of 14/7/37, there were further proceedings in the Native Court case involving an Order of re-opening of the case by the then "D. O". on 22/9/38 and further order of inspection before judgment was finally given on 5/10/38 as they fully participated in the proceedings. They intentionally misrepresented the facts to the court. C

(v) That the Defendants (as Plaintiffs) deliberately procured the part of the proceedings favourable to them to enable them obtain judgment in their favour thereby deceiving and misleading the court in the suit HOS/I/79. D

(vi) That if the full record of proceedings of the Native Court case had been tendered, the decision of the Court in Suit HOS/I/79 would have been different." E

Quite clearly, as can be seen above, the issue of fraud was raised in the above averments and it is a well known fact that fraud is an element of crime, the proof of which must be beyond reasonable doubt, as is provided by section 138 of the Evidence Act Laws of the Federation of Nigeria 1990. F

Now, the pertinent question to be asked and answered here is, did the appellants who were the plaintiffs who alleged the crime in their above averments prove the allegation of crime in the High Court? The answer will only be found in the evidence adduced by the appellants. In his evidence the plaintiff/appellant testified inter alia thus: G

"I remember Suit No. HOS/I/79 before Oloko, J. The Defendants won the case. We appeal The judgment it is (sic) still pending. The Plaintiff based his case on Ila Orangun proceeding No. 1/37 between ancestor of the Defendants and Tolagbe the ancestor of Exhibit A2). The judgment Exhibit A2 is fraudulent..... We found the correct preceding (sic) at Oluwasanmi Library, Obafemi Awolowo University Ife....." H

It is instructive to note that even though fraud was not estab-

lished by the above evidence, nor was there such pertinent evidence in the course of cross examination the issues of authenticity, custody and discrepancies between Exhibits B and Bl were not raised by the parties, but they were raised suo motu by the lower court, when it found thus:-

B *“Apart from this observation, there are glaring omissions, between exhibits B and Bl (being respectively the manuscript and type-written scripts) which the learned trial Judge made use of in his judgment. Without going into further details on the discrepancies on exhibits B and Bl which were considered accurate in the lower Court, I am of the view that they are replete with suspicions and largely incoherent. In these circumstances, I am of strong opinion that the high standard of proof to establish fraud which is beyond reasonable doubt was not established in the trial Court. There was therefore, with due regard, no basis at all for the learned trial Judge to make an order setting aside the judgment in Suit No. HOS/I/97 (sic) on the averment of unsubstantiated fraud.”*

I must point out here that the lower court raised these issues suo motu, without giving the parties the opportunity to be heard on them. This error is frowned upon by the law as it does not allow that practice. See Okorodudu v. Okoromadu 1977 3 SC. page 21, Odiaso & Anor v. Agho & Ors 1972 1 All N.L.R. (part 1) page 170, Olusanya v. Olusanya 1983 1 SC NLR part 136 page 136, and Atanda & Anor v. Lakanmi 1974 1 All N.L.R. (part 1) page 168.

F It is my belief that the issue of fraud is the fulcrum of this appeal, and having dealt with it above I am of the view that it suffices for the treatment of this appeal. It in fact wraps up the over all argument of both parties, and puts to rest the real purport of the appeal. G In the circumstances and for the fuller treatment of the issues in the lead judgment, I find merit in the appeal. I have had the advantage of reading in advance the lead judgment delivered by my learned brother Coomassie JSC. I agree entirely with his reasoning that the appeal should be allowed, and I also allow it in its entirety. I abide by H the consequential orders made in the lead judgment.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on the 3rd December, 2003, allowing the appeal of the Respondents against the Judgment of Yusuff, J. of the Osun State High Court delivered on 13th October, 1998, in favour of the Appellants. ^B

Dissatisfied with the said decision, the Appellants have appealed to this Court on three (3) grounds of appeal. They have formulated two (2) issues for determination, namely; ^C

“1. *Whether the lower court was right to have based its decision of proof of fraud upon extraneous matters.*

2. *Whether the lower court was right in its findings and decision that fraud was not proved*”

On their part, the Respondents formulated three (3) issues for determination namely, ^D

“**ISSUE ONE** - *Whether or not the decision of the Court of Appeal that the Appellants did not establish beyond reasonable doubt that the Respondents obtained judgment in Suit No. HOS/1/79 namely Muibi Agric (sic) & ors. v. Kadiri Otun Imale & 2 ors. by fraud or misrepresentation was based on extraneous matters raised suo motu by the Court of Appeal.*” ^E

ISSUE TWO - *Whether or no the Court of Appeal was right in its decision that the Appellants did not establish by evidence the averments of fraud pleaded in paragraphs 8 (i) (ii) of the Appellants’ statement of claim.*” ^F

ISSUE THREE - *Whether the Court of Appeal was right in setting aside the finding of the trial court that the Respondents obtained the judgment in Suit HOS/1/79 and holding that the Appellant did not establish fraud against the Respondents as pleaded in their Statement (sic.)*” ^G

I note that while issue 3 is stated to be covered by ground 1 of the Notice of Appeal, issues is stated to be covered by ground (sic) 2 & 3 of the Notice of Appeal. In Issue 3 it is not stated what ground of appeal it covers, But I am prepared to hold that it is also distilled from the said grounds 2 & 3 of the Notice of Appeal. ^H

When this appeal came up for hearing on 29th September, 2009, Ajibola, Esq., - the learned counsel for the Appellants, adopted

both their Appellants' Brief of Argument and Reply Brief. He urged the Court, to allow the appeal.

Ojo, Esq. - the learned counsel for the Respondents, also adopted their Brief of Argument. He urged the Court, to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

B Before the reservation of the Judgment, I had drawn the attention of Mr. Ajibola off record, to the fact that their Brief was faulty in that it was signed by "Ajibola & Co." and there is/was no evidence that it is a firm duly registered as such. He did not respond to my observation. Even recently, in the case of *Okafor & ors. v. Nweke & Ors.* (2007) 10 NWLR (Pt. 1043) 521; (2007) 3 S.C. (Pt. II) 55; (2007) All FWLR (Pt. 368) 1016, this Court -per Onnoghen, JSC, dealt with this issue or fact. A partnership or firm, unless duly registered as such, with respect, is not a legal Practitioner recognized by law or a person entitled to practice as a barrister and solicitor. See also Sections 2(i) and 24 of the Legal Practitioners Act, Cap. 207 LFN. See the cases of *The Registered Trustees of Apostolic Church Lagos Archdiocese v. Rahman Akindele* (1967) NMLR 263 @ 265-
 E *First Bank of Nig. PLC & Rankassa Enterprises Ltd. v. Alhaji Salmanu Maidawa* dated 27th March, 2002, at pages 13 & 14 - per Mangaji, JCA (of blessed memory) (unreported); my concurring Judgments/Contributions in *Suits No. CA/J/234/2000 - Major-General Musa Bamaïyi (rtd.) v Dandaladi A.S. Garlla* dated 9th December, 2004 (unreported) and *CA/J/241/2001 - Dominic Nwani v. Bakari & anor*
 F also dated 9th December, 2004 (unreported). If learned counsel who appear before this Court, persist in this practice of signing any process of this Court as & Co. without evidence of being duly registered as such, it may be obliged to disregard or discountenance, such process including Briefs. Such signing in my respectful but firm view, is
 G NOT an irregularity as held by the Court of Appeal - per Allagoo, JCA in the case of *Unity Bank PLC v. Oluwafemi* (2007) All FWLR (Pt. 382) 1923 relying on the case of or decision in *Cole v. Martins* (1968) All NLR 161 (Lardner's case). It is a fundamental error. However, in the interest of the litigants, I will go on for the last time, with
 H the merits of this appeal.

In my respectful view, the vexed question or crux of the instant case leading to this appeal is, with respect, the holding by the court below or the basing of its decision on proof of fraud by the Appel-

lants on extraneous matters and worse still, raised by it, *suo motu* and to be specific on what it regarded as suspicion. Even at that, it is settled in criminal matters, that suspicion however great, grave or strong, goes to no issue. At page 100 of the Records, the court below - per Ibiyeye, JCA stated inter alia, as follows:

“The foregoing insertion attracts some curiosity as the origin of it is unclear. The pertinent question is: Who after judgment had been delivered and signed by the President of Ila Native Court on 14. 7.37 prompted the re-opening of the Case? Is it regular to insert P. T.O. (in capital letters) in the middle of an order? These questions which are left unanswered call for strong suspicion and on the respondents could explain it (the suspicion) This he (sic) failed to do. The interjection of these words is, in my respectful view in bad faith and should not be, accorded any probative value.

Apart from this observation, there are glaring omissions, between exhibits B and B1 (being respectively the manuscript and type written script?) which the learned Trial Judge made use of his judgment. Without going into further details on the discrepancies on exhibits B and. B1 which were considered accurate in the lower court. I am of the view that they are replete with suspicion and largely incoherent, in these circumstances, I am of strong opinion that the high standard of proof to establish fraud which is beyond reasonable doubt was not established in the trial Court. There was therefore, with due regard, no basis at all for the learned trial Judge to make an order setting aside- the judgment in Suit No. HOS/1/97 (sic) on the averment of unsubstantiated fraud”.

As noted by me above, these extraneous issue/matters, were raised *suo motu*. They were never raised either in the trial court or even in the court below. It has been stated and restated by this Court in a legion of decided authorities, that a court should and ought not to raise *suo motu*, an issue or issues (although it has a discretion to so do) without inviting the parties or their counsel, to address it on such issue or issues. I note that the learned counsel for the Appellants at page 8 of their Brief, cited/referred to twenty-nine (29) cases/authorities in this regard. He also cited the case of *Plus any a v. Olusanya* (1983) 1 SCNLR 136; (1983) NSCC 97 @ 102 where this Court-per Uwais, JSC (as he then was), stated inter alia, as follows:

“It is abundantly dear from the judgment of the Federal Court

of Appeal that these extraneous matters influenced the learned justice in arriving at the decision to allow the appeal. The court has said on a number of occasions that although an Appeal Court is entitled, in its discretion, to lake points *suo motu* if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only where the points are so taken the parties must be given the opportunity to address the Appeal Court before decision on the points made by the Appeal Court. See *Kuti & Anor. v. Jibowu A Anor* (1971) 1 All N.L.R. (Pt. II) page 180 at page 192; *Salawu Ajao v. Karimu Ashiru & ors.* (1973) 1 All N.L.R. (Pt. II) page 51 at page 63; *Atanda & Anor. v. Lakanmi*, (1974) All N.L.R. (Pt. 1 page) 168; and *Kuti v. Balogun* (1978) 1 LR.N. 353 at page 357".

[underlining mine]

See also the cases of *Chief Elugbe v. Emimigbe & ors.* (2004) 12 SCNJ. 106 at 115; (2004)11 - 12 S.C. 60; (2004) 20 NSCCR 355 and *Mrs. Evangeline Fombo v. Rivers State Housing & Property Development Authority* (2005) 5SCNJ. 213 citing some other cases therein. An issue is said to be extraneous, when it was neither raised nor canvassed at the trial court on pleadings and in the evidence of the parties. See *Olusanya's* case (supra). In the circumstance, I hold that the above said observation and procedure of the court below, with respect, occasioned to the Appellants, a miscarriage of justice. In my humble, respectful and firm view, I allow this appeal on this point or issue alone because, it is most fundamental and what is more, this issue or point, was the main pivot upon which the court below, based or hinged its said Judgment. I agree with the Appellants in their Brief at page 10, that without those critical observations about Exhibit "B and Bl" , its conclusion or decision, would have been different.

If I may add, the attitude of an Appellate Court towards Native, Area or Customary Courts' proceedings, has also been long established in many decided authorities to the effect that the court, should and ought to look at the substance, rather than the form. See the cases of *Ajayi v. Aina* (1942) 6 NLR 67 @ 71 - per Francis, J. (reproduced) *Chuwkwunta v. Chukwu* 14 WACA 34;1 *Adogan v. Ainu* (1964) 1 ANLR 127; *Chief Ajagunjeun & ors. V Sobo Osho of Taku village & ors.* (1977) 5 S.C. 89; *Oyah & anor. v. Ikolide & 4 ors.* (1995) 7SCNJ. 122 @ 131-132 -per Iguh, JSC; *Ekennia v. Nkpakara & 7 ors.* (1997) 5 SCNJ. 70 @ 83 also per Iguh, JSC citing several

other cases therein; *Ajagbonna v. Chief Iledare* (1997) 6 SCNJ. 33 @ 41 - per Ogwuegbu, JSC, citing also, several other cases therein and *Chief Dokubo & anor. v. Chief Omoni & 9 ors.* (1999) 6 SCNJ. 168 @ 180- 181.

In other words greater latitude must be given and broad interpretation placed on such proceedings. The learned counsel for the Appellants has cited and referred to the case of *Odofin & anor. V. Oni* (2001) 1 SCNJ. 130 (not 13) @ 149 - 150 - per Achike, JSC, which he reproduced and which included several other decided cases therein some of them, already mentioned by me above.

As regards documentary evidence, this Court is in as good a position as a trial court, in the evaluation of documentary evidence pursuant to Order 8 Rule 12 (2) of its Rules. The Court can examine also, the said documents and exhibits in question in this case and draw necessary inferences. See the cases of *FSB International Bank Ltd. v. Imano (Nig.) Ltd* (2000) 11 NWLR (Pt. 679) 620 @ 637; (2000) 7 SCNJ 65 - per Achike, JSC and *Gonzee Nig. Ltd. v. Nigerian Educational Research & Development Council & 2 ors.* (2005) 6 SCNJ. (Pt. 1) 25 @ 35; (2005) All FWLR (Pt. 274) 235 @ 247 - 248; (2005) 6 S.C. (Pt.1) 25 @ 35.

There is the pleadings of the Appellants in paragraph 8 of their Statement of Claim. They gave or supplied the particulars of the fraud and testified. There is evidence by the Appellants' witness that, the complete proceedings containing the part that the Respondents hid, concealed or suppressed and were later found at Oluwasanmi Library, Obafemi Awolowo University, Ife. The document is certified. I will stop here.

It is from the foregoing and the fuller lead Judgment of my learned brother, Muntaka-Coomassie, JSC just delivered and which I had the advantage of reading before now and I agree with the conclusion, that I too, allow this appeal, set aside the said decision of the court below and restore the said Judgment of the trial court. I abide by the consequential order in respect of costs.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother, Muntaka-Coomassie, JSC'. I agree with the reasons

therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

The facts leading to this appeal have been properly stated in the leading judgment. Put briefly, based on the incomplete decision of Ila Native Court of 14 -7-37 to wit; Exhibit A2, Oloko, J. found in favour of the respondents herein in his judgment delivered on 23-1-81. The appellants, as plaintiffs, later secured the complete record of the said Native Court to wit: Exhibits B & B1 and in a new suit, claimed that the judgment of Oloko, J. be set aside on ground of fraud and/or misrepresentation. Yusuf, J. entered judgment for the plaintiffs.

The defendants fell unhappy and appealed to the Court of Appeal which had axe to grind with Exhibits B & B1 and allowed the appeal. The plaintiffs felt irked with the stance posed by the Court of Appeal and appealed to this court.

In the appellants' brief of argument, the two issues formulated for determination of this appeal read as follows: -

- "(1) *Whether the lower court was right to have based its decision on proof of fraud upon extraneous matters.*
- (2) *Whether the lower court was right in its finding and decision that fraud was not proved."*

The three issues couched by the respondents have the same tone with the appellants' issues reproduced above. I wish to consider the appellants' own issues.

Learned counsel for the appellants pointed it out that the observations upon which the lower court based its findings and decision were the court's own personal and private observations about Exhibits B & B1. He felt that the court's observations followed its private examination of the documents in Chambers while writing its judgment and not during the normal court session. He opined that the observations are criticisms and attack on the credibility, genuineness or authenticity of the exhibits and a conclusion that they lacked credibility and probative value.

Learned counsel for the respondents felt that the court could embark upon such a venture.

It is clear to me that it is not the responsibility of a court to embark upon "cloistered justice" In making enquiry into the case outside the court, not even by examination of documents which were in

evidence when same had not been examined in the open court. This is because a judge is an adjudicator, not an investigator. See *Duriminiya v. Commissioner of Police*. (1961) NNLR 70 at 74; *Dennis Ivienagbor v. Henry....Osato Bazuaye* (1999) 6 SCNJ 235 at 243.

Let me state it in clear terms that the learned justice of the court below embarked upon cloistered justice to demolish Exhibits B & B1, the pivot of the appellants' case for no just cause. The unusual procedure adopted by the court below should not be allowed to have any effect, have was to no avail.

A court should not set up for parties a case different from the one set up by the parties themselves in their pleadings and or their evidence. See *Oniah v. Onyiah* (1989) 1 NWLR (pt.99) 514; *Ojo Osagie v. Adonri* (1994) 6 NWLR (pt.349) 131.

Both at the trial court and the court below, issue of the credibility, genuineness or authenticity of Exhibits B & B1 was neither raised nor contested, the court below raised it suo motu without calling for input from parties' counsel, the court thereby entered the arena and breached the principle of fair hearing. That was not good enough. See *Atanda v. Lakanmi* (1974) 1 NMLR 345; *Union Bank v. Ozigi* (1994) 3 SCNJ 42; *Olusanya v. Olusanya* (1983) 1 SCNLR 136 at 139; *Kuti v. Balogun* (1978) 1 L.R.N. 353 at p.357.

I observe that the learned justice of the court below went to the extent of criticizing the procedure adopted by the Ila Native Court in recording appearances of parties thereat. Same is a mere formality add not a matter of substance. The procedure of a Native Court should not be subjected to strict principles of law as done in the regular courts of record. Greater latitude and broader interpretation should be accorded to decisions of native courts. See *Efi v. Eyinful* (1954) 14 W.A.C.A. 424; *Ekpo v. Utong* (1900) L.R.C.N. 1473 at 1587; *Odofoin v. Oni* (2001) 1 SCNJ 13; *Olujinle v. Adeagbo* (1988) 2 NWLR (pt.75) 238 at p. 251.

I have no hesitation in resolving issue I in favour of the appellants and against the respondents.

In respect of issue 2, the fraud alleged is that the respondents fraudulently made use of a false and incomplete court proceeding to wit: Exhibit A2 to prosecute suit No. HOS/1/79 and subsequently obtained judgment in their favour. The respondents decided to sweep under the carpet: as it were, the complete proceedings of Ila Native

Court to wit: Exhibits B & B1. In effect, the respondents embarked upon a high degree of misrepresentation to procure judgment in their favour. When the whole gamut of the circumstantial evidence in respect of the surrounding events is carefully considered, fraud can safely be inferred. See *Nasiru v. The State* (1999) 1 SCNJ 83. V Safiu B Amusa 4 Ors. v. The. State (1986)3 NWLR (pt.30) 536.

In my considered view, it goes without saying that fraud and/or misrepresentation was proved by the appellants. It was erroneous of the court below to have found otherwise. I equally resolve Issue 2 C in favour of the appellants and against the respondents.

For the above reasons and the fuller ones contained in the lead judgment, I have no iota of doubt that the appeal is meritorious. It is hereby allowed, The judgment of the court below is set aside while that of the trial court presided over by Yusuf, J. is restored. I D abide by the order on costs contained in the judgment of my learned brother.

E

F

G

H