

SUPREME COURT OF NIGERIA
5TH MARCH, 2010, SC. 232/2003
G. A. OGUNTADE, M. MOHAMMED,
W. S. N. ONNOGHEN, M. S. MUNTAKA-COOMASSIE,
O. O. ADEKEYE, JJSC

1. DR. DAVID CHUKWUEMEKA

OBIEFUNA OKOYE

2. EMMANUEL NNAEMEKA APPELLANT

AGUSIONWU OLIBI

*(For themselves and on behalf
of members of the Olibi family
of Okpuno Aborji village, Oba)*

AND

1. CHRISTOPHER N. OBIASO

2. AMALIWUBA OBIASO RESPONDENT

3. MADUEKE IWEABUDIME (EMEFO)

4. SUNDAY ONYEAGOLUM

APPEALS - Judgments - Findings of fact - Land in Exhibits B and B1
- Whether within the land in dispute - Contrary to argument of appellants - Court of Appeal found both land to be outside the land in dispute (H1)

EVIDENCE - Documents - Exhibit A1 - Weight - There is a concurrent finding that it lacks credibility - Which finding is supported by evidence - So there is no reason to warrant interference with the finding (H2)

LAND LAW - Title - Proof - Respondents' acts of possession - Effect - They constitute conclusive evidence of ownership - Not proof of pledge - As the pledged lands have been shown - To be outside the land in dispute (H3)

EVIDENCE - Documents - Admissibility - Principles - The governing principles are whether the document is pleaded - Whether it is relevant - And whether it is admissible in law (H4)

FACTS

The plaintiffs/appellants sued defendants/respondents before the High Court of Anambra State, sitting at Onitsha, claiming declaration of title to the land in dispute, damages for trespass and injunction, among others. The case of appellants was that the land in dispute comprised two pieces of land pledged by one Onyeuke Agusiokwu to 1st and 2nd respondents respectively, vide two pledge agreements - Exhibits B and B1, and another area of land which 2nd to 4th respondents hold of appellants on customary tribute. Appellants allege that the land pledged by Onyeuke Agusiokwu were part of appellants' family land and were pledged as such. On the other hand, while they did not deny the pledge by Agusiokwu, respondents posit that the land pledged were personal property of the pledgor and were pledged as such, moreover that the pledged land were outside the land now in dispute. Respondents maintain that the land in dispute belonged to them. Appellants tendered exhibits A1, a composite plan meant to prove that the land in exhibits B and B1 were part of the land in dispute.

Both parties pleaded and relied on customary arbitration which they said was held by the village elders on the instant land dispute. But each side alleged that the award was in their favour. However, though respondents tendered exhibit J as the written award of the arbitration panel, appellants tendered no counter version, nor did they contest the content of exhibit J which was in favour of respondents. Appellant nonetheless contested the admissibility of exhibit J. After hearing, the learned trial judge found for respondents as he held that the pledged lands were not part of the land in dispute despite exhibit A1. The court therefore, held that in view of the exercise of acts of possession by respondents not explained by appellants, appellants had failed to prove their claims. Aggrieved, appellants appealed to Court of Appeal which appeal was dismissed. This is their further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the court below directed itself properly and correctly on the evidence of acts of possession and the location of the lands under pledge as per exhibits B, B1 and A1 in relation to the land in dispute.

2. Whether exhibit J was admissible and rightly admitted as a record in proof of the customary arbitration between the appellants and the respondents."

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)
Land in Exhibits B and B1 - Whether within the land in dispute

1. To begin with, it is the argument of learned counsel for the appellants that the Court of Appeal in exhibit H found that the lands evidenced in exhibits B and B1 are located within the land in dispute contrary to what the lower courts found in the instant case. That, with respect, is not borne out by the record at all.

Apart from finding that the pieces of land pledged are outside the land in dispute, the Court of Appeal also found in exhibit H, that the said pieces of pledged land are the personal property of the pledgor. (p. 1340 C / 1341 A)

EVIDENCE - Documents - Exhibit A1 - Weight

2. It is very important to note that the lower courts also concurrently found that exhibit A1 was tailored to meet the case of the appellants though they said so in different ways. Their conclusion on the matter clearly demonstrates their disbelief of exhibit A1 or lack of its credibility. I find no special circumstance to warrant this Court's interference with the concurrent findings of fact by the lower courts as the same were not perverse or in any way unsupported by evidence on record. In fact the finding is supported by the testimony of PW8 reproduced in Exhibit H to the effect that you have to pass through the pledged lands to reach the land in dispute. (p. 1341 C)

Title - Proof - Respondents' acts of possession - Effect

3. It follows clearly that with the finding that the pledged lands fall outside the disputed land, the acts of possession and ownership by the respondents over the piece of land in dispute cannot be said to be the acts of possession exercised by a pledgee of land, which cannot, in law, ripen to ownership of the land in question. It is therefore clear and I also hold, that the lower courts were right in holding that the numerous acts of possession exercised by the respondents on the land in dispute in recent time constitute conclusive evidence of ownership of the land in question particularly as the traditional history

relied upon by the parties in attempt to establish their title to the land proved inconclusive. (p. 1341 F)

Documents - Admissibility - Principles

B 4. It is settled law that the issue of admissibility of any documentary evidence is governed by the principle as to whether or not the document is pleaded by the party (ies) to the proceedings; whether it is relevant to the subject matter of inquiry by the court or tribunal and whether it is admissible in law.

C Exhibit J was pleaded in paragraph 23 of the further, further amended statement of defence. It is relevant to the inquiry being undertaken or conducted by the court and is admissible in law. Exhibit J therefore satisfies the conditions for admissibility laid down by this Court in *Okonji vs Njokanma* (1999) 14 NWLR (pt. 638) 250.
D (pp. 1343 D / 1346 D)

REPRESENTATION

A.I. Ani Esq., (T. Maduka Esq. with him) for the Appellants.

G. E. Ezeuko Jnr. Esq. O. B. Mbanisi (Mrs.) for the Respondents.

E

CASES REFERRED TO

Etiko vs Aroyewum (1959) 4 FSC 129 at 131

Briggs vs Briggs (1992) 2 NWLR (pt. 228) 128

F Agu vs Ikwewibe (1991) 3 NWLR (pt. 180) 385

Duniya v. Jimoh 1994 3 NWLR Pt. 334 Pg. 609

Ohaeri v. Akabeze (1992) 2 NWLR pt. 221 page 1

Aashnu vs Adekoya (1974) 1 All NLR 35 at 41-42

B. O. N. v. Saleh (1999) 3 NWLR Pt. 981 Page 145

G Korki vs Magnusson (1993) of NWLR (pt. 317) 287

Oyediran v. Alebiosu 1992 6 NWLR Pt. 249 Pg. 550

Olufosoye vs Olurunfemi (1989) 1 NWLR (pt. 95) 26

Okonji vs Njokonina (1999) 14 NWLR (pt. 638) 250

Anyabunsi V. Ugwunze (1995) 6 NWLR (pt. 401) Pg. 255

H Onwugbufor vs Okaye (1996) 1 NWLR (pt. 424) 252 at 281

Fawehinmi v. N. B. A (No. 2) 1989 2 NWLR Pt. 105 Page 558

Omega Bank (Nig) PLC vs O. B. C Ltd (2005) All FWLR (pt: 249) 1964

STATUTE REFERRED TO

Evidence Act, s. 91

LEAD JUDGMENT BY ONNOGHEN JSC

The appellants were plaintiffs at the High Court of Anambra State, Holden at Onitsha in suit NO. 0/40/76 in which they claimed the following reliefs against the respondents who were then the defendants: B

“(a) A declaration that the plaintiffs are entitled to customary right of occupancy of the land hereinbefore described as the land in dispute, the annual valued of which is N40.00.” C

“(b) An order of court for the 1st and 2nd defendants to accept the redemption fee paid by them to the said pledged land delineated on the plaintiffs, Plan No. NG/AN 180/99 and therein hatched blue.” D

“(c) An order of court for forfeiture against the 2nd, 3^d and 4th defendants in respect of the areas on customary tribute hatched red on the plaintiffs’ plan.”

“(d) N400.00 General Damages for trespass and wanton destruction of the plaintiffs’ economic crops on the land in dispute outside the area pledged to the 1st and 2nd defendants as aforesaid.” E

“(e) perpetual injunction to restrain the defendants, their servant, agents, representatives and each and everyone of them from any further acts of trespass upon the said land or from interfering in any way whatsoever with the plaintiffs’ enjoyment of the said land.” F

Parties to the action filed and exchanged their pleadings. The action was instituted and prosecuted in a representative capacity. The land in disputed is called “*Ana Abogwugwu*” by the appellants and is said to situate at Okpuno Aborji village in Oba which the appellants claim was pledged in 1968 to 1st and 2nd defendants which the family sought to redeem. G

At the conclusion of trial, the learned trial judge dismissed the case of the plaintiffs/appellants who consequently appealed to the Court of Appeal which found no merit in the appeal and dismissed same. The present appeal is a further appeal by the appellants against the judgment. H

Both parties are natives of Oba town, in Anambra State, which town was founded by their common ancestor, OBA. It is agreed

by the parties that the said OBA had nine (9) sons. Apart from the above two basic facts, the traditional history/evidence as to who came to own the land in dispute conflicts with each other with each party pleading its own version. However both parties rely on acts of recent possession over the land in dispute in addition to their version of traditional history as to how they came to own the land in question. Both parties also pleaded a customary arbitration which took place between the parties in 1975 and was conducted by the elders of Oba town/community who rendered a decision thereon, though the verdict varied between the parties.

It is not disputed that sometime in 1968, two pieces of land were pledged by one ONYEUE AGUSIOKWU to the 1st and 2nd defendants/respondents respectively, which transaction was evidenced in exhibits B and B1, tendered by the plaintiffs/appellants. It is the contention of the appellants that the said pieces of land situate, and/or are contained within the land in dispute, which extent is delineated in exhibit A - a survey plan also tendered by the appellants. On the other hand, the defendants/appellants concede the pledge of the two pieces of land in dispute but contend that they do not only fall outside the disputed land but were the personal property of the pledgor as against the claim of family ownership put forward by the plaintiffs/appellants. To prove that the two pieces of pledged land fall within exhibit A, the appellants tendered exhibit A1, which is a composite plan or a superimposed plan resulting from the superimposition of appellants' plan, exhibit A, on the defendants/respondents' plan, exhibit G.

However, the learned trial judge, after reviewing the evidence before the court held that the traditional history of the parties were in conflict thereby necessitating his application of the principles in *Kojo vs Bonsie* by having recourse to acts of ownership and possession by the parties on the land in dispute extending over a period of time in resolving the issue of the ownership of the said land and come to the conclusion that the evidence of the defendants/respondents is to be preferred to that of the plaintiffs/appellants; that the pieces of land in dispute do not belong to the family of the plaintiffs/appellants but was the personal property of the pledgor and that they fall outside the land claimed by the plaintiffs/appellants in exhibit A.

On the question of customary arbitration pleaded by both par-

ties, the court found that the plaintiffs/appellants abandoned their pleadings in that respect as they adduced no evidence to establish their version of the outcome or decision of the arbitration which they had pleaded was for the defendants to swear to a juju oath but which the defendants failed/or neglected to do; that the defendants/respon- B
dents, on the other part testified and established the fact of the cus-
tomary arbitration and the decision of the arbitrators as evidenced
in exhibit J, to be in their favour. The trial court therefore held that
exhibit J is binding on the parties as the same satisfies all require-
ments of traditional/customary arbitration and that the plaintiffs/ap- C
pellants are consequently estopped from relitigating the issue of own-
ership of the disputed land.

From the summary so far, it is very clear that it does not matter which version of traditional history was accepted by the learned trial judge and affirmed by the lower court particularly as exhibits B D
and B1, which have not been denied by the respondents clearly show
that two pieces of land belonging to the pledgor were pledged by
him to the 1st and 2nd defendants/respondents. However, the issues
relevant to the determination of the dispute are:

(a) Whether the land in exhibits B and B1 are the personal E
property of the pledgor or his family property as contended by the
appellants.

If the pledged lands are the personal property of the pledgor they cannot be part of the disputed land which is said to be the com- F
munal/family property of the plaintiffs/appellants as both modes of
ownership cannot co-exist in relation to the same property. That will
be so irrespective of exhibit A1 which purports to put the pledged
lands within the land in dispute. On the other hand, if the pledged
lands form part of the communal/family land of the plaintiffs/ap- G
pellants then the established fact of pledge of the pieces of land is suffi-
cient to establish the claim of ownership put forward by the plaintiffs/
appellants vis-a-vis the defendants/respondents particularly as it is
settled law that a pledge does not ripen into ownership because once
a pledge, always a pledge. That apart, by the operation of section 46 H
of the Evidence Act, acts of possession and enjoyment of land may
be evidence of ownership or right of occupancy not only of the par-
ticular piece of land with reference to which such acts are done, but
also of other land so situated or connected therewith by locality

that what is true as to the one piece of land is likely to be true of the other piece of land.

(b) The other issue is whether the pledged lands fall within the disputed land being claimed by the plaintiffs/appellants, and,

(c) Whether the customary arbitration was proved, if so what B is the legal consequences flowing therefrom.

As stated earlier in this judgment, the trial court dismissed the case of the plaintiffs and their appeal to the lower court was also dismissed.

C In the appellants brief deemed filed on the 11th day of June, 2009, learned counsel for the appellants, ANTHONY I. ANI ESQ, submitted the following two issues for the determination of the appeal. The issues are as follows:-

1. Whether *the court below directed itself properly and cor-*
D *rectly on the evidence of acts of possession and the location of the*
lands under pledge as per exhibits B, B1 and A1 in relation to the
land in dispute (distilled from grounds 1 and 3 of the grounds of
appeal).

2. Whether *exhibit J was admissible and rightly admitted as a*
E *record in proof of the customary arbitration between the appellants*
and the respondents (distilled from ground 2). "

In arguing issue 1, learned counsel for the appellants submitted that the lower court failed to give adequate and deserved consid-
F eration to the conclusion of the trial court that the pledged land, as
evidenced in exhibits B and B1 were located outside the disputed
land and thereby resulted in a serious miscarriage of justice; that the
pleadings and evidence from the plaintiffs/appellants particularly, ex-
hibits A and A1 show clearly that the pledged land fall within the
G disputed land; that the lower court was in error in affirming the find-
ing of the trial court that the pledged land do not fall within the land
in dispute; that exhibit A1 clearly places the pledged land within the
disputed land and as the same is documentary, the court ought to
have relied on same as a hanger from which to assess the truth or
H otherwise of the oral testimony to the effect that the land was outside
the disputed land, relying on *Aashnu vs Adekoya* (1974) 1 All NLR
35 at 41-42; that the evidence of the surveyor who prepared and
tendered exhibit A1, PW1, was not challenged either under cross
examination or by any other document and that the said exhibit

ought to have been used to test the oral evidence as to the location of the pledged land; that in exhibit H, the Court of Appeal came to the conclusion that the pieces of land in exhibits B and B1 fall within the disputed land; that a survey plan is the best evidence of the location of any piece of land, relying on *Briggs vs Briggs* (1992) 2 NWLR (pt. 228) 128; *Awofolaju vs Adedoyin* (1992) 8 NWLR (pt. 260) 492; that the lower court went outside the record to make findings on exhibit A1 not supported by the evidence; that the fact that the pledged land forms part of the disputed land had been found by the trial court in an earlier trial, and by the Court of Appeal upon an appeal on that judgment as evidenced in exhibit H and that the learned trial judge in the instant case has no power to set aside the said findings of facts; that the lower courts were in error in regarding all the evidence of acts of possession by the defendants/respondents as conclusive evidence of acts of ownership particularly in view of the fact of the pledge of the two pieces of land, thereby making such acts, the acts of pledges that will not ripen to ownership; that the lower courts were in error when they held that the two pieces of land pledged were the personal property of the pledgor.

On the other hand, Learned Counsel for the respondents G. E. EZEUKO (JNR) in the amended respondents' brief filed on the 7th day of July, 2009 formulated three issues for determination. The issues are as follows:-

"1. Whether the two parcels of land pledged per Exhibits B and B1 are outside or within the land in dispute - GROUND ONE"

2. Whether the court below was right when they found that the arbitration of Oba elders admitted as Exhibit J was admissible and acts as estoppels against the appellants – GROUND TWO"

3. Whether the court below was right in relying on the principles in the case of Kojo II vs Bonsie to resolve the conflicting and inconclusive traditional histories of the parties – GROUND THREE".

In arguing his issue 1, learned counsel referred the court to the testimonies of PW2 at pages 110 and 111 of the record; PW3 at page 118; DW2 at page 123 and the findings of the lower courts at pages 186 and 281 of the record and submitted that there is abundant evidence that the pledged lands are outside the land in dispute and that they were the personal lands of the pledgor; that the court cannot add to the words used in exhibits B and B1, an agreement

signed by the parties thereto, relying on section 132 of the Evidence Act, *Korki vs Magnusson* (1993) of NWLR (pt. 317) 287; *Agbareh vs Mimra* (2008) All FWLR (pt. 409) 559; that the appellants cannot be heard to contradict what they pleaded; that this court should not interfere with the concurrent findings of fact by the lower courts as
B there is no reasons to do so; that the argument of counsel for the appellants that in exhibit H the Court of Appeal found that exhibits B and B1 were within the land in dispute is not borne out of the record and referred the court to page 186 of the record where the trial court reproduced the relevant part of exhibit H; that the said court actually came to the conclusion that the land in exhibits B and B1 were
C the personal lands of the pledgor and that they exist outside the disputed land.

Learned Counsel further submitted that where the evidence
D of traditional history by the parties conflict or is inconclusive, the court will have recourse to recent acts of possession and ownership, relying on *Balogun vs Akanji* (1988) 1 NWLR (pt. 70) 301; *Onwugbufor vs Okaye* (1996) 1 NWLR (pt. 424) 252 at 281. Referring to the pleadings and evidence of traditional history, learned counsel submitted
E that since they conflict with each other, the lower courts were right in resorting to acts of possession and ownership exercised by the parties to determine ownership of the land in dispute; that the acts of possession and ownership of the respondents were numerous and positive enough to warrant the inference that they own the land in dispute; that though the plaintiffs/appellants pleaded that they had tenants on the disputed land, they called none to testify to that effect; that the trial court was right in its findings which were rightly affirmed by the lower court and urged the court not to disturb the concurrent
F findings of facts.
G

There is no doubt that the issue under consideration has to do with the concurrent finding of facts by the lower courts in relation to the issue as to whether the pledged land is the personal property of the pledgor and whether the said pieces of land fall within the land
H in dispute or outside it. I had earlier stated in this judgment that if the pledged lands fall within the land in dispute which is said to be family or communal land, and are not the personal lands of the pledgor, then the principle that once a pledge always a pledge or that a pledge does not ripen to ownership of the pledged property will apply to the

facts of the case to weigh the evidence of acts of possession and ownership in favour of the appellants because the acts of possession exercised by a pledgee cannot be equated to the acts of the owner of the property.

In the instant case, the lower courts have found as a fact that the pledged lands were not the family property of the appellants but the personal property of the pledgor and that they fall outside the disputed land. It is in evidence that people do own land both individually and communally in Oba Community and that the pledgor owned personal land. This shows clearly that individual ownership of land in the community is not unknown. After evaluating the evidence on record, the trial court found as follows at pages 186 - 187 of the record:

"It is the finding of the court on the evidence and materials before it that the pledged lands are not only personally owned by Onyeuke Agusiokwu but outside the land said to be in dispute in the case. The plaintiffs' plan Exhibit A showing the pledged lands as being with

the land in dispute appears to me to be used to suit the case of the plaintiffs. It is I prefer Exhibit G the Defendants' plan."

The above finding was by the judge whose duty it is to make them after listening to witness testify and watching their demeanor. It is settled law that it is the primary duty of a trial court to evaluate the evidence and ascribe probative value thereto. When the matter came before the lower court, the court affirmed the above findings at page 281 of the record in the following terms:

"From what has been said earlier on, the learned trial judge's findings above appear down to earth and pragmatic. The appellants tried to depict that their Exhibit A and Exhibit G are said to be on the same scale. And yet the situations of the pledged lands in Exhibit G outside the land in dispute have been transplanted and fixed within the land in dispute in Exhibit A1. In Exhibit G, the two pledged lands appear co-joined out of the land in dispute. But in Exhibit A1, the two plots of pledged land are separated and placed at fairly opposite ends within the lands in dispute. An undiluted map reading clearly shows that the appellants tried to play pranks but at the end, they were caught by their own web of deceit. They attempted to hide

behind one finger to no avail."

The law on concurrent finding of facts is very settled. It is that this Court does not make a practice of interfering with the concurrent findings of fact by the lower courts except where there are special circumstances to warrant same, such as findings are perverse or not supported by the evidence or there is a wrongful application of substantive or procedural law etc., etc.

In the instant case, can it be said that the findings of the lower courts are perverse to warrant being set aside on any ground known to law? A close examination of the record reveals that the findings are supported by the evidence on record. **To begin with, it is the argument of learned counsel for the appellants that the Court of Appeal in exhibit H found that the lands evidenced in exhibits B and B1 are located within the land in dispute contrary to what the lower courts found in the instant case. That, with respect, is not borne out by the record at all** as what the Court of Appeal said in exhibit H, was reproduced in full by the lower court at page 186 of the record as follows:-

"With due respect to the learned judge, it seems to me he took a beclouded premise to arrive at an inevitably wrong conclusion. Exhibits B and C (B - B1 in this proceedings) specifically say that the parcels of land pledged are owned by one Mr. Onyeuke Agusioku. In fact Exhibit B makes it clear that he 'personally owned' the parcels of land therein referred to. It cannot therefore be argued by the plaintiffs in support of their case that the said parcels of land pledged formed party of their family land. In other words, they cannot rely on those exhibits and alter what they say in clear words simply to support their case as to the ownership of the parcels of land therein pledged. The evidence of PW8 Obiefio Ibeabuchi, who testified on behalf of the plaintiffs confirms a distinction between the plaintiffs' family land said to be in dispute and Agusioku land. He said under cross-examination 'I know one Agusioku of Oliobi family. I have to go from Agusioku's land to reach the land in dispute'. That is what in effect the defendants have said all along. They aver that the lands pledged by Agusioku are not within the land in dispute but within his personal land. They said so in evidence. Their survey plan which is identical with the plaintiffs survey plan as regards the land in dispute puts the pledged lands outside the land in dispute."

From the above passage from exhibit H, it is very clear that learned counsel for the appellants was very economical with the truth when he stated in his brief that the Court of Appeal found, in exhibit H, that the pieces of land pledged in exhibits B and B1 are within the land in dispute. That is very unfortunate, to put it very mildly. **Apart from finding that the pieces of land pledged are outside the land in dispute, the Court of Appeal also found in exhibit H, that the said pieces of pledged land are the personal property of the pledgor.** So you have a situation of three courts making the same findings of fact, not even two, in the instant case.

It is very important to note that the lower courts also concurrently found that exhibit A1 was tailored to meet the case of the appellants though they said so in different ways. Their conclusion on the matter clearly demonstrates their disbelief of exhibit A1 or lack of its credibility. I find no special circumstance to warrant this Court's interference with the concurrent findings of fact by the lower courts as the same were not perverse or in any way unsupported by evidence on record. In fact the finding is supported by the testimony of PW8 reproduced in Exhibit H to the effect that you have to pass through the pledged lands to reach the land in dispute. PW8 was called by and did testify on behalf of the plaintiffs, and his testimony clearly put the pledged lands outside the land in dispute contrary to exhibit A1. PW8's evidence on the point also accords with exhibit G, the survey plan of the respondents which the trial court accepts as being the true representation of the extent of the land in dispute vis-a-vis the pledged lands.

It follows clearly that with the finding that the pledged lands fall outside the disputed land, the acts of possession and ownership by the respondents over the piece of land in dispute cannot be said to be the acts of possession exercised by a pledgee of land, which cannot, in law, ripen to ownership of the land in question. It is therefore clear and I also hold, that the lower courts were right in holding that the numerous acts of possession exercised by the respondents on the land in dispute in recent times constitute conclusive evidence of ownership of the land in question particularly as the traditional history relied upon by the parties in attempt to establish their

title to the land proved inconclusive. The case of the appellants with regards to acts of possession and ownership of the land is made worse by the fact that though the appellants pleaded that in the exercise of their right of ownership of the said disputed land they let out portions thereof to tenants, the appellants called no tenant to testify to that very important fact, thereby abandoning their pleading in that respect.

On issue 2, learned counsel for the appellants submitted that exhibit J was inadmissible and that the trial court wrongly overruled the objection of learned counsel for the appellants on admissibility of the said exhibit J as the same did not satisfy the two conditions stated in section 91 (l) (a) and (b) of the Evidence Act; that the maker of exhibit J was not called to tender same, relying on *Etiko vs Aroyewum* (1959) 4 FSC 129 at 131; *Atolabi vs Shorun* (1985) 1 NWLR (pt. 2) 360; *Olufosoye vs Olurunfemi* (1989) 1 NWLR (pt. 95) 26; that the lower court was in error in not holding that exhibit J was wrongly admitted in evidence; that the circumstances mentioned in subsection (2) of section 91(1) which would have made exhibit J otherwise admissible were never adverted to nor found to exist before admitting same; that the court has no power to admit a copy of a document which was not certified neither was the signature of the maker, Mr. Ejelogu proved; that it was not proved that the parties to the arbitration voluntarily submitted to the customary arbitration, etc, etc, relying on *Agu vs Ikewibe* (1991) 3 NWLR (pt. 180) 385; *Ohaeri vs Akabueze* (1992) 2 NWLR (pt. 221) 1. Learned counsel urged the court to resolve the issue in favour of the appellants and allow the appeal.

On his part, learned counsel for the respondents referred to the case of *Okonji vs Njokonina* (1999) 14 NWLR (pt. 638) 250 and submitted that three main criteria govern admissibility of documents, namely:

- (a) whether the document is pleaded
- (b) whether it is relevant to the inquiry by the court, and,
- (c) whether it is admissible in law;

that exhibit J satisfies the three conditions as the same was pleaded by both parties, it is relevant to the facts of the case and there is no law against its admissibility; that a document can be admitted in the absence of the maker, the key to its admissibility being relevance,

relying on Omega Bank (Nig) PLC vs O. B. C Ltd (2005) All FWLR (pt. 249) 1964; Igbodin vs Obianke (1976) 9 - 10. S. C 179; that exhibit J was the copy given to the respondents by the arbitrators and that there is no requirement that the signature of the secretary of the arbitrators must be proved as issues were never joined on it; that the appellants are bound by exhibit J haven voluntarily submitted to the arbitration etc and urged the court to dismiss the appeal. B

It must be pointed out that the argument of learned counsel for the appellants on issue 2 is limited to the issue of admissibility of exhibit J and does not extend to the consequences of the decision of the arbitration panel evidenced in exhibit J. C

The question therefore remains whether exhibit J is admissible in evidence. Learned counsel for the appellants has submitted that it was inadmissible while counsel for the respondents contends that it is admissible. D

It is settled law that the issue of admissibility of any documentary evidence is governed by the principle as to whether or not the document is pleaded by the party (ies) to the proceedings; whether it is relevant to the subject matter of inquiry by the court or tribunal and whether it is admissible in law. E

In making the submission under issue 2, learned counsel for the appellants relied on the provisions of section 91 (i) (a) and (b) of the Evidence Act which provides as follows:-

“91 (1) In any civil, proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document, and tending to establish that fact shall on production of the original document be admissible as evidence of that fact if the following conditions are satisfied. F

(a) If the maker of the statement either
(i) had personal knowledge of the matters dealt with by the statement G

(b) If the maker of the statement is called as witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness or if he is beyond the seas and it not reasonably practicable to secure the attendance, or if all reasonable efforts to find him have H

been made without success.”

Before one can decide on the relevance or applicability of section 91 (a) and (b) supra, it is necessary to look at the pleadings of the parties, the evidence, the objection and ruling thereon.

In paragraph 40 of the Further, Further Amended Statement of Claim, the plaintiffs/appellants pleaded as follows:-

“40 Before that date, the defendants planted beacons beyond the three portions of land over which they were expected to take oath. The elders saw the beacons which enclosed other lands of the plaintiffs and other peoples' lands and then insisted that the defendant should confine their oath taking to the three portions which the plaintiffs said were let on customary tribute to them but the defendants refused. By a letter dated 29th June, 1975 hereby pleaded by Mr. Jerry Ejelogu, the then Secretary to Oba elders meeting, communicated to the 1st plaintiff the said decision of the elders. The plaintiffs will found on the said letter.”

Emphasis supplied by me.

On the other hand, the defendants/respondents pleaded in paragraph 23 of their Further, Further Amended Statement of Defence as follows:-

“23. The parties voluntarily submitted to the customary arbitration of the meeting of Oba Elders and agreed to be bound by their findings and award. The arbitrators heard both parties during several sittings and inspected the land. On 5/5/75, the arbitrators published their award and positively informed the plaintiffs that the land in dispute does not belong to them and that the land belongs to the defendants. The defendants will found and rely on their own copy of the recorded decision of the said Oba Elders Arbitration signed and delivered them by the Secretary of the said Oba Elders meeting, Mr. Jerry Ejelogu, as estoppels against the plaintiffs.”

In his evidence in chief, DW5 stated at pages 138 - 139 of the record, inter alia:

“In February 1975 Isaac Okoye without leave broke into the land at an area being farmed by the 4th defendant and started cutting down some of the economic trees on the land We reported the matter to the meeting of Oba elders who are charged to look into civil disputes in Oba. The body is composed of elders from each of nine villages that compose Oba. The elders invited both parties to

their meeting. We answered their summons. The elders demanded to know from the parties if they would submit to their arbitration and if we would accept their decision as final. We all consented. Before the elders went into the matter a fowl was killed and parties partook of it as a sign of covenant (sic covenant) to be bound by the decision (Igbandu)..... After visiting the land, heard from the parties questions asked, they decided that the land belongs to Umuokpagu and that it situate in Umuogati. B

The arbitration of the elders was recorded by their secretary Jerry Ejelogu from Isu village. C

We later demanded and obtained a copy of the proceedings and decision of the arbitration committee of the elders (minutes of minutes identified) Seeks to tender....."

The tendering of the document was objected to by learned counsel for the appellants in the following terms: D

"Chief Mogbo objects says it does not accord with what the defendants pleaded in paragraph 23 of their further, further amended Statement of Defence. If it was the copy given to the defendants, it has to be certified. The writer has got to come and show that it was a copy of the record he kept. No proof of the signature of the Secretary and no evidence that Jerry Ejelogu made the copy....." E

After the reply by learned counsel for the defendants, the trial court ruled as follows:-

"The defendants pleaded the document sought to be tendered in paragraph 23 of their further, further amended statement of defence. The witness led evidence in accordance with what they pleaded in the paragraph. The document is relevant and admissible. The objection is overruled. Documents admitted and marked exhibit J." F G

It should be noted that learned counsel for the appellants did not revisit the issue of admissibility of exhibit J in his address nor in the issues submitted by him to the trial judge for resolution as reproduced in the judgment of the trial court at pages 183-184 of the record - there were 11 issues in all. Secondly, the relevant issue submitted by learned counsel for the appellants to the lower court for determination is issue 1 which posited thus:- H

"1. Whether the respondents pleaded and established a customary arbitration according to law which could operate as estoppels

against the appellants.”

I have gone through the argument of counsel on the above issue and can conclusively say that it does not include a challenge to the admissibility of exhibit J. I have equally gone through the judgment of the lower court which also confirms the fact that the issue of
B admissibility of exhibit J was never considered by that court. The issue, as presently constituted, is therefore a fresh issue being raised for the first time in the appeal before this Court.

In any event it is very clear from the pleadings that both
C parties pleaded the customary arbitration by Oba elders in relation to the disputed land and indicated intention to rely on the decision reached by that body. However, while the appellant’s pleaded that the decision was in their favour, the respondents pleaded the contrary. The appellants were therefore, under the circumstances not
D taken by surprise by the respondents. Surprisingly however, the appellants who pleaded reliance on the decision of Oba elders refused and or neglected to tender same in evidence. As I had earlier found/held, which is also the same by the lower courts, **exhibit J was
pleaded in paragraph 23 of the further, further amended statement of defence. It is relevant to the inquiry being undertaken or conducted by the court and is admissible in law. Exhibit J therefore satisfies the conditions for admissibility laid down by this Court in Okonji vs Njokanma (1999) 14 NWLR (pt. 638) 250.** Exhibit J touches on the same land earlier dealt with by
F Oba elders under customary arbitration and therefore very relevant to the case; it was a copy given to the respondents by the secretary to the Oba elders who handled the arbitration as testified to by DW5 who can legally tender exhibit J as the document given to them in
G the circumstances described. It does not need the secretary of Oba elders to tender it before it can be admissible in evidence neither does it require proof of the signature of the said secretary particularly when the appellants never challenged by way of reply, the facts pleaded in paragraphs 22 and 23 of the further, further amended statement
H of defence so as to join issues on the authenticity of exhibit J. Exhibit J is also not a public document to require certification. I therefore resolve issue 2 against the appellants.

In conclusion, I find no merit whatsoever in this appeal which is hereby dismissed by me with N50,000.00 costs against the appel-

lants. The judgment of the lower court is hereby affirmed by me.
Appeal dismissed.

OGUNTADE JSC

I have the advantage of reading in draft the lead judgment by my learned brother Onnoghen JSC. I agree with his reasoning and his general approach in the treatment of the issues. Further I share his opinion that this appeal has no merit. I would also dismiss it with costs as with costs as assessed in the lead judgment.

MOHAMMED JSC

The judgment just delivered by my learned brother Onnoghen, JSC was read by me in draft before today. I entirely agree with him that there is no merit at all in this appeal. Accordingly, I also dismiss the appeal with N50,000.00 costs to the Respondents.

MUNTAKA-COOMASSIE JSC

I have read in advance the lead judgment read by my learned brother Walter Onnoghen JSC. I agree entirely that the appeal has no merit and that it should be dismissed. I, with respect, adopt the reasons and conclusion given in the said lead judgment. Accordingly the appeal is hereby dismissed by me with N50,000 costs against the appellants. The decision of the lower court it is hereby restored and affirmed. Appeal dismissed.

ADEKEYE JSC

I was privileged to read before now the judgment just delivered by my brother W. S. N Onnoghen JSC. My Lord had meticulously considered the three issues raised for determination in this appeal. I agree absolutely with his reasoning and conclusion in all the three issues. I shall however add a few words on the admissibility of Exhibit J - the Customary Arbitration of Oba Elders, as estoppel against the appellants by way of emphasis. Ordinarily admissibility of evidence is governed by section 6 of the Evidence Act. The cardinal

consideration in the admissibility of a document is relevance. Once a piece of document is relevant, it is admissible.

Fawehinmi v. N. B. A (No. 2) 1989 2 NWLR Pt. 105 Page 558 SC.

B. O. N. v. Saleh (1999) 3 NWLR Pt. 981 Page 145

B F. B. N. PLC v. Jibo (2006) 9 NWLR Pt. 985 Pg. 261

Torti v. Ukpabi (1984) 1 SCNLR p9 224

However, there is a distinction between admissibility of a document, and the weight to be attached to it, when put through the crucible of evaluation of evidence and the weight to be attached to it.

C The courts have always engaged three criteria in the admissibility of a document like:-

1. Whether the document is pleaded

D 2. Whether the document is relevant to the subject matter of dispute.

3. Whether it is legally admissible.

Duniya v. Jimoh 1994 3 NWLR Pt. 334 Pg. 609

Oyediran v. Alebiosu 1992 6 NWLR Pt. 249 Pg. 550

Okonji v. Njokanma 1999 14 NWLR Pt. 638 Pg. 250.

E Exhibit J is relevant as it was made in respect of the Land subject matter of dispute. It was pleaded by the plaintiffs/appellants in paragraph 40 of their Further, Further Amended statement of claim - (vide page 75 of the Record). The defendants/respondents pleaded same in paragraphs 22 and 23 of their Further, Further Amended
F Statement of Defence.

The relevant paragraphs read paragraph 75 of Further, Further Amended Statement of claim-

Paragraph 75

G *"Before that date, the defendants planted beacons beyond the three portions of Land over which enclosed other Lands of the plaintiffs and other people Lands and then insisted that the defendants should confine their oath taking to the three portions which the plaintiffs said were let on customary tribute to them. But the defendants refused. By a letter dated 29th June 1975 hereby pleaded by*
H *Mr. Jerry Ejelogu the then secretary to Oba Elders meeting, communicated to the 1st plaintiff the said decision of the elders. The plaintiffs will found on the said letter".*

Paragraphs 22 and 23 of their Further, Further Amended

Statement of Defence. Paragraphs 22

"In answer to paragraphs 37 and 38 of the further amended statement of claim, the defendant say that in or about the month of February 1975, one Isaac C. O. Okoye, the Okpala of Oliobi family, without leave or license of the defendants broke and entered the entered the defendants said Land called "Ani Umuokpagu" and started cutting down some economic trees thereon, whereupon the defendants referred and reported the said Mr. Okoye's wrongly act to the meeting of Oba Elders, a customary body that arbitrates on Civil disputes in Oba. Both the said Isaac Okoye and the 2nd plaintiff brought this action for themselves and on behalf of the members of Oliobi family".

Paragraph 23

"The parties voluntarily submitted to the customary arbitration of the meeting of Oba Elders and agreed to be bound by their findings and award. The arbitrators heard both parties during several sittings and inspected the land. On 5/5/75 the arbitrators published their award and positively informed the plaintiffs that the Land in dispute does not belong to them and that the Land belongs to the defendants. The defendants will found and rely on their own copy of the recorded decision of the said Oba Elders arbitration signed and delivered to them by the secretary of the said Oba Elders meeting, Mr. Jerry Ejelogu as estoppel against the plaintiffs".

The plaintiffs/appellants did not file a reply to the paragraphs 22 and 23 of the Further and Further Amended statement of defence. The 1st plaintiff/appellant giving evidence as PW2 under cross examination said:-

"It is correct that the Elders of Oba went into the dispute between us and the defendants. The defendants reported us to Oba Elders in accordance with Oba custom, my elder brother was sent for, I do not know if my elder brother agreed that Oba Elders should look into the matter as I was not there. The secretary of the elders at the time was Jerry Ejelogu. I did not attend the deliberations. I heard of the settlement of the secretary furnished me with a copy of their decision. My brother told me as the deliberations were going on with the elders. I do not know if the decision of Oba Elders were reduced in writing, I do not know the number of time they sat to settle the matter. They reached a decision communicated to me by the secre-

tary”

(vide page 115 of the Record).

The 1st defendant/respondent gave evidence as DW5 and stated:-

B “We reported the matter to the meeting of Oba Elders who
are charged to look into civil disputes in Oba. The body is composed
of elders from each of the nine villages that compose Oba. The elders
invited both parties to their meeting. We answered their summons.
C The elders demanded to know from the parties if they would submit
to their arbitration and if we would accept their decision as final. We
all consented. Before the elders went into the matter, a fowl was
killed and parties partook of it as a sign of covenant to be bond by
the decision (Igbandu). The plaintiffs stated their case as well as the
D defendants. The elders visited the Land on several occasions and saw
everything on the Land. They were shown the pledged Land and
other features on the Land. After visiting the Land, heard from both
parties, questions asked, they decided that the Land belongs to
Umuokpagu and that it is situated in Umuogolu. The arbitration of
the elders was recorded by their secretary Jerry Ejelogu from Isu
E village”

(vide pages 138 -139 of the Record).

The learned trial judge rightly concluded about Exh J on
page 190 of the record that:-

F “I hold that the arbitration of Oba Elders in the case acts as
an estoppel against the plaintiffs. They cannot be heard to re-litigate
the matter all over again.”

Assampong v. Amuaku (1932) 1 WACA 192 Ohaeri v.
Akabeze (1992) 2 NWLR pt. 221 page 1

G Akpan v. Otong (1996) 10 NWLR pt.470 pg. 108 Agu v.
Ikewibe (1991) 3 NWLR pt. 180 pg. 385

Oparaji v. Ohanu (1999) 9 NWLR pt. 618 pg. 290

A party can prove the existence of a customary arbitration
by pleading and establishing the following:-

H a) That there has been a voluntary submission of the matter
in dispute to an arbitration of one or more persons.

b) That it was agreed by the parties either expressly or by
implication that the decision of the arbitrations will be accepted as
final and binding.

c) *That the said arbitration was in accordance with the custom of the parties or of their trade or business.*

d) *That the arbitrators reached a decision and published their award: and*

e) *That the decision or award was accepted at the time it was made.* B

Igwego v. Ezeugo (1992) 6 NWLR pt. 249 pg. 561

Anyabunsi V. Ugwunze (1995) 6 NWLR (pt. 401) Pg. 255

Egesimba v. Onuzunuke (2003)15 NWLR (pt.791)pg. 466.

The foregoing factors were present in the matter in hand from the evidence of PW2 and DW5 and pleadings of the parties. Exhibit J is not a public document, and hence does not require any certification. It is the finding of the two lower courts that Exhibit J an arbitration decision of Oba Elders act as an estoppel against the plaintiffs/appellants. In the circumstances they cannot be heard to re-litigate the matter all over again. C D

An appellate court will not interfere with the findings by the lower courts unless the findings are perverse or the lower court raised wrong inference upon accepted facts or applied wrong principle to such facts. E

The finding of the lower court affirming that of the trial court that Exhibit J the arbitration of Oba Elders was admissible and acts as estoppel against the plaintiffs/appellants is unassailable; this court has no reason to reverse it.

With further reasons given by my brother in the Leading judgment, I also find no merit in this appeal. I dismiss same with N50,000.00 costs in favour of the Respondents. F

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