

SUPREME COURT OF NIGERIA

23RD APRIL, 2010. SC. 25/2003

**CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. A. FABIYI, O. O. ADEKEYE, JJSC**

1. MR. MELFORD AGALA

2. MR. B. S. BAGSHAW

3. MR. HAMILTON H. DAWARI

(For themselves and on behalf of Alibo family

of Okusin Compound of Ido in Degema

Local Government Area of Rivers State.) DEFENDANTS/

4. MR. CHIEF FELIX OWUKIO EGWERE

5. CHIEF KAIZER OPUWARIBOKO

6. CHIEF LONDON D. ESUK

7. CHIEF GEORGE PRABO

8. CHIEF ROBINSON BIBI

9. CHIEF EBENEZER ODIO

10. MR. CAPTAIN OYIBO

(For themselves and on behalf of Ido

Council of Chiefs)...

AND

1. CHIEF BENJAMIN OKUSIN

2. MR. GRAHAM D. OWUKOLO

3. BENNETH A. JOHNBULL

4. MR. GIDEON B. HARRY

(For themselves and on behalf

of Oko family In Okusin compound

of Ido in Degema Local

Government Area of Rivers State)

PLAINTIFFS/

..... RESPONDENTS

JUDGMENTS - Basis - Reliance on exhibit P4 - Whether fatal - Though the reliance on it was improper - It has not led to miscarriage of justice - In view of the contents of exhibits P.1 and P. 2 - So it is not fatal (H1)

LAND LAW - Evidence - Original name of compound - As Oko Polo - Proof - From the content of paragraph (4) of Exhibit P.1 - Which supports the evidence of plaintiffs' witness No.1 - This fact has been

proved (H2)

PLEADINGS - Evidence - Testimony by PW.1 of an "appeal" - Whether pleaded - In view of the pleading in paragraph 22 of amended statement of claim - There was proper pleading to back the evidence (H3)

EVIDENCE - Relevance - Uncontradicted evidence - Effect on judgment - Where such evidence is irrelevant to the claim - It will have no consequence on the judgment (H4)

APPEALS - Grounds - Failure to state ground - While stating particulars - Effect - Such failure renders the particulars stated useless - As there must be a ground of appeal - Before particulars will follow (H5)

FACTS

The plaintiffs/respondents sued defendants/appellants before the High Court of Rivers State holden at Degema claiming sundry reliefs by which they asserted that the compound in dispute was originally named and referred to as Oko Polo and subsequently renamed Okusin Polo and was never known as Alibo compound. Respondents asserted that 1st appellant cannot be paramount head of the compound under Kalabari native law and custom in view of the fact that he was only related to the compound by marriage and his chieftaincy did not emanate from the compound but from one Okoro compound. The case of respondents was that 2nd and 4th appellants had written a letter to 5th appellant notifying him that the name of the compound in dispute was Alibo's compound originally and that it was erroneously being called Okusin Polo which practice they wanted stopped. The letter was in evidence as Exhibit P1. Subsequently, 2nd, 3rd and 4th appellants also wrote another letter to 1st respondent purporting to pass a vote of no confidence on him as the chief of Okusin Polo. The letter is Exhibit P2.

On the other hand, appellants allege that there was never any compound known as Okoro's compound nor Okusin Polo in Ido town as claimed by respondents. To rebut this allegation of appellants, respondents put in evidence Exhibit P4 - a memorandum written by 5th appellant in his official capacity enumerating the com-

pounds in Ido to include Okoro's and Okusin's. Though Exhibit P4 was made during the pendency of the suit, learned trial judge put reliance on it in his judgment. Eventually, trial judge gave judgment to respondents as claimed. Aggrieved, appellants appealed to Court of Appeal which court dismissed the appeal. Though the court held that Exhibit P4 was wrongly relied on, it held that the reliance did not occasion miscarriage of justice in view of the contents of Exhibits P1 and P2. Still dissatisfied, appellants have come on a further appeal to Supreme Court. Respondents have also cross-appealed on the holding that Exhibit P4 was wrongly relied on. But though they failed to state any ground of appeal in their notice of cross-appeal purportedly stated particulars.

ISSUES FOR DETERMINATION

APPEAL:

"1. Whether it was right in law to hold that the reliance on Exhibit P. 4 by the trial court did not occasion miscarriage of justice.

2. Whether it was right decision to reject the plea of estoppel per rem judicata upon evidence based on unpleaded facts.

3. Whether the facts as found for the Respondents were derived from their pleadings and whether the evidence presented in defence was controverted. If no, whether the Respondents proved their case on a balance of probability as required by law."

CROSS APPEAL:

Whether the notice of cross-appeal is incompetent

HELD (Unanimously dismissing the appeal and striking out the cross-appeal per **MUKHTAR JSC**)

Reliance on exhibit P. 4 - Whether fatal

1. The excerpt of the lower court's judgment which learned counsel for the appellant is quarrelling with under this issue reads as follows:-

"However, without Exhibit P. 4 the court would have come to the same conclusion it did having regard to the contents of Exhibits P. 1 and P. 2. This means that the improper use of Exhibit P. 4 has not led to miscarriage of justice."

The lower court in its lead judgment did agree that reliance on Exhibit P. 4 by the learned trial judge was wrong in view of the fact that it was made by a party during the pendency of the suit. Having done so, I think his further pronouncement on Exhibits P. 1 and P. 2

was in order and not wrong in law. In the light of these discussions I resolve the issue in favour of the respondents, and dismiss ground (1) of appeal to which it is married. (pp. 1429 B/1434 H)

Original name of compound - As Oko Polo - Proof

- B 2. The pertinent question to ask here is if the compound in controversy was originally called Alibo as per the content of paragraph (3) supra, then how did it get to be called Oko Polo, and Okusin Polo later, as per the content of paragraph (4) supra? It is difficult to fathom the reason why the name would undergo series of changes. If it was C Alibo, the most likely situation is that it should continue to be Alibo without any break, and the defendants would not as at 29th June 1985 be seeking to rename the compound Alibo. It is most unlikely and inconceivable more so the history of the compound vide the D evidence of plaintiffs witness No. 1 reproduced supra is supported by paragraph (4) of Exhibit P. 1, in that it said that the compound was recently named Okusin Polo from Oko Polo, not Alibo. (p. 1432 F)

Testimony by P.W.1 of an "appeal" - Whether pleaded

- E 3. The purpose of pleadings is to avoid springing surprises on the other party, and by the content of paragraph (22) supra the plaintiffs have not sprung any surprises on the defendants, by PW 1 merely adding the word 'appeal' in his evidence.
- F As a matter of fact a careful perusal of the last sentence of the reproduced paragraph (22) above can to my mind be interpreted to mean an appeal, as the action followed the dissatisfaction of the plaintiffs on the earlier action to the native tribunal as is contained in paragraph (21) of the amended statement of claim.
- G In essence I am satisfied that there was proper pleading to back the evidence of PW 1 complained against, and so the findings of the two lower courts had foundation. (p. 1435 H/ 1436C/F)

Uncontradicted evidence - Effect on judgment

- H 4. A trial judge at the stage of writing a judgment and making findings and decisions, appraises the evidence of each side of the divide, and gives the evidence of each side the probative value it deserves before arriving at a just conclusion of the case. In the process of doing so he determines which of the relevant evidence to believe, whether they

are contradicted or not because he had the singular advantage of listening and watching the demeanour of the witnesses.

I use the word relevant above to qualify the evidence, for it is important that the quality of the evidence is considered, as it is not all evidence adduced in a suit that is relevant to the issue or matter in controversy. B

In the instant case many aspects of the evidence adduced by the defendants even if not contradicted were not of relevant consequence to the claim. (p. 1437 F)

Failure to state ground - While stating particulars - Effect C

5. A notice of preliminary objection against the cross appeal was raised by the respondents, for an order striking out the cross-appeal for being incompetent. The ground of the objection reads as follows:-

“The notice of Cross-Appeal filed on 8th March, 2002 is incompetent for non-compliance with Order 8 Rule 2 (1) of the Supreme Court Rules in that it does not contain any ground” D

It is on record that no ground of appeal was actually stated, only particulars.

I don't know if this was done inadvertently, for I cannot fathom how an appellant can take the pains of stating particulars of error, without stating the ground of appeal from which the particulars flow. Order 8 Rule 2(1) supra talks of grounds of appeal, and sub rule (2) also reproduced above presupposes that there must be grounds of appeal before particulars will follow there under. The failure to state the ground of appeal rendered the particulars of error in the notice of cross-appeal useless and of no effect. There is to my mind and for all intent and purposes no ground of appeal to support the notice of cross-appeal. F

I would conclude that no appeal exists whatsoever, after the sole purported ground of appeal would have been struck out as argued by the learned counsel for the respondents. (pp. 1439 G/1440 G/ 1441 B) G

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REPRESENTATION

Mr. Faye Dikio for the Appellants.

M. C. Oputa for the Respondents.

CASES REFERRED TO

- Ike v. Ugboaja (1993) 6 NWLR pt 301 pg. 539
 Oforlette v. State 2000 FWLR part 12 page 2081
 Egbe v. Alhaji (1990) 1 NWLR part 128 page 546
 B Ifejika v. Oputa 2001 11 NWLR part 725 page 583
 Saraki v. Kotoye 1992 9 NWLR part 264 page 184
 Akuru v. Olubadan-in-Council (1954) 14 WACA p. 523
 Akeredola v. Akinremi 1989 3 NWLR part 108 page 164
 C A. G. Kwara State v. Alao (2000) 9 NWLR part 673 page 84
 Buraimoh v. Esa & ors. (1990) 2 NWLR (Pt. 133) 406 @ 419
 Okpala & anor. v. Ibeme & anor. (1989) 2 NWLR (Pt. 102) 208
 Arinze v. First Bank of Nig. Ltd. (2004) 12 NWLR (Pt. 888) 663 @ 673
 D Awosile v. Chief F. O. D. Sotunbo (1992) 5 NWLR (Pt. 243) 514 @ 530
 Alli & anor. v. Chief Alesinloye & 8 ors. (2000) 6 NWLR (Pt. 660) 177 @ 212
 Vincent Standard Steel (Nigeria) Limited v. Government of Anambra
 E State 2001 8 NWLR part 715 page 454
 Calabar East Co-operative Thrift Credit Society Ltd, v. Etim E. Ikot (1999) 14 NWLR (Pt. 638) 225 @ 240, 241

STATUTE & RULES REFERRED TO

- F Evidence Act, s. 91 (3)
 Supreme Court Rules, O. 8 r. 2

LEAD JUDGMENT BY MUKHTAR JSC

- G The plaintiffs (who are now the respondents in this appeal) in the High Court of Rivers State holden at Degema claimed the following reliefs as per their amended Statement of Claim against the defendants who are now the appellants in this appeal:-
 “(3) *A declaration that the 1st Defendant Chief Olunta Alibo whose Chieftaincy emanates from Okoro compound is not a Chief of Okusin compound and therefore cannot be paramount Head of the said Okusin Compound under Kalabari Native law and custom neither can the Plaintiffs come under the jurisdiction of his Chieftdom.*
 H (4) *An injunction restraining the 1st Defendant from parading*

himself as Head of the said Okusin Compound to which the Plaintiffs and 1st set of Defendants belong.

(5) An Injunction restraining all the Defendants from accepting recognizing or dealing with the said 1st Defendant as Head of Okusin Polo to which the Plaintiffs and 1st set of Defendants belong.

(6) An Injunction restraining all the Defendants their servants and or agents or any person or persons acting in trust for or under them from identifying or doing or refraining from doing anything that may be tantamount to identifying the said Okusin Polo as Alibo Polo of Ido in Degema Local Government Area of the Rivers State.” B

The plaintiffs instituted the action for themselves and in a representative capacity for the Oko family of which they are members. I will summarize the plaintiffs' case as contained in their amended statement of claim. In 1884 when Ido town was founded there were eight major compounds including Okusin and Okoro. The first daughter of Okusin, Oko together with her household came to the present town of Ido to re-establish the compound. Later her sister Ikpaiko and her son Awo joined her in Ido in the compound named Oko Polo and later changed to Okusin Polo by all descendants of Okusin. After the death of Oko her first son Iganikon became the head of the Okusin family, and was succeeded by Chief Nelson Okusin. The plaintiffs traced the history of the defendants' family and their relationship with the plaintiffs which came about through marriage with Alibo of Okoro compound and so Okusin Polo can never be named after Alibo, which the defendants want to effect vide a letter. The defendants wrote another letter to the plaintiffs' Head of Okusin family denouncing his head-ship of Okusin compound. Consequently the plaintiff took the 1st - 4th Defendants before the Ido Council of Chiefs, who asserted that the land upon which the compound was situated was cleared initially by Awo Alibo and his descendant Dewari. The plaintiffs were not satisfied and they initiated a further process to Abbey House of Buguma, the arbitration of which the 1st- 4th defendants declined. The actions of the defendants led to the institution of this action in the High Court. C
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The defendants in their amended statement of defence denied most of the plaintiffs' allegations, adding that at the arbitration, both parties paid the arbitration fees and were sworn with their witnesses on oath under pain of death to speak the truth before the decision

was given. For that they relied on waiver, estoppel per rem judicatum, and estoppel by conduct. The defendants denied that Okusin and Okoro were any of the eight major compounds/house at the time of the settlement at New Ido in 1884, but that their chieftaincy stools were created by members of their families. They denied that B Oko established or headed the Okusin family as it was even contrary to Kalabari Custom. They traced their rights and roots to Alibo, their own ancestor.

After the completion of pleadings both parties adduced evidence, which were evaluated by the learned trial judge who at the C end of the day entered judgment in favour of the plaintiffs. Dissatisfied with the decision, the defendants appealed to the Court of Appeal, which affirmed the decision of the trial court, and dismissed the appeal. The defendants have again appealed to this court on four D grounds of appeal. The plaintiffs are also dissatisfied with certain aspects of the decision and they have cross-appealed. As is the practice in this court, both parties exchanged briefs of argument which were adopted at the hearing of the appeal.

The appellants filed appellants' reply brief of argument, in which E they re-argued this appeal, which negates the purpose of an appellant's reply brief of argument. The purpose of a reply brief of argument is meant to give an appellant the advantage of replying to new points of law raised in a respondent's brief of argument which he may wish to clarify, and not to repeat his earlier argument. See Vincent Standard Steel (Nigeria) Limited v. Government of Anambra State 2001 F 8 NWLR part 715 page 454, and Ifejika v. Oputa 2001 11 NWLR part 725 page 583.

I will deal with the main appeal first before proceeding with the G cross-appeal. In the appellants' brief of argument are the following issues for determination.

"1. Whether it was right in law to hold that the reliance on Exhibit P.4 by the trial court did not occasion miscarriage of justice.

2. Whether it was right decision to reject the plea of estoppel H per rem judicata upon evidence based on unpleaded facts.

3. Whether the facts as found for the Respondents were derived from their pleadings and whether the evidence presented in defence was controverted. If no, whether the Respondents proved their case on a balance of probability as required by law."

The single issue formulated for determination in the respondents' brief of argument is:-

"Whether the evidence adduced in this case is so overwhelming, Exhibit P. 4 notwithstanding to justify the decision of the Court of Appeal confirming that of the trial court."

I will adopt the appellants' issues for the treatment of this appeal, commencing with issue (1). ***The excerpt of the lower court's judgment which learned counsel for the appellant is quarrelling with under this issue reads as follows:-***

"I uphold the submission of the learned counsel in this regard that the trial judge was wrong in using Exhibit P. 4 which was prepared during the pendency of the case. However, without Exhibit P. 4 the court would have come to the same conclusion it did having regard to the contents of Exhibits P. 1 and P. 2. This means that the improper use of Exhibit P. 4 has not led to miscarriage of justice."

According to learned counsel the court did not state the portion of Exhibits P.1 and P.2 that could have supported the conclusion of the learned trial judge. He further contended that in arriving at his conclusion the learned trial judge did not take into consideration the evidence of the 1st set of defendants that only descendants of Alibo collect taxes in the compound, that the 1st Defendant who was the paramount chief of Alibo lives in the house built by Dewari and that house was built in the centre of the compound with a shrine, that Dewari and Awo were buried there, that none of the plaintiffs' ancestors was buried in the compound, and that the Alibos allocate land to the Okusin. It is the submission of learned counsel that if these pieces of evidence were taken together by the two lower courts, their decisions would have been different.

In his reply, the learned counsel for the respondents has argued that the above contention of the appellants cannot be taken in any way as credible grounds or evidence to change the justice of the case as decided by the lower courts. According to learned counsel they are not enough to suggest that the compound's name is "Alibo" as against the contents of Exhibits P1 and P2 and the obvious fact and finding that the compound had from the on set been known and called Okusin compound. There is no evidence that the beneficiaries of these taxes are limited to the Alibos or that others are re-

stricted from burying their dead therein. In short, these evidence are not relevant to the issue in controversy, and the fact that they were not controverted was not material.

Perhaps I should look at the premise the claim was predicated on in the trial court vis-a-viz the evidence adduced by the parties.

B The first relief sought in the plaintiffs' pleadings being the main relief has been reproduced above and it speaks for itself In their amended statement of claim the plaintiffs/respondents made the following relevant averments:-

C *"17. From time beyond memory, the Plaintiffs compound has been known as Okor compound at one time and Okusin compound as it later came to be called. It has never been and cannot under Kalabari native Law and Custom as Alibo compound as no compound in Kalabari is named after the person who merely relates to it by marriage.*

D *18. 1st Plaintiff who is acknowledged as the Chief of Okusin compound has under his jurisdiction the whole descendants of Okusin including the 2nd and 4th Defendants. The 1st Defendant though a Chief of Okoro compound also subscribes to the 1st Plaintiff's jurisdiction when he comes over to the compound for family matters.*

E *19. Sometime in July, 1985 2nd to 4th Defendants (Inclusive) wrote a letter to the 5th Defendant in his official capacity notifying him of a purported change of name of the Plaintiffs' compound to Alibo compound. They also in that document, misrepresented and wrongly stated the history of Okusin compound. Plaintiffs will found upon the letter.*

F *20. Similarly, by another letter dated 9th July, 1985 the 2nd, 3^d and 4th Defendants wrote to the Plaintiff who is the Head of Okusin compound purporting to pass a vote of no confidence on him and stating inter alia that they do not recognize him again as Head of Okusin compound and the lineage of the 1st Plaintiff. The said letter is hereby pleaded. These letters were written without the knowledge and consent of the Plaintiffs.*

H *In joining issues with the plaintiffs the defendants/appellants averred thus in their amended statement of defence:-*

15. Defendants in answer to paragraph 18 of the Statement of Claim aver that 1st plaintiff is the Chief of the Okusin Chieftaincy stool in Alibo compound (not Okusin Compound). As stated in paragraph

9(e) this stool is under the paramount chieftaincy stool of Chief Alibo 1st Defendant. Chief Olunta Alibo is Chief of Alibo compound (not Okoro Compound as there is none). 1st Defendant in his capacity as Paramount or Head Chief of Alibo's compound presented the 1st Plaintiff to the Town during this installation as the Chief of Okusin stool in 1976. Nobody had even acknowledged 1st Plaintiff as Chief of Okusin Compound. Except as herein averred paragraph 18 of the Statement of Claim is denied.

16. Defendants (1st set) in answer to paragraph 19 and 20 (sic) of the Statement of Claim admit writing the two letters. The first was written on 9th July, 1985 to 5th Defendant as Amadabo of Ido with a copy endorsed to 1st Plaintiff of the resolution of the Alibo House of attempts being made by Oko's descendants to change the name of Defendants (1st set) compound from Alibo Polo (compound) to Oko Polo by frequent reference to Alibo Polo as Oko Polo or Okusin Polo. The second letter also date 9/7/85 was written to 1st Plaintiff notifying him of the vote of no confidence in him by Ikpaiko's children and not to recognize him (1st Plaintiff) as Chief Benjamin Okusin. Both letters were signed by Defendants in various capacities the earlier by 3rd and 4th Defendants on behalf of the Alibo House and the later by 2nd, 3rd and 4th Defendants for Ikpaiko's children who claim equal right to the Okusin stool with 1st Plaintiff. The authors of both letters in their capacities do not require the knowledge or consent of the 1st plaintiff before doing so."

I will now reproduce the evidence of the plaintiffs in proof of the above material pleadings. The 4th plaintiff who testified as PW1 gave the following material evidence:-

"Sometime in July 1985, the 2nd and 4th Defendants wrote a letter to the 5th Defendant (the Amadabo of Ido) notifying him of a purported change of our compound from Okusin's compound to Alibo's compound. The letter was copied to our head chief- 1st plaintiff- and he gave it to me to read it for him since he cannot read and write....."

On 9/7/85 my head chief also gave me another letter to read for him which I did. It was written by 2nd, 3rd and 4th Defendants

The letters mentioned in the evidence were admitted in evidence as Exhibits P.1 and P.2. In the course of cross examination the

witness said inter alia thus:-

“The issue in this case is that we call it Okusin’s compound while the 1st set of Defendants call it Alibo compound. I deny your suggestion that there is nothing like Okusin’s compound in New Ido. Rather there is no Alibo compound.”

B At this juncture I will reproduce the content of Exhibits P.1 and P. 2 for a proper understanding of the complaint and gravamen of the issue in controversy. Exhibit P.1 reads:-

“Your Royal Highness,

C *ALIBO POLO (COMPOUND)*

we had (sic) been directed to inform you and the Ido Council of Chiefs that the following decisions were taken at a full meeting of the Alibo House on the 29th June, 1985.

D *1. That when the town moved from Elem Ido to the new settlement, all families first settled at Opuje Poku while bushes were being cleared.*

2. The bush clearing in our compound was done by our fathers in the persons of late Dawa II Alibo and Awo Alibo.

E *3. After the bush clearing, families moved from Opuje-poku to their respective compound and these compounds were named after their FATHERS e.g. Eguere, Esuku, Alibo just to mention a few.*

4. In the case of our compound the public had been misled over the years by calling it names like Oko Polo, Alibo Polo and recently Okusin Polo.

F *5. The Chiefs and the entire people of Alibo compound have now resolved that as from now the compound should be called ALIBO POLO AND CHIEF OLUNTA AWO ALIBO is the Head of the compound.....”*

G ***The pertinent question to ask here is if the compound in controversy was originally called Alibo as per the content of paragraph (3) supra, then how did it get to be called Oko Polo, and Okusin Polo later, as per the content of paragraph (4) supra.? It is difficult to fathom the reason why the name would***
H ***undergo series of changes. If it was Alibo, the most likely situation is that it should continue to be Alibo without any break, and the defendants would not as at 29th June 1985 be seeking to rename the compound Alibo. It is most unlikely and inconceivable more so the history of the compound vide the evi-***

dence of plaintiffs witness No. 1 reproduced supra is supported by paragraph (4) of Exhibit P. 1, in that it said that the compound was recently named Okusin Polo from Oko Polo, not Alibo. The learned trial judge believed the evidence of the Plaintiffs and found as follows in his judgment:-

"I believe them that at first the compound (as is confirmed in paragraph 4 of exhibit P1) and that later they changed it to the name of their ancestor-Okusin (the father of Oko and Ikpaiko)." B

The position of the law is that the realm of believing any witness is within the prerogative of a trial judge who had the singular advantage of seeing and listening to a witness who gave evidence in his court. Any finding based on such evidence cannot be faulted by an appellate court who had no such advantage but is confined to the record of proceedings before it. See *Iwenofu v. Iwenofu* 1975 9-11 SC. 79, *Governor v. Laniba* 1974 10 SC. 227, and *Gwawoh v. C. O.* D P. 1974 11 SC. 243.

Then Exhibit P. 4

On the same 9th of July 1985 when Exhibit P1 was written Exhibit P. 2 was also written, but Exhibit P. 2 was addressed to the 1st respondent Benjamin Okusin, and it reads:- E

"We are directed to inform you that the off-springs of Mrs. Ikpaiko Alibo (Nee Ikpaiko Okusin) have resolved during their general meeting that they have been unanimously passed a vote of no confidence in you as Chief Benjamin Okusin."

Following this resolution, the children of Mrs. Ikpaiko Alibo will neither attend your meeting nor recognize you as Chief Benjamin Okusin in Ido council of Chiefs. F

You are quite aware that the Chieftaincy stool which you are representing is legitimately owned by the two great mothers Oko and Ikpaiko. G

Your mother Mrs. Ikpaiko Alibo (Nee Ikpaiko Okusin) took this decision so as to maintain the existing cordial relationship within the two families."

Underlining is mine. H

I am not sure I understand what the authors of Exhibit P. 2 mean by the first underlining, for what is intended is not clear to me. To me it is bereft of any meaningful impact on the subject matters as a simple interpretation will be that they had no confidence in him as

a person, as opposed to him as a family or compound head. On the second and third underlinings the authors have conceded that the stool is owned by their ancestors and so their two families. All the above reproduced pieces of evidence have established the fact that the head of the 1st respondent/plaintiff Benjamin Okusin was the head and chief of the Okusin family to wit the 1st set of defendants/respondents belong and it is he who calls the meeting they attend. The fact that it was in that year of 1985 that they resolved to call the compound Alibo compound reinforces the case of the plaintiffs/respondents. All the pieces of evidence were neither controverted nor discredited by the appellants in their evidence.

Civil cases are determined on preponderance of evidence and balance of probabilities and so he who asserts a fact must prove that fact with credible evidence that is relevant to the matter in controversy, not evidence that is irrelevant and inconsequential to the success of the claim. See *Elias v. Omo-Bare* 1982 5 SC. 2, *Woluchem v. Gudi* 1981 5 SC. page 291, *Elias v. Disu* 1962 1 All N. L. R. page 214, and *Imana v. Robinson* 1979 3 - 4 SC. 1, and section 135 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990. On Exhibit P. 4 the learned trial judge in his judgment posited and found thus:-

"In Exhibit P. 4, memorandum written on 29th June 1988, the Amadabo of Ido, Chief Felix Owukio Eguere (who is the 5th Defendant in this suit) submitted inter alia, that the following Chieftaincy stools are operational in Ido-Opuwariboko, Esuku, Prabo, Oyibo, Ngo, Alibo, Alawarifaa, Iga, Odio, Biki, Suku, Toboitemea, Ebenibo, Ogbo, Owoyo, Okusin and Okoro stools.

That document was made by the 5th Defendant, and relied upon by the Plaintiffs it shows, therefore, and I accept, that all those chieftaincy stools are operational now at Ido town. That takes care of those names that are in dispute namely Ngo, Alibo, Okusin and Okoro. All of them have been recognized by Ido as chieftaincy stools that are operational now at Ido."

The lower court in its lead judgment did agree that reliance on Exhibit P. 4 by the learned trial judge was wrong in view of the fact that it was made by a party during the pendency of the suit. Having done so, I think his further pronouncement on Exhibits P. 1 and P. 2 was in order and not wrong in

law. In the light of these discussions I resolve the issue in favour of the respondents, and dismiss ground (1) of appeal to which it is married.

Now to issue (2) in the appellants' brief of argument. The grouse of the appellants under this issue is the finding of the lower court which reads:-

"In this case, however it is clear that the respondents were not satisfied with the decision of the native tribunal and appealed to a higher tribunal but the appellants by their own showing refuse to appear before the higher appellate tribunal, It follows therefore the traditional arbitration process had not been concluded".

As facts and evidence in a case have their root in pleadings, I will reproduce the relevant pleading that touched on the native arbitration mentioned above. In paragraph 22 of the amended statement of claim the plaintiffs pleaded thus:-

"22. The Chiefs wrongly decided thus: that since the land on which the compound is situate was cleared and prepared initially by Awo Alibo and one Dewari who they alleged was also Alibo's descendant, the act of the 1st to 4th Defendants was in order. In doing this, the 5th to 12th Defendants never considered the version of the Plaintiffs neither did they give reason for preferring one version to the other. The Plaintiffs immediately rejected the decision and informed all the Defendants of their intention not to be bound by same. They subsequently issued a summons against the 1st to 4th Defendants before the Abbey House of Buguma the Arbitration of which the 1st to 4th Defendants declined."

It is the contention of the appellants' counsel that the evidence of the plaintiffs that appeal emanates from the decision of Amadabos to the Abbey house, and since that was not pleaded, the evidence should have been ignored as it goes to no issue. He placed reliance on the cases of Akinola v. Oluwo 1962 SCNLR 117, and Emegokwe v. Okadigbo 1973 4 S.C. 113. According to learned counsel for the appellants when the evidence on the appeal in question of 'appeal' is ignored the decision of the court below has no foundation and it is liable to be set aside. It is indeed a cardinal principle of law that pleadings are summary of the facts of a case that must be served on an opponent to enable him be on notice of the facts to contend with in court at the hearing. **The purpose of pleadings is to avoid spring-**

ing surprises on the other party, and by the content of paragraph (22) supra the plaintiffs have not sprung any surprises on the defendants, by PW 1 merely adding the word ‘appeal’ in his evidence. See *George v. Dominion Flour Mills Ltd* 1963 1 SCNLR page 117. *George v. U. B. A. Ltd* 19728-9 SC. page 264. and *Oduka v. Kasumu* 1968 NMLR page 28.

It is indeed another principle of law that parties are bound by their pleadings and must not go beyond what they have pleaded in their evidence, as doing so will render the evidence so given a non-issue, and liable to be struck out.

Conversely, as pleadings make for economy the trite law is that parties are not required to plead evidence, and authority abounds on this principle of law. See *A. G. Kwara State v. Alao* (2000) 9 NWLR part 673 page 84, and *Okeji v. Olokoba* 2000 4 NWLR part 654 page 513. **As a matter of fact a careful perusal of the last sentence of the reproduced paragraph (22) above can to my mind be interpreted to mean an appeal, as the action followed the dissatisfaction of (he plaintiffs on the earlier action to the native tribunal as is contained in paragraph (21) of the amended statement of claim** which is as follows:-

“21. Pursuant to the above, plaintiffs sued the 1st to 4th Defendants before the Ido Council of Chiefs presided over by the 5th Defendant. At the native arbitration to decide the matter in which the 5th to 12th Defendants attended. Both sides were asked to state their case wherein the council adjourned to give a decision”.

In essence I am satisfied that there was proper pleading to back the evidence of PW 1 complained against, and so the findings of the two lower courts had foundation. Issue no (2) in the circumstances has to be resolved in favour of the respondents, and so ground of appeal no. (2) to which it is related fails, and it is hereby dismissed.

In arguing issue (3) of the appellants, the learned counsel for the appellants referred to paragraphs 9 (c), 10 (c) 15, 13 (b), 18 (c) and (v) and 27 of the amended statement of defence and their supporting evidence. This issue revolves around weight of evidence and appraisal. Perhaps I should reproduce some of the paragraphs and their evidence as stated in the appellants’ brief of argument, starting with a part of paragraph 9 (c) which reads:-

“9 (c)Oko, aged at the time, died at Opuje Poku at new Ido where all Ido people first camped before moving to their various compounds established at the time.”

“9 (e) Nelson Alele (now late)..... was selected and finally installed on 2nd July 1958 as the first Chief Okusin. At that time Chief Hargrove Dewari Alibo III (now late) was head of Alibo Compound and he presented him (Chief Nelson Okusin) to the Town during installation. By custom, it is the Head or Paramount Chief of the Compound that presents Chief under him to the Town during installation at new Ido”.

“10 (c) By Kalabari custom, canoes are led by the House Chief or Head of the House never by women especially during the time of war as was the case in 1884 and land is never allotted (sic) or allocated to women to clear for settlement especially at new Ido..... Also because it was (sic) war period in 1884 women were never involved in such exercises”.

The learned counsel for the appellants has argued that since the defendants/appellants gave evidence that were not contradicted in support of the above pleadings, and the respondents failed to file a reply to the said pleadings, the appellants’ evidence on the pleadings stands to be discountenanced. He placed reliance on the cases of *Akeredola v. Akinremi* 1989 3 NWLR part 108 page 164, and *Pan Bisibilder Ltd v. First Bank Ltd* 2000 FWLR part 2 page 177. Learned counsel further submitted that since the evidence of the defendants was not controverted, it ought to have been accepted by the trial court as unchallenged and referred to the case of *Oforlette v. State* 2000 FWLR part 12 page 2081.

A trial judge at the stage of writing a judgment and making findings and decisions, appraises the evidence of each side of the divide, and gives the evidence of each side the probative value it deserves before arriving at a just conclusion of the case. In the process of doing so he determines which of the relevant evidence to believe, whether they are contradicted or not because he had the singular advantage of listening and watching the demeanour of the witnesses. (See the cases of *Governor v. Laniba*, *Iwenofu v. Iwenofu*. and *Gwawoh v. C. O. P.* supra.

I use the word relevant above to qualify the evidence, for it is

important that the quality of the evidence is considered, as it is not all evidence adduced in a suit that is relevant to the issue or matter in controversy. Some witnesses ramble on and on matters that are not correlated to the pivot of the case. **In the instant case many aspects of the evidence adduced by the defendants even if not contradicted were not of relevant consequence to the claim.**

The learned trial judge after a careful evaluation of the evidence before him in his judgment posited the following:-

"I do not, therefore, believe the Defendants' witnesses that the compound at new Ido was established by Awo and Dewari. I do not believe them that the compound is known as Alibo compound. I believe the Plaintiffs' witnesses that the compound was established by Oko. I believe them that it was Oko who later brought Ikpaiko, and her son Awo to that compound, and that that was how the 1st set of Defendants, who are the descendants of Ikpaiko came to live in the same compound with the Plaintiffs. I believe them that at first the compound (as is confirmed in paragraph 4 of Exhibit P1) and that later they changed it to the name of their ancestor-Okusin the father of Oko and Ikpaiko".

The lower court as per the lead judgment endorsed the above conclusion thus:-

"I agree entirely with the conclusion of the trial court which in my view was the most reasonable conclusion from the facts before it."

The learned trial judge definitely adhered and applied the principles in *Odojin v. Mogaji & Ors* 1978 NSCC page 275 where Fatayi-Williams JSC (as he then was) enjoined the courts thus:-

"In short, before a Judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale, he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the

balance of probabilities. Therefore in determining which is heavier, the judge will naturally have regard to the following:-

- (a) whether the evidence is admissible;
- (b) whether it is relevant;
- (c) whether it is credible;
- (d) whether it is conclusive, and
- (e) whether it is more probable than that given by the other

party.

Finally, after invoking the law, if any, that is applicable to the case, the trial judge will then come to his final conclusion based on the evidence which he has accepted.”

In the light of the above argument I answer this last issue in the affirmative, and dismiss grounds of appeal nos. (3) and (4) which covers the issue. This is an appeal on concurrent findings of facts which the law does not permit an appeal court to interfere with unless the findings are not supported by credible evidence and are perverse and have led to miscarriage of justice. In the instant case, the findings are supported by credible evidence and they cannot be faulted; as there is no palpable error in them. This court cannot and will not therefore disturb them. See the cases of Chikere v. Okegbe 2000 12 NWLR part 681, page 274, Salami v. Gbodoolu 1997 4 NWLR part 499, page 277, and Ibodo v. Enarofia 1980 5 SC page 412.

The end result is that the appeal completely lacks merit and substance, in which case it must be dismissed and I dismiss it. I assess costs at N50,000.00 in favour of the respondents against the appellant.

The respondents filed a cross-appeal against the judgment of the Court of Appeal on a single ground of appeal; to wit briefs of argument were exchanged. In the course of the treatment of this cross-appeal I will refer to the cross-appellants, as the appellants and the cross-respondents as the respondents. ***A notice of preliminary objection against the cross appeal was raised by the respondents, for an order striking out the cross-appeal for being incompetent. The ground of the objection reads as follows:-***

“The notice of Cross-Appeal filed on 8th March, 2002 is incompetent for non-compliance with Order 8 Rule 2 (1) of the Supreme Court Rules in that it does not contain any

ground”.

At this juncture I will reproduce the said order 8 Rule 2 (2). It reads:-

“2(1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the court below which shall set forth the grounds of appeal, state whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part) and state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service”.

I will also reproduce sub rule (2). It reads:-

“(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated”.

The learned counsel for the respondents in this appeal has submitted that any notice of appeal (including notice of cross-appeal) which does not contain any ground of appeal is incompetent because it is from the ground of appeal an appellate court will be able to determine whether the issues brought on appeal relate to the judgment. He placed reliance on the cases of Saraki v. Kotoye 1992 9 NWLR part 264 page 184 and Egbe v. Alhaji (1990) 1 NWLR part 128 page 546. It is counsel’s prayers that the notice of cross-appeal be struck out.

The learned counsel for the appellants has not deemed it necessary to file cross-appellants’ reply brief of argument to address and reply the submissions on the notice of preliminary objection. That leaves me therefore with only the argument of the respondents.

In order to understand the complaint of the respondents, one will have to carefully peruse the ground of appeal in the notice of cross-appeal. **It is on record that no ground of appeal was actually stated, only particulars.** I will reproduce it as it is in the notice of cross-appeal here below. It reads:-

“**GROUNDS OF APPEAL**

(i) **ERROR-IN-LAW**

PARTICULARS OF ERROR

1. *Exhibit P4 is relevant and goes to the crux/basis of the mat-*

ter before the trial court.

2. Though made during the pendency of the case, it was made by the maker not as a party to the case or in a personal capacity but in his official capacity as Amayanabo of Ido Community.

3. When a party makes a document during the pendency of a case “in his official capacity” such relevant document is admissible and is not hampered or rendered inadmissible by the provisions of Section 91 (3) of the Evidence Act”.

The above clearly shows that a ground of appeal is missing. **I don’t know if this was done inadvertently, for I cannot fathom how an appellant can take the pains of stating particulars of error, without stating the ground of appeal from which the particulars flow.** It is like placing load on a legless donkey, which because of its incapacity cannot convey the load to its destination. **Order 8 Rule 2(1) supra talks of grounds of appeal, and sub rule (2) also reproduced above presupposes that there must be grounds of appeal before particulars will follow there under. The failure to state the ground of appeal rendered the particulars of error in the notice of cross-appeal useless and of no effect. There is to my mind and for all intent and purposes no ground of appeal to support the notice of cross-appeal.** Since what we have is only the half hearted attempt at a single ground of appeal, and there is no other ground of appeal. **I would conclude that no appeal exists whatsoever, after the sole purported ground of appeal would have been struck out as argued by the learned counsel for the respondents.**

In fact, I am not only striking out the ground of appeal for being incompetent but the whole cross-appeal, which in essence has no ground of appeal to sustain it.

In the final analysis I strike out the cross-appeal, and award the cost of N50,000.00 in favour of the respondents, against the appellants in the cross-appeal.

TOBI JSC

I have read the judgment of my learned brother Mukhtar, JSC and I agree with her reasoning and conclusion that this appeal should be dismissed. I hereby affirm the judgment of the court below affirm-

ing the decision of the trial court. I also award N50,000.00 costs in favour of the respondent.

OGBUAGU JSC

B This is an appeal against the Judgment of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below”) delivered on 29th January, 2002 dismissing the appeal of the Appellants and affirming the Judgment of the High Court of Rivers State sitting in Degema Judicial Division - per Ndu J. (as he then was now C.J.)
 C delivered on 9th December, 1996 in favour of the Respondents.

D Dissatisfied with the said Judgment, the Appellants have appealed to this Court on four (4) grounds of appeal. The Respondents filed on 8th March, 2002 a Notice of Cross-Appeal containing no ground of appeal at all. Even the motion to amend the Notice of Cross Appeal by “inserting the error in law” was withdrawn by their learned counsel and was accordingly, struck out on 25th January, 2010. The Appellants have formulated three issues for determination and no issue was/is formulated in respect of ground 4 which is the omnibus ground. They read as follows:

“3.2 ISSUE NO. 1

Whether it was right in law to hold, that the reliance on Exhibit P. 4 by the trial Court did not occasion miscarriage of justice in the circumstances of this case.

3.3 ISSUE NO 2

Whether it was right decision to reject the plea of Estoppel per fern judicata upon evidence based on unpleaded facts.

3.4 ISSUE NO. 3

G *Whether the facts as found for the Respondents were derived from their pleadings and whether the evidence presented in defence was controverted. If no, whether the Respondents proved their case on a balance of probability as required by law”.*

H I note that while Issue 1 is stated in paragraph 4.2 of the Appellants’ Brief to be taken from ground 1 of the grounds of appeal and that Issue 2 is drawn from ground 2, it is not stated from what ground of appeal, issue 3 was raised, formulated or distilled from. The consequence, is firmly established. Any issue not covered by any ground of appeal, is incompetent and will be struck out. See the

cases of Okpala & anor. v. Ibeme & anor. (1989) 2 NWLR (Pt. 102) 208; (1989) 3 SCNJ 152; Management Enterprises v. Olusanya (1987) 2 NWLR (Pt. 55) 179; (1987) 4 SCNJ. 10; Calabar East Co-operative Thrift Credit Society Ltd, v. Etim E. Ikot (1999) 14 NWLR (Pt. 638) 225 @ 240, 241, 243; (1999) 12 SCNJ. 321 @ 340 - per Achike, JSC (of blessed memory) and Alli & anor. v. Chief Alesinloye & 8 ors. (2000) 6 NWLR (Pt. 660) 177 @ 212; (2000) 4 SCNJ. 264 just to mention but a few.

I note however, that the Appellants in their Reply Brief which is with respect, a substantial repetition of the arguments in the first Brief, erroneously stated firstly, that originally only one ground of appeal was filed. But at pages 262-263 of the Records, there are two (2) grounds of appeal. Secondly, to complicate the matter further it is stated that from the three grounds of appeal, three issues for determination were formulated. That these issues were based on the three grounds of appeal which again, they reproduced. It is again not stated under which of the respective grounds, they were/are formulated. I was minded to strike out the said Issue No. 3 together with all the arguments in respect thereof since an Appellate Court which includes this Court, can only hear and decide on issues raised on the grounds of appeal filed before it. In any case, I hereby strike out ground 4 of the grounds of appeal for being incompetent.

On their part, the Respondents, formulated one "question" for determination, namely,

"Whether the evidence adduced in this case is no overwhelming, Exhibit P4 notwithstanding to justify the decision of the Court of Appeal confirming that of the trial court".

I note also that the Respondents, did not state under which ground of appeal, the above issue is/was raised/distilled or formulated. What applies to an Appellant, applies also to a Respondent in view of the above decided authorities. See the case of Ikegwuoha v. University of Jos (2005) All FWLR (Pt. 280) 1573. At page 2 paragraph 1.4 of the Appellants' Reply Brief, it is stated

"Rather than argue the only issue formula led for the Respondents, learned counsel veered away and argued Appellants 'issues'."

In paragraph 1.5 thereof, it is stated that the Reply

"is targeted at showing that the Respondents' argument is incompetent and to reply on some new points introduced"

In the interest of justice, I will, even briefly, deal with the three issues of the Appellants which takes care of the lone issue of the Respondents.

The facts of the case briefly stated, are that the Respondents were the plaintiffs in the trial court claiming some declarations and injunction. They sued in a representative capacity. The original 1st Plaintiff, is now late. The Appellants and their privies as sued, denied the claims. Both sides later amended their respective pleadings. From the pleadings, it is the case of the Respondents that one Madam Oko-daughter of one Okusin together with her children, her sister Ikpaiku and her son Awo and other members of her father's household, moved to New Ido and therein, founded a compound sometime in 1884. The compound was initially called and known as Oko's Compound but it was later changed and was known as and called "Okusin Compound" in order to reflect, the name of her late father.

The Appellants on their own part, stated or asserted that one Dawari (an adopted son of one Alibo) and Awo the only son of Alibo by Ikpaiku, brought Awo's mother Ikpaiko and her sister Oko to the New Ido. That although Alibo himself, did not go to New Ido, the Compound in which Dawari, Awo, Ikpaiku and Oko settled, was called Alibo. Both sides gave evidence and called two witnesses each and tendered documentary evidence or Exhibits. At the conclusion of hearing and addresses by the learned counsel for the parties, Ndu, J (as he then was now C.J.) found in favour of the Respondents. The Appellants, unsuccessfully appealed to the court below which dismissed their appeal and affirmed the Judgment of the trial court, hence the instant appeal.

When this appeal came up for hearing on 25th January, 2010, Dikio, Esq. of counsel for the Appellants, applied to amend their paragraph 3.1 at page 5 of their Brief to read four (4) grounds of appeal instead of three (3). The application was granted as prayed. He stated that he raised three (3) issues. He adopted both their Amended Brief of Argument and the Reply Brief. He urged the Court to allow the appeal. Oputa, Esq.- learned counsel for the Respondents, also adopted their Brief of Argument and he urged the Court to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

I will quickly deal with the Notice of Preliminary Objection of the Appellants in respect of the Cross-Appeal dated 11th June, 2007

and filed on 12th June, 2007. The Notice of Cross Appeal dated 8th March, 2002 and filed on 8th March, 2002 appears at pages 264 and 265 of the Records. There is no Ground of Appeal. What appears is,

**“ERROR-IN-LAW
PARTICULARS OF ERROR”**

There are three particulars of Error.

I have already noted that the application to amend the said Notice of Appeal praying as reflected in the Memorandum of Amendment and proposed Amended Notice of Cross Appeal attached to the affidavit and marked Exhibit A and A1, was withdrawn for reason(s) best known to the learned counsel for the Respondents and the said application was granted and the motion, was accordingly struck out. So, the status quo. So to speak, of the said original Notice of Appeal remained. In the circumstance, the said Notice of Cross-Appeal, becomes incompetent. It is hereby and accordingly struck out. The Preliminary Objection is upheld.

In my respectful but firm view, this appeal will be determined by me, on two unambiguous documentary evidence admitted in evidence as Exhibit P1 and P2 respectively. The two exhibits, were addressed, to the 1st Respondent who was called “Your Royal Highness”. It is dated 9th July, 1985. In Exhibit P1, it is asserted in No. 4 thus:

“In the case our compound the public had been misled over the years (i.e. as far back as 1884) by calling it names like Okoh polo, Alibo polo and recently Okusi Polo.”
[the underlining mine].

The 2nd and 4th defendants/Appellants signed it and it was addressed to Amaidabo of Ido.

In Exhibit P2, the following appear therein inter alia:

“You are quite aware that the Chieftaincy stool owned by the which you are representing is legitimately owned by the great mothers Oko and Ikpaiko

Your mother Mrs. Ikpaiko Alibo (Nee Ikpaiko Okosin) took this decision so as to maintain the existing cordial relationship within the two families”.

[the underlining mine]

It was signed by the 2nd, 3rd and 4th defendants/Appellants and sent to the 1st plaintiff/Respondent. The above need no interpreta-

tion as they are clear. The learned trial Judge, painstakingly, dealt with this issue at pages 162 to 167 of the Records and thoroughly in my respectful view, made far reaching and impeccable findings of facts and holdings that are supported by the evidence of the Respondents in the Records. At page 167 thereof, His Lordship stated inter alia, as follows:

"I do not, therefore, believe the Defendants 'witnesses' that the compound at new Ido was established by Awo and Dewari. I do not believe them the Compound is known as Alibo Compound".

His Lordship continued inter alia, thus:

"I believe the Plaintiffs' (meaning Respondents') witnesses that the compound was established by Oko. I believe that it was Oko who later brought Ikpaiko, and her son Awo to that Compound and that was how the 1st set of Defendants, who are the descendants of Ikpaiko came to live in the same Compound with the Plaintiffs. I believe them that at first the Compound (as is confirmed in paragraph 4 of exhibit P1) and that later they changed it to the name of their ancestor - Okusin (the father of Oko and Ikpaiko)".

At page 257 of the Records, the court below stated inter alia, as follows;

"I agree entirely with this conclusion of the trial court which in my view was the most reasonable conclusion from the facts before it".

It has been stated and re-stated in a number of decided authorities that the evaluation of evidence, is the exclusive domain of the trial court only where it is borne out of the evidence led before that court. See the cases of Lawal v. Dawodu (1972) 8-9 S.C. 83; Mogaji v. Odofia (1978) 4 S.C. 91; Olubode v. Salami (1985) 2 NWLR (Pt. 7) 282; Onwucharuba v. Onwucharuba (1993) 5 NWLR (Pt. 292) 185 C. A.; A. C. B. Ltd. v. Oba (1993) 7 NWLR (Pt. 304) 173, all referred to in the case of Chukwuogor v. Attorney-General, Cross-River State & 2 ors. (1998) 1 NWLR (Pt. 534) 375 @ 399-400 C. A.

Also settled, is that concurrent findings of fact(s) of two lower courts, will not be disturbed or interfered with by this Court once such findings are on evidence legally admissible as in the instant case leading to this appeal. See the cases of Enang v. Adu (1981) 11 - 12 S.C. 25 @ 42; Buraimoh v. Esa & ors. (1990) 2 NWLR (Pt. 133) 406 @ 419; (1990) 4 SCNJ. 1; Awosile v. Chief F. O. D. Sotunbo

(1992) 5 NWLR (Pt. 243) 514 @ 530; (1990) 6 SCNJ. 182; Alhaji Usman v. Garke (2003) 7 SCNJ. 38 @ 55; Otunba Owoyemi v. Prince Adekoya & 2 ors. (2003) 12 SCNJ. 131 @ 149; Arinze v. First Bank of Nig. Ltd. (2004) 12 NWLR (Pt. 888) 663 @ 673, 675 -679; (2004) 5 SCNJ. 183 @ 188; (2004) 5 S.C. 160 and many other cases in this regard. My answer to issue 1 of the Appellants is in the Positive/Affirmative. My answer as to Issue 3 of the Appellants as couched, is answered by me and that the facts as found for the Respondents, were derived from their pleadings and that the Respondents, proved their case on the balance of probability as required by law.

This should have been the end of this appeal, but let me by way of emphasis, deal with the issue relating to native or customary arbitration. Generally, by Section 6 (1) & (5) of both the Constitution of the Federal Republic of Nigeria, 1979 and 1999, it is in the courts and not to non-judicial bodies, that judicial powers of the Federal Republic of Nigeria, is vested. The courts therefore, take the view that it is open to the parties, to choose whether to follow the normal channel for determination of any controversy through the machinery of the courts or to submit the matter voluntarily, to the non-judicial body for a decision. If they choose the former, the decision of a court of competent jurisdiction on such a matter, would constitute an *estoppel per rem judicatam*. Where they choose the latter and there was an intervention by a non-judicial body, then the court ought to be satisfied that a number of conditions precedent, were satisfied before it could hold that the decision constitutes estoppel.

The conditions precedent to bindingness of a customary arbitration, are as follows:

“(a) *there must have been a voluntary submission of the disputes by the parties to the non-judicial body;*

(b) the parties must have agreed to be bound by the decision of the non judicial body as final;

(c) that the decision was in accordance with the custom of the people or of their trade or business; and

(d) that the arbitrators reached a decision and published their award”.

See the cases of Awosile v. Chief Sotunbo (supra) @ 532 citing the cases Of Inyang v. Essien (1957) SCNLR 112: Njoku v. Ekeocha

(1972) 2 ECSLR 199; Idika & ors. v. Erisi & ors. (1988) 2 NWLR (Pt. 78) 563; (1988) 5 SCNJ 208: and Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385; (1991) 4 SCNJ. 56. In this last case, Nnaemeka-Agu, JSC stated at page 533 inter alia, as follows:

B *“Parties to disputes will do -well to remember that such per-*
sons or bodies..... though highly placed and respectedare not
judicial bodies Before their decision on any matter in dispute be-
tween parties can be relied upon as estoppel, all the above require-
ments of a binding customary arbitration must be shown to have
C *been observed. The pleadings and evidence in this case fall far short*
of those requirements. Once such is the position, the case must be
decided on by evidence “.
[The underlining mine]

D It is settled that where the intervention was merely an attempt
at settlement of the dispute between the parties, no such consequence
follows. See the cases of Awosile v. Chief Sotunbo (supra) 532
Ofumata v. Anoka (1974) 4 ECSLR 251 and Agu v. Ikewiba (supra).
An arbitration, is a reference to the decision of one or more persons
either with or without an umpire of a particular matter in difference
E between the parties. In the case of Agu v. Ikewibe (supra), this Court
- per Karibi-Whyte, JSC in respect of the second requirement, put it
thus:

F *“The indication of the willingness of the parties to be bound by*
the decision of the non-judicial body or freedom to reject the deci-
sion where not satisfied”.

In respect of the third requirement, it is stated thus:

“that neither of the parties has resiled from the decision so
pronounced”

G In the instant case leading to this appeal, firstly, there is the
pleading of the Respondents in paragraph 22 of the Amended State-
ment of Claim in which they pleaded that the 5th to 12th Defendants,
never considered the version of the Plaintiffs/Respondents neither
did they give reason for preferring one version to the other. That the
H Plaintiffs/Respondents immediately, rejected the decision and informed
all the Defendants of their intention not to be bound by the said
decision and subsequently initiated by way of summons against the
1st to 4th Defendants before the Abbey House of Buguma.

I note that the trial court at page 153 of the Records, stated

inter alia, as follows:

“One thing is clearly lacking in the pleading to suggest that the decision of such a customary body constituted estoppel per rein judicatam, and that is that, at any time before the verdict, both parties expressly or by implication agreed to be bound by its decision.

That is usually a very important element which must be pleaded and proved in evidence since the body is not a court vested with judicial powers. If it is pleaded and proved that both parties agreed to be bound by the decision of the arbitrators, the resilience of any of the parties after the verdict would be immaterial as the decision will properly be treated as constituting an estoppel per rem judicatam provided of course that the submission to the body was voluntary. See per Karibi-Whyte in Agu v. Ikewibe (supra) at p. 406.

Since the Defendants failed to aver in their pleadings, and prove by evidence, that at any stage before the verdict of the Ido Council of Chiefs on the matter, the parties expressly or by implication agreed to be bound by the decision of that body, I hold that the decision of the Ido Council of Chiefs does not constitute an estoppel rem judicatam to stop the Plaintiffs from bringing this action against the Defendants”.

I agree. I cannot fault the reasoning and conclusion.

However, the court below - per Ogebe, JCA (as he then was) at page 258 of the Records, stated inter alia, as follows:

“In this case however, it is clear that the respondents were not satisfied with the decision of the native tribunal and appealed to a higher tribunal but the appellants by their own showing refused to appear before the higher Appellate Tribunal. It follows therefore that the traditional arbitration process had not been concluded and it would be unjust to hold that the result of the first tribunal which the respondents appealed and the appellants refused to attend the hearing must be binding on the respondents. It would be a dangerous precedent to hold that once parties submit themselves to a native arbitration such parties are precluded from going before regular courts no matter how unsatisfactory the decision by the arbitration may be to either of the parties. That will make the traditional arbitration tribunal a final court from which there can be no appeal. Such a status for a native tribunal will be unconstitutional as the 1999 Constitution by Section 36(1) gives parties right of access to regular courts to venti-

late their grievances. In this case respondents immediately rejected the decision of the arbitration and took steps to correct it but the appellants declined to follow it up. The appellants cannot be heard to complain that the arbitration decision must act as estoppel per rem judicata against the respondents.

B *I am satisfied that the trial court was right in holding that the respondents were not bound by the result of the native arbitration.....”*

Here again, there are concurrent judgments of the two lower courts which in my humble and respectful view, are not perverse and therefore, cannot be disturbed or interfered with by this Court. I therefore, answer the Issues 3.3 of the Appellant:- in the affirmative/ Positive. If the facts are unpleaded, then it is the Appellants who failed to plead the relevant facts which will amount to and justify the said plea. They cannot now complain. It is the settled law that they must D plead such requirements highlighted by me above in this Judgment.

In the final result or analysis, it is from the foregoing and the fuller lead Judgment of my learned brother, Mukhtar, JSC just delivered and which I had the privilege of reading before now and I agree with his/her reasoning and conclusion that this appeal completely E lacks merit and substance, I too dismiss the appeal. I hereby affirm the Judgment of the court below affirming the decision of the trial court. Costs follow the event. I also award N50,000.00 (fifty thousand naira) costs in favour of the Respondents payable to them by F the Appellants.

FABIYI JSC

I have read before now the judgment just delivered by my G learned brother, Mukhtar, JSC. I completely agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed. I hereby affirm the judgment of the court below affirming the decision of the trial court. I abide by the order for costs in favour of the Respondents as contained in the lead H judgment.

ADEKEYE JSC

I had the advantage of reading before now the judgment just

delivered by my learned brother, A. M. Mukhtar, JSC. My Lord had meticulously considered all the issues distilled for determination in this appeal. The respondents as plaintiffs in Suit No. DHC/4/89, sued for themselves and on behalf of Oko family in Okusin Compound of Ido in Degema Local Government Area of Rivers State for declaratory and injunctive reliefs. At the High Court of Rivers State, Degema Judicial Division, their claims were predicated on the true historical identity of their family compound known as Okusin Compound, which the appellants made frantic efforts to change to Alibo Polo. Both lower courts found in favour of the respondents and granted all the reliefs. The germane issue on which the parties joined issues now is, whether the compound at Ido where both parties live should be called Okusin or Ido. Upon the movement from Old Ido to New Ido in 1884, the compound had been identified as Okusin. In 1985, precisely one hundred years thereafter, the appellants agitated that the compound assume the name Alibo. The two courts had exhibits P¹ and P² and P⁴ and the decisions of Customary Arbitration Panel to contend with. Exhibit P⁴ came from the Paramount traditional ruler of the entire community. He was the reputed father and custodian of tradition, Native Law and Custom of the people. He gave an independent traditional evidence of the family compound. In the case of Alli v. Alesinloye (2000) 6 NWLR pt. 660 pg. 177 at pgs. 207 - 208 paras. G-A had this to say about traditional history-

“Evidence of traditional history in land matters which is nothing short of evidence of a historical fact transmitted from generation to generation in respect of a family communal land may, in appropriate cases be given by any witnesses who by virtue of their relationship and circumstances and before them, their ancestors, with the land owning family or community, are in a position and knowledgeable enough to testify on the traditional evidence in question. Such witnesses may include those who by virtue of the intimate and age-long close association, interaction and/or relationship from time Immemorial between the family or community and those of the land owners in issue are clearly knowledgeable and in as good a position, if not even better than the land owners to give cogent and relevant traditional evidence in respect of ownership of such land.”

Although evidence of traditional history is clearly admissible in law, the weight to be attached to it is a matter which is left to the

experience and wisdom of the judge.

Akuru v. Olubadan-in-Council (1954) 14 WACA p. 523.

The courts relied on Exhibit P⁴ and such step could not have occasioned a miscarriage of justice. Consequently, there is now before this court concurrent findings of fact by the High Court and the
B Court of Appeal. The attitude of the Supreme Court to concurrent findings of fact by the two lower courts is that it is not the business of the apex court to disturb and overturn such findings which are not shown to be perverse or that they did not flow from the evidence led
C at the trial court. In the prevailing circumstance of this appeal, this court has no reason to interfere with the concurrent findings of fact of the two lower courts.

Ike v. Ugboaja (1993) 6 NWLR pt 301 pg. 539.

Enang v. Adu (1981) 11-12 SC pg. 25.

D Ige v. Olunloyo (1984)1 SCNLR pg. 158.

Bayo v. Ahemba (2001) 2 WRN pg. 109.

Daniel Holdings Ltd. v. United Bank for Africa PLC (2005)7
SC pt. 11 pg. 247.

With fuller reasons given by my learned brother in the leading
E judgment, I agree that the appeal lacks merit, and I also dismiss it. I adopt all the consequential orders as mine.

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