

SUPREME COURT OF NIGERIA
20TH JANUARY, 2012. SC. 19/1997
CORAM: - W. S. N. ONNOGHEN, J. A. FABIYI, S.
GALADIMA, N. S. NGWUTA, M. U. PETER-ODILI, JJSC

CHIEF AYOOLA ADEOSUN APPELLANT
(For himself and on behalf of the
Asao Branch of the Onidasa Ruling
House of Ipoti-Ekiti Substituted by
Order of Court of 8th December, 2009)
AND
1. THE GOVERNOR OF EKITI STATE
2. THE ATTORNEY-GENERAL OF
EKITI STATE
3. SECRETARY, IJERO LOCAL
GOVERNMENT
4. ELIJAH OLADELE AYENI RESPONDENTS
(For himself and on behalf of the Ejisun
Branch Ruling Family of Ipoti-Ekiti)
5. CHIEF INURIN ABISOYE
6. CHIEF AROWOLO ESIKIN

CHIEFTAINCY MATTERS - Customary law - Registered declaration
- Effect - It constitutes statement of the applicable customs - And court
and parties are bound by same - Save where the declaration is
fundamentally defective (H1)

EVIDENCE - Defence - Evidence obtained from defence witness -
Where it is in line with facts pleaded by plaintiff - It forms part of
plaintiff's evidence - And can be relied upon in proof of facts in dispute
between the parties (H2)

PLEADINGS - Binding nature of - Cases are decided on issues as
joined in the pleadings - The purpose being to avoid surprise at the trial
(H3)

APPEALS - Leave - Raising of fresh issues - Limitation - Fresh issues
must be limited to the case as pleaded by parties - And evidence on

2 Adeosun v. Gov. of Ekiti State (2012) 1 KLR (pt. 304) 1;

record in support of their positions - As well as the judgment thereon (H4)

DOCUMENTS - Validity - Invitation to determine - Is proper if the validity of the document is put in issue - In the pleadings of parties before the court (H5)

FACTS

The original plaintiff/appellant (Joseph Adebayo Osaguna) was a prince of the Onidasa Ruling House of Ipoti-Ekiti and one of the three contestants to the stool of Olupoti of Ipoti-Ekiti. The others are 4th defendant/respondent and one Joseph Ajewole Ogunsola. 1st to 3rd defendants/respondents are Ondo State Government functionaries with roles to play in the execution of the provisions of Ondo State Chiefs Edict No. 11 of 1984 as regards the appointment and approval of the occupant of the stool of Olupoti of Ipoti. While original 5th to 7th defendants/respondents were Chiefs of Ipoti who performed the functions of Kingmakers in the selection of 4th respondent as the Olupoti-elect. Original 8th defendant/respondent was the Chief who functioned as the Head of Onidasa Ruling House. By Exhibit "U", the said kingmakers selected 4th respondent and recommended him to Ondo State government for appointment as the new Olupoti of Ipoti-Ekiti.

Dissatisfied with the appointment, appellant instituted this action against respondents at High court of Ondo State holden at Akure. He claimed inter alia, that the declaration purportedly made under Section 5(1) of the Chiefs' Edict 1964 as the Customary Law regulating the selection of the Olupoti of Ipoti Chieftaincy approved on 24th December 1987 and registered on 26th December, 1987 is defective, faulty and objectionable and it is not a true reflection of the Customary Law regulating the selection of a person to be the holder of the Olupoti Chieftaincy and should, therefore be declared null and void and of no effect whatsoever. At the end of hearing, the court entered judgment for appellant. Aggrieved, 4th-7th respondents filed appeal at the Court of Appeal, Benin City Division. Appellant cross appealed. The court allowed the appeal and dismissed the cross-appeal. Being dissatisfied, appellant has appealed to Supreme Court. 4th to 6th respondents cross-appealed to Supreme Court.

ISSUE FOR DETERMINATION

“Having held that there had been a violation of the native law and custom of the Ipoti-Ekiti in the selection of the 4th defendant, was the Court of Appeal entitled to uphold the validity of the said selection upon a ground (which was founded upon a case) which was completely contrary to the case made by defendants in the court below”.

HELD (Unanimously allowing the main appeal and dismissing the cross appeal per **ONNOGHEN JSC**)

CHEIFTAINCY MATTERS - Registered declaration - Effect

1. In addition to the pleadings of the parties, the Registered Chieftaincy Declaration of the State (Ondo State) constitutes a statement of the customs/traditions and/or customary law of the people as it relates to the chieftaincy to which the declaration relates. It is also settled law that where a Registered Declaration exists in relation to a chieftaincy, it constitutes a complete statement of the relevant customs/traditions and/or customary law applicable to the said chieftaincy and the Court and parties are not allowed to go outside it in deciding the applicable customary law except where there is evidence that the said chieftaincy declaration is fundamentally defective or does not contain the real custom/customary law of the people applicable to the stool in question, etc. (p. 14 B)

Evidence obtained from defence witness

2. There is the argument of counsel for the respondents that the trial court relied on the evidence DW. 4 in making its finding on the issue of consultation with Ifa Oracle and not the evidence by the plaintiff. It is my considered view that the submission is misconceived in that the fact in dispute was pleaded and issue joined therein in the pleadings of the parties; Exhibit “D” paragraph F (f) was also in evidence and is relevant to the issue in question and finally, it is settled law that evidence elicited from the cross-examination of a defence witness which is in line with the facts pleaded by the plaintiff forms part of the evidence produced by the plaintiff in support of facts pleaded in the Statement of Claim and can be relied upon in proof of the facts in dispute between the parties. It follows therefore that, the admission of DW4 was not only an admission against interest, it also goes to prove the averment of the plaintiff that consultation with Ifa Oracle

was required but not done in relation to the nomination/selection of the 4th respondent. (p. 15 F)

PLEADINGS - Binding nature of

3. It is settled law that cases decided on pleadings are decided on the issues as joined in the pleadings, the purpose being to avoid surprise at the trial. From the pleadings earlier reproduced in this judgment, it is very clear that the issue before the Court is simply whether or not in the nomination/selection process of an Olupoti of Ipoti-Ekiti, the name or names of candidate(s) must be sent for consultation with Ifa Oracle prior to nomination/selection of a candidate which both courts resolved in the affirmative. The issue of omission to comply with that requirement being substantial or not never arose from the pleadings and was, therefore, very irrelevant in the determination of the case as no party put such a case before the Court. (p. 16 C)

APPEALS - Leave - Raising of fresh issues - Limitation

4. It is very clear that the present stand of the cross appellants is completely the opposite of their case on the pleadings and as presented at the trial court. It is the case of the cross appellants that they obtained leave of the Court to raise the issue as a fresh point of law at the lower court but the question is whether the leave so granted in the circumstances allows the cross appellant to change their case at will and from one Court to the other. The answer cannot be far fetched. It is a big NO. A leave to raise fresh issue limits the issue to be so raised to the case of the parties as pleaded, the evidence on record in support of their contending positions and the judgment of the Court thereon. The issue cannot be at large otherwise it will constitute an instrument of ambush against the opponent. It is very improper of counsel who contented at the trial that the 4th defendant was lawfully appointed in accordance with the guidelines, Exhibit “D”, and was defeated in that contention to now turn round on appeal to this Court to contend that the very provisions which constituted the pivot of his case at trial was ultra vires, null and void and expect the court to take him serious. If the approach of the cross appellants is encouraged then there will be no certainty in the case a party is to meet in the Court which will erode the right to fair hearing. A party’s case in any proceeding cannot be like a chameleon which changes its colours depending on its mood and

environment. (p. 19 D)

DOCUMENTS - Validity - Invitation to determine

5. While it may be the law that a party “can invite the court at any stage of the proceeding to determine the validity of any legal document that will be used in the course of the proceeding” the invitation would be proper only if the legal validity of the said legal document is put in issue in the pleadings of the parties before the Court. If not the invitation is of no moment, as in this case. In short, I find no merit whatsoever in the cross appeal, which is accordingly dismissed by me. (p. 20 C)

REPRESENTATION

Owoseni Ajayi Esq. for the Appellant

Dayo Akinlaja, Esq (A-G Ekiti State) for 1st - 3rd respondents with S. B. Ofo, Esq (S-G Ekiti State), Soji Odowolafe, Esq. and Julius Ajibare, Esq ACLO.

J. O. Disu, Esq for 4th – 6th respondents/cross appellants

CASES REFERRED TO

Bhojsons Plc vs Daniel - Kalio (2006) 5 NWLR (Pt. 973) 330

Ekek vs Ogbonda (2006) 18 NWLR (Pt. 1012) 506

Bunge vs Gov. Rivers State (2006) 12 NWLR (Pt. 995) 573

Oredoyin vs Arowolo (1989) 4 NWLR (Pt. 114) 172

Mafimisebi vs Ebuwa (2007) 2 NWLR (Pt. 1018) 385

Akinterinwa v. Oladunjoye (2000) 6 NWLR (Pt. 659) 92

Oniah v. Onyiah (1959) 1 NWLR (Pt. 99) 514

Ojo-Osagie v. Adonri (1994) 6 NWLR (Pt. 349) 131

Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566

Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248

Njoku & Ors v. Eme & Ors (1973) 5 SC 293

Orizu v. Anyaegbunam (1978) 5 SC 21

Ehimare & An. v. Enihonyon (1985) 2 SC 49

Iweka v. SCOA (2000) 3 SC 21

STATUTES REFERRED TO

Chiefs’ Edict 1984, ss. 1 (3) (a) (v), 8

Chiefs’ Edict 1964, s. 5 (1)

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal and a cross appeal against the judgment of the court of Appeal, Holden at Benin City in appeal No. CA/B/155/93 delivered on the 22nd day of March, 1996, in which the court allowed the appeal and dismissed the cross appeal against the judgment of the High Court of Ondo State Holden at Akure, in Suit No. AK/62/88 in which the court declared the registered Olupoti Chieftaincy Declaration null and void, etc.

At the trial court, the original plaintiff/appellant, Joseph Adebayo Osaguna instituted the action against the defendants/respondents in which he claimed the following reliefs:-

1. The declaration purportedly made under Section 5(1) of the Chiefs' Edict 1964 as the Customary Law Regulating the selection of the Olupoti of Ipoti Chieftaincy approved on 24th December, 1987 registered on 26th December, 1987 is defective, faulty and objectionable and it is not a true reflection/codification of the Customary Law regulating the selection of a person to be the holder of the Olupoti Chieftaincy and should, therefore be null and void and of no effect whatsoever.

2. All actions purported to have been taken by:

- a. the so called head of the Onidasa Ruling House namely Chief Aduramola Adesuyi, the Ejisun,
- b. the so called Kingmakers of the Olupoti of Ipoti Chieftaincy namely Chief Ihurin Abinoye, Arowolo Elemkin and Kauni Ejesu respectively and
- c. the secretary of Ijero Local Government in the purported nomination and selection of one Mr. Elijah Oladele Ayeni under the provision/authority of the said declaration is meaningful, null and void and of no effect whatsoever.

3. The purported selection of Mr. Elijah Oladele Ayeni an Olupoti elect by the said so called kingmakers is unlawful, null and void and of no effect whatsoever.

4. The Asso Emila and Ejemu families/branches, otherwise known as Amilede houses of the Onidara Ruling House are the only and truly the sons (Princes) of the Onidasa Ruling House of Ipoti-Ekiti and the only and truly the families/branches of the said Ruling House that can lawfully nominate a candidate(s) for selection into the vacant

stool of the Olupoti of Ipoti by the true kingmaker namely the Iwaraja Mefa (the inner council) excluding the Olupoti of Ipoti namely chief Odofin of Ipoti, Sajiyani Ejiyan, Odofin Ejiyan, Ajana Owa and Odofin Owa in accordance with the customary Law of the Ipoti-Ekiti Community.

5. The proper and true Head of the Onidasa Ruling House is Chief Asao and not Chief Ejisun. B

6. The Aworos namely chief Aworokin, Aworojasin and Asalu are the true and only accredited channel of consultation with the Ifa Oracle in the nomination and selection process(es) of a person to fill the vacant stool of the Olupoti of Ipoti Chieftaincy. C

7. The plaintiff, namely prince Joseph Adebayo Osagawa having been unanimously, properly, duly and jointly nominated by the Asao Emila and Ejowu (Amilede) families/branches of the Onidasa Ruling House for the vacant stool of Olupoti be approved by the Ondo State Government. D

2. An order compelling the Executive Council of Ondo State to direct the committee of the Ijero Local Government charged with the making of declarations under S. 1 of the Chief Edict, 1984 to amend the said Olupoti Chieftaincy Declaration or make a new declaration to reflect the true customary Law regulating the selection of a person to be holder of the Olupoti Chieftaincy. E

3. AN INJUNCTION:

i. restraining the 1st, 2nd and 3rd defendants by themselves or their servants and or agents or otherwise however from implementing or giving effect to the purported nomination and or selection of the 4th defendant, namely Elijah Oladele Ayeni as the Olupoti or Oba-elect; F

ii. restraining the 4th defendant, namely Elijah Oladele Ayeni from parading or holding out himself as the Olupoti of Ipoti-Ekiti and from exercising any of the Olupoti royal functions. G

The original plaintiff and appellant in this court was a prince of the Onidasa Ruling House of Ipoti-Ekiti and one of the three contestants to the stool of Olupoti of Ipoti-Ekiti the others being the 4th defendant/respondent and one Joseph Ajewole Ogunsola. H

The 1st to 3rd respondents are Ondo State Government functionaries with roles to play in the execution of the provisions of Ondo State Chiefs Edict No. 11 of 1984 as regards the appointment and approval of the occupant of the stool of OLUPOTI of IPOTI.

The original 5th, 6th and 7th respondents are chiefs of Ipoti who performed the functions of kingmakers in the selection of the 4th respondent as the Olupoti elect, whilst the 8th respondent was Chief Ejisun who functioned as the head of Onidasa Ruling House but was challenged at the trial.

B By Exhibit “U” the 5th-7th defendants/original respondents, as kingmakers selected the 4th respondent and recommended his appointment as the new Olupoti of Ipoti-Ekiti which appointment was challenged by the original plaintiff/appellant, on the following grounds:-

C a. That the 4th respondent was not qualified to be a candidate for election/selection to the stool of Olupoti of Ipoti-Ekiti because he was not a Prince of the Onidasa Ruling House neither was he a descendant of any of the previous ten (10) occupiers of that stool.

D b. That the 5th-7th defendants who acted as kingmakers were not lawful kingmakers under native law and custom of Ipoti-Ekiti and none of the lawful kingmakers -the Iwarefa - were consulted on the selection.

E c. That the 8th defendant as Chief Ejisun was not a member of the Onidasa Ruling House and acted contrary to Ipoti-Ekiti customary law in presiding over the meeting of the Princes of the Onidasa Ruling House and as the head of the said ruling house.

F d. That the custom of the people which required that Ifa Oracle be consulted by the Ipoti Aworos was not complied with in the selection.

On the 13th day of January, 1993, the trial Court entered judgment for the plaintiff/appellant in the following terms:-

“Finally, I hold on the evidence before the court:

G *1. That the Ruling House entitled to produce the Olupoti of Ipoti is called Onidara Ruling House.*

2. The Head of Onidasa Ruling House is Ejisun.

3. The families or branches making up the Onidasa Ruling House are:-

a. Asao

H *b. Olomo*

c. Emila

d. Ejemu

e. Ejisun

4. The names of the candidates if not disqualified are by

customary law sent to the Aworo for consultation with Ifa Oracle.

5. That the kingmakers are Odofin Ipoti, Inurin, Eisinkin, Eisaba and Ejemu.

6. That the Olupoti Chieftaincy Declaration purportedly approved and registered on 24th December, 1987 is defective in that:-

i. it omitted some of the important customary laws of Ipoti Community as indicated in this judgment,

ii. it was not published so much so that the contestants claimed not to know of its contents,

iii. above all it was not approved by the appropriate authority as required by law.

It is hereby declared that the Olupoti Chieftaincy Declaration purportedly approved and registered on 24th December, 1987 is null and void. Consequently, all actions taken in pursuant to the Chieftaincy Declaration are null and void and of no effect whatsoever.

The 1st, 2nd and 3rd defendants by themselves and their agents are hereby restrained from giving effect to the nomination or selection made under the defective Olupoti Chieftaincy Declaration.

The 4th defendant Elijah Oladele Ayeni is hereby restrained from parading himself and exercising any of the Olupoti Royal functions because of the defect in the instrument of his appointment. As neither the plaintiff nor the defendant can claim total victory over the other, I will make no order as to costs."

The 4th- 7th defendants were dissatisfied with the judgment and appealed against same, particularly the grant of reliefs (4) and (6) in the judgment supra i.e. that the names of candidates who are not disqualified by customary law are sent to the Aworos for consultation with Ifa Oracle and that the Chieftaincy Declaration was defective and consequently null and void, while the plaintiff/appellant cross appealed on the finding/holding of the trial court that:-

(a) there was only one Ruling Housing, the Onidasa, and that the said House consists of five branches with Chief Ejisun as its head; and

(b) that the kingmakers are Odofin, Ipoti, Chief Inurin, Chief Eisaba and Ejemu.

The Court of Appeal allowed the appeal and dismissed the cross-appeal resulting in the instant appeal before this court. The issue for the determination of which has been identified by learned counsel

for appellant OWOSENI AJAYI, ESQ in the amended brief of argument deemed filed on 7th February, 2011, as follows:-

“Having held that there had been a violation of the native law and custom of the Ipoti-Ekiti in the selection of the 4th defendant, was the Court of Appeal entitled to uphold the validity of the said selection upon a ground (which was founded upon a case) which was completely contrary to the case made by defendants in the court below”.

At this stage, it is important to mention the fact that the 4th - 6th respondents have also cross appealed against the judgment of the lower court delivered on the 22nd day of March, 1996, which incidentally and funny enough, allowed the appeal of the instant 4th - 6th respondents against the judgment of the trial Court.

However, the issues for determination of the cross-appeal have been identified by learned Counsel for the 4th - 6th respondents/cross appellants, NIRAN DISU, ESQ in the amended 4th - 6th respondents/cross appellant brief filed on 22nd November, 2010 as follow:-

“1. Whether the Court of Appeal was right when it held that it could not make any pronouncement on the issue of whether or not paragraphs F (a), F (f) and F (g) of the Chieftaincy Declaration, Exhibit E “D”, are consistent with the provisions of the 1984 Chiefs Edict.

2. Whether the inclusion of sub-paragraph F(a), F(f) and F(g) in the Registered Declaration for the Olupoti Chieftaincy Exhibit “D” is ultra vires S. 1 (3) (a) (v) of the 1984 Chiefs Edict of Ondo State?”

Another important point to be mentioned is the fact that learned Counsel for the 1st and 2nd respondents OKWUDILI AGBO, ESQ filed a Notice of Preliminary Objection on the 16th day of July, 2010 against the appeal on the following grounds:-

“1. The appellants Further and Further Amended Statement of Claim on which the trial judgment and the subsequent appeal upon which this appeal is predicated was signed by a law firm “W. A ALADEDUTIRE & CO” and not by a legal practitioner known as (sic, to) law (pp. 3-9 of Record).

2. The said Further and Further Amended Statement of Claim was null and void ab initio.

3. All subsequent process filed in response to the void Further and Further Amended Statement of Claim as well as the trial judgment and all other proceedings premised thereon are null and void ab initio.

4. The sole issue raised and argued by the appellant in his brief

of argument is incompetent for not flowing from the grounds of appeal raised.

5. The entire appeal is grossly and incurably incompetent.

6. This Honourable Court lacks jurisdiction to entertain or hear this appeal”.

The objection was argued in the 1st and 2nd respondents brief of argument deemed filed on the 7th day of February, 2011. However, on the 24th day of October, 2011, when the appeal was heard learned Counsel for the 1st and 2nd respondents DAYO AKINLAJA, ESQ, Hon. Attorney-General of Ekiti State withdrew the first arm of the argument on the objection dealing with the competence of the Further Amended Statement of Claim as a result of which the same was struck out by the Court leaving arguments on the validity of the sole issue formulated by counsel for appellant for the determination of the appeal.

On the surviving ground of objection, it is the submission of learned Counsel that there was no ground of appeal in which a complaint is raised to the effect that the decision of the lower court upholding the validity of 4th respondent’s selection was based on a case contrary to that made by the respondents; that issues for determination must flow from the grounds of appeal failure of which the issue(s) must be disregarded, relying on *Bhojsons Plc vs Daniel - Kalio* (2006) 5 NWLR (Pt. 973) 330 at 355 - 356; *Ekek vs Ogbonda* (2006) 18 NWLR (Pt. 1012) 506 at 522; that since there is no valid issue formulated from the grounds of appeal, the grounds be deemed abandoned and consequently struck out, particularly as an omnibus ground of appeal cannot support an issue.

Learned Counsel urged the court to uphold the preliminary objection. On his part, it is the submission of counsel for appellant that the submission of his learned friend *supra* is misconceived as the issue is supported by the grounds of appeal.

I have carefully read through the seven grounds of appeal together with their particulars and I am satisfied that the sole issue raised therefrom for the determination of the appeal is adequately covered by the grounds of appeal. I need not reproduce all the grounds herein as the objection is obviously designed to waste the time of the court. It is lacking in substance and is consequently dismissed by me.

In arguing the issue, learned Counsel for appellant referred to paragraphs 33 and 34 of the Further Amended Statement of Claim where appellant pleaded the custom of consultation of Ifa Oracle by the Aworose before the selection of Olupoti of Ipoti-Ekiti and the denial of the said paragraphs by the 4th - 8th defendants in their paragraph 25 of the Further Amended Statement of Defence; that the trial Court found the non-compliance proved and held that the same was contrary to paragraph F(f) of Exhibit "D" - the Chieftaincy Declaration.

It is the further submission of learned Counsel that the above finding by the trial Court was affirmed by the lower Court in its judgment at page 321 of the record but that instead of stopping there the lower Court erroneously went on to reverse the trial Court on the point by holding that the failure to consult Ifa Oracle was not substantial enough to render the selection of the 4th respondent invalid; a finding/holding which is contrary to the case put forward by the 4th - 8th defendants at the trial and urged the Court to resolve the issue in favour of the appellant and allow the appeal.

On his part, learned Counsel for the 1st, 2nd and 3rd respondents submitted that the lower Court was right in its holding that the failure complained of was cosmetic as the same is based on the case as presented and contested by the parties particularly the resolution of issue 2 formulated by the 4th - 7th appellants before the lower Court (the present 4th - 6th respondents); that the issue of consultation with Ifa Oracle being a condition precedent to the selection of the Olupoti was not pleaded by the appellant but "cropped up in the judgment of the trial Court...."; that the question of the effect of the failure to consult Ifa Oracle is that of interpretation of Exhibit "D" paragraph F(f) thereof, which is within the province of the Court to do relying on *Bunge vs Gov. Rivers State (2006) 12 NWLR (Pt. 995) 573 at 629* and urged the Court to resolve the issue against appellant and dismiss the appeal.

On his part, learned Counsel for the 4th - 6th respondents stated that the trial Court only found that there was an omission to consult Ifa Oracle in the selection process without going further to find on the consequences of that omission thereby making the 4th - 6th respondents to challenge the decision and argued that the omission was not substantial enough to invalidate the selection of the 4th

respondent and that the lower Court was competent to re-examine the issue which was really raised by the trial Court in its judgment; that the conclusion by the lower Court that consultation with Ifa Oracle by the Aworos is of no consequence is in the nature of a consequential order which the Court is empowered to make.

It is the further submission of learned Counsel, which I take to be in the alternative; that if the holding by the lower Court on the effect of the omission to consult Ifa Oracle is considered as made in error by this Court, such an error has not resulted in a miscarriage of justice and urged the Court to resolve the issue against appellant and dismiss the appeal. There is no doubt that appellant pleaded consultation with Ifa Oracle by the Aworos as a condition precedent to the selection of Olupoti of Ipoti-Ekiti and that the 4th - 6th respondents denied that fact in their Further Amended Statement of Defence as follows:-

In paragraphs 33 and 34 of the Further Amended Statement of Claim the plaintiff/appellant averred thus:-

“33. The plaintiff avers that it is the prevailing custom in respect of the Olupoti Chieftaincy for the Ifa Oracle to be consulted by the accredited Ipoti Aworos.

34. The plaintiff avers that the Aworos, namely Chief Aworokin, Aworojasin and Asalu are from time immemorial the only accredited channel of consultation with the Ifa Oracle in the matters of nomination and selection of a candidate to fill the vacant stool of the Olupoti and there was no time that they were consulted by anybody on the existing vacancy to the Olupoti Stool. The plaintiff will rely on the written complaint of the Aworos dated 13th September, 1988.”

In reaction to the above averments, the 4th - 8th defendants stated in paragraph 25 of the Further Amended Statement of Defence as follows:-

25. The 4th - 8th defendants deny paragraphs 33 and 34 of the Further Amended Statement of Claim and state that the Ipoti Aworos do not have any pre-installation functions to perform in the nomination/selection processes of an Olupoti of Ipoti”.

From the pleadings supra, it is clear that issues were joined by the parties as to whether by the customs of Ipoti people relating to the stool of Olupoti of Ipoti, the Ifa Oracle must be consulted on nomination and selection of candidate for the stool. While the plaintiff insists that it is the custom of the people, the 4th - 8th defendants

contend that the

Aworos have no pre-installation functions to perform. What the trial Court was, in the circumstance, called upon to determine was which of the two versions is the correct statement of the customary law or custom of the people of Ipoti-Ekiti in relation to their relevant chieftaincystool.

In addition to the pleadings of the parties, the Registered Chieftaincy Declaration of the State (Ondo State) constitutes a statement of the customs/traditions and/or customary law of the people as it relates to the chieftaincy to which the declaration relates. It is also settled law that where a Registered Declaration exists in relation to a chieftaincy, it constitutes a complete statement of the relevant customs/traditions and/or customary law applicable to the said chieftaincy and the Court and parties are not allowed to go outside it in deciding the applicable customary law except where there is evidence that the said chieftaincy declaration is fundamentally defective or does not contain the real custom/customary law of the people applicable to the stool in question, etc.

In the instant case, Exhibit “D” is the chieftaincy declaration relating to Olupoti chieftaincy and it provides in paragraph F(f) as follows:-

“(f) the kingmakers shall meet within fourteen (14) days of receiving the name or names of the candidate or candidates nominated and consider his or their suitability according to custom. Unless a candidate suffers a disqualification in accordance with the Chief Edict, his name shall be submitted by the kingmakers for consultation of Ifa by a person appointed by them for the purpose.

Where however there is no unanimity by the kingmakers, the kingmakers shall decide the candidate by a simple majority of votes”.

The next question is what is the finding/holding of the trial Court in relation to the issue as joined in the pleadings and the evidence on record? The answer is in the judgment of that Court at page 107 of the record where the Court found as follows:-

“DW. 4 Chief Daramola Ejisun admitted under cross-examination that the names of the candidates were not sent to Ifa Oracle. Whereas paragraph F (f) of the purported Registered Declaration is to the effect that unless a candidate suffers a disqualification in accord-

ance with the Chiefs Edict his name shall be submitted to the kingmakers for consultation of Ifa Oracle by a person appointed by them for that purpose. This is a substantial omission in the selection process of 4th defendant i.e. Elijah Oladele Ayeni.”

From the above and by the rules and procedure of the Court the issue in controversy had been resolved in favour of the plaintiff/ B
appellant’s version of the applicable custom of the people to the relevant process leading to the nomination selection of Olupoti of Ipoti-Ekiti. The trial Court did not only find that consultation with Ifa Oracle is a condition for the nomination/selection process but that its C
omission is a substantial omission.

What was the reaction of the lower Court to the above finding of fact by the trial Court? This can be found at page 321 of the record where the court held as follows:-

*“So one can say from the forgoing that the 4th - 7th appellants D
had admitted that the names of the candidates were never sent to the Aworos for consultation with Ifa Oracle, their reason being that such was not the custom. That being the case the plaintiff/respondent had no duty to call evidence to rebut or prove what was admitted. Our law is that “facts admitted need not be proved s. 75 of Evidence Act 1990”. E*

It is very clear from the above passage from the judgment that the lower Court agreed with or affirmed the finding of the trial Court on the procedure for the nomination/selection of the 4th defendant/ respondent.

***There is the argument of counsel for the respondents that F
the trial court relied on the evidence DW4 in making its finding on the issue of consultation with Ifa Oracle and not the evidence by the plaintiff. It is my considered view that the submission is misconceived in that the fact in dispute was G
pleaded and issue joined therein in the pleadings of the parties; Exhibit “D” paragraph F(f) was also in evidence and is relevant to the issue in question and finally, it is settled law that evidence elicited from the cross-examination of a defence witness which is in line with the facts pleaded by the plaintiff forms part of the H
evidence produced by the plaintiff in support of facts pleaded in the Statement of Claim and can be relied upon in proof of the facts in dispute between the parties. It follows therefore that, the admission of DW4 was not only an admission against***

interest, it also goes to prove the averment of the plaintiff that consultation with Ifa Oracle was required but not done in relation to the nomination/selection of the 4th respondent.

However, the lower Court went on, after affirming the finding of the trial Court that there was no consultation with Ifa Oracle as required by the customs of the people, to hold that the omission or non-compliance did not result in a miscarriage of justice as the same was not substantial, and that appellant failed to satisfy the Court that the failure to consult Ifa Oracle nullified the entire nomination exercise by reference to decided authority. I agree with the submission of counsel for appellant that the lower Court was in error in so holding.

It is settled law that cases decided on pleadings are decided on the issues as joined in the pleadings, the purpose being to avoid surprise at the trial. From the pleadings earlier reproduced in this judgment, it is very clear that the issue before the Court is simply whether or not in the nomination/selection process of an Olupoti of Ipoti-Ekiti, the name or names of candidate(s) must be sent for consultation with Ifa Oracle prior to nomination/selection of a candidate which both courts resolved in the affirmative. The issue of omission to comply with that requirement being substantial or not never arose from the pleadings and was, therefore, very irrelevant in the determination of the case as no party put such a case before the Court.

It should be remembered that Exhibit “D” is the codified customary law relating to the nomination/selection of an Olupoti of Ipoti-Ekiti and in paragraph F(f) thereof the word “shall” is employed in relation to the need of consultation with Ifa Oracle and that the trial court had found the omission to comply therewith to be “*a substantial omission in the selection process....*”

The finding by the trial Court is very much in accord with paragraph F(f) which used the word “shall” which has, in cases such as this, been interpreted to mean mandatory, not permissive or discretionary in nature.

In short, I find merit in the sole issue under consideration and therefore resolve same in favour of the appellant and consequently allow the appeal.

In relation to the cross appeal, the issues for the determination

had been identified in the Amended Cross-Appellant brief filed on 22nd April, 2010, to be as follows:-

“1. Whether the Court of Appeal was right when it held that it could not make any pronouncement on the issue of whether or not paragraph F (a), F (f) and F (g) of the Chieftaincy Declaration, Exhibit “D”, are consistent with the provisions of the 1984 Chiefs Edict. B

2. Whether the inclusion of sub-paragraph F(a), F(f) and F(g) in the Registered Declaration for the Olupoti Chieftaincy Exhibit “D” is ultra vires S.1(3)(a)(v) of the 1984 Chief Edict of Ondo State”.

In arguing the issues, learned Counsel for cross appellants stated that leave of the lower Court was sought and obtained to raise the issue but that court failed to resolve the issue in its judgment now on appeal and urged the court to now determine the issue, which is whether or not paragraphs F(a), F(f) and F(g) of Exhibit “D” are consistent with the provisions of 1984 Chiefs Edict in line with the principle laid down by this court in *Ukwunnenyi vs. State* (1989) 4 NWLR (Pt. 114) 131 at 144, that a subsidiary legislation which conflicts with the provisions of its paramount legislation must be cut down and that the part of the subsidiary legislation which seeks to extend the content and application of the paramount legislation is a nullity; that since paragraphs F(a), F(f) and F(g) of Exhibit “D” seek to extend the provision of Section 1 (3) (a)(v) of the 1984 Chiefs Edict of Ondo State, they are invalid and consequently null and void. C

Learned Counsel urged the Court to hold that there is therefore no legal provision for the consultation of Ifa Oracle in the process of appointing a candidate for the Olupoti of Ipot-Ekiti Chieftaincy and allow the cross appeal. F

In his reaction to the cross appeal, learned Counsel for Appellant/cross respondent, in the amended respondents’ brief to the cross appeal deemed filed on 7th February, 2011, submitted that the cross appeal be dismissed in that:- G

(a) having made out a case at trial that the 4th defendant’s selection had been properly made in accordance with the procedure prescribed by the Chiefs Edict of 1984 and the guidelines set out in the registered declaration, it is no longer open for the 4th - 7th defendants/respondents to contend that the guidelines were ultra vires and consequently null and void, and H

(b) that the provisions in the registered declaration were

properly inserted pursuant to the provisions of Section 8 of the Chiefs Edict, 1984 relying on the case of Adetoun Oladije vs N. B Plc (2007) 5 NWLR (Pt. 1027) 415 at 441.

It is the further submission of counsel that the cross appellants cannot in one breath contend that the 4th respondent was lawfully appointed in accordance with the guidelines and turn round, after being defeated on the issues to contend on appeal that the very same provisions were ultra vires and consequently null and void, relying on Oredoyin vs Arowolo (1989) 4 NWLR (Pt. 114) 172; Mafimisebi vs Ebuwa (2007) 2 NWLR (Pt. 1018) 385 at 428 - 429 and urged the Court to dismiss the cross appeal.

In the reply brief filed on 22nd April, 2010, learned Counsel for cross appellant submitted that since the law is that the main purpose of a cross appeal is to correct an error which is standing in the way of a respondent in the main appeal, it is therefore proper for the Court to be called upon to determine whether paragraphs F(a), F(f) and F(g) of Exhibit "D" are in conformity with the enabling law; that the cross appellant can invite the Court at any stage in a proceeding to determine the validity of any legal documents to be used in the course of the proceeding, etc.

It is not in dispute that the issues in the cross appeal were fresh issues raised, with leave of the lower Court but that the Court failed to pronounce on them.

The pivot of the plaintiff's case as can be gleaned from the record rests on relief No. 1(i) which is:

"The declaration purportedly made under S. 5(1) of the Chiefs Edict 1984 as the customary law regulating the selection of the Olupoti of the Ipoti Chieftaincy approved on 24th December, 1987 registered on 24th December, 1987 is defective faulty and objectionable and it is not a true reflection/codification of the customary law regulating the selection of a person to be the holder of the Olupoti Chieftaincy and should, therefore be null and void and of any effect whatsoever."

I had earlier reproduced the averments of the plaintiff in paragraphs 33 and 34 of The Further Amended Statement of Claim while dealing with the main appeal which deal with the requirement of consultation with Ifa Oracle on the issue of nomination or selection of Olupoti of Ipoti-Ekiti. The reaction to the said paragraphs of the Statement of Claim and captured in paragraphs 24 and 25 of the

Further Amended Statement of Defence of the 4th -7th defendant where the pleaded thus:-

“24. The 4th - 8th defendants deny paragraphs 31 and 32 of the Further Amended Statement of Claim and state that the nomination/selection of the 4th defendant was in accordance with Ipoti Native Law and Custom as well as the procedure prescribed in the Chiefs Law and Guidelines set out in the registered declaration relating to the Olupoti of Ipoti”.

“25. The 4th - 8th defendants deny paragraphs 33 and 34 of the Further Amended Statement of Claim and state that the Ipoti Aworos do not have any pre-installation functions to perform in the nomination/selection process of the Olupoti of Ipoti”.

The above paragraphs of the pleadings constitute the fundamental/pivot of the case of the parties in relation to Exhibit “D” which includes paragraphs F (a), F (f) and F (g) now sought to be declared null and void by the 4th - 6th respondents/cross appellants.

It is very clear that the present stand of the cross appellants is completely the opposite of their case on the pleadings and as presented at the trial court. It is the case of the cross appellants that they obtained leave of the Court to raise the issue as a fresh point of law at the lower court but the question is whether the leave so granted in the circumstances allows the cross appellant to change their case at will and from one court to the other. The answer cannot be far fetched. It is a big NO. A leave to raise fresh issue limits the issue to be so raised to the case of the parties as pleaded, the evidence on record in support of their contending positions and the judgment of the Court thereon. The issue cannot be at large otherwise it will constitute an instrument of ambush against the opponent. It is very improper of counsel who contented at the trial that the 4th defendant was lawfully appointed in accordance with the guidelines, Exhibit “D”, and was defeated in that contention to now turn round on appeal to this Court to contend that the very provisions which constituted the pivot of his case at trial was ultra vires, null and void and expect the court to take him serious. If the approach of the cross appellants is encouraged then there will be no certainty in the case a party is to meet in the Court which will erode the right to fair

hearing. A party's case in any proceeding cannot be like a chameleon which changes its colours depending on its mood and environment.

The very tactic deployed by the cross appellants in the cross appeal is what they used at the lower Court when they argued that the plaintiff did not contend nor give evidence to show that the non-compliance with the provisions of paragraph F(f) of Exhibit "D" was substantial enough to nullify the nomination/selection of the 4th respondent and the lower Court, unfortunately agreed with them despite the facts pleaded by the parties, the evidence on rotation record which incidentally included paragraph F(f) of Exhibit "D".

While it may be the law that a party "can invite the court at any stage of the proceeding to determine the validity of any legal document that will be used in the course of the proceeding" the invitation would be proper only if the legal validity of the said legal document is put in issue in the pleadings of the parties before the Court. If not the invitation is of no moment, as in this case. In short, I find no merit whatsoever in the cross appeal, which is accordingly dismissed by me.

In conclusion, I find merit in the main appeal which is accordingly allowed by me. The judgment of the lower Court delivered on the 22nd of March, 1996, setting aside the judgment of the trial Court is hereby set aside, while the judgment of the trial Court in suit no. AK/62/88 delivered on the 15th day of January, 1993, is hereby restored and affirmed by me with N50,000.00 costs from each set of respondents to the appellant.

It is further ordered that the cross appeal by the 4th - 6th respondents be and is hereby dismissed for lacking in merit with N50,000.00 costs against the cross appellants in favour of the appellant/cross respondent.

Appeal allowed, cross appeal dismissed.

FABIYI JSC

I have read before now, the judgment just delivered by my learned brother, Onnoghen, JSC. I completely agree with the lucid reasons therein advanced to arrive at the conclusion, that the main appeal should be allowed, while the cross appeal deserves to be

dismissed.

This is a chieftaincy matter. The main complaint of the appellant is that the Court of Appeal agreed with the trial High Court that there was violation of the native law and custom of Ipoti people in that the names of the candidates for the chieftaincy stool were not sent for Ifa consultation and such was in breach of Ipoti custom. The Court of Appeal watered it down and curiously asserted that such was cosmetic and equates with a mere irregularity. B

The stance of the Court below was not in tandem with the case of the respondent at the trial Court. C

It is not the business of a Court to set up for parties a case different from the one set up by the parties themselves in the pleadings and their evidence. See: *Akinterinwa v. Oladunjoye* (2000) 6 NWLR (Pt. 659) 92; *Oniah v. Onyiah* (1959) 1 NWLR (Pt. 99) 514, *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Pt. 349) 131 and *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566. With respect to the cross-appeal, the counsel who contended at the trial Court that the 4th defendant was lawfully appointed in accordance with the guidelines in Exhibit D and was defeated thereat has now turned round on appeal to this Court to contend that the provision which constituted the pivot of his case at trial was ultra vires, null and void. A Court of record cannot take same with any atom of seriousness. The cross appellant should be reminded that there should be consistency in prosecuting his case at the trial Court as well as on appeal. There should be no somersault. See: *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248. E F

For the above reasons and the fuller ones adumbrated in the lead judgment, I too feel that the main appeal should be allowed, while the cross-appeal is dismissed. I endorse all the consequential orders contained in the lead judgment; that relating to costs inclusive. G

GALADIMA JSC

I have had the opportunity of reading in draft, the lead judgment just delivered by my brother, ONNOGHEN JSC. I entirely agree with him that the main appeal should be allowed, while cross-appeal should be dismissed. H

For purposes of the brief comment that I make hereunder, I shall adopt the facts as stated in the judgment, except in so far as I need

any part of them for my comment. Both the Court of first instance and the Court of Appeal agreed that there was violation of the Native Law and Custom of Ipoti people in that the names of the candidates for their chieftaincy stool were not sent to Ifa Oracle for consultation. The Court of Appeal however in my view was in error and ran foul of
 B fundamental principle of the law, because it failed to conform to its role of appellate status.

The trial Court at page 107 of the Record of Appeal made the following findings:

C *“DW. 4, Chief Daramola Ejisun admitted under cross-examination that the names of the candidates were not sent to Ifa Oracle, Whereas, paragraph F(f) of the purported Registered Declaration is to the effect that unless a candidate suffers a disqualification in accordance with the chiefs Edict, his name shall be submitted to the
 D kingmakers for consultation of Ifa Oracle by a person appointed by them for that purpose.*

This is a substantial omission in the selection process of 4th defendant i.e. Elijah Oladele Ayeni.”

E From the above, clearly, the issue in controversy was resolved in favour of the Appellants. The trial Court has held that consultation with Ifa Oracle is a condition precedent for the chieftaincy selection process. The omission was considered substantial, in effect. The admission of DW4 was not only an admission against interest it
 F supports the averment of the plaintiff that consultation with Ifa Oracle was required in relation to the selection of 4th Respondent. This is where the lower Court went wrong. After affirming the finding of the trial Court that there was no actual consultation with Ifa Oracle as required by the custom of Ipoti Ekiti people, it went on to hold that the
 G omission did not result in a miscarriage of justice as same was not substantial; and also that the appellant failed to satisfy the Court that failure to consult Ifa Oracle nullified the entire nomination exercise. This is where the Court below was wrong. Its stance was not in tandem with the case of the plaintiff at the trial. From the pleadings, it is very
 H clear that the issue before the trial Court is whether or not in the nomination process of Olupoti of Ipoti-Ekiti the name or names of candidates must be referred to Ifa Oracle for consultation. The issue of omission to comply with the requirement being substantial or not neither arose nor was it put up as a case before the trial Court. The

finding by the trial Court is therefore in accord with paragraph F(f) of Exhibit “D” in which the word “shall” is imperative and has mandatory force and obligatory, not permissive or discretionary. It is in the light of this that the lone issue is resolved in favour of the Appellants.

With respect to the cross-appeals the stand of the cross-appellants is completely different from their case on the pleadings and as presented at the trial Court. The learned Counsel for the cross-appellant who contended at the trial Court that the 4th Respondent’s appointment was in accordance with the guidelines in Exhibit ‘D’ and was defeated thereat has now somersaulted on appeal to this Court to contend that the provision was ultra vires, and therefore null and void.

Inconsistency indeed, is shown by 4th - 6th cross-appellants. No appellate Court shall entertain this sham complaint. The cross appeal is accordingly dismissed.

In conclusion, the main appeal is adjudged meritorious and accordingly is allowed. The cross-appeal is lacking in merit and hereby dismissed.

I abide by consequential order made in the leading judgment including costs.

NGWUTA JSC

In his further and further amended statement of claim dated 28th February, 1991, and filed on 4th of March, 1991, the appellant, at paragraph 36 thereof, reproduced the claims endorsed on his Writ of Summons as amended dated 19th July, 1990 and issued at the High Court of Ondo State, Akure Judicial Division on 23rd July, 1990. The appellant claimed declaratory reliefs, an order on the Ondo State Executive Council and injunctive reliefs all in respect of nomination/selection of candidate for the vacant stool of the Olupoti of Ipoti-Ekiti Chieftaincy.

In its judgment, the trial High Court inter alia declared the Olupoti Chieftaincy Declaration by which the 4th respondent was nominated the Olupoti of Ipoti-Ekiti, null and void.

The 4th, 5th, 6th and 7th defendants/appellants appealed to the Court of Appeal. The appellant cross-appealed against the finding of the trial Court that there was only one Ruling House in Ipoti-Ekiti, the Onidasa House with its named five branches with Chief Ejisun as

its head, etc. The Court of Appeal allowed the appeal and dismissed the cross-appeal.

Both sides were dissatisfied with the judgment. The appellant filed a notice of appeal while the 4th-6th Respondents filed a notice of cross-appeal.

B In his amended brief of argument deemed filed on 7/2/2011, learned Counsel for the appellant raised the following issue for determination:

C *“Having held that there had been a violation of the native law and custom of the Ipoti-Ekiti in the selection of the 4th defendant, was the Court of Appeal entitled to uphold the validity of the said selection upon a ground (which was founded upon a case) which was completely contrary to the case made by defendants in the Court below.”*

D The 4th - 6th Respondents/Cross-Appellants, in their amended brief presented these two issues for determination:

“1. Whether the Court of Appeal was right, when it held that it could not make any pronouncement on the issue of whether or not paragraph F(a), F(f) and F(g) of the Chieftaincy Declaration, Exhibit ‘D’ are consistent with the provisions of the 1984 Chiefs Edict.

E 2. Whether the inclusion of sub-paragraph F(a), F(f) and F(g) in the Registered Declaration for the Olupoti Chieftaincy Exhibit D is ultra vires S.1(3)(a)(v) of the 1984 Chiefs Edict of Ondo State.”

F First and 2nd Respondents raised a preliminary objection on the following six (6) grounds:

“1. The appellants further and further amended statement of claim on which the trial judgment and the subsequent appeal upon which this appeal is predicated was signed by a law firm “W. A. Aladedutire & Co.” and not by a legal practitioner known to law.

G 2. The said further and further amended statement of claim was null and void ab initio.

3. All subsequent processes filed in response to the void further and further amended statement of claim as well as the trial judgment and all other proceedings premised thereon are null and void ab initio.

H 4. The sole issue raised and argued by the appellant in his brief of argument is incompetent for not flowing from the grounds of appeal raised.

5. The entire appeal is grossly and incurably incompetent.

6. This Honourable Court lacks jurisdiction to entertain or hear

this appeal.”

The preliminary objection was argued in the 1st and 2nd Respondents’ brief but at the hearing of the appeal the argument relating to the competence of the further amended statement of claim was withdrawn and struck out, leaving argument on the validity of the sole issue for determination of the appeal. B

Grounds II and IV of the Grounds of Appeal read thus:

Ground II: “The Court of Appeal erred in law and misdirected itself when it held that: ‘However, that notwithstanding I hold that the registered Declaration Exhibit D was wrongly nullified by the learned trial Judge for failure by the Kingmakers to order on Ifa consultation. IV. the Court of appeal erred in law and misdirected itself, when it held that the appointment of the 4th defendant by the Kingmakers was valid even without compliance with the provisions in Exhibit D as regards the consultation of Ifa Oracle...” C D

The lower Court found that there was a violation of the native law and custom of Ipoti-Ekiti in the selection of the 4th defendant and in spite of the said violation upheld the selection of the 4th defendant.

This in substance is the sole issue raised by the appellant and as found by my learned brother, Onnoghen, JSC the issue flows from the grounds of appeal, at least from the grounds reproduced above. The preliminary objection that the sole issue for determination does not arise from any ground of appeal cannot be sustained and it is hereby dismissed. E

The parties in the pleadings joined issue on consultation with the Ifa Oracle in the selection of a candidate to fill the vacant stool of the Olupoti. In paragraphs 33 and 34 of the further amended statement of claim, the appellant, then plaintiff, pleaded thus: F

“33. The plaintiff avers that it is the prevailing custom in respect of the Olupoti Chieftaincy for the Ifa Oracle to be consulted by the accredited Ipoti Aworos. G

34. The plaintiff avers that the Aworos, named Chief Aworokin, Aworojasin and Asalu are from time immemorial the only accredited channel of consultation with the Ifa oracle in the matters of nomination and selection of a candidate to fill the vacant stool of the Olupoti and there was no time that they were consulted by anybody on the existing vacancy to the Olupoti stool. The plaintiff will rely on the written complaint of the Aworos dated 13th September, 1988.” H

The 4th-8th defendants countered the above averments in their further amended statement of defence paragraph 25 as follows:

“25. The 4th - 8th defendants deny paragraphs 33 and 34 of the Further Amended Statement of Claim and state that the Ipoti Aworos do not have any pre-installation functions to perform in the nomination/selection processes of an Olupoti of Ipoti.”

The Chieftaincy declaration is Exhibit D. In paragraph F(f), it provides:

“(f). The kingmakers shall meet within fourteen (14) days of receiving the name or names of the candidate or candidates nominated and consider his or their suitability according to the custom. Unless a candidate suffers a disqualification in accordance with the Chiefs Edit, his name shall be submitted by the Kingmakers for consultation of Ifa by a person appointed by them for the purpose. Where however there is no unanimity by the Kingmakers, the Kingmakers shall decide the candidate by a simple majority of votes.”

For all intents and purposes, the selection/nomination cannot be regarded as final until the Ifa Oracle has been consulted and its view or advice is known. The trial Court was right in its resolution of the issue on which the parties did not agree. It was not the case of the respondents that consultation with the Ifa Oracle, though required, could be dispensed with or without effect on the validity of the nomination/ selection of a candidate. The lower Court therefore has no business making a case for the Respondents other than the case in the pleading and evidence. See *Njoku & Ors v. Eme & Ors* (1973) 5 SC 293; *Orizu v. Anyaegbunam* (1978) 5 SC 21; *Ehimare & An. v. Enihonyon* (1985) 2 SC 49.

In the second issue raised by the Cross-Appellants, it is my humble view that the Court below failed to consider the impact of the new issue sought to be raised before granting the relief to raise new issue on appeal. The pleading in paragraph 25 of the further amended statement of defence is to the effect that the nomination/selection of the 4th defendant was in accordance with the Native Law and Custom as well as the procedure prescribed in the Chiefs Law and Guidelines set out in the registered declaration relating to the Olupoti of Ipoti.

The Chieftaincy Declaration is Exhibit D on which the 4th defendant relied in his pleading. Parts of Exhibit D are paragraphs F(a), F(f) and F(g) which the cross-appellants seek to nullify in new

issue which they were granted leave to raise by the Court below. A party has to be consistent in his case; he cannot on appeal, present a case completely different from the case at the trial.

An appeal is an invitation to a higher Court to find out whether on proper consideration of the facts placed before it and the applicable law the lower Court arrived at a correct decision. See *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172 at 211; *Iweka v. SCOA* (2000) 3 SC 21 at 31. B

An appellate Court is not in a position to determine the correctness or otherwise of an issue not raised and determined in the Court below. Perhaps, the lower Court, realizing its error in granting leave to raise a new issue completely outside the issues raised and determined in the trial Court, declined to make the pronouncement sought by the respondents. C

For the above and the more exhaustive reasoning contained in the lead judgment of my learned brother, Onnoghen, JSC, the draft of which judgment I read before now, I also allow the appeal and dismiss the cross-appeal as devoid of merit. I adopt the consequential orders in the lead judgment, including order on costs. D

Appeal allowed. Cross-appeal dismissed. E

PETER-ODILI JSC

This case was commenced by way of writ of summons and statement of claim in 1988, by one, Prince Joseph Adebayo Osagunna (now deceased) of Asao Branch of Onidasa Ruling House of Ipoti-Ekiti, Ekiti State. Prince Osagunna, who lost in his bid for nomination as Olupoti of Ipoti Ekiti was aggrieved as a result of violation of the procedure for nomination of the election of an Olupoti of Ipoti Ekiti particularly the violation of the native law and custom of Ipoti-Ekiti people and hence, commenced this action at the then Akure Judicial Division of Ondo State Judiciary. Prince Joseph Osagunna (deceased) diligently prosecuted the case from the High Court to the Supreme Court. While the appeal was awaiting hearing at this Court the said Prince Joseph Osagunna died on 21st October, 2000. F G H

Since the only issue remaining for determination in this appeal which concerns the violation of native law and custom of the Ipoti-Ekiti in the selection of the 4th respondent as Olupoti of Ipoti-Ekiti survive

the deceased/appellant efforts were made by interested members of Onidasa ruling house to substitute one of them to prosecute the appeal to finality. These efforts took time and on 8th December, 2009, Chief Ayoola Adeosun who is head of Asao Branch of Onidasa Ruling House by the order of this honourable Court was substituted as appellant and
 B to prosecute this appeal to its logical conclusion.

The appellant who was the plaintiff in the Court below instituted this action in the Akure Division of the High Court of Ondo State claiming the reliefs as stated hereunder:

1. DECLARATION

C i. The Declaration purportedly made under S. 5 (1) of the chiefs' Edict, 1984 as the customary Law Regulating the selection of the Olupoti of Ipoti Chieftaincy approved on 24/12/87, registered on 24/12/87 is defective, faulty and objectionable and it is not a true
 D reflection/condition of the customary law regulating the selection of a person to be holder of the Olupoti Chieftaincy and should, therefore be null and void and of no effect whatsoever.

ii. All actions purported to have been taken by:

(a) The so called head of the Onidasa ruling house namely,
 E Chief Adaramola Adesuyi, the Ejisun.

(b) The so called Kingmakers of the Olupoti of Ipoti chieftaincy, namely Chiefs Inurin Abisoye, Arowolo Eisinkin and Kasumu Ejemu respectively:

F (c) The secretary of Ijero local Government in the purported nomination and selection of one Mr. Elijah Oladele Ayeni under the provisions/authority of the said declaration is unlawful, null and void and of no effect whatsoever.

iii. The purported selection of Mr. Elijah Oladele Ayeni as
 G Olupoti elect by the said so called kingmakers is unlawful, null and void and of no effect whatsoever.

iv. The Asao and Emila families/branches otherwise known as Amilede Houses of the Onidasa Ruling House are the only and truly the sons (princess) of the Onidasa ruling house of Ipoti Ekiti and the
 H only truly the families/branches of the said ruling house that can lawfully nominate a candidate(s) for selection into the vacant stool of the Olupoti of Ipoti by the true kingmakers namely the Iwarefa meta i.e. Chief Odifin Ipoti, Eisaba Ipoti, Sajiyan Ejiyan, Odofin Ejiyan-Owa, and Odofin Owa in accordance with the customary law of the

Ipoti Ekiti community.

v. The proper and true head of the Onidasa ruling house is chief Asao and not Chief Ejisun.

vi. The Aworos, namely Chief Aworokin, Aworojasin and Asalu are the true and only accredited channel of consultation with the Ifa Oracle in the nomination and selection process of the person to fill the vacant stool of the Olupoti of Ipoti chieftaincy. B

vii. The plaintiff, namely Prince Joseph Adebayo Osagunna having been unanimously, properly, duly and jointly nominated by the Asao and Emila (Amilede) families/branches of the Onidasa ruling house for the vacant stool of Olupoti be approved by the Ondo State government. C

2. An order compelling the Executive Council of Ondo State to direct the committee of the Ijero Local Government charged with the making of declarations under S.34 of the Chiefs Edict, 1984 to amend, the said Olupoti chieftaincy declaration or make a new declaration to reflect the true customary law regulating the selection of a person to be the holder of the Olupoti Chieftaincy. D

3. AN INJUNCTION:

i. Restraining the 1st, 2nd and 3rd defendants by themselves or their servants and or agents or otherwise however from implementing or giving effect to the purported nomination and on selection of the 4th defendant namely Elijah Oladele Ayeni as the Olupoti of Ipoti as Oba-elect. E

ii Restraining the 4th defendant namely, Elijah Oladele Ayeni from parading or holding out himself as the Olupoti of Ipoti-Ekiti and from exercising any of the Olupoti royal functions. F

The plaintiff a Prince of the Onidasa ruling house of Ipoti Ekiti was one of the three candidates who contested for the vacant stool of Olupoti of Ipoti the others being the 4th defendant and one Joseph Ajewole Ogunsola. G

The first three defendants are functionaries of the Ondo state Government and who have a role to play in the application, implementation and or the execution of the provisions of the Chiefs Edict No. 11 of 1984 of Ondo State, particularly with regard to the appointing and approval of holder of the Obaship of OLUPOTI OF IPOTI. H

The 5th, 6th and 7th defendants are minor chiefs of Ipoti who

performed the functions of kingmakers in the selection of the 4th defendant as the Olupoti elect whilst the 8th defendant (who died after giving evidence at the trial) was Chief Ejisun who had functioned as the head of the Onidasa ruling house but whose right to function as such was challenged at the trial.

B By the certificate of appointment dated the 7th of April, 1988. Exhibit “U” the 5th and 7th defendants as kingmakers chose the 4th defendant and recommended his appointment as the new Olupoti of Ipoti Ekiti.

C The appellant challenged the election of the 4th defendant on several grounds viz:

1. That he was not qualified to be a candidate for election to the Obaship of Olupoti to Ipoti-Ekiti because he was not a prince of the Onidasa ruling house neither was he a descendant of any of the ten D previous holders of the Obaship of Otupoti-Ekiti.

2. That the 5th, 6th and 7th defendant who had acted as kingmakers were not the lawful kingmakers under native law and custom of the Ipoti-Ekiti and that none of the lawful kingmakers - the Iwarefa-were consulted on the said selection.

E 3. That the 8th defendant as Chief Ejisun was not member of the Onidasa ruling house and acted contrary to Ipoti customary law in presiding over the meeting of the Princes of the Onidasa ruling house and as the head of such ruling house.

F 4. That the prevailing custom of the Ipoti chieftaincy which required that the Ifa Oracle to be consulted by the Ipoti Aworos was violated in that they were not consulted on the existing vacancy in the Olupoti stool.

G The Olupoti of Ipoti Chieftaincy Declaration was produced in evidence and marked Exhibit “D”.

In his judgment delivered on the 13th of January, 1993, the learned trial Judge held as follows:

H *“(1) That the Olupoti of Ipoti Chieftaincy declaration had not been approved by the Executive Council in accordance with the provisions of the enabling Edict and was therefore null and void.*

(2) That there is only one ruling house of the Olupoti chieftaincy, the Onidasa house consisting of five families and that Chief Ejisun was the head of the ruling house.

(3) That Ipoti native law and custom as reflected in Exhibit “D”

requires that the name or names of the candidates of the Olupoti chieftaincy be sent to the Aworos for consultation with the Ifa Oracle and that this custom was violated in the selection of the 4th defendant and that his said selection was therefore null and void.

(4)That the kingmakers are Odofin Ipoti, Chief Inurin, Chief Eisinkin, Chief Eisaba and Chief Ejemu as contended for by the defendants.

(5) That the Olupoti Chieftaincy declaration was defective null and void because:

- a. It violated the customary law of the Ipoti community; and*
- b. It was not published as required by law;*
- c. It was not approved by the appropriate authority.”*

The learned trial Judge therefore granted an injunction restraining the 1st, 2nd and 3rd defendants from giving effect to the nomination and selection made under the said declaration whilst the 4th defendant was restrained from parading himself as the Olupoti.

The 4th, 5th, 6th and 7th defendant appealed (the 8th defendant having died in the meantime) against the determination of the High Court that chieftaincy declaration was null and void on the three grounds found by the learned trial Judge and against his determination that the selection of the 4th defendant was void on the ground that the Ifa Oracle had not been consulted.

The plaintiff/appellant cross-appealed against the determination of the learned trial Judge that:

(a) There was only one ruling house of the Onidasa, and that the house consisted of five branches and that Chief Ejisun was head of that ruling house.

(b) That the kingmakers were Odofin Ipoti, Chief Inurin, Chief Eisinkin, Chief Eisaba and Chief Ejemu.

After hearing arguments the Court of Appeal sitting at Benin City dismissed the cross-appeal of the plaintiff and allowed the appeal of the 4th, 5th, 6th and 7th defendants.

This appeal by the plaintiff/appellant is in the main, against the decision of the Court of appeal allowing the cross-appeal of the 4th, 5th, 6th and 7th defendants.

It will easily be recalled that one of the grounds upon which the High Court had declared the selection of the 5th defendant as null and void was that there had been in the selection process, a failure by the

kingmakers to submit the names of the candidates for consultation with the Ifa Oracle, a requirement stipulated by native law and custom of the Ipoti Ekiti and by Olupoti Chieftaincy Declaration Exhibit “D”.

In dealing with the claims of the 5th - 7th defendants on this point, the Court of Appeal rejected their arguments and affirmed the findings of the learned trial Judge that the native law and custom in respect of the Olupoti chieftaincy required that the names of the candidates be submitted for consultation with the Ifa Oracle and also that there had indeed been a failure to observe the native law and custom of the Ipoti people in the selection of the 4th defendant. But the Court of Appeal nevertheless proceeded to hold that failure to follow the same was not sufficient to nullify the selection of the 4th defendant because the requirement of native law and custom was purely cosmetic and insubstantial. They therefore allowed the appeal for that, amongst other reasons.

On the date of hearing learned Counsel on behalf of the appellant adopted the brief as settled by Owoseni Ajayi Esq. in which was couched a single issue viz:

“Having held that there had been a violation of the native law and custom of the Ipoti Ekiti in the selection of the 4th defendant was the Court of Appeal entitled to uphold the validity of the said selection upon a ground (which was founded upon a case) which was completely contrary to the case made by the defendants in the court below.”

Learned Counsel for the 1st and 2nd respondent adopted their brief settled by Okwudili Agbo Esq in which they formulated a sole issue for determination which is:

“Whether the lower Court was not justified on the particular facts and circumstances of this case especially the provisions of the Olupoti Chieftaincy Declaration in holding that the failure of the kingmakers to have sent the name of the 4th respondent for Ifa consultation was not a fatal omission to warrant the nullification of the nomination or selection of the 4th respondent.”

On their part 4 - 5th respondent had their brief of argument settled by Niran Disu and therein were crafted two issues for determination and these are as follows:

1. Whether the Court of Appeal was right when it held that it could not make any pronouncement on the issue of whether or not

paragraphs F(a), F(f), F(g), of the Chieftaincy Declaration, Exhibit “D” are consistent with the provisions of the 1984 Chiefs Edict.

2. Whether the inclusion of sub paragraphs F(a), F(f) and F(g) in the Registered Declaration for the Olupoti chieftaincy Exhibit “D” is ultra vires S. 1(3)(a)(v) of the 1984 Chiefs Edict of Ondo State?

The sole issue as crafted either by the appellant or the 1st and 2nd respondents jointly are (sic, is) apt for the determination of the appeal. On that appellant contended that the Court of Appeal was in error and ran foul of two constitutional and fundamental principles as it failed to conform to its role of appellate status and not operate as though it had original jurisdiction. Also, it embarked on resolving an issue that had not been submitted for determination of the High Court. That even when the Court of Appeal held that the Ifa Oracle could be consulted at any time before installation or recognition by the State Government it is wondered whose case based on the pleadings the Court below was supporting. That is because the Court of Appeal took that artificial position on the issue of the Ifa Oracle to go against the judgment of the trial court which represented the true position and that is that a failure to submit the names of the candidates to the Ifa Oracle was a violation of the native law and custom of the Olupoti chieftaincy which rendered the selection of the 4th defendant void.

Learned Counsel for the appellant said it cannot be correct that failure to follow the prescribed custom of the consultation of the oracle was inconsequential as the Court of Appeal held, contrary to the position taken by the High Court. He cited section 13 of the Ondo State High Court of Law; Governor of Kwara State v Ewilaye (1997) 2 NWLR 118; Imonikhe v. A-G Bendel State (1992) 6 NWLR (pt.236) 410 - 411.

Responding, learned Counsel for 1st and 2nd respondents submitted that the court below only reformulated the issue raised by the appellants in that court and the issue came from ground 3 of the amended notice and grounds of appeal of the 4th - 7th appellants here now 4th - 7th respondents. That court was legally permitted to so formulate issues which it considers apposite to dispose of the matter before it. He cited *Egwa v Egwa* (2007) 1 NWLR (Pt. 1014) 71 at 86.

Learned Counsel for the respondents 1st and 2nd said a case had not been properly made out that the consultation to the Ifa Oracle was a condition precedent and that what the Court of Appeal did was

the interpretation of paragraph F(f) of the Registered Declaration and that the interpretation of what its import was as decided by the Court of Appeal was the proper construction within the circumstances. He cited *Bunge v Governor of Rivers State (2006) 12 NWLR (Pt. 995) 573 at 629 G- H.*

B For the 4th - 6th respondents was contended that where legislation derives its force of authority from a paramount enactment the subordinate legislation draws its life blood from the paramount enactment, and cannot have a wider binding force than the latter. That Exhibit "D" derives its validity from 1984 Chiefs Edict of Ondo State.

C That the declaration F(b) F(e) of Exhibit "D" seek to state in unambiguous terms the method of nomination by each ruling house, which provisions are in conformity with the Ondo State Chief Edict of 1984. That section 1(3) (a) (v) of the Ondo state Chiefs Edict 1984 D specifically provide that the declaration should include the method of nomination by each ruling house without any reference either directly or by analogy to the inclusion of any function and/or functions by the secretary of the Local Government and/or kingmakers. He referred to *Adefulu v Okulaja (1996) 9 NWLR (pt. 475) 668 at 683 - 684.*

E That this Court should declare that, in so far as sub paragraphs F (a), F (f) and F (g) of the declaration (Exhibit D) seek to extend and /or elongate the content and application of the paramount enactment which is the provision as contained in section 1(3) (a) (i-v) of the Ondo State Chiefs Edict of 1984, they are invalid, null and void and of no F effect whatsoever and should therefore be expunged. That if those paragraphs are nullified and or expunged then there should be no need to consult the Ifa Oracle in the process of appointing a candidate for the Olupoti Chieftaincy. That is a summary of the materials G available in this discourse.

What is clear and of concurrent finding is that there was as part of the procedures for the selection of the Olupoti, the consultation of the Ifa Oracle first made with the names of candidates by the Aworos. On that, the Court of Appeal held:

H *"The defendants had failed to establish their case that there was no custom which required that the names of the candidates be submitted to the Aworos for Ifa consultation yet the defendants will succeed on the ground that there was a requirement that the Ifa oracle be consulted but that requirement was merely cosmetic and unimpor-*

tant.”

That was a conclusion different from the Court of trial which held that the non submission of those names of candidates to Ifa robbed the selection of the king validity being a condition precedent. The governing law upon which a selection could be made and the name of the successful candidate sent to the government for recognition is section 13 of the Ondo state High Court Law which enjoins the High Court to observe and enforce the principles of native law and custom which are applicable and not contrary to natural justice, equity and good conscience. Also to be noted as germane, the fact that section 1 (3)(a) (v) of the Ondo state chiefs Edict of 1984 specifically provides that the declaration as in this instance Olupoti Chieftaincy Declaration should include the method of nomination by each ruling house.

In the light of those statutory provisions, there was a mandate on the ruling house or houses to state their native law and custom of selection, the steps thereto and what had been done. Any step of native law and custom for the selection not adhered to would render the selection of no validity being a condition precedent and being the foundation of what is sent to the Local Government, firstly before the State Government would go to no issue on the cardinal principle of not putting something on nothing. The Court of Appeal making or affirming the finding of the High Court that the consultation to the oracle was one of the steps, the Court of Appeal went on a wrong course to have reached the illogical conclusion that it was not an important step. It was not only important, it was a step that could not be waived or ignored or by-passed being a fundamental procedure in the road to the selection of the king. I place reliance to the case of *Oredoyin v. Arowolo* (1939) 4 NWLR (P. 114) 172 which principles arose from similar facts as exist here.

In conclusion, I have no hesitation in allowing this appeal and setting aside the judgment and orders of the Court of Appeal while restoring the decision of the High Court. I abide by the fuller reasons and orders of my learned brother, W. S. N. Onnoghen JSC who delivered the leading judgment.