

SUPREME COURT OF NIGERIA
FRIDAY 19TH DECEMBER, 2014. SC. 159/2007
**CORAM:- J. A. FABIYI, S. GALADIMA, B. RHODES-
VIVOUR, N. S. NGWUTA, J. I. OKORO, JJSC**

1. MOHAMMED HUSSENI
2. HIS ROYAL HIGHNESS
ALHAJI SAIDU KAWU HALIRU APPELLANTS
(EMIR OF LAFIAJI)
AND
1. MOHAMMED NDEJILO MOHAMMED
2. NDEJILO ABUBAKAR (NDEJILO)
3. MAMA YTYA (TSAAZA) RESPONDENTS
4. MAMA GANA (MAJIN DODO)
5. MOHAMMED GANA (Madawakin)
(For themselves and on behalf of
Zambufu Traditional Councilors)

APPEALS - Preliminary objection - Purpose of - It is meant to scuttle appeal in limine - And its success spells end of the appeal - Or so much of it that falls within the ambit of the objection (H1)

APPEALS - Courts - Hierarchy of - CA is an intermediary court between HC and SC - And SC has no jurisdiction to hear appeal direct from HC - Or to make an order bypassing position of CA (H2)

APPEALS - Grounds - Competence of - As the issues and grounds relate to CA - With respect to the judgment of trial court - The preliminary objection is without merit and is dismissed (H3)

APPEALS - Grounds - Mistake - Correction of - Admission of error is not synonymous with correction of same - And unless corrected by laid down procedures the mistake persists (H4)

APPEALS - Brief - Amendment - Meaning - Amendment in present context - Connotes a correction of errors in the process before court - Or including in it what was not originally there (H5)

3574 Husseni v. Mohammed (2014) 12 KLR (pt. 354) 357; (2015)

APPEALS - Brief - Amendment of - Leave - Whether error is that of counsel or party - There can be no amendment without leave of court first sought and had (H6)

APPEALS - Issues - Validity - Issues 1, 3 & 4 not shown to relate to any grounds - Are not only incompetent - But completely valueless and ought to be ignored (H7)

APPEALS - Determination - Basis - Appeal is determined upon issues formulated from grounds - And any ground not having argument proffered on the issue framed - Is deemed abandoned (H8)

APPEALS - Brief - Mistake - Effect - As counsel failed to correct mistake in his brief - Appellants' issues 1, 3 & 4 and grounds 1, 2, 3 & 4 in the amended notice of appeal are incompetent (H9)

APPEALS - Issue - Meaning of - It is a question of law or fact or of both - Arising from ground of appeal which when resolved one way or the other - Will affect the result of the appeal (H10)

APPEALS - Issues - Proliferation of - Should be avoided - As it is undesirable to formulate an issue - Composed of more than one question for determination (H11)

APPEALS - Reply brief - Purpose - It is not designed to give appellant a second chance to improve his argument - Or supply omissions in the brief (H12)

ACTIONS - Civil matters - Proof - Standard of - Civil cases are determined on balance of probabilities - And not by number of witnesses called - But by probative value of their testimonies (H13)

COURTS - Integrity - Protection of - It is the duty of counsel to guard and protect integrity of court - And any aspersion cast on the court by counsel - Reflects adversely on the counsel (H14)

APPEALS - Reply brief - Objection - Basis - There ought to have been specific reference to portion of the judgment affirmed by CA -

As it is not for SC to substantiate the assertion of appellants' counsel (H15)

APPEALS - Concurrent findings - Appellants have not provided basis for SC to interfere with the findings of trial court - Which were considered and endorsed by Court of Appeal (H16)

FACTS

Before the High Court of Kwara State Ilorin, plaintiffs/respondents initiated this action against defendants/appellants, claiming among others for a declaration that 1st appellant under the age long custom and tradition of Zambufu has no right whatsoever to ascend the throne as the Zhitsu of Zambufu and a perpetual injunction restraining 1st appellant from parading himself as the Zhitsu of Zambufu. Appellants denied the material averments in the Statement of Claim and pray for the dismissal of respondents' claim.

The matter went to trial and at the end of which the learned trial Judge found that 1st appellant was not from the ruling house and the proper procedure for the appointment to the throne was not followed. He therefore nullified the appointment and turbaning of 1st appellant as the Zhitsu of Zambufu and restrained him from parading as the Zhitsu of Zambufu. Not satisfied with the judgment, appellants appealed to the Court of Appeal Ilorin Division. The court in its judgment also held that proper procedure was not followed in the appointment and turbaning of 1st appellant. It upheld the judgment of the trial court and dismissed the appeal. Aggrieved further, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Having regard to the pleadings particularly the Respondents' reply to the statement of defence and the totality of evidence adduced by the parties, was the Court below right in affirming the decision of the trial Court in favour of the Respondents?"

HELD (Unanimously dismissing the appeal per

NGWUTA JSC)

APPEALS - Preliminary objection - Purpose of

1. A preliminary objection to the hearing of an appeal is meant to scuttle the appeal in limine. Its success spells the end of the appeal or so much of it as falls within the ambit of the preliminary objection.

It is the duty of the court, due to its nature as pre-emptive strike, to rule on it one way or the other once it is raised before taking any further step in the matter. (p. 3586 H)

Courts - Hierarchy of

2. In the hierarchy of Courts, the Court of Appeal is an intermediary between the trial Court and the Supreme Court.

The Supreme Court has no jurisdiction to hear appeal direct from the trial Court or to make an order that will ignore or bypass the constitutional position of the Court of Appeal as the bridge between the trial Court and the Supreme Court as it were. (p. 3587 G)

APPEALS - Grounds - Competence of

3. In real terms the grounds of appeal complained of the failure of the Court of Appeal to do or refrain from doing what the appellants expected the Lower Court to do or refrain from doing in its determination of the appeal before it from the trial Court. I see nothing in any of the six grounds of appeal, their particulars or the issues distilled therefrom that by-passes the judgment of the Court of Appeal to attack the judgment of the trial Court.

Learned Counsel for the Respondents appeared to have spoken from both sides of his mouth, having adopted the same procedure he complained of in raising his two issues for determination. In issue 1, he queried: "...whether the Lower Court was not right in affirming the decision of the trial Court." Also in issue 2, he asked "whether the Lower Court was not right in affirming..." It makes no difference that learned Coun-

sel was raising issues and not framing grounds of appeal.

The issues so raised, just like the grounds of appeal, relate to what the Court of Appeal did or did not do with respect to the judgment of the trial Court. I find no merit in the preliminary objection which is hereby dismissed. (p. 3588 C) B

APPEALS - Grounds - Mistake - Correction of

4. My noble Lords, the admission of error or mistake is not synonymous with the correction of the error or mistake. Unless the mistake identified and admitted, is corrected by laid down procedure, it persists and will persist as error or mistake irrespective of a purported correction by the party at fault. (p. 3589 G) C

APPEALS - Brief - Amendment - Meaning

5. Whether the mistakes were made by Counsel or the appellants learned Counsel became aware of same when the respondents' brief was served on him. Irrespective of who made the mistakes, learned Counsel could have filed a motion for leave to amend his brief of argument. He failed or neglected to do so. He could have applied orally for leave to amend the relevant portion of his brief at the hearing of the appeal but he neglected to do so. D

Learned Counsel merely highlighted the mistakes he said were made by the appellants and indicated what the appellants should have done but did not apply to amend his brief. See Order 2 rule 28 (1) of the Supreme Court Rules. Amendment in the present context connotes a correction of any errors or mistakes in the process before the Court, or including in it what was not originally there. E

It is nothing but the correction of an error committed in any process - in this case the appellants' brief. (p. 3590 A) F

APPEALS - Brief - Amendment of - Leave

6. It has to be emphasised herein that unlike the Rules of the Supreme Court of England (Ord. 20 r. 3 (1)) there is no provision in our Supreme Court Rules permitting a party to amend his process without leave of Court. H

Whether the error or mistake be that of learned Counsel for the party or that of the party, there can be no amendment or correction of the error or mistake without the leave of Court first sought and had. In this case, the much touted mantra that “the mistake of Counsel should not be visited on his clients”

B is inapplicable as the mistakes herein are that of the appellants themselves as stated by their Counsel. (p. 3590 D)

APPEALS - Issues - Validity

C 7. From the above, it follows therefore that contrary to the submission of learned Counsel for the appellants, issues 1, 3 and 4 are not predicated on any of the six grounds of appeal in the appellants’ amended notice of appeal and grounds 1, 2, 3 and 4 thereof have no issues formulated from them. Issues D 1, 3 and 4 not shown to relate to any grounds of appeal are not only incompetent but completely valueless and ought to be ignored. (p. 3590 G)

APPEALS - Determination - Basis

E 8. Appeal is decided upon the issue formulated for determination from the grounds of appeal. When an issue is formulated, the grounds of appeal upon which the issue is based is extinguished as it were and replaced by the said issue. A ground of appeal must have an issue to cover it and an argument is proffered to cover the issue. Any ground of appeal not having any argument proffered on the issue framed therefrom is deemed abandoned and ought to be struck out. (p. 3591 B)

G APPEALS - Brief - Mistake - Effect

H 9. Learned Counsel for the appellants sought to underplay the mistakes which he claimed were made by his clients - the appellants - but the mistakes go to the essence of grounds of appeal and issues distilled therefrom for determination. Left uncorrected as in this case, the mistakes are fatal to the grounds of appeal and issues involved and the issue of whether or not the respondents were misled is out of it.

It is imprudent of learned Counsel for the appellants to concede the mistakes in his brief, identify the mistakes and

proceed with the appeal without any attempt to correct the mistake even if made by his clients. Consequently, issue 1, 3 and 4 in the appellants' brief and grounds 1, 2, 3 and 4 in the amended notice and grounds of appeal are incompetent and are hereby struck out. The same applies to arguments relating to same in the briefs. This leaves the appellants with only one issue - issue 2 derived from grounds 5 and 6 of the amended notice and grounds of appeal. (p. 3591 D) B

APPEALS - Issue - Meaning of

10. In an appeal, an issue for determination is a question of law or fact or both arising from the ground of appeal which when resolved one way or the other will affect the result of the appeal. (p. 3592 A) C

APPEALS - Issues - Proliferation of

11. A proliferation of issues should be avoided. It is undesirable to formulate an issue composed of more than one question for the Court to determine. (p. 3592 F) D

APPEALS - Reply brief - Purpose

12. In practice, a reply brief is not designed to give the appellant a second chance at the cherry, or to improve the argument, or supply omissions in the appellants' brief. In this appeal, the parties have joined issues in their briefs. I do not see any new point in the respondents' brief to which the appellants could reply. The reply alleged to be on point of law is a repetition and improvement of argument in the appellants' brief. I will ignore the so-called reply on points of law. (p. 3593 A) E

ACTIONS - Civil matters - Proof - Standard of

13. My Lords, civil cases are determined on the balance of probabilities which in itself means preponderance of evidence. The trial court places the evidence adduced before it by the parties in the imaginary scale to see which side of the scale is heavier, not by the number of witness called by each party but by the quality or probative value of the testimony of the wit- F

nesses. This is the import of deciding a case on balance of probabilities. (p. 3594 H)

COURTS - Integrity - Protection of

14. To say that a court found it convenient to come to a particular conclusion implies that the court failed in its duty to consider and weigh the evidence before it and apply the law relevant thereto. It implies that the court searched for and followed the line of least resistance instead of relying on the evidence before it. The court is charged with a dereliction of duty when there was no basis for same. It is the duty of learned counsel, notwithstanding his side of the divide, to guard and protect the integrity of the court with the wraparound security of a mother hen over its chickens. Any aspersion, express or implied, cast on the court by any counsel, reflects adversely on that Counsel. (p. 3595 B)

APPEALS - Reply brief - Objection - Basis

15. Appellants did not raise the validity, vel non, of the respondents' "Reply to Statement of Defence" but assumed that the said reply was incompetent. It may be so on its face but the matter has to be raised and determined before the issue of reliance on it can be raised. In any case, even if it is established and not just assumed, that the reply brief is incompetent, it is not enough to say that the Court relied on it.

Learned Counsel for the appellants ought to have specifically made reference to the portion of the judgment of the trial Court affirmed by the Court below wherein reliance was placed on the reply brief. It is not for this Court to search through the record to find evidence or facts to substantiate the assertion that the trial Court relied on the Reply Brief. But as I said earlier in this judgment, there is no ground of appeal from which the issue of validity of the reply brief would have been raised. (p. 3595 G)

APPEALS - Concurrent findings

16. The mere fact that there are three names on Exhibit 2 including the names of the 1st defendant is not evidence that the

1st appellant (defendant) is from a ruling house and, ipso facto, qualified as a candidate to contest for the position of Zhitsu of Zambufu. If anything, it has brought about this litigation. I do not agree with the learned Counsel for the appellants that the findings of the trial Court which were considered and endorsed by the Court below are perverse, not supported by evidence or arrived at as a result of improper exercise of judicial discretion or that they resulted in a miscarriage of justice. B

The trial Court had the opportunity to see, hear the witnesses and determine the veracity, vel non, of the evidence offered. The Court of Appeal reviewed the proceedings and affirmed the decision of the trial Court. This is an appeal against the concurrent findings of facts of the two Courts below. The appellants have not provided a basis for this Court to interfere with the concurrent findings of the High Court and the Court of Appeal. (p. 3597 B) C D

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Facts often mistaken E

It is a common feature in some briefs filed in this Court that a fact is often confused with speculation. Value judgment or private opinion as to what the Court did or did not do is often presented as established fact. In issue 2 reproduced above, that “the decision of the trial Court is heavily based on inadmissible evidence” assumes facts not established. That the Court relied heavily on inadmissible evidence is a matter which should be established by showing reliance on the evidence and the inadmissibility of same. The same applies to the trial Court’s alleged reliance on perceived weakness of the appellants’ case as against the strength of the respondents’ case. F G

The appellants assumed that their opinion of what the Court did or failed to do constitute facts on which they predicated their complaint in issue 2. (p. 3592 B) H

2. Words & phrases – Convenient – Meaning of

Now “CONVENIENT” is an adjective and means inter alia, the following: carefree, easily done, effortless, opportune, presenting few

difficulties, requiring no effort. (p. 3595 A)

3. Counsel to be guided by ethical conduct with reference to court

I am constrained once more to comment on the language of learned Counsel for the Respondents. To describe an order made by a Court of competent jurisdiction as “purported” is in my view an assault on the dignity of the Court. The order subsists as long as it is not set aside by a higher Court in the hierarchy.

If for any reason it is set aside, it is an order of Court which has been set aside and not a purported order. Learned Counsel for the appellant might as well dub the entire judgment of the Court “purported judgment”. In their use of language, even in relation to an order they consider bad in law or on facts, Counsel should always be guided by decency and ethical conduct. (p. 3598 A)

REPRESENTATION

J. S. Bamigboye Esq. with Salmau Jawondo Esq., for the Appellants
Dr. Oladapo Olanipekun with Tale Alabi Esq., Olubukola Araromi
(Mrs.), Winnifred Olanipekun (Mrs.), Aisha Aliyu (Mrs.), Aisha Aliyu
(Mrs.) and Adetola Adeleke Esq., for the Respondents

CASES REFERRED TO

- Galadima v. Tunbia (2000) 6 SC (pt. 1) 196
- Onyekwuluje v. Animashaun (1996) 3 SCNJ 24
- Akinpelu v. Adegboye (2008) 4-5 SC (pt. 11) 25
- Agbaka v. Amadi (1998) 11 NWLR (pt. 572) 16
- Sapo v. Sunmonu (2010) All FWLR (pt. 531) 1408
- Olaiya v. State (2010) All FWLR (pt. 514) 1
- Awojugbagbe Light Ind. Ltd. v. Chinukwe (1990) 1 NWLR (pt. 270) 485
- Solanke v. Sometun (1974) 1 All NLR (pt. 1) 586
- Adekoye v. Akin-Olugbade (1987) 3 NWLR 214
- Omo v. JSC Delta State (2007) SC (pt. 11) 1
- Nteoguija v. Ikuru (1998) 10 NWLR (pt. 569) 267
- Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566
- Unity Bank Plc v. Bouari (2008) 2-3 SC (pt. 11) 1
- Imonikhe v. A-G Bendel State (1992) 6 NWLR (pt. 248) 396

Adejumo v. Ayantegbe (1989) 3 NWLR (pt. 110) 417

RULES REFERRED TO

Supreme Court of England, O. 20 r. 3(1)

Supreme Court Rules, O. 2 r. 23(1)

B

BOOK REFERRED TO

Burton's Legal Thesaurus 4th Ed. p. 128

LEAD JUDGMENT BY NGWUTA JSC

Subscribed on the Writ of Summons issued at the High Court of Justice of Kwara State, Ilorin Judicial Division on the 26th day of November, 1991 and reproduced as paragraph 34 of the Statement of Claim, are the Respondents' (then plaintiffs) claims against the appellants (then defendants):

C

"34. WHEREOF the Plaintiffs claim against the defendants jointly and severally as follows:

D

(1) A declaration that the 1st defendant under the age long custom and tradition of Zambufu has no right whatsoever to ascend the throne as the Zhitsu of Zambufu.

E

(2) A declaration that under the native law and custom relating to the selection and appointment of Zhitsu of Zambufu, the 1st defendant's family is not a ruling house in Zambufu.

(3) A declaration that the appointment and/or turbaning of the 1st defendant by the 2nd defendant on or about the 12th day of November, 1991- as the Zhitsu of Zambufu is illegal, null and void and of no effect whatsoever as same is against the age long custom and tradition Zambufu relating to and in connection with the appointment of Zhitsu of Zambufu.

F

(4) A declaration that the 1st plaintiff is the duly selected and appointed Zhitsu of Zambufu Traditional Councillors or Kingmakers in accordance with the custom and tradition of Zambufu relating to and in connection with the selection and appointment of Zhitsu of Zambufu.

G

(5) An order commanding and/or directing the 2nd defendant to turban or install the 1st plaintiff as the duly selected and appointed Zhitsu of Zambufu by the majority of Zambufu Traditional Councilors or Kingmakers.

H

(6) *A perpetual injunction restraining the:*

(i) *defendant from parading or presenting himself as the Zhitsu of Zambufu;*

(ii) *2nd defendant, his servants, agents, privies or any person or persons however from recognising, dealing or relating with the 1st defendant as the Zhitsu of Zambufu.”*

In their Statement of Defence, the defendants (now appellants) denied the material averments in the Statement of Claim, concluding at paragraph 29 of the Statement of Defence thus:

“29. *Whereof the defendants pray that the plaintiffs’ claim be dismissed with costs.*”

At the conclusion of trial and after a review of the entire case, the learned trial Judge Adebara J., concluded thus:

“*For the avoidance of doubt and sake of clarity, judgment is hereby entered for the plaintiffs as follows:*

1. *(a) Under native law and custom of Zambufu the family of Mohammed Hussein the 1st defendant, do (sic) not belong to a ruling house in Zambufu.*

(b) *Therefore, that the 1st defendant has no right under Zambufu custom and tradition to ascend to the throne of Zhitsu of Zambufu.*

(c) *In consequence, the appointment and turbaning of the 1st defendant on 12/11/91 as the Zhitsu of Zambufu by the 2nd defendant, His Royal Highness the Emir of Lafiagi is illegal, null and void and of no effect.*

2. *In consequence of the fore goings:*

(a) *Mohammed Hussein, the 1st defendant, is hereby restrained from parading or presenting himself as the Zhitsu of Zambufu, and*

(b) *His Royal Highness, Alhaji Saidu Kawu Haliru, the Emir of Lafiagi, the 2nd defendant is hereby restrained whether acting by himself or through his servants, agents, privies or any person or persons howsoever from recognising, dealing or relating with the said Mohammed Hussein, 1st defendant, as the Zhitsu of Zambufu.*

CONSEQUENTIAL ORDER:

...Having nullified the appointment of Mohammed Hussein as Zhitsu of Zambufu, I hereby make a consequential order that the Ndejiko of Zambufu (the 2nd plaintiff) should present the names of

the remaining two contestants, i.e. Mohammed N. Mohammed (the 1st plaintiff herein) and Ibrahim Ndakogi to the 2nd defendant, His Royal Highness, the Emir of Lafiagi who will appoint the most suitable among the two as the Zhitsu of Zambufu.”

Aggrieved by the judgment, the defendants, now appellants, appealed to the Court below on 9 grounds. Though the file contains “proposed additional grounds of appeal, numbered 10 to 15 and a motion for leave to file the additional grounds of appeal, the motion was withdrawn and struck out on 5th May, 1004. The operative grounds of appeal are as contained in the Notice of Appeal filed on 29th January, 2003 from which the appellants formulated five issues for the Lower Court to resolve.

On their part, the respondents formulated four issues for determination.

In a split decision of 2 to 1 in favour of the respondents, the Court below dismissed the appeal in the following terms:

“On the whole, I see no merit in this appeal, which is accordingly dismissed. The decision of the trial Judge is affirmed. The appellants are to pay costs of N10,000.00 for the respondents.”

Once more dissatisfied with the judgment against them, appellants complained to this Court on five grounds contained in the amended notice of appeal.

In their amended brief of argument, learned Counsel for the appellants distilled the following four issues from the five grounds of appeal for the Court to resolve:

“1. Whether the Lower Court was right in affirming the decision of the trial Court that the appellants did not deny and join issues with the respondents on the existence of Jinu as ruling house in Zambufu. (Ground 2)

2. Whether the Court below was right in affirming the decision of the trial Court which is heavily based on inadmissible evidence premised on the respondents’ “Reply to Statement of Defence” and perceived weakness of the appellants’ case as against the strength of the respondent’s case. (Grounds 5 and 6)

3. Whether the Lower Court was right in affirming the decision of the trial Court that the 1st respondent was neither qualified to be appointed as Zhitsu of Zambufu nor was the proper Procedure followed in his appointment by the 2nd appellant even with all the

contradictions in the respondents’ evidence without and resolving the issue of existence or otherwise of Kingmakers in Zambufu. (Grounds 3 and 4)

B 4. *Whether the Court below was right in affirming the consequential order made by the trial Court when the respondents never made such a case before the trial Court nor sought for such a relief. (Ground 1)”*

C In his brief of argument, learned Counsel for the respondents filed a notice of preliminary objection based on which he urged the Court to strike out:

(i) grounds 1, 2, 3, 4, 5 and 6 of the amended notice of appeal dated 23rd April, 2014, filed on 24th April, 2014 and deemed properly filed and served on 28th April, 2014 (Amended Notice of Appeal).

D (ii) The entire amended notice of appeal;

(iii) The Respondents’ amended brief of argument dated 23rd April, 2014 filed on 24th April, 2014 and deemed properly filed and served on 28th April, 2014 (Amended brief of argument).

E Argument on the preliminary objection was incorporated in the amended Respondents’ brief.

Without prejudice to the preliminary objection raised and argued as part of their brief, the respondents formulated the following two issues for the Court to resolve:

F “1. Having regard to the state of evidence and pleadings at the trial Court vis-à-vis the finding that the 1st appellant is not qualified to vie for and or ascend the throne of Zhitsu of Zambufu, whether the Lower Court was not right in affirming the decision of the trial High Court. (Grounds 1, 3, 4, 5 and 6)

G 2. Whether the Lower Court was not right in affirming the consequential order made by the trial Court (Ground 2)”

Learned Counsel for the appellants filed a reply brief composed of two parts:

H (1) Reply to preliminary objection, and

(2) Reply to points of law.

A preliminary objection to the hearing of an appeal is meant to scuttle the appeal in limine. Its success spells the end of the appeal or so much of it as falls within the ambit of the preliminary objection. See *Galadima v. Tunbia* (2000) 6 SC

(Pt.1) 196 at 207. ***It is the duty of the court, due to its nature as pre-emptive strike, to rule on it one way or the other once it is raised before taking any further step in the matter.*** See Onyekwuluje v. Animashaun (1996) 3 SCNJ 24 at 35.

I have carefully considered the appellants' amended notice of appeal, the substance of each of the six grounds of appeal therein and the issues isolated therefrom and argument on both sides as to the competence of the grounds of appeal and ipso facto the competence of the appeal itself.

The respondents' case in the preliminary objection is that the six grounds of appeal "...are unrelated to and do not arise from the judgment of the court of Appeal being appealed against." I think that it is appropriate to set out the appellants' complaints in each of the six grounds of appeal:

Ground 1: *"The court of Appeal erred in law when it failed to consider the issue of failure of the trial Court to resolve the question..."*

Ground 2: *"The Court of Appeal erred in law in affirming the consequential order made by the trial Court..."*

Ground 3: *"The court of Appeal erred in law in affirming the decision of the trial Court..."*

Ground 4: *"The Court of Appeal was in error of law when in affirming the decision of the trial Court it ignored factual contradictions..."*

Ground 5: *"The Court of Appeal erred in law in affirming the decision of the trial court that..."*

Ground 6: *"The Court of Appeal erred in law in affirming the decision of the trial Court that..."*

In each case, the particulars are not at large but tally with the ground which they are said to highlight.

In the hierarchy of Courts, the Court of Appeal is an intermediary between the trial Court and the Supreme Court. See Akinpelu v. Adegboye & 3 Ors (2008) 4-5 SC (Pt.11) 25.

The Supreme Court has no jurisdiction to hear appeal direct from the trial Court or to make an order that will ignore or bypass the constitutional position of the Court of Appeal as the bridge between the trial Court and the Supreme Court as it were.

With the above in view, can it be said as argued by the learned Counsel for the Respondents and vehemently disputed by learned Counsel for the Appellants, that each of the six grounds of appeal relates to the judgment of the trial Court and does not relate to or arise from the judgment of the Court of Appeal.

B In each of the six grounds of appeal reproduced in parts above, the complaint is based on what the Court of Appeal did or failed to do in relation to the judgment of the trial Court on appeal before it. Basically, in an appeal from the trial Court to the Court of
C Appeal, the later is expected to agree or disagree with the decision of the trial Court, that is to affirm by dismissing the appeal or disagree with the trial Court by allowing the appeal.

***In real terms the grounds of appeal complained of the failure of the Court of Appeal to do or refrain from doing what
D the appellants expected the Lower Court to do or refrain from doing in its determination of the appeal before it from the trial Court. I see nothing in any of the six grounds of appeal, their particulars or the issues distilled therefrom that by-passes the judgment of the Court of Appeal to attack the judgment of the
E trial Court.***

***Learned Counsel for the Respondents appeared to have spoken from both sides of his mouth, having adopted the same procedure he complained of in raising his two issues for
F determination. In issue 1, he queried: "...whether the Lower Court was not right in affirming the decision of the trial Court." Also in issue 2, he asked "whether the Lower Court was not right in affirming..." It makes no difference that learned Counsel was raising issues and not framing grounds of appeal.***

The issues so raised, just like the grounds of appeal, relate to what the Court of Appeal did or did not do with respect to the judgment of the trial Court. I find no merit in the preliminary objection which is hereby dismissed.

In what learned Counsel for the Respondents headed "Preliminary Point" he argued that none of issues 1, 3 and 4 has any bearing with the grounds of appeal - grounds 1, 2, 3 and 4 from which they purportedly arose. He contended that the issues are incompetent, not having been distilled from grounds of appeal. He relied on Agbaka v. Amadi (1998) 11 NWLR (Pt.572) 16 at 24. Re-

lying on Sapo v. Sunmonu (2010) All FWLR (Pt. 531) 1408 at 1418 and Olaiya v. State (2010) All FWLR (Pt.514) 1 at 7, he argued that the grounds of appeal from which no competent issues have been formulated are deemed abandoned. As a second point, learned Counsel referred to issue 2 and submitted that two issues were compressed into one. He relied on Awojugbagbe Light Ind. Ltd. v. Chinukwe (1990) 1 NWLR (Pt.270) 485 at 490 wherein the Court deprecated the practice of formulating compound issues.

In his reply, learned Counsel for the appellant conceded the argument of learned Counsel for the respondents in relation to issues 1-3 and 4 and grounds 1, 2, 3 and 4 of the amended notice of appeal. He said he made mistakes in relating issue 1 to ground 2 instead of ground 3, issue 3 to grounds 3 and 4 instead of grounds 1 and 4, issue 4 to ground 1 instead of ground 2.

On the second point, he argued that his issue 2 does not fall within the class of issues the Court of Appeal deprecated in Awojugbagbe v. Chinukwe (supra).

It is clear, as contended by learned Counsel for the Respondent and conceded by learned Counsel for the Appellants, that issue 1 was not framed from ground 2, issue 3 was not distilled from grounds 3 and 4 and issue 4 did not arise from ground 2 of the Appellants' amended notice and grounds of appeal. It follows therefore that issues 1, 3 and 4 are hanging in the air not having been isolated from grounds of appeal indicated in the appellants' brief in the amended notice and grounds of appeal.

In the same vein, grounds 1, 2, 3 and 4 are bereft of issues for determination. Learned Counsel for the Appellants admitted that "the appellants made the following mistakes" in the marriage of the issues for determination with the grounds of appeal from which they ought to have been framed.

My noble Lords, the admission of error or mistake is not synonymous with the correction of the error or mistake. Unless the mistake identified and admitted, is corrected by laid down procedure, it persists and will persist as error or mistake irrespective of a purported correction by the party at fault. Perhaps, seeking to exonerate himself from the blunder, learned Counsel for the appellants blamed his clients for the mistakes thus: *"the appellants made the following mistakes..."*

Whether the mistakes were made by Counsel or the appellants learned Counsel became aware of same when the respondents' brief was served on him. Irrespective of who made the mistakes, learned Counsel could have filed a motion for leave to amend his brief of argument. He failed or neglected to do so. He could have applied orally for leave to amend the relevant portion of his brief at the hearing of the appeal but he neglected to do so.

Learned Counsel merely highlighted the mistakes he said were made by the appellants and indicated what the appellants should have done but did not apply to amend his brief. See Order 2 rule 28 (1) of the Supreme Court Rules. Amendment in the present context connotes a correction of any errors or mistakes in the process before the Court, or including in it what was not originally there. See Solanke v. Sometun (1974) 1 All NLR (Pt.1) 586. It is nothing but the correction of an error committed in any process - in this case the appellants' brief. See Adekoye v. Akin-Olugbade (1987) 3 NWLR 214 at 233.

It has to be emphasised herein that unlike the Rules of the Supreme Court of England (Ord. 20 r. 3 (1)) there is no provision in our Supreme Court Rules permitting a party to amend his process without leave of Court. Order 2 r. 23 (1) of the Supreme Court Rules provides:

"Ord. 2 r. 28 (1): Every application to the Court should be by notice of Motion supported by affidavit..."

Whether the error or mistake be that of learned Counsel for the party or that of the party, there can be no amendment or correction of the error or mistake without the leave of Court first sought and had. In this case, the much touted mantra that "the mistake of Counsel should not be visited on his clients" is inapplicable as the mistakes herein are that of the appellants themselves as stated by their Counsel.

From the above, it follows therefore that contrary to the submission of learned Counsel for the appellants, issues 1, 3 and 4 are not predicated on any of the six grounds of appeal in the appellants' amended notice of appeal and grounds 1, 2, 3 and 4 thereof have no issues formulated from them. Issues 1, 3 and 4 not shown to relate to any grounds of appeal are

not only incompetent but completely valueless and ought to be ignored. - see Omo v. JSC Delta State (2007) SC (Pt.11) 1, Sunday Sodinye Nteoguija & Anor v. Chief Dickson A. Ikuru (1998) 10 NWLR (Pt.569) 267 at 288, Ugo v. Obiekwe (1989) 1 NWLR (Pt.99) 566.

Appeal is decided upon the issue formulated for determination from the grounds of appeal. When an issue is formulated, the grounds of appeal upon which the issue is based is extinguished as it were and replaced by the said issue. A ground of appeal must have an issue to cover it and an argument is proffered to cover the issue. Any ground of appeal not having any argument proffered on the issue framed therefrom is deemed abandoned and ought to be struck out. See Unity Bank Plc & Anor v. Bouari (2008) 2-3 SC (Pt.11) 1.

Learned Counsel for the appellants sought to underplay the mistakes which he claimed were made by his clients - the appellants - but the mistakes go to the essence of grounds of appeal and issues distilled therefrom for determination. Left uncorrected as in this case, the mistakes are fatal to the grounds of appeal and issues involved and the issue of whether or not the respondents were misled is out of it.

It is imprudent of learned Counsel for the appellants to concede the mistakes in his brief, identify the mistakes and proceed with the appeal without any attempt to correct the mistake even if made by his clients. Consequently, issue 1, 3 and 4 in the appellants' brief and grounds 1, 2, 3 and 4 in the amended notice and grounds of appeal are incompetent and are hereby struck out. The same applies to arguments relating to same in the briefs. This leaves the appellants with only one issue - issue 2 derived from grounds 5 and 6 of the amended notice and grounds of appeal.

The learned Counsel for the Respondents also raised the issue that the appellants' Counsel formulated a compound issue as issue 2 in his brief. Issue 2 in appellants' amended brief reads thus: H

"2. Whether the Court below was right in affirming the decision of the trial Court which is heavily based on inadmissible evidence premised on the Respondents' "Reply to Statement of Defence" and perceived weakness of the appellants' case as against the

strength of the respondents' case (grounds 5-6)."

In an appeal, an issue for determination is a question of law or fact or both arising from the ground of appeal which when resolved one way or the other will affect the result of the appeal. See Imonikhe & Anor v. A-G Bendel State & Ors (1992) 6 NWLR (Pt.248) 396 at 407. See also Adejumo & Ors v. Ayantegbe (1989) 3 NWLR (Pt.110) 417, Angyu & Anor v. Alhaji Malami & Anor (1992) 9 NWLR (Pt.264) 274.

It is a common feature in some briefs filed in this Court that a fact is often confused with speculation. Value judgment or private opinion as to what the Court did or did not do is often presented as established fact. In issue 2 reproduced above, that "the decision of the trial Court is heavily based on inadmissible evidence" assumes facts not established. That the Court relied heavily on inadmissible evidence is a matter which should be established by showing reliance on the evidence and the inadmissibility of same. The same applies to the trial Court's alleged reliance on perceived weakness of the appellants' case as against the strength of the respondents' case.

The appellants assumed that their opinion of what the Court did or failed to do constitute facts on which they predicated their complaint in issue 2. Broken down to its component parts, issue 2 is made up:

- (1) Complaint that the evidence relied on is inadmissible.
- (2) That the judgment was based on the weakness of the appellants' case against the strength of the Respondents' case.

A proliferation of issues should be avoided. See Ugo v. Obiekwe (1989) 21 SC (Pt.11) 41. ***It is undesirable to formulate an issue composed of more than one question for the Court to determine.*** See Labiyi v. Anretiola (1992) 10 SCNJ 1 at 2. Order 6 of the Supreme Court Rules has no provision for "sub-issues". See Salami & Anor v. Lawal (2008) 6-7 SC (Pt.11) 242.

In addition to his reply to the preliminary objection and the preliminary points in the Respondents' brief, learned Counsel for the appellants included in his reply brief a "Reply to points of Law". In the said reply, he dealt serially with the paragraphs of the Respondents' brief. As an established matter of practice and procedure the reply brief contemplated by ord. 6 r. 5 (3) of the Supreme Court Rules (as amended) is not a wholesale reply to the Respondents'

brief.

In practice, a reply brief is not designed to give the appellant a second chance at the cherry, or to improve the argument, or supply omissions in the appellants' brief. See Akande v. Adisa (2012) 15 NWLR (Pt.1324) 53S SC Izedunmwun v. UBN Plc (2012) 6 NWLR (Pt.1295) 1. ***In this appeal, the parties have joined issues in their briefs. I do not see any new point in the respondents' brief to which the appellants could reply. The reply alleged to be on point of law is a repetition and improvement of argument in the appellants' brief. I will ignore the so-called reply on points of law.***

I have considered the compound issue 2 distilled by the appellants from grounds 5 and 6 of the amended notice of appeal. On the other hand learned counsel for the respondents' formulated issue 1 from ground 1, 3, 4, 5 and 6 and issue 2 from ground 2.

I have determined from the appellants' amended brief of argument that the mistakes allegedly made by the appellants left grounds 1 to 4 without any issues formulated therefrom. The respondents cannot therefore formulate an issue from appellants' grounds 1 to 4 as the said grounds are deemed abandoned, there being no application to amend the errors or mistakes identified by learned counsel for the appellants. Also issue 2 formulated by learned counsel for the respondents arose from appellants' ground 2, one of the two grounds deemed abandoned.

In the circumstances, the respondents have no valid issues for determination. The Court is left with appellants' compound issue 2. For a just determination of the appeal, I will reframe appellants' issue 2 framed from grounds 5 and 6 of the amended notice of appeal.

Issue 2 as framed by learned Counsel for the appellants reads:

"Issue No. 2. Whether the Court below was right in affirming the decision of the trial Court which is heavily based on inadmissible evidence premised on the respondents' reply to statement of defence and the perceived weakness of the appellants' case as against the strength of the Respondents, case (Grounds 5 and 6)."

I will reframe the issue to read:

"Having regard to the pleadings particularly the Respondents' reply to the statement of defence and the totality of evidence ad-

duced by the parties, was the Court below right in affirming the decision of the trial Court in favour of the Respondents?"

My noble Lords, I will start with what appears to be in vogue these days - unwarranted attack on the integrity and impartiality of the court. In paragraph 5.11 of his brief learned counsel for the appellants lamented that:

"However, in the face of the pleadings and evidence of the parties as demonstrated above, the trial Court still found it convenient to come to the conclusion that the appellants did not deny the existence of Jinu as a ruling House in Zambufu. See lines 10-18 of page 189 of the record."

Reproduced hereunder is not only the portion of the judgment to which the learned Counsel for the appellant limited his assertion but the entire portion from pages 10 to 23 of the record wherein the trial Court held:

"I need to observe at this stage that even though the defendants were asserting the names of the two ruling houses in Zambufu to be Ginda and Gbasa there is nowhere where they specifically denied the existence of Jindu as a ruling house in their pleadings. Rather a close reading of the paragraphs 3, 4 and 8 of the defendants' statement of defence and the evidence of DW1 shows that they were denying the existence of Maaji Bunu as a ruling house in Zambufu. I am afraid, there is no basis for this. The plaintiffs did not assert that Maaji Bunu is a ruling house in Zamburu. For the avoidance of doubt PW1, PW2, PW3 and PW4 testified that Jinu is a ruling house in Zambufu. Indeed both PW1 and PW2 gave the number of Maaji Zhitsus that had been produced by the Jinu ruling house of Zambufu to four to date."

Ibrahim Kolo who testified as PW4 told the Court that he is from Jinu family at Zambufu. (See page 189 lines 10-23). There is no basis for suggesting that the above findings of the trial Court was not based on the pleading and evidence before the Court, but on convenience as alleged by learned Counsel.

My Lords, civil cases are determined on the balance of probabilities which in itself means preponderance of evidence. The trial court places the evidence adduced before it by the parties in the imaginary scale to see which side of the scale is heavier, not by the number of witness called by each party but

by the quality or probative value of the testimony of the witnesses. This is the import of deciding a case on balance of probabilities. See Mogaji v. Odofoin (1978) 4 SC 91, Adekunle v. Aremu (1998) 1 NWLR (Pt.533) 208 -210.

Now “CONVENIENT” is an adjective and means inter alia, the following: carefree, easily done, effortless, opportune, presenting few difficulties, requiring no effort. See Burton’s Legal Thesaurus Fourth Edition at page 128.

To say that a court found it convenient to come to a particular conclusion implies that the court failed in its duty to consider and weigh the evidence before it and apply the law relevant thereto. It implies that the court searched for and followed the line of least resistance instead of relying on the evidence before it. The court is charged with a dereliction of duty when there was no basis for same. It is the duty of learned counsel, notwithstanding his side of the divide, to guard and protect the integrity of the court with the wraparound security of a mother hen over its chickens. Any aspersion, express or implied, cast on the court by any counsel, reflects adversely on that Counsel.

I have considered the grounds of appeal and issues raised before the court below. While ground 3 of the amended notice and grounds of appeal complained of the trial Court’s finding relating to Jinu as a ruling house in Zambufu, there was no issue framed from the said ground.

Appeals are determined based on the issues raised from the grounds of appeal and not on the grounds of appeal. The two are not the same. See Oniah v. Onyia (1989) 1 NWLR (Pt.99) 514 at 516. A Court has no business considering and pronouncing on an issue not submitted to it for resolution.

Appellants did not raise the validity, vel non, of the respondents’ “Reply to Statement of Defence” but assumed that the said reply was incompetent. It may be so on its face but the matter has to be raised and determined before the issue of reliance on it can be raised. In any case, even if it is established and not just assumed, that the reply brief is incompetent, it is not enough to say that the Court relied on it.

Learned Counsel for the appellants ought to have spe-

cifically made reference to the portion of the judgment of the trial Court affirmed by the Court below wherein reliance was placed on the reply brief. It is not for this Court to search through the record to find evidence or facts to substantiate the assertion that the trial Court relied on the Reply Brief. But
as I said earlier in this judgment, there is no ground of appeal from which the issue of validity of the reply brief would have been raised.

I have perused several times pages 342-346 of the record which learned Counsel referred to as showing that the judgment of the trial Court affirmed by the Court below relied on the respondents' reply brief. There is no reference to the reply brief in those pages of the judgment of the trial Court. Most of all, my Lords, there is nowhere in the judgment of the trial Court or in the judgment of the Court below which affirmed it indicating or revealing:

"...that the trial Court heavily relied on the weakness of the appellants' case rather than the strength of the respondents' to give judgment in favour of the respondents and against the appellants."

There could be strengths in the case of both parties just as there could be weaknesses in each of them but the trial Court, in its judgment which was affirmed by the Court below, did not predicate its judgment on the strength of the respondents' case or on the weakness of the appellants' case. As I stated earlier, the decision of the trial Court which the Court of Appeal endorsed was based on a preponderance of evidence.

The issue of decision based on the strength of the defence against the weakness of the plaintiffs' case came from the imagination of the appellants' Counsel. It did not arise from the judgment of the trial court or the court of Appeal. It is therefore not a proper issue before this Court.

From the evidence on record, three sets of persons were involved in the selection/appointment of Zhitsu - the people themselves, those who convey the wishes of the people to the Emir and the Emir himself. The respondents say that those who present the selected candidates to the Emir are traditional councilors who they regard as Kingmakers. On the other hand, appellants have contended that there are no Kingmakers in Zambufu but advisers to the Zhitsu.

Whether they are called Kingmakers as the respondents claim

or advisers as the appellants would have it, is of no moment in the outcome of the case in as much as the parties agree on the role of the middlemen between the people and the Emir in the selection, appointment and turbaning of the Zhitsu of Zambufu. This is hardly an issue upon which this Court could be called upon to reverse the decision of the Court below as urged upon the Court by the appellants. B

The mere fact that there are three names on Exhibit 2 including the names of the 1st defendant is not evidence that the 1st appellant (defendant) is from a ruling house and, ipso facto, qualified as a candidate to contest for the position of Zhitsu of Zambufu. If anything, it has brought about this litigation. I do not agree with the learned Counsel for the appellants that the findings of the trial Court which were considered and endorsed by the Court below are perverse, not supported by evidence or arrived at as a result of improper exercise of judicial discretion or that they resulted in a miscarriage of justice. C D

The trial Court had the opportunity to see, hear the witnesses and determine the veracity, vel non, of the evidence offered. The Court of Appeal reviewed the proceedings and affirmed the decision of the trial Court. This is an appeal against the concurrent findings of facts of the two Courts below. The appellants have not provided a basis for this Court to interfere with the concurrent findings of the High Court and the Court of Appeal. See Okolo v. Uzoka (1978) 4 SC 77, Abba v. Ogodo (1984) 1 SCNLR 372, Idundun v. Okumagba (1976) 1 NMLR 2000, Chikwendu v. Mbamali (1980) 3 - 4 SC 31. E F

Let me make reference to the complaint against the consequential order made by the trial Court and affirmed by the Court below. Learned Counsel for the appellants conceded that his clients made mistakes in their issues vis-à-vis the grounds of appeal. According to learned Counsel, one of the mistakes is that the appellants said “issue 4 is derived from ground 1 instead of ground 2 from which the issue is actually derived.” G H

I have already stated in this judgment that an identification and an admission that a mistake has been made cannot take place of the correction of the said mistake. The only way to correct the error admitted by Counsel is by way of application to the Court. Learned

Counsel chose not to correct the mistakes even if made by his clients.

I am constrained once more to comment on the language of learned Counsel for the Respondents. To describe an order made by a Court of competent jurisdiction as “purported” is in my view an assault on the dignity of the Court. The order subsists as long as it is not set aside by a higher Court in the hierarchy.

If for any reason it is set aside, it is an order of Court which has been set aside and not a purported order. Learned Counsel for the appellant might as well dub the entire judgment of the Court “purported judgment”. In their use of language, even in relation to an order they consider bad in law or on facts, Counsel should always be guided by decency and ethical conduct.

There is no basis for interfering with the order of the trial Court affirmed by the Court of Appeal.

In the final result, the appeal lacks merit and it is hereby dismissed. Appellants to pay N100,000 to the respondents.

Appeal dismissed.

E

FABIYI JSC

I had the advantage of reading very carefully the judgment just handed out by my learned brother - Ngwuta, JSC. I agree that the appeal lacks merit and deserves an order of dismissal; in the main.

I seek leave to say a few words of my own in support. Put briefly, the crux of the appeal is whether the two courts below were right in finding that the 1st appellant was not qualified to be appointed as Zhitsu of Zambufu and that proper procedure was not followed in his appointment and the subsequent stamp of authority given by the 2nd appellant. I feel that the salient issue should be considered in this court of last resort as same is considered very vital by the parties. The two courts below clearly found that there are two ruling houses in Zambufu. They are Jinu and Gbasa. The 1st appellant is not from any of the two Ruling houses. He was found to be from Kada house which is not a ruling house.

The two courts below found that the correct procedure was not followed in the process of appointing the 1st appellant as the Zhitsu of Zambufu. The name of the 1st appellant was not sent to the 2nd appellant by the Ndejiko as mandated by the custom of Zambufu

people. This is extant from the cold facts in the record of appeal.

Let me observe it at this point that it is not the business of the court to make declaration of customary law relating to the selection or appointment of a chief. It is however the business of the court to make a finding of what the customary law is and apply the law for declaration. Under the Evidence Act, a customary law is a matter of fact to be pleaded and proved by evidence unless it has been judicially noticed. See: the case of Lipede v. Sonekan (1995) 1 NWLR (Pt.374) 668. B

The two courts below concurrently found that the 1st appellant is not from any of the two ruling houses in Zambufu. As well, Ndejiko who should present the name of the duly selected person to the 2nd appellant in accordance with established custom was brushed aside. That was not good enough. This court will not interfere with the pragmatic findings of the two lower courts in the prevailing circumstance. See: Kale v. Coker (1982) 12 SC 252; Anaeze v. Anyaso (1993) 5 NWLR (Pt.291) 1. C D

For my above remarks and the detailed reasons contained in the judgment of my learned brother, I too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly and endorse the consequential orders therein contained including the order as to costs. E

GALADIMA JSC

I have had the opportunity of reading in draft the lead judgment of my learned brother NGWUTA, JSC just delivered. I agree with his reasoning leading to the conclusion that the appeal lacks merit and should be dismissed. F

The concurrent findings of the two courts below based on the facts placed before them were that the procedure for appointing the 1st appellant to the stool of ZHITSU of Zambufu was not followed. The said appellant who was neither from the ruling house of JINU nor Gbasa cannot claim the right to be appointed the ZHITSU. This is against the customary law of the people of Zambufu. It was on record that the name of the appellant was not sent to the 2nd appellant by the Ndejiko as required by custom. G H

The court below agreed with the trial court that the current

procedure in appointing a ZHITSU of Zambufu is for the name of a sole candidate or, where they are more than one, their names be sent to the 2nd appellant for turbaning. The two Lower Courts found that there is no evidence that Ndejiko submitted the name of the 1st appellant to the 2nd appellant.

B In view of the foregoing and the detailed consideration of the other related issues in the lead judgment the appeal must fail; I equally dismiss same and abide by consequential orders made including costs by my learned brother NGWUTA, JSC.

C _____

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the judgment of my learned brother, Ngwuta, JSC. I agree with it and for the reasons D which he gives I, too would dismiss the appeal. Customary law is a question of fact to be proved by evidence. Clearly, a mirror of accepted usage. There is compelling evidence which the learned trial judge found conclusive that the leads to the recognition of the custom that the right to the Zhitsu of Zambutu Chieftaincy is shared E between the Jinu and Gbasa Ruling Houses. A person to be appointed a Zhitsu must come from one of the Ruling Houses. After selection is done by the Kingmakers the name of the successful person is sent to the 2nd appellant by the Ndejiko, whose duty it is to F appoint and turban the said person. This is the established custom of the people of Zambutu, and it is to be strictly followed when appointing a Zhitsu. Concurrent findings of the two courts below are that the 1st appellant is not from any of the two Ruling Houses. On this ground alone the 1st appellant is not qualified to be the Zhitsu of Zambutu.

G It is long settled that the Supreme Court will not upset concurrent findings of fact by the courts below unless satisfied that such findings are perverse, or cannot be supported from the evidence before the court or there was miscarriage of justice or violation of some principle of law or procedure. See Arowolo v. Olowookere & 2 H Ors (2011) 11 - 12 SC (pt.ii) p.98, Cameroon Airlines v. Otutuizu (2011) 1 - 2 SC (Pt.iii) p.200.

Findings of fact are usually made by the trial court after cross-examination. Then, the judge would have had the advantage of watching the demeanour of the witnesses and be in a good position

to make correct assessment of witnesses testimony. A privilege reserved exclusively for trial judges. Where, though the issues relate to the correct inference to be drawn from facts proved an appellate court is in as good a position as the trial court to make proper inference from facts proved, and would readily reverse findings of fact if in its opinion it is not supported by evidence. B

Learned counsel for the appellant has not been able to show to this court that the finding of the trial court affirmed by the Court of Appeal that the 1st appellant does not belong to any of the two Ruling Houses is perverse or cannot be supported by evidence. In the circumstances concurrent findings of fact of the two courts below are correct. C

For this, and the findings in the leading judgment this appeal is dismissed with costs as proposed by my learned brother Hon. Justice N. S. Ngwuta. D

OKORO JSC

I read in advance the judgment of my learned brother, Ngwuta, JSC just delivered with which I am in total agreement that this appeal lacks merit and ought to be dismissed. My learned brother has meticulously and quite efficiently dealt with the salient issues submitted for the determination of this appeal. I shall however make a few comments in support of the judgment. E

My Lords, this is a Chieftaincy matter in respect of Zambufu village in Edu Local Government Area of Kwara State. The record shows that there are two ruling houses in Zambufu viz - jinu and Gbasa. There are traditional councilors whose duties include the receipt of applications from candidates interested in the chieftaincy stool of Zambufu called Zhitsu. After procession of the applications, one person is sent to the Emir of Lafiagi for turbaning. However, if there is no consensus candidate, all the candidates are sent to the Emir who chooses one of them and turbans him as the Zhitsu. The 1st appellant was turbanned by the second appellant. The case of the plaintiff at the High Court was that the 1st appellant was not from any of the recognized ruling houses and that his selection by the 2nd appellant and subsequent turbaning was against the custom of Zambufu people. That his name was never forwarded to the Emir by F G H

the Ndejiko as demanded by custom.

In its findings, the High Court held that the first appellant is not from any of the recognized ruling houses and that his turbaning was not in accordance with their native law and custom. The learned trial judge then ordered the name of the first respondent and one other to be submitted to the Emir of Lafiagi (2nd appellant) to choose one as the Zhitsu of Zambufu.

The appellants herein appealed to the Court of Appeal which by a split decision of two to one, upheld the decision of the High Court and also agreed that the first appellant was not from any known or recognized ruling house but from Kada family which is not a ruling house. Still not being satisfied, the appellants have appealed to this court. From the 6 grounds of appeal filed, the learned counsel for the appellants has distilled four issues for the determination of this appeal. The four issues are as follows:-

“1. Whether the Lower Court was right in affirming the decision of the trial Court that the appellants did not deny and join issues with the respondents on the existence of Jinu as ruling house in Zambufu.

2. Whether the Court below was right in affirming the decision of the trial Court which is heavily based on inadmissible evidence premised on the respondents’ “Reply to Statement of Defence” and perceived weakness of the appellants’ case as against the strength of the respondent’s case.

3. Whether the Lower Court was right in affirming the decision of the trial Court that the 1st respondent was neither qualified to be appointed as Zhitsu of Zambufu nor was the proper Procedure followed in his appointment by the 2nd appellant even with all the contradictions in the respondents’ evidence without and resolving the issue of existence or otherwise of Kingmakers in Zambufu.

4. Whether the Court below was right in affirming the consequential order made by the trial Court when the respondents never made such a case before the trial court nor sought for such relief.”

Learned counsel for the respondents, Dr. Oladapo Olanipekun, has however distilled two issues for the determination of this appeal

They are:-

1. Having regard to the state of evidence and pleadings at the trial court vis-à-vis the finding that the 1st appellant is not qualified to

vie for and or ascend the throne of Zhitsu of Zambufu, whether the Lower Court was not right in affirming the decision of the trial High Court.

2. Whether the Lower Court was not right in affirming the consequential order made by the trial court.

Although my learned brother Ngwuta, JSC has struck down all the issues for determination except appellant's issue No.2, I think that the gist of the complaint before this court is whether the Lower Court was right in affirming the decision of the trial court that the 1st appellant was neither qualified to be appointed as Zhitsu of Zambufu nor was the proper procedure followed in his appointment and subsequent turbaning by the 2nd appellant. This court has a duty to put this issue in proper perspective and give it an air for finality. The court below held on the issue as follows:-

"On the state of the pleadings and evidence, the learned trial judge was perfectly justified in his decision that the 1st appellant was not qualified to vie for the stool of Zhitsu of Zambufu, not being from any of the two ruling houses. Not only did he fail to show satisfactorily that he hails from one of the two ruling houses, but also the respondents proffered enough evidence to show, on the balance of probabilities, that he did not. I must therefore resolve this issue against the appellants."

There is no doubt that the learned trial judge had earlier identified the two ruling houses in Zambufu that are eligible to present candidates for the stool of Zhitsu to be Jinu and Gbasa and that the 1st appellant herein was not from any of the two ruling houses. The 1st appellant was identified to have come from Kada House which is not a ruling house. Accordingly, he was adjudged not qualified to occupy the stool of Zhitsu of Zambufu. The Court of Appeal clearly accepted and agreed with these findings. This brings me to the question of concurrent findings on the point by the two Lower Courts. This court usually approaches such findings from the premises that, following from the fact that making of findings on primary facts is a matter pre-eminently within the province of the court of trial, which has the opportunity of seeing and hearing the witnesses testifying, a judge's conclusion on the facts is presumed to be correct so that presumption must be displaced by the person seeking to upset the judgment on facts. In other words, where there is sufficient evidence to

support concurrent findings of fact by two Lower Courts, such finding should not be disturbed unless there is a substantial error apparent on the record: that is, the findings have been should to be perverse, or some miscarriage of justice or some material violation of some principle of law or of procedure is shown. I dare say, this is not
 B the case here. See *Adaku Amadi V. Edward N. Nwosu* (1992) 6 SCNJ 59, *Onwujuba v. Obieniu* (1991) 4 NWLR (Pt.188) 16, *Igwego v. Ezeugo* (1992) 6 NWLR (Pt.249) 561; *Osho v. Foreign Finance Corporation* (1991) 4 NWLR (Pt.784) 157.

C The other aspect is on the procedure in appointing the 1st appellant as the Zhitsu of Zambufu. The court below agreed with the trial court that the correct procedure in appointing a Zhitsu is for the name of a sole candidate or, if there are more than one, the names of such candidates be sent to the 2nd appellant by the Ndejiko. It is
 D only after that, that the 2nd appellant can turban the sole candidate or choose one from the list if there are more than one candidate. As was found by the two Lower Courts, there is no evidence that the Ndejiko ever submitted the name of the 1st appellant to 2nd appellant. For me, I agree with the two Lower Courts that the correct
 E procedure was not followed in the selection and turbaning of the 1st appellant.

Based on the above and fuller reasons adumbrated in the lead judgment, I agree that this appeal is devoid of any scintilla of
 F merit and is hereby also dismissed by me. I abide by all the consequential orders made in the lead judgment, that relating to costs, inclusive.

G

H