

COURT OF APPEAL OWERRI DIVISION
FRIDAY 3RD OCTOBER, 2014. CA/OW/35/2012
CORAM:- R. C. AGBO, I. I. AGUBE, I. G. MBABA, JJCA

1. DANIEL OKORIE
2. FERDINAND OKORIE
3. JONAH OKORIE APPELLANTS
4. DAMIAN OKORIE
5. VIRGINUS OKEREKE
AND
CHIEF MAURICE O. CHUKWU RESPONDENT

COURT PROCESSES - Abuse - Characteristics - It shows itself in the institution of multiple actions on the same subject matter - Against the same parties (H1)

APPEALS - Court of Appeal - Jurisdiction - CA is barred from entertaining appeal from Customary Court of Appeal - Except same rests on issues of Customary Law (H2)

ORDERS OF COURT - Certiorari - Conditions for - The relief is available where there is lack or excess of jurisdiction - Error on the face of record - And breach of fair hearing (H3)

FACTS

This action was instituted at the Customary Court, Umunumo district, Ehime Mbano in Imo State by plaintiff/respondent against defendants/appellants. Respondent sought for declaration, damages and perpetual injunction against appellants. The action was dismissed by the court. Not satisfied, respondent rather than filing an appeal brought an originating motion at the Customary Court of Appeal of the State. His prayer is for an order of certiorari quashing the proceedings and judgment of the trial Customary Court. The court heard the motion and dismissed same. Aggrieved further, respondent lodged appeal in the Court of Appeal Port Harcourt Division against the decision of the Customary Court of Appeal. Thereafter, respondent approached the Customary Court of Appeal on an appeal, challenging the final judgment of the trial Customary Court.

Appellants raised preliminary objection against the hearing of respondent's appeal at the Customary Court of Appeal. Appellants' contention is that respondent's latest appeal at the Customary Court of Appeal and his originating motion at the same court, was an abuse of the court process. The reason for the contention is that respondent's earlier appeal at the Court of Appeal Port Harcourt Division, against the refusal of the Customary Court of Appeal to quash the proceedings and judgment of the trial Customary Court was still pending. The Customary Court of Appeal in its ruling dismissed appellants' preliminary objection on the ground that respondent's appeal before it and the appeal pending before the Court of Appeal are not on the same issue. The court thus held that the appeals as constituted do not amount to abuse of court process. The court therefore refused to dismiss respondent's appeal before it. Dissatisfied, appellants have appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

"1. Whether the lower Court was right when it held that the Respondent's Appeal No.CCA/OW/A/25/2008 and motion No.CCA/OW/MISC/25/2008: Chief Maurice O. Chukwu vs. Daniel Okorie & 5 Ors brought before the Court, do not constitute an abuse of the process of court when the Respondent's Appeal NO.CA/PH/109/2008 Chief Maurice O. Chukwu vs. Customary Court Umunumo Ehime Mbano L.G.A. pending at the Court of Appeal is yet to be determined.

2. Whether the lower Court was right when it failed to hold that Respondent's Appeal NO.CCA/OW/A/25/2008 and Motion NO.CCA/OW/MISC/25/2008 Chief Maurice O. Chukwu vs. Daniel Okorie & 5 Ors. pending before it constitute an abuse of the process of Court when Respondent did not offer any argument in response to the Appellants' argument that the RES in the matter is already before the Court of Appeal in Appeal NO.CA/PH/109/2008 Chief Maurice O. Chukwu vs. Customary Court Umunumo Ehime Mbano L.G.A. filed by the Respondent."

HELD (Unanimously dismissing the appeal per **MBABA****JCA)***COURT PROCESSES - Abuse - Characteristics*

1. Certainly, abuse of the process of Court has nothing to do with Customary Law or any question of customary Law, as such legal lexicon and procedure belong to the realms of the Principles of Common Law, which frowns at mischievous, employment and using of the process of Court, to cheat, annoy or irritate an opponent. It shows itself, sometimes, in the institution of multiple actions on the same subject matter against the same parties, or institution of a matter during the pendency of another one, claiming the same reliefs. (p. 315 B)

APPEALS - Court of Appeal - Jurisdiction

2. It appears obvious, as per the decided authorities from the Supreme Court, that the position of the apex court on issue of appeals from the Customary Court of Appeal to the Court of Appeal, is that, this Court is barred from entertaining any appeal emanating from the Customary Court of Appeal, except the same rests on question(s) calling for the construing of issue of Customary Law, simpliciter. Interpretation of Section 245(1) of the 1999 Constitution is not a question of requiring Appellant to seek and obtain the leave of the Court of Appeal, where the appeal involves other questions either of Law or of facts, outside question(s) of Customary Law, as is the case in the application of Section 242 (2) of the 1999 Constitution (where appeal is not as of right). I believe this position of the Constitution was intentional, probably to make the Customary Court of Appeal a final Court of Litigation at level, except on questions of Customary Law, or what constitute applicable Customary Law.

I have earlier ex-rayed the grounds of Appeal formulated by the Appellants (and the issues distilled there-from by the Appellant) and came to the conclusion that the same are not contemplated within the purview of any question of Customary Law. I therefore have no difficulty in holding that this ap-

peal does not come within the limits of the jurisdiction of the Court of appeal to entertain, as the appeal runs foul of the Section 245(1) of the 1999 Constitution.

The Preliminary objection therefore succeeds and is hereby upheld. This Appeal is therefore afflicted by virus of incompetence and liable to be struck out. (pp. 316 G/318 A)

ORDERS OF COURT - Certiorari - Conditions for

3. The relief of Certiorari is usually available where any of the following condition is established in the decision or act of an inferior Court/tribunal.

(i.) Lack of or excess of jurisdiction

(ii.) Error on the face of record of an inferior Court or tribunal

(iii.) Breach of observance of natural justice regarding fair hearing. (p. 321 D)

NOTABLE POINT OF INTEREST

DANJUMA JCA

1. Certiorari – Definition of

The Blacks Law Dictionary, 8th Edition, by Bryan A. Garner, pages 241 - 242 defines ‘Certiorari’ as “An extraordinary writ issued by an Appellate Court, at its discretion, directing a lower Court to deliver the record in the case for review...” (And further explains it as)

“The established method by which the Court of King’s Bench from the earliest times exercised superintendence over the due observance of their limitations by inferior courts, checked the usurpation of jurisdiction, and maintained the supremacy of the royal courts, was by writs of prohibition and certiorari. A Proceeding by writ of certiorari (cause to be certified) is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to transmit the record of its proceedings for review, for excess of jurisdiction. It is similar to a writ of error, in that it is a proceeding in a higher court to superintend and review judicial acts, but it only lies in cases not appealable by writ of error or otherwise.” (p. 320 H)

REPRESENTATION

C. T. Okeke Esq. with R. C. Mgbenu Esq., for the Appellants
E. O. Onyema Esq., for the Respondent

CASES REFERRED TO

Moyosore v. Gov. of Kwara State (2012) 5 NWLR (pt. 1293) 242 B
Menakaya v. Menakaya (1994) 5 NWLR (pt. 345) 512
NEPA v. ANGO (2001) 15 NWLR (pt. 737) 627
Pam v. Gwom (2000) 74 LRCN 22
Tiza v. Begha (2005) 129 LRCN 1833 C
Ohari v. Akpoemonye (1999) 65 LRCN 77
Hirnor v. Yongo (2003) FWLR (pt. 159) 1358
Alaede v. Oguguo (2007) All FWRL (pt. 349) 1188
Anah v. Anah (2008) 9 NWLR (pt. 1091) 75
Umeh v. Iwu (2008) NWLR (pt. 1089) D
Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 156
Adekosun v. Adegosulu (1991) 3 NWLR (pt. 179) 293
Okafor v. A-G Anambra (1991) 6 NWLR (pt. 200) 659
Ekpo v. Calabar Local Govt. Council (1993) 3 NWLR (pt. 281) 324
Ezenwa v. Bestway Electric Manufacturing Co. Ltd. (1999) 18 NWLR E
(pt. 613) 82

STATUTE & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 242(2), 245(1) F
Court of Appeal Rules 2011, O. 10 r. 1

BOOKS REFERRED TO

Blacks Law Dictionary 8th Ed. pp. 241-242
Handbook of Common Law Pleading p. 340 G

LEAD JUDGMENT BY MBABA JCA

This is an appeal against the Ruling of Imo State Customary Court of Appeal, delivered on 22/6/2010, coram: Hon. Justice F. C. Abosi (Presiding), Hon. Justice P.I. Okpara and Hon. Justice V.C. H Okorie, Judges of the Customary Court of Appeal, Imo State. In the Ruling, their Lordships dismissed the application seeking to dismiss/strike out Respondents' Appeal NO.CCA/OW/A/25/2008 and motion CCA/OW/MISC/25/2008 there - from, for alleged abuse of the

process of Court.

The Respondent in this appeal, as Plaintiff at the Customary Court, Umunumo district, Ehime Mbano, in suit No.CC/UM/16/2002, had taken out an action against the Appellants in this appeal, praying for declaration, damages and perpetual injunction. He later tried to stop the hearing of the suit, unsuccessfully. The suit was dismissed by the trial Court on 18/7/2005, after the trial and being dissatisfied, the Respondent, instead of appealing, filed an originating motion (CCA/OW/MISC/64/2005) at Customary Court of Appeal, seeking an order of Certiorari, to quash the proceedings and the said judgment of the Customary Court, delivered on 18/7/05. The motion was heard and dismissed by the Customary Court of Appeal on 27/6/2006. The Respondent, thereafter, filed appeal to the Court of Appeal against the said judgment of Customary Court of Appeal refusing to quash the proceedings and judgment of 18/7/05. That is the Appeal NO.CA/PH/109/2008, in this Court.

The Respondent, thereafter, filed appeal NO.CCA/OW/A/25/2008 at the Customary Court of Appeal to challenge the said final judgment of the Customary Court, delivered on 18/7/2005. The attempt to scuttle the hearing of that appeal brought about this appeal, CA/OW/35/2012, because the preliminary objection, raised by the Appellants, on 23/2/2010 (CCA/OW/MISC/25A/2008) against the appeal was dismissed. Appellant had argued that the appeal (CCA/OW/A/25/2008 and Respondents motion (CCA/OW/MISC/25/2008, to regularize some processes) was an abuse of the court process, for the reason that the earlier appeal CA/PH/109/2008 by the Respondent, against the refusal of the Customary Court of Appeal, in CCA/OW/MISC/64/2005, to quash the proceedings and judgment of 18/7/05, was still pending in this court.

In refusing to strike out/dismiss the Respondent's appeal (CCA/OW/A/25/2008), the Appellate lower Court had (Per Okpara J) said:

"I have considered the arguments of Counsel on both sides. The grounds of appeal in the Appeal at the Court of Appeal in CA/PH/109/2008 cannot, from all indications, have distilled from them the same issues as in the appeal in CCA/OW/A/25/2008. The subject matter in the two appeals cannot be the same, as the appeal in the Court of Appeal is with regards to the dismissal of the application for Certiorari and prohibition. The appeal in this court has its subject matter

the claims at the lower Court. While the appeal to this Court can determine all the issues, the appeal to the Court of Appeal can only quash the judgment of the Court. It is not in doubt that there is a slight difference in the parties to both appeals. From the foregoing, I do not see any malice, fraud or want of bona fides in the appeal to this Court. There is no duplication of court process as was the case in African Re-Insurance Corporation Case (supra)..." See page 286 of the Records.

That is the decision Appellants are appealing against, as per their Notice and grounds of appeal, filed on 5/7/2010 (Pages 287 - 293 of the Records of Appeal), wherein Appellants raised three (3) grounds of appeal.

Appellants filed their brief of argument on 26/4/2012 and a Reply Brief on 30/5/12, following Respondent's Notice of Preliminary Objection, raised in the Respondent's brief, filed on 22/5/2012.

Appellants raised two (2) Issues for determination, as follows:

"1. *Whether the lower Court was right when it held that the Respondent's Appeal No.CCA/OW/A/25/2008 and motion No.CCA/OW/MISC/25/2008: Chief Maurice O. Chukwu vs. Daniel Okorie & 5 Ors brought before the Court, do not constitute an abuse of the process of court when the Respondent's Appeal NO.CA/PH/109/2008 Chief Maurice O. Chukwu vs. Customary Court Umunumo Ehime Mbano L.G.A. pending at the Court of Appeal is yet to be determined. (Ground 3)*

2. *Whether the lower Court was right when it failed to hold that Respondent's Appeal NO.CCA/OW/A/25/2008 and Motion NO.CCA/OW/MISC/25/2008 Chief Maurice O. Chukwu vs. Daniel Okorie & 5 Ors. pending before it constitute an abuse of the process of Court when Respondent did not offer any argument in response to the Appellants' argument that the RES in the matter is already before the Court of Appeal in Appeal NO.CA/PH/109/2008 Chief Maurice O. Chukwu vs. Customary Court Umunumo Ehime Mbano L.G.A. filed by the Respondent.*" (Grounds 1 and 2)

The Respondent's Notice of Preliminary objection hinged on the ground that the appeal was incompetent and this Court lacked jurisdiction to entertain it as none of the grounds of Appeal contained in the Notice of Appeal raised any issue of Customary Law, contrary to the provisions of Section 245(1) of the Constitution of

Federal Republic of Nigeria 1999, as amended.

In the alternative (in case overruled), the Respondent distilled a lone issue for the consideration of the appeal, thus:

“Whether the lower Court was right in deciding that Appeal NO. CCA/OW/A/25/2008 Chief Maurice O. Chukwu vs. Daniel Okorie & 5 Ors. and Motion NO.CCA/OW/MISC/25/2008 therein pending before it do not constitute an abuse of Court process, having regard to Appeal NO. CA/PH/109/2008 Chief M.O. Chukwu vs. Customary Court, Umunumo Ehime Mbano L.G.A. & 6 Ors. pending before the Court of Appeal?”

This Appeal was heard on 17/9/14, when the parties adopted their briefs, starting with the Respondent’s Counsel who argued the preliminary objection.

As in keeping with the tradition and procedure, we have a duty to consider the preliminary objection, first, being a threshold issue: I must observe that the Respondent, in raising the preliminary objection in the Respondent’s brief, admitted that he failed to file a prior Notice of the Preliminary Objection as envisaged by Order 10 Rule 1 of this Court’s Rules, 2011, thus, the objection being caught by the virus of incompetence, as seen in the various decisions of this Court and of the Apex Court to the effect that failure to establish payment for filing a process (to activate it) is fatal to the objection, except filing fee was waived or ordered to be paid, belatedly. (See Moyosore vs. Gov. of Kwara State (2012)5 NWLR (Pt. 1293) 242; Garba vs. Ummuani (2012) LPELR - 9814(CA) (2013)12 WRN 76; Menakaya vs. Menakaya (1994)5 NWLR (Pt. 345)512; NEPA vs. ANGO (2001)15 NWLR (Pt.737) 627; GTB PLC vs. Fadco Industries Nig. Ltd & Anor. (2013) LPELR - 21411 (CA)

This Court had, however, ordered the Respondent to pay the requisite filing fees (at the close, of the hearing) for the preliminary objection, as a condition for the consideration of the same by this Court. Of course, he did.

The Respondent’s main point in support of the preliminary objection is that the grounds of appeal in the Notice of Appeal raised no issue of Customary Court Law. He relied on the provisions of Section 245 (1) of the 1999 Constitution, which states:

“An appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any Civil Proceedings

before the Customary Court of Appeal with respect to any question of Customary Law, and such other matters as may be prescribed by an Act of the National assembly”

To answer the question as to when a question of Customary Law is said to be raised under Section 245(1) of the 1999 Constitution, the Respondent referred us to the case of Pam vs. Gwom (2000)74 LRCN 22 at 25, where the Supreme Court (per Ayoola JSC) held:

“I venture to think that a decision is in respect of a question of Customary Law when the controversy involves a determination of what the relevant Customary Law is and the application of Customary Law so ascertained to the question in controversy.” See also Tiza vs. Begha (2005) 129 LRCN 1833 at 1855.

Counsel had submitted that it is settled law that where an appeal from Customary Court of Appeal to the Court of Appeal does not raise any question of Customary Law, such appeal remains incompetent and the Court of Appeal would not be seised of jurisdiction to entertain it. He further relied on OHAI Vs. Akpoemonye (1999) 65 LRCN 77 at 92; HIRNOR Vs YONGO (2003) FWLR (Pt. 159) 1358 at 1371 - 1372.

He added that, since this appeal is one against the refusal to strike out the substantive appeal for alleged abuse of the Court process, the same has nothing to do with any question of Customary Law; that issue of alleged abuse of the process of court does not in any way involve determination of what constitutes Customary Law, nor the application of Customary Law. Rather, that the question of abuse of court process deals with matters of procedure involving general principles of common law. He relied again on Pam Vs Gwom (supra) Page 43 and Alaede Vs Oguguo (2007) All FWRL (Pt. 349) 1188 at 1200.

Replying, Appellants’ Counsel, submitted that the cases of Pam Vs Gwom (supra) and Alaede Vs Oguguo (supra) do not avail the Respondent, as those cases rather call for consideration of the grounds of appeal (whether they raise issue of Customary Law), not the issue for determination. He urged us to hold that the grounds of Appeal are valid, raising questions of Customary Law and so, competent.

RESOLUTION OF ISSUES

At this stage, it is necessary to reproduce the grounds of ap-

peal, raised by the Appellants, which are (without their particulars):

“Grounds 1:

The learned Justices of the Imo State Customary Court of Appeal erred in application of Customary Law, when it held that Appeal No. CCA/OW/A/25/2008/ motion No. CCA/OW/MISC/25/2008 Chief Maurice O. Chukwu Vs Daniel Okorie & 5 Ors. Pending before the Imo State Customary Court of Appeal does not constitute an abuse of process of Court when Appeal No. CA/PH/109/2008 Chief Maurice O. Chukwu Vs Customary Court, Umunumo Ehime, Mbano L.G.A is pending at the Court of Appeal.

2. Learned Justices of Imo State Customary Court of Appeal erred in Application of Customary Law, when it held that Appeal No. CCA/OW/A/25/2008 motion No. CCA/OW/MISC/25/2008 Chief Maurice O. Chukwu Vs Daniel Okorie & 5 ORS. pending before the Customary Court of Appeal does not Constitute an abuse of the process of Court, when the RES in the matter is already before the Court of Appeal by virtue of Appeal No. CA/PH/109/2008 Chief Maurice O. Chukwu Vs Cumstomary Court Umunumo Ehime Mbano L.G.A pending at the Court of Appeal, Owerri.

3. The Learned Justice of the Imo State Customary Court of Appeal erred in the application of Customary Law when it held that Respondents’ Appeal No. CCA/OW/A/25/2008/ Motion CCA/OW/MISC/25/2008 Chief Maurice O. Chukwu Vs Daniel Okorie & 5 ORS pending at the Imo State Customary Court of Appeal is not an abuse of the Process of Court or that it does not amount to duplication of process of Court, when the Respondent did not offer any argument in response to the Appellants argument that the Res is already before the Court of Appeal.”

Of course, the three grounds of appeal (and the 2 issues distilled therefrom) are more or less the same, complaining of error by the justices in the application of Customary Law, when they held that the Respondent’s appeal in CCA/OW/A/25/2008 (and motion therein) was not an abuse of the process of court, considering the fact that Appeal NO. CA/PH/109/2008, taken out by the Respondent at the Court of Appeal, was pending; that because the RES in the said Appeal NO. CA/PH/109/2008 was pending, the appeal NO. CCA/OW/A/25/2008 amounted to duplication of the same court process.

Though Appellants kept employing the phrase “*Learned jus-*

tices erred in the application of Customary Law” they woefully failed to state or explain the Customary Law which was wrongly applied by the lower Court, as the Appellants kept complaining about abuse of the court process, by reason of failing to hold that Appeal NO.CCA/OW/A/25/2008 (and Motion NO.CCA/OW/MISC/25/2008) before it amounted to abuse of the process of court, just because Appeal NO. CA/PH/109/2008 related to the complaint arising from the same suit NO.CC/UM/16/2002, delivered on 18/7/2005.

Certainly, abuse of the process of Court has nothing to do with Customary Law or any question of customary Law, as such legal lexicon and procedure belong to the realms of the Principles of Common Law, which frowns at mischievous, employment and using of the process of Court, to cheat, annoy or irritate an opponent. It shows itself, sometimes, in the institution of multiple actions on the same subject matter against the same parties, or institution of a matter during the pendency of another one, claiming the same reliefs. See the case of Anah vs. Anah (2008)9 NWLR (pt.1091)75; Umeh vs. Iwu (2008) NWLR (Pt.1089); Saraki vs Kotoye (1992) 9 NWLR (pt. 264) 156. See also Tailor & Ors vs Balogun & Ors (2012) LPELR 10673 (CA); (2012)10 WRN 137, where we held, relying on Saraki vs Kotoye (1992) 11-12 SCNJ, on what constitutes abuse of Court process, as follows:

“The abuse consists in the intention, purpose and aim of the person exercising the right of issue (of the process) to harass, irritate and annoy the adversary, and interfere with the administration of Justice, such as instituting actions between the same parties, simultaneously, in different Courts even though on different grounds ... Abuse of process of the Court is a term generally applied to a process which is wanting in bona fide and is frivolous, vexatious or oppressive. It can also mean abuse of legal procedures or improper use of judicial process”

What is very clear is that, none of the above lexicons, terms or processes pertains to Customary Law or Customary Law practices, to suggest a question of Customary Law for the Court of Appeal to consider and pronounce on, under Customary Law.

In a recent decision of this Court in the very case of Chief Maurice O. Chukwu Vs Customary Court of Appeal & Ors. CA/PH/

109/2008 (the very sister case relied upon by the Appellant to frustrate the hearing of Respondent's appeal at the Court below), this court held on 21/8/2014, relying on the Supreme Court case of Pam vs. Gwom (2000) FWLR 9Pt.1) 1 at 12 that:

B *"The right of appeal from the Customary Court of Appeal to the Court of Appeal is as of right and must relate to any question of Customary Law and/or such other matters as may be prescribed by an Act of National Assembly that can extend this right by providing for such matters. Neither the Federal Military Government nor the*
 C *National Assembly, made such other provision as envisaged in Section 224(1) of the 1979 Constitution. In the circumstances, for an appeal from the Customary Court of Appeal to the Court of Appeal to be competent, it must raise a question of Customary Law."*

D My Lord, Ayoola JSC, in that case of Pam vs. Gwom (supra) said:

"The question therefore is: when is a decision in respect of a question of Customary Law? I venture to think that a decision is in respect of Customary Law when the controversy involves a determination of what the relevant Customary Law is and the application of
 E *the customary Law so ascertained to the question in controversy... When the decision of the Customary Court of Appeal turns purely on facts, or a question of procedure, such decision is not with respect to a question of Customary Law, notwithstanding that the applicable*
 F *law is Customary Law."*

In the case of Ohari vs. Akpoemonye (1999) 1 SC 96, the Appellant had raised questions on the provision of Sheriffs and Civil Process Act, Cap 407, Law of the Federation and of fair hearing. The Supreme Court held that those questions were not within the con-
 G *templation or purview of Customary Law, therefore the Court of Appeal lacked the vires to entertain appeals emanating from the Customary Court of Appeal on such questions, in view of the Constitutional Provisions in section 224(1) 1979.*

H ***It appears obvious, as per the decided authorities from the Supreme Court, that the position of the apex court on issue of appeals from the Customary Court of Appeal to the Court of Appeal, is that, this Court is barred from entertaining any appeal emanating from the Customary Court of Appeal, except the same rests on question(s) calling for the con-***

struing of issue of Customary Law, simpliciter. Interpretation of Section 245(1) of the 1999 Constitution is not a question of requiring Appellant to seek and obtain the leave of the Court of Appeal, where the appeal involves other questions either of Law or of facts, outside question(s) of Customary Law, as is the case in the application of Section 242 (2) of the 1999 Constitution (where appeal is not as of right). I believe this position of the Constitution was intentional, probably to make the Customary Court of Appeal a final Court of Litigation at level, except on questions of Customary Law, or what constitute applicable Customary Law.

Considering this same problem in the said case of Chief Maurice O. Chukwu vs. Customary Court, Umunumo, Ehime, Mbano LGA & Ors (supra), my learned brother, Agube JCA held, thus:

“The Supreme Court had held however that, when, notwithstanding the agreement of the parties as to the applicable customary law, there is still a dispute as to the extent and manner in which the applicability of the Customary law determines or regulates the rights of the parties and/or their relationship and obligations, having regards to the facts established, a resolution of such dispute can be regarded as a decision with respect to a question of Customary Law... How does this court determine whether an Appeal raises a question of customary Law? I am of the candid view that this court can only answer this question by looking at the claim of the Appellant or Respondent as the case may be... the evidence led at the trial and the entire proceedings, based on issues raised thereat. Furthermore, this Court should also subject the judgment appealed against and the Grounds of Appeal and Issues raised for determination as formulated from the said Grounds to careful scrutiny, in order to so determine the competence of the Appeal... Accordingly, an appeal to the Court of Appeal from the decision of the Customary Court of Appeal must be limited to a complaint with respect to a question of Customary Law and in the absence of a complaint by a ground or grounds of appeal raising the Issues of Customary Law, the Court of Appeal would appear to have no jurisdiction to adjudicate on the matter, unless the matter is brought within the enactment of the National Assembly extending the jurisdiction of the Court of Appeal to the strict constructionist approval to the interpretation of Section 224 (1)

(now Section 245 (1) of the 1999 Constitution.”

I have earlier ex-rayed the grounds of Appeal formulated by the Appellants (and the issues distilled there-from by the Appellant) and came to the conclusion that the same are not contemplated within the purview of any question of Customary Law. I therefore have no difficulty in holding that this appeal does not come within the limits of the jurisdiction of the Court of appeal to entertain, as the appeal runs foul of the Section 245(1) of the 1999 Constitution.

The Preliminary objection therefore succeeds and is hereby upheld. This Appeal is therefore afflicted by virus of incompetence and liable to be struck out.

I think it is wise to go further to also consider the merits of the appeal, for whatever it is worth, ours being only a penultimate Court.

The main point canvassed by the Appellants in the two issues formulated (which are more or less on the same complaint) is that, because Appeal NO CA/PH/109/2008, earlier taken out by the appellants against the refusal of the Customary Court of Appeal to quash the proceedings and judgment of the Customary Court in suit NO CC/UM/16/2002, was still pending in this Court, the Respondent abused the process of Court to have appealed against the final judgment of the said Customary Court in the said Suit NO. CC/UM/16/2002, delivered on 18/7/2005. They argued, strongly, that the Appeal NO.CCA/OW/A/25/2008 (and the motion therein -CCA/OW/MISC/25/2008) was an abuse of the process of court, since the said Appeal NO.CA/PH/109/2008 was pending in this Court; i.e. that the Res in the matter was already pending in this Court.

Appellants argued that in the Appeal NO. CA/OW/25/2008 at the Customary Court of Appeal, the Respondent was praying that the judgment of 18/7/05 be set aside, while in the Appeal CA/PH/109/2008 the Respondent prayed for an order of certiorari to quash the same judgment, among other things. He relied on the case of Adekosun vs. Adegosulu (1991)3 NWLR (Pt.179) 293 at 306; Morgan vs. West African Automobile & Engineering Co. Ltd (1971) 1 NWLR (sic) 219; Okafor V. A G Anambra (1991) 6 NWLR (pt. 200) 659 at 680.

In his reply, the Respondent argued that for a case to constitute a multiplicity of actions and an abuse of the process, the com-

plainant must prove that the multiple actions are between the same parties, relate to the same subject matter and raise the same issues for determination. He relied on the case of Okafor Vs A.G. Anambra State (1991) 6 NWLR (pt. 200) 659 at 681; Ikine vs. Edjerode (2001) 92 LRCN 3288 at 3307.

The Respondent argued that the parties, subject matter and issues in the appeal NO.CA/PH/109/2008, before this Court, are different from the parties, subject matter and the issues in the Appeal NO. CCA/OW/A/25/2008 at the Customary Court of Appeal. He explained, that whereas the Appeal pending in this court (CA/PH/109/2008) had to do with appeal against refusal to issue prerogative writ (Order of Certiorari and prohibition), the appeal pending at the Customary Court of Appeal was one against the final decision of the Customary Court in the same Suit NO. CC/UM/16/2002, delivered on 18/7/2005 (of which the pre-rogative writ was also directed at). D He relied on the case of Agwuegbo vs. Kagoma (2000) FWLR (Pt.19) 511 at 527, where this court held:

“When a Court is considering whether or not an order of certiorari would issue against the finding of an inferior Court or tribunal, such court must be guided by the principle that it is not acting in an appellate capacity... In this regard, therefore, the Court exercising supervisory jurisdiction must not substitute its own views for those of the inferior court or tribunal.” E

It should be clear that the prerogative writ taken out in the Customary Court of Appeal in suit NO.CCA/OW/MISC/64/2005, which resulted in the Appeal NO. CA/PH/109/2008 in this Court was an originating process, which the Customary Court of Appeal Law/ Rules permit. Section 79 of the Customary Court Laws of Imo State, states: F

“The Customary Court of Appeal shall have and exercise original jurisdiction in any matter which the prerogative writ is sought against a Customary Court.” G

Even though it can be argued that the Respondent was not properly guided when he opted, in the first place, for the use of prerogative writ to quash the proceedings and judgment in Suit NO.CC/UM/16/2002, instead of appealing against the judgment, I think he cannot be faulted for exercising his right to do so under the law, given the complaints he raised. And when the prerogative writ H

failed to yield the desired result, he (Respondent) then saw the need to appeal against the judgment of 18/7/05, which remained subsisting and binding on him! At the same time, the refusal to grant the prerogative orders had given rise to another right of appeal, as to whether the Customary Court of Appeal exercised its discretion properly, when it refused the order of certiorari to quash the judgment and proceedings in the Suit CC/UM/16/2002! It is therefore obvious that the Appeal in CA/PH/109/2008 was a fight against the refusal to make the order of certiorari/prohibition and the principal parties were the Appellants in this Appeal and the 1st Respondent in that Appeal, (which is the Customary Court, Umunumo, Ehime, Mbano LGA), whereas the principal parties in the Appeal in CCA/OW/A/25/2008 remained the Appellants in this appeal and the Respondent, who took out the suit at the Customary Court (suit NO.CC/UM/16/2002) and lost.

I think the Learned justices of the Customary Court of Appeal were right when they held that the principle of abuse of the process of Court did not apply to the appeal before them (CCA/OW/A/25/2008), consequent upon the pendency of the Appeal NO. CA/PH/109/2008 in this Court, because the two appeals (though traceable to the same matter at the Customary Court (CC/UM/16/2002) and the judgment delivered on 18/7/2005) had different parties, different subject matters and different issues/reliefs, though traceable to the same origin/complaints.

It is obvious as earlier stated, that reliefs sought in application for certiorari/prohibition which challenges the jurisdiction and powers of an inferior court to entertain a matter, in the first place, and faults the decision taken by the inferior Court, is one seeking the production of the said proceedings and the decision there-from before the superior court for the purpose of quashing. That is not the type of relief sought in an appeal against a judgment, which though, it would pray for the setting aside of judgment complained of, would not usually seek to nullify the trial or to quash the same. Moreover, in an appeal, the Appellant may quarrel with the decision of the lower Court for being erroneous, but the lower Court is never a party to the appeal, to defend/justify its power or vires to entertain the suit in the first place, unlike in certiorari/prohibition proceedings.

The Blacks Law Dictionary, 8th Edition, by Bryan A. Garner,

pages 241 - 242 defines 'Certiorari' as "*An extraordinary writ issued by an Appellate Court, at its discretion, directing a lower Court to deliver the record in the case for review...*" (And further explains it as)

"The established method by which the Court of King's Bench from the earliest times exercised superintendence over the due observance of their limitations by inferior courts, checked the usurpation of jurisdiction, and maintained the supremacy of the royal courts, was by writs of prohibition and certiorari. A Proceeding by writ of certiorari (cause to be certified) is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to transmit the record of its proceedings for review, for excess of jurisdiction. It is similar to a writ of error, in that it is a proceeding in a higher court to superintend and review judicial acts, but it only lies in cases not appealable by writ of error or otherwise." Benjamin J. Shipman, Handbook of Common Law Pleading p. 340, at 541 (Henry Winthrop Ballantine ed., 3d ed. 1923).

The relief of Certiorari is usually available where any of the following condition is established in the decision or act of an inferior Court/tribunal.

(i.) Lack of or excess of jurisdiction

(ii.) Error on the face of record of an inferior Court or tribunal

(iii.) Breach of observance of natural justice regarding fair hearing. See the case of Ekpo vs. Calabar Local Govt. Council (1993) 3 NWLR (pt.281) 324; Ezenwa vs. Bestway Electric Manufacturing Co Ltd (1999) 18 NWLR (Pt. 613) at 82. See also the case of NAGPPE VS. PHARMACISTS COUNCIL OF NIG. & ORS (2013) LPELR 21834 CA, where we held, recently, on similar issue, that:

"The holding of UWAIFO JCA (as he then was) in the case of Onuzulike vs. CDS Anambra State (1992) 3 NWLR (Pt.232) 791 is instructive here: Certiorari or prohibition will lie against any body or person having a legal authority to determine questions affecting the right of subjects, whenever the duty implies at least that body or person should act fairly or in accordance with a statutory provision." See also the recent decision of this court in Alhaji Alkasim & Anr. U. SULEIMAN & Anr. Vs. Upper Zaria Court NO.1 GRA Zaria & Anr. CA/K/178/2013 pages 26 -27 delivered on 11/3/2014.

Of course, judgment in CC/UM/16/2002 was appealable and the Respondent was exercising his right of appeal in Appeal NO. CCA/OW/A/25/2008, when Appellants tried to stop him by this Appeal.

I therefore resolve the issues against the Appellants as I hold that the appeal lacks merit. It is accordingly dismissed. Parties to bear
B their respective costs.

AGBO JCA

C I agree.

AGUBE JCA

I was privileged to read in advance the very erudite and ex-
D pository judgment of my learned brother, I. G. Mbaba, JCA and I cannot but agree with his reasoning therein that the Appeal lacks merit and is accordingly dismissed. I also affirm the judgment of the Lower Court and abide by the Order as to costs.

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