

IN THE SUPREME COURT OF NIGERIA

Suit No: SC373/2001

Petitioner: Isah Onu (Madaki of Ajiyolo) Aboko-Oche nicknamed Ajiyolo Ofalemu) Ejeh Adejoh Shaibu Adejoh Gabriel Okolo Omeji Opaluwa Alabi Abalaka (Suing for and on behalf of themselves and members of Aboko and Oche Ruling Houses)

And

Respondent: Ibrahim Idu Respondents Aliwo Faruna ILani Obaje (Gago of Abocho) Dekina Local Government The Governor of Kogi State Attorney General of Kogi State

Date Delivered: 2006-07-09

Judge(s): Salihu Modibo Alfa Belgore , Umaru Atu Kalgo , George Adesola Oguntade , Mahmud Mohammed , Ikechi Francis

Judgment Delivered

The appellants were the Plaintiffs at the High Court of Dekina, Kogi State, where as the representatives of Aboko and Oche ruling houses, they issued a writ of summons against the respondents as the Defendants claiming the following reliefs:

- '1. A Declaration that the purported nominations, appointment and/or recognitions of the 1st and 2nd Defendants as Madaki (Idaka) Ajiyolo and Madaki (Okoyi) Ajiyolo respectively in the said Ajiyolo, Aboko-Oche village/community by the 3rd and 4th Defendants is contrary to and a violation of the established Igala traditional (sic) and culture obtainable in the said village/community as well as a breach of the Kogi State Government's Guidelines on the appointments of village/community Heads (Madakis) and is therefore null and void and of no effect whatsoever.
2. A Declaration that only qualified members from the two Ruling Houses of Aboko and Oche lineages are qualified to be nominated and/or appointed as Madakis for the village/ community Ajiyolo Aboko-Oche
3. A Perpetual Injunction restraining the 1st and 2nd Defendants from acting, parading or conducting themselves as Madakis (Village/Community Heads) Idoko Ajiyolo and Okoyi Ajiyolo respectively in Ajiyolo Aboko-Oche in Dekina Local Government Area of Kogi State.
4. A Perpetual Injunction prohibiting or restraining the 3rd, 4th, 5th and 6th Defendants either by themselves or servants or agents or by whomsoever from recognising the 1st and 2nd Defendants as Madakis Village/Community Heads) at the said Ajiyolo Aboko-Oche'

The parties filed and exchanged pleadings. The relevant pleadings are the Statement of claim filed on 15/10/97, Joint Statement of Defence of 1st, 2nd and 3rd Defendants filed on 10/11/97, Reply to the Joint Statement of Defence of the 1st, 2nd and 3rd Defendants filed on 3/12/97, Joint Statement of defence of the 4th, 5th and 6th Defendants filed on 9/12/97 and Reply to the Joint Statement of Defence of the 4th, 5th and 6th Defendants filed on 9/01/98. The case was heard by Tom Yakubu J. The Plaintiffs called 9 witnesses. The 1st to 3rd Defendants called five witnesses. The 4th to 6th Defendants called one. On 1/12/99, the trial judge in a well-reasoned judgment dismissed the claims of the Plaintiffs in their totality.

The Plaintiffs were dissatisfied with the judgment of the trial Court. They brought an appeal against it before the Court of Appeal, Abuja Division (i.e., the Court below.). The Court below on 24/7/2001, in a unanimous judgment dismissed the Plaintiffs' appeal. Still dissatisfied, the Plaintiffs have come on a final appeal before this Court. In their appellants' brief, the issues for determination in the appeal were identified as the following:

- '1. Whether the Plaintiffs/appellants had established or led ample material and credible evidence as to their traditional history, which entitled their family exclusively, to the Madakiship of Ajiyolo Aboko-Oche otherwise known as

Ajiyolo Ofalemu.

2. Whether having regards to the pleadings and evidence adduced in support thereof, the Court of Appeal was right in not interfering with the findings made by the trial Court.
3. Is the Madakiship a traditional office'
4. Whether the Court of Appeal was right when it held that the trial Court rightly rejected the affidavit of late Chief Shaibu Ogbadu.
5. Whether the Court of Appeal was right when it dismissed the appeal of the appellants and confirmed the judgment of the trial Court despite finding that the trial Court had wrongly invoked s.149 of the Evidence Act, Cap. 113 Laws of the Federation of Nigeria, 1990.'

The 1st and 2nd Defendants in their Joint brief formulated five issues of their own. Those issues are however similar to the Plaintiffs five issues. The 3rd and 4th to 6th Defendants filed no briefs. Neither did Counsel appear for them. I shall be guided in this judgment by the Plaintiffs\appellants\ issues for determination.

Before a consideration of the issues for determination, it is helpful for an appreciation of the issues as discussed to state the background of the dispute leading to this appeal as pleaded by the parties in their diverse pleadings.

The Plaintiffs in their statement of claim pleaded the following facts:

- '1. That Ajiyolo Aboko-Oche was founded by two brothers namely Aboko and Oche.
2. That Aboko and Oche settled in the Eastern and Western parts respectively of Ajiyolo; and that the present names of the two settlements reflect their origins.
3. That the parents of 1st and 2nd respondents are strangers in Ajiyolo.
4. That under native law and custom of Igala, the Madakis of the village have over the years been appointed exclusively from the lineages of Oche and Aboko alternately; and that the two lineages constitute the only two ruling houses.
5. That all the previous Madakis of the village have been appointed from the male descendants of Oche and Aboko.
6. That contrary to the established native law and custom of Igala, the 3rd and 4th Defendants appointed and recognised the 1st and 2nd Defendants as Madaki (Idaka) Ajiyolo and Madaki (Okoyi) Ajiyolo respectively.
7. That there were no places or clans known as Idaka and Okoyi within Ajiyolo Aboko-Oche village.
8. That the appointment and recognition of the 1st and 2nd Defendants as Madakis is contrary to Igala native law and custom as the said 1st and 2nd Defendants are not from Ajiyolo.

The 1st, 2nd and 3rd Defendants in their Joint Statement of Defence pleaded:

1. The village Ajiyolo had never been known as Ajiyolo Aboko-Oche.
2. The Defendants were not strangers in the village as pleaded by the Plaintiffs.
3. That the grandparents of the Plaintiffs, Aboko and Oche migrated from Ofeijiji in Egume to Okikili in Dekina:

4. That Aboko and Oche did not go to Ajiyolo and so could not have founded the village.
5. That Ajiyolo village was founded by one EYIBO ADEHI from Okoyi in Aboche, Biraidu District of Dekina.
6. That the Plaintiffs grandparents migrated through several villages before finally settling at Ajiyolo with the founder of Ajiyolo, Eyibo Adehi.
7. That the village was originally called Ajiyolo but later became known as Ajiyolo Ofalemu to distinguish it from other villages known as Ajiyolo and arising from the fact that oranges abound there,
8. That there were three main clans in Ajiyolo Ofalemu, namely: - (1) Okoyi clan from where the 1st Defendant came. (2) Idaka from where the 2nd Defendant came and Onuche/Edime from where the Plaintiffs came.
9. That each of the three clans was entitled to appoint its own Madaki by communal consensus.

The 4th to 6th Defendants in their Joint Statement of Defence pleaded the following: -

1. That they knew of a village called Ajiyolo Ofalemu but did not know or hear of Ajiyolo Abokoche.
2. That the Defendants knew the 1st Plaintiff as the Madaki of a village under Aboche Gago Area only.
3. That Madakiship was a new innovation by Government to facilitate Tax collection in Gago Area and not a traditional title.
4. That Madakis were appointed by communal consensus by the wards or clans where one was required.
5. That the 4th - 6th Defendants recognised the 1st Plaintiff as a Madaki but that that did not give him a monopoly of the title.
6. That Madakis were not appointed to perform cultural ceremonies but to assist in Tax assessment and collection.

It was on the above state of pleadings that the suit was tried. On that state of pleadings issues were clearly joined as to who was the founder of the village. There was also an issue joined as to how many clans there were in Ajiyolo and as to whether appointment to Madakiship was hereditary and confined to the Plaintiffs' Aboko and Oche family alone or whether it was merely a consensual matter as decided by each clan or community.

It is apparent that the foundation of the claim of the Plaintiffs was their assertion that their grandparents founded Ajiyolo and that there existed an Igala custom that as such founder the male descendants of Aboko and Oche were entitled to produce the Madaki alternately in perpetuity.

In this judgment I intend to consider together the 1st and 2nd Issues formulated by the Plaintiffs. I shall thereafter discuss one after the other the remaining issues 3 and 4 and 5.

The appellants' Counsel in his brief has produced extracts from the evidence of P.W.1, P.W.2, P.W.3, P.W.6, D.W.1, D.W.3 with a view to show that even some defence witnesses at the trial made admissions which supported the case that all Madakis hailed from the Aboko-Oche family. Counsel relied on *Olatunji v. Adisa* [1995] 2 NWLR (Part 376) 167 at 181; *Fasiku II v. Oluronke II* [1999] 1 SC. 16 at 38, *Akinola v. Oluwo* [1962] 2 NSCC 157 at 160.

It was further submitted by Counsel that the evidence called by the Plaintiffs clearly established that Ajiyolo Aboko-Oche was first settled upon by Aboko and Oche. It was submitted that where witnesses called by a party contradicted one another, the case of the party calling such witnesses should fail. This was Counsel's reaction to an alleged contradictions in the evidence given by D.W.4 and D.W.5 as to who first settled in Ajiyolo. Counsel relied on *Eboade v. Alomesin* [1997] 5 NWLR (Pt 506) 490 at 507; *Anyaduba v. NRTC. Ltd.* (1992) 5 NWLR (Pt .234) 535 and *Mogaji v.*

Cadbury [1985] 2 NWLR (Pt.7) 393 at 430. It was further submitted that the evidence given by D.W.I should not be believed as he is a tainted witness: Mbenu v. State [1998] 3 NWLR (Pt.84) 615 at 626; UITHMB. K Aluko [1996] 3 NWLR (Pt.434) 47 at 86; Udo v. Eshiett [1994] 8 NWLR (Pt. 363) 483 at 501 and Ishola v. The State [1979] 9-10 SC. 81.

Plaintiffs/appellants' Counsel argued that the Plaintiffs called sufficient evidence to establish the native law and custom that the Aboko-Oche family always produced the Madakis in Ajiyolo Aboko Oche. It was submitted that 'a custom is a particular way of behaviour which because it has long been established among members of a social group or tribe can develop and acquire the force of right.' He argued that custom was a matter of fact to be pleaded and proved by evidence - Adeyeri II v. Atanda [1995] 5 NWLR (Pt.377) 512 at 537 and Giwa v. Erinmilorun [1961] NSCC 157 at 159. It was submitted that where a trial Court has not made a proper use of the opportunity of seeing and hearing witnesses testify or where the finding was not supported by the printed record or where the finding was not the proper conclusion or inference to be drawn, the appellate Court would interfere by altering, reversing or setting aside such perverse findings: Ogbuokwelu v. Umeanafunkwa [1994] 4 NWLR (Pt.341) 676; Nnajofofor v. Ukonu [1985] 2 NWLR (Pt.9) 686; Udeze v. Chudebe [1990] 1 NWLR (Part 125) 141 at 161; Woluchem v. Gudi [1981] 5 SC.29 at 296 and Mogaji v. Odofin (1978) 4 SC. 91.

The Counsel for 1st and 2nd Defendants in his brief reproduced extracts from the evidence given by some of the witnesses who testified in his effort to show that there was no evidential support for the planks around which the Plaintiffs' case was built.

I think, with respect, that appellants' Counsel did not fully advert his mind to the principles guiding an appellate Court in its approach to the findings of fact made by a trial Court. When the findings of fact made by the trial Court are followed in addition by the affirmatory findings of the Court of Appeal, Counsel carries a big burden in persuading this Court to intervene on such concurrent findings of fact.

Now in Okuoja v. Ishola [1982] 7S.S. 147 at 162-163 (Reprint), this Court per Nnamani JSC discussing the approach of an appellate Court to the findings of fact made by a trial Court said:

'The principles on which a Court of Appeal can interfere have been examined in so many authorities of this Court, and the law is so settled, that it has almost become trite. For a recent examination of these principles, see Chief Victor Woluchem & Ors. v. Chief Simon Gudi & Ors.(1981) 5 S.C.291 at 295 and 326. The basis of it all is that the trial Court has the advantage of having seen the witnesses, an advantage which the Court of Appeal does not have limited as it is to the printed evidence. The presumption is that the findings of fact by the trial judge are right and the duty to displace such a presumption falls on the party challenging them. Kojo v. Bonsie (1953) 14 WACA 242; Akesse v. Ababio (1935) 2 WACA 264; Kisiedu & Ors. v. Dompok & Ors. (1935) 2 WACA 268. In a criminal case R. v.Ologen 2 WACA 333 it was the view of the West African Court of Appeal that:

'it is not the function of a Court of Appeal to retry a case on the notes of evidence and to set aside the verdict, if it does not correspond with the conclusions at which the members of the Court would have arrived on these notes.'

See also Odogbolu v. Okeluwa [1981] 6-7 SC.99 at 105-107.

It is also important to bear in mind that where findings of fact made by a trial Court are supported by evidence a Court of Appeal will not intervene: See Osayeme v. State [1966] N.M.L.R. 388 and Adeyemi v. Bamidele [1968] 1 All NLR 31 at 38.

The trial Court in the instant case at pages 161-162 of the record set out the findings of fact, which it made on the evidence thus:

- '(1) That Ajiyolo Ofalemu village was first founded by Eyibo Adehi as contended by the 1st to 3rd Defendants.
- (2) That there are three clans, namely: Aboko-Oche for the Plaintiffs; Idaka for the 1st Defendant and Okoyi for the 2nd Defendant in the said village.

(3) That the Madakiship of Ajiyolo Ofalemu is not a traditional institution nor a chieftaincy; it has no Ruling Houses nor Kingmakers.

(4) That the status of the Madaki in the said village is not a creation of the Dekina Local Government (4th Defendant herein).

(5) That the 4th Defendant had no business or power in confirming the appointment of the 1st and 2nd Defendants as Madakis of their respective clans.

(6) That the Madakiship of the village is not the exclusive reserve of the Plaintiffs' Aboko-Oche clan or family.'

Further, at page 162 of the record of proceedings, the trial Court in its judgment held thus:

'The P.W.2 (1st Plaintiff), P.W.3, P.W.4 and P.W.9 all being members of the Aboko-Oche clan admitted that neither the 1st Defendant nor the 2nd Defendant is a Madaki over the Aboko-Oche clan. In the circumstance, I find that the selection and appointment of the 1st Defendant as the Madaki of Idaka clan in Ajiyolo Ofaelmu was by communal consensus of the said Idaka clan. I so hold.

I also find that the selection and appointment of 2nd Defendant as the Madaki of Okoyi clan in Ajiyolo Ofalemu was by communal consensus of the said Okoyi clan. I accordingly hold.

I am of the firm opinion that the Plaintiffs have not shown by credible evidence in this case that the Madakiship of Ajiyolo Ofalemu is rooted in the Aboko-Oche family clan exclusively and that the selection and appointment of the 1st and 2nd Defendants as Madakis in the said village violated any Igala native law and custom. The Plaintiffs have not proved the custom upon which their action is predicated.'

The Court below in its judgment at page 333 while commenting on the findings of fact made by the trial Court said:

'These are findings of fact made by the trial Court based on the evidence adduced before it. It had found that the Plaintiffs have not made out its claim, and the appointments of the 2 Madakis by their respective clans is sustainable with or without the approval of the local government. The only conclusion to be arrived at by the trial Court is the dismissal of the Plaintiffs' claim. This the Court had done, and I see no need to disturb that finding for the trial judge had properly considered all triable issues raised before him. As I had earlier mentioned a Plaintiff succeeds on the strength of his case or on the evidence he adduces before the Court. The most important factor in this case is the Igala Traditional customary law that entitles the Plaintiffs to the Madakiship of Ajiyolo Aboko-Oche. They had not been able to prove the customary law, nor have they proved that their ancestors were the first settlers in the village, infact the Defendants have shown otherwise. They can therefore not be entitled to the declaratory and injunctive reliefs they were seeking from the lower Court.

An appellate Court is always reluctant to disturb findings of fact made by a trial Court unless such findings are perverse or not based as evidence that was before that Court. In the instant case the findings of the lower Court are based on the evidence before it and the only logical finding based on that evidence is the dismissal of the Plaintiffs claim.'

With the affirmation of the findings of fact made by the trial Court by the Court below, we in this Court are confronted with concurrent findings of fact with which we must not interfere except for special reasons shown. In *Enang v. Adu* [1981] 11-12 SC. 17 at page 27 (Reprint), this Court per Nnamani JSC said on concurrent findings:

'The task of the appellants on this ground of appeal is made more difficult by the fact that there are before us concurrent findings of fact by both the learned trial Chief Judge and the learned Justices of the Court of Appeal. It is settled law that such concurrent findings, where there is sufficient evidence to support them, should not be disturbed. *Kefi v. Kofi* 1 WACA 284. This rule of practice can only be obviated if there is some miscarriage of justice and violation of some principle of law or procedure. The Privy Council in *The Stool of Abinabina v. Chief Kojo Enyimadu* (1953) 12 WACA 171

at 173 quoted with approval, a definition of the miscarriage of justice necessary for such a purpose previously given by Lord Thankerton in *Scrimati Bibhabati Devi v. Kumar Ramendre Narayan Roy* 62 TLR 549. This is that:

'The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the findings cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect.'

There is no such violation of any proposition of law or any principle of procedure in the instant case. This ground of appeal must also fail.'

The Plaintiffs have not shown before us that there has been a violation of law or procedure of such a proportion or magnitude such as the violation or error if corrected will result in the findings becoming unsustainable or that there will be a miscarriage of justice. It seems to me, that from the drift of the arguments of Plaintiffs' Counsel that learned Senior Counsel did not fully appreciate the potency of some of the findings of fact made or their devastating effect on the case made by the Plaintiffs. For an instance, the finding that Eyibo Adehi and not Aboko and Oche founded Ajiyolo Ofalemu was enough to sustain the dismissal of the Plaintiffs' case. Another equally devastating finding to the 'Plaintiffs' case was the finding that there were three clans in Ajiyolo Ofalemu.

Once there is evidence, even if a weak one upon which the findings could be hinged, the appellate Court could not interfere. In his evidence P.W.2 had testified under cross-examination:

'Egume is our ancestral home before our grand parents came to settle at Ajiyolo. I do not know how long ago that the village of Ajiyolo Aboko-Oche was founded. Aboko, the father of Onuche died at Egume. Oche the father of Edime also died at Agume. Neither Aboko nor Oche stepped into Ajiyolo.'

Another remarkable piece of evidence came from P.W.6 when he testified:

'There is no family that is particularly appointed 'as the Madaki of Ajiyolo Aboko-Oche. The first Plaintiff is from the Ajiyolo Aboko-Oche family.'

Viewed against the background of the evidence available, the invitation to us to reverse the concurrent findings of fact made by the two Courts below cannot be accepted.

I now consider issue No. 3. Under this issue the Plaintiffs raised a poser as to whether the Madakiship in issue was a traditional office. The trial Court decided that it was not and the Court below confirmed this. It seems to me however that this issue is now purely hypothetical or academic as whichever answer is given to this issue will not affect the conclusion that the case was rightly dismissed.

The 4th issue raises the question whether the affidavit sworn to by late Chief Shaibu Ogbadu was rightly received in evidence. The Plaintiffs had first brought their case by originating summons. At that time, one Chief Shaibu Ogbadu had sworn an affidavit in support of the Plaintiffs' suit. The Plaintiff later filed a suit by writ of summons necessitating the filing of pleadings. Meanwhile, Chief Shaibu Ogbadu had died. In the course of hearing on 28-05-98, the Plaintiffs attempted to tender through P.W.5 the affidavit deposed to by Chief Shaibu Ogbadu. The trial Court refused the affidavit in evidence. Before the Court below, the Plaintiffs raised the issue in their appeal. The Court below in reacting to the issue said at pages 331-332:

'The facts of this case has shown that the affidavit evidence in issue was deposed to on 16 of October 1992 and the case was first initiated before the trial Court on 8th January 1993. That affidavit was used in the first case between the parties. In the second case when the case was _ to be heard de-novo on pleadings as ordered by this Court, Chief Shaibu Ogbadu was then deceased and the Plaintiffs sought to tender a certified true copy of the deposition through a Registrar before whom the deposition was made. An objection to its admissibility was raised which was upheld by the trial Court.

Similarly the second document which was used in the first case was rejected when it was sought to be tendered. On the affidavit I am firmly of the view that proviso (b) to S.34 (l) of the Evidence Act - 'that the adverse party to the first proceeding had the right and opportunity to cross-examine'- will very much go against the admissibility of the document particularly if it is taken in light of the circumstances of this case. Similarly the trial Court was right to have held that the affidavit was sworn to in anticipation of the case and that the two part of S.91 (3) are to be read differently. Where a document or a deposition is found to be made in anticipation of a case yet to be initiated it becomes inadmissible. The 2nd document was tendered twice before the trial Court it was rejected on 29th May 1998 and then sought to be tendered again through another witness in the course of the proceedings the trial Court was therefore right to have held."

Section 34 (1) of the Evidence Act provides:

'34 (1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the fact which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the Court considers unreasonable:

Provided '

- (a) that the proceeding was between the same parties or their representatives in interest;
- (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine, and
- (c) that the questions in issue were substantially the same in the first as in the second proceeding.'

The language of section 34 (1) of the Evidence Act above is plain and simple to understand. Although, Chief Shaibu Ogbadu had deposed to the affidavit evidence in the earlier suit commenced by originating summons, the affidavit which he deposed to would be inadmissible in a subsequent case unless the conditions in the proviso to section 34(1) are satisfied. It is beyond argument that Chief Shaibu Ogbadu could not have been cross-examined under a suit commenced by originating summons unless the trial judge in the event of a conflict on the affidavit evidence orders that parties or their witnesses give oral evidence. That was not the case here and so Chief Shaibu Ogbadu was not and could not have been cross-examined. The consequence in my humble view is that his deposition in an affidavit even if in a judicial proceeding could not be received in evidence. It is my view that the two Courts below were right to reject the affidavit deposition by Chief Shaibu Ogbadu in evidence.

Lastly is the 5th issue. The trial Court had in its judgment at page 151 said:

'Perhaps, if the 2nd, 3rd and 7th Plaintiffs had testified in this matter, the story of the Plaintiffs regarding the founding and naming of the village would have impressed me, more particularly the 3rd and 7th Plaintiffs who were said 'to have introduced the sweet orange seedlings and plants into the village and which allegedly gave momentum to the nicknaming of the village as Ajyolo Ofalemu. The 2nd, 3rd and 7th Plaintiffs were not reported to have died during the pendency of their action, in this Court. I think this is an appropriate situation to invoke Section 149(d) of the Evidence Act, 1990, against the Plaintiffs. And I so hold.'

The Court below in its judgment at page 330 of the record was of the view that the trial Court was wrong in its approach.

The Court below said:

'There is however no law which compels a Plaintiff in a representative action to attend Court to testify. See Kehinde v. Ogunbunmi [1967] 149 NLR 306 particularly so in a civil action where a party wins or falls on the strength of his case. He may choose to adduce evidence in support of his pleadings or he may choose not to do so in which case he loses. In the instant case the Plaintiffs had adduced evidence which they felt would support their claim and they have stated

before the Court that the 2nd, 3rd and 6th Plaintiffs could not testify because of their age and ill health. The trial judge was therefore wrong to have invoked the provisions of S.149 (d) of the Evidence Act against the Plaintiffs.'

It is necessary here to say that the trial Court made the offending remark relative to the evidence of D.W.I, a 95-year-old man, who claimed to be a member of Plaintiffs' family. He testified that he had personally participated in the movement of the Plaintiffs' family from Ajiyolo Aji Odekpe Omeje to Ajiyolo Ofalemu and that on arrival at Ajiyolo Ofalemu, they met a person called Eyibo Adehi. It is the Plaintiffs' argument that the Court below ought not have affirmed the trial Court's findings in view of the improper reliance placed by the trial Court on Section 149 of the Evidence Act. Perhaps, a case would have arisen for the reconsideration of the findings of fact by the trial Court, if the findings were hinged alone on the evidence of D.W.1. It seems to me that the implication of the improper reference by the trial Court to Section 149(d) of the Evidence Act, is simply that there was no evidence from the Plaintiffs' side, which could displace the evidence of D.W.I. As I observed earlier, P.W.2 called by the Plaintiffs had in fact testified that both Aboko and Oche died at Egume and that neither stepped on Ajiyolo Ofalemu soil. There was therefore ample evidence on record to support the findings of fact made by the trial Court. There was no necessity for the Court below to interfere with those findings in consequence of the Court's below inability to agree with the trial Court on its erroneous reliance on Section 149(d) of the Evidence Act.

On the whole, I am satisfied that this appeal has no merit. It is dismissed with N10, 000.00 costs in favour of the Defendants/ Respondents.

Judgement delivered by
Salihu Modibo Alfa Belgore, J.S.C.

I, on clear written record in this appeal, find no merit in it. I dismiss it as totally lacking in merit. I therefore award N10, 000.00 as costs in this appeal.

Judgement delivered by
Umaru Atu Kalgo, J.S.C.

I have had the privilege of reading in advance the judgment of my learned brother Oguntade J.S.C. just delivered. I agree with his reasoning and conclusions reached therein which I adopt as mine. I therefore find no merit in the appeal and I dismiss it with costs as assessed in the leading judgment.

Judgement delivered by
Mahmud Mohammed, J.S.C.

I have had before today the advantage of reading in draft the judgment of my learned brother Oguntade J.S.C., which has just been delivered. My learned brother has meticulously analysed and fully dealt with all the issues raised before us in this appeal. I therefore entirely agree with his reasoning and conclusion, which I adopt as my own in dismissing the appeal. I abide by the order on costs in the leading judgment.

Judgement delivered by
Ikechi Francis Ogbuagu, J.S.C.

I have had the privilege of reading in draft, the lead Judgment of my learned brother, Oguntade, J.S.C., just delivered. I am in entire agreement with him that this appeal lacks merit and must perforce, fail. I wish however, to add a few words

of mine by way of emphasis.

The case of the Appellants who were the Plaintiffs at the trial Court from their pleadings, is that their family, is entitled exclusively, to the Madakship of Ajiyolo Ofalemu They say or claim, that their ancestors, Aboko and Oche were the first settlers that founded the village. So, every claim of customary right of the Appellants constitutes the pith or plank upon which they rested their case.

The 1st, 2nd and 3rd Defendants/Respondents, showed to the contrary, that it was one Eyibo Adehi who first founded and settled in the said three (3) Clans in the village, namely, Aboko-Oche, Idaka and Okoyi Clans respectively. The also asserted, that each Clan, was entitled to appoint one of its own, as Madaki of the Clan. While the Appellants called nine (9) witnesses and tendered three (3) exhibits i.e. exhibits \"P1\", \"P2\" and \"P3\" respectively which were admitted in evidence (as three (3) other documents, were tendered but were rejected). The 1st to 3rd Respondents called five (5) witnesses and also tendered three (3) exhibits, i.e. Exhibits \"D1\", \"D2\" and \"D3\" respectively. The 4th Respondent, called one (1) witness and tendered one (1) exhibit i.e. Exhibit \"D4\".

After the trial, the learned trial Judge, in a well considered Judgment in my respectful view, and after making various findings of fact at pages 161 to 162 of the Records, found as a fact, that Eyibo Adehi of 1st and 3rd Respondents, found and settled in the said village and not Aboko and Oche as asserted by the Appellants. The findings of fact by the trial Court as reproduced at page 327 of the Records, are to the effect that:

- (1) Ajiyola Ofalemu village, was first founded by Eyibo Adehi of/for the 1st to 3rd Defendants/Respondents.
- (2) There are three (3) Clans - i.e. Aboko-Oche of/for the Plaintiffs/Appellants, Idaka of/for the 1st - Defendant/Respondent and Okoyi of/for the 2nd Defendant.

I note that the case of the Defendants/Respondents is that the appointment of a Madaki over their respective Clans, did not in any way, encroach on the right of the Plaintiffs/Appellants who had their own Madaki. In other words, the positions of the Madakis of the three Clans, are parallel and do not mix so to say. Put differently or in another way, the Plaintiffs/Appellants, have (undisputed), their own Madaki of Ajiyola Oboko-Oche while the 1st and 2nd Defendants/Respondents, have their own Madaki Idaka and Okoyi respectively. I also note from the pleadings of the Appellants in paragraphs 26,27 and 28 of their Statement of Claim at page 6 of the Records, that the above statement or finding by me, have support. They read as follows:

'26. The Plaintiffs aver that the 1st and 2nd Defendants are not male descendants of Aboko and Oche, They are not from the two lineage of the Ruling Houses in Ajiyolo Aboko-Oche village.

27. The 1st Defendant is patrilineal from Idaka village near Iyala and that the said Idaka has never been part of Ajiyola Aboko-Oche village.

28. The 2nd Defendant is from Ogbogbo in Okoyi area of Abocho and that the said Okoyi is not part of Ajiyola Aboko-Oche village.'

I note also, the evidence of DW1 - Ojo Odo who is a member of the Appellants' family at pages 87 and 88 of the Records and as appears in the Judgment of the trial Court at page 327 of the Records. He testified on oath, inter alia, as follows:

'I know the Plaintiffs (i.e. the Appellants) in this case. The Plaintiffs also live at Ajiyolo Ofalemu The 1st and 2nd Defendants also live at Ajiyolo Ofalemu. 1st Plaintiff is the son of my elder brother. 2nd Plaintiff is my elder brother. 3rd Plaintiff is my elder brother too. 4th Plaintiff is the son of my elder brother. 6th Plaintiff is my father's younger brother. 7th Plaintiff is my elder brother. Apart from the 2nd Plaintiff, none of the other Plaintiffs mentioned above is older than me. I am from the same Clan with the Plaintiffs. My grand parents migrated from Egune Ofejiji. They migrated because of war in the olden days..... After some time, Onuche said he could not drink clay water again and so they migrated to Ajiyolo Ojodokpe Omeju. Onuche died at the said Ajiyolo Ajodokpa Omejo. Neither Aboko nor

Onuche and Oche ever settled at Ajiyolo Ofalemu. However, the descendants of Aboko and Oche moved again and settled at Ajiyolo Ofalemu. I was old enough and used to go to the farm and I participated in the packing of our goods from Ajiyolo Ajodokpe Omejo to Ajiyolo Ofalemu. On arrival at Ajiyolo Ofalemu, we met one person called Eyibo Adehi. My people above mentioned migrated to settle with Eyibo Adehi at Ajiyolo Ofalemu. It is not true that the family of Aboko and Oche were the first settlers at Ajiyolo Ofalemu.....'

At page 89 of the Records, he continued as follows:

'The Aboko and Oche family has no King makers in Ajiyolo Ofalemu. We are entitled to our own Chieftaincy at Egume. There is no dispute between me and the other members of Aboko-Oche family like the Plaintiffs herein, for me to tell lies against them. I have narrated the truth as I am aware.'

This witness, did more damage to the Appellants' case under cross-examination by Ogwo, Esqr, learned Counsel for the Plaintiffs/Appellants He gave graphic evidence about the various Madakis in Ajiyolo Ofalemu starting from the first one Ihiaba Ogaji. The learned trial Judge noted at page 157 of the Records, that neither the 2nd, 3rd nor the 7th Plaintiffs, testified before him to enable the Court gain from the wealth of their personal knowledge in this matter. Not that it matters since the action was brought in a representative capacity. But what is relevant in my respectful view, is that the learned trial Judge, had this to say, inter alia;

'..... All the other witnesses, who testified before the Court in this case, apart from their being younger than the DWI did not possess any personal knowledge of nor did they participated (sic) in the movement to Ajiyolo Ofalemu. In fact, most of them were born in Ajiyolo Ofalemu. From the evidence of the DW1, he was part of Plaintiffs' family when they moved or migrated from Ajiyolo Ayi Odokpa Omejo to Ajiyolo Ofalemu.....'

The learned trial Judge made some interesting but fundamental findings in his Judgment. Sample At page 158 of the Records, he stated inter alia, as follows:

'Madaki is not traditional and ipso facto, not a chieftaincy, the question of Kingmakers and ruling houses do not seriously arise, in the circumstances of this case.....'.

At pages 162 to 163, the following inter alia, appear:

'..... I find that the selection and appointment of the 1st Defendant as the Madaki of Idaka Clan in Ajiyolo Ofalemu was by the communal consensus of the said Idaka Clan. I so hold.

I also find that the selection and appointment of the 2nd Defendant as the Madaki of Okoyi Clan in Ajiyolo Ofalemu was by the communal consensus of the said Okoyi Clan. I accordingly hold.

I am of the firm opinion (sic) (meaning opinion) that the Plaintiffs have not shown by credible evidence in this case, that the madakiship of Ajiyolo Ofalemu is rooted in the Aboko-Oche family clan exclusively and that the selections and appointment of the 1st and 2nd Defendants as Madakis in the said village violated any Igala Native Law and Custom. The Plaintiffs have not proved the custom upon which their action is predicated'

At page 106, he stated inter alia, as follows:

'In the circumstances, just as the Plaintiffs have the right to select and appoint a madaki for their own clan by consensus of the members of their clan they must silence the primordial and natural instinct in them, to wit: \"I or we only\" and recognize the right in their neighbours from Okoyi and Idaka clans in the same village, to select and appoint their own madakis for themselves. And this is moreso, because the position of a madaki is neither a chieftaincy nor a traditional Institution, which must follow customary lineages of ancendancy (sic).

This, to my mind, the human principle of \"live and let's live\" must be allowed to operate and thrive in the circumstances of this case.

It is apparent to me, from the evidence herein, that the 1st and 2nd Defendants are more interested in \"power sharing with the Plaintiffs rather than a total 'power shift' to them.....'

Finally, at page 165 of the Records, His Lordship stated inter alia, as follows:

'Thus it is fair and square which is the quintessence of justice rooted in a dynamic customary law that a group of people in any given community must be free to select and appoint their own madaki a mere village tax collector, which position is not even premises (sic) on a chieftaincy.'

All said, I am satisfied that the Plaintiffs have failed to prove their claim on a preponderance of evidence. The claim has no onions, hence it is not predicated on a strong wicket. It merits a dismissal and it is accordingly, hereby dismissed.'

The Court below ' per Bulkachuwa, JCA, at page 328 of the Records, stated inter alia, as follows:

'The whole case of the Plaintiffs hinges on that and unless and until they prove it they must fail in their claim. In civil case particularly a Plaintiff wins or loses (sic) (meaning loses) his case on his ability to prove his claim. Where he fails to prove what he claims he also fails to be entitled to the reliefs he is - seeking from the Court.

In the instant case the trial Court had properly evaluated what was before it and I see no need to disturb that finding - Oyeleke vs Alamu (1998) 8 NWLR part 560 36 Olukoga vs Faude (1996) 7 NWLR Part 462 516.\" I therefore resolve the two issues against the appellants\".

After reproducing part of the findings of fact and holdings of the trial Court at pages 162 ' 163 of the Records, the Court below at page 333, stated inter alia, as follows:

'These are findings of fact made by the trial Court based on the evidence adduced before it. It had found that the Plaintiffs have not made out its (sic) claim, and the appointments of the 2 Madakis by their respective clans is sustainable with or without the approval of the Local Government. The only conclusion to be arrived at by the trial Court is dismissal of the Plaintiff's (sic) claim. This the Court had done, and I see no need to disturb that finding for the trial Judge had properly considered all triable issues raised before him. As I had earlier mentioned, a Plaintiff succeeds on the strength of his case or on the evidence he adduces before the Court.....' .

Regrettably, the learned Counsel for the Appellants in paragraph 4.1 23 of their Brief, after reproducing part of the pronouncement or finding by the Court below at page 333 of the Records, stated that the said finding, was perverse and unsupported by the evidence before the Court. What a very unkind word used by the learned Counsel. He cited and relied on the case of Ogbuokwelu (not li) & ors. v. Umeanafunkwa & anor (1994) 4 NWLR (Pt. 341) 676 (it is also reported in (1994) 5 SCNJ 24); Nnajifor v. Ukonu (1985) 2 NWLR (Pt. 9) 686; Udeze & 2 ors. v. Chidebe & 4 ors. (1990) 1 NWLR (Pt. 125) 141 @ 161 (it is also reported in (1990) 1 SCNJ. 104); Woluchem v. Gudi (1981) 5 S.C. 291 @ 296 and Mogaji v. Qdofin (1978) 4 S.C. 91.

Firstly, the meaning of a finding said to be perverse and therefore, an Appellate Court, could interfere, has been stated and restated in a number of decided authorities including Kuma v. Kuma (1936) 5 WACA 4 and Akinloye v. Eyiola (1968) NMLR 92. A finding is said to be perverse, when it runs counter to the evidence and pleadings or where it has been shown that the trial Judge took into account matters which ought not to have been taken into account or shuts his eyes to the obvious or (as added by the learned Counsel for the 1st and 2nd Respondents at paragraph 4.1.20 of their Brief), when it has occasioned a miscarriage of justice. He cited and relied on the cases of The State v. Ajie (2000) FWLR (Pt. 16) 2831 @ 2843 C-E (it is also reported in (2000) 7 SCNJ.I) and Oyedeji v. Akinyele (2000) FWLR (Pt. 77) 970 @ 997 9-11. See also the cases of Atolagbe v. Shorun (1985) 4 S.C. 250 (1985) 1 NWLR (Pt.2) 360 @ 373 & 375, Adimora v. Ajufo & ors. (1988) 3 NWLR (Pt.80) 1 @ 15, (1988) 6 SCNJ. 18, Nzekwe & Ors. v. Madam Nzekwu (1989) 2 NWLR (Pt. 104] 393 @ 396; (1989) 3 SCNJ. 167 all cited with approval in the case of Nkado & 2 ors. v. Obiano & anor. (1997) 5 SCNJ. 33.

Surely, from the above definition, if you like, by no stretch of imagination, could the said finding or the findings of the Court below, be said to be perverse. For me, it is or they are not. I so hold.

Secondly, it is now settled, that when there is evidence to support the conclusion of the trial Judge (as in the appeal before the Court below) either in granting or dismissing the claim or claims of a party, the Court of Appeal, will not interfere. Also settled, is, where however, it is established on appeal, that the trial Court in coming to its decision, either has applied wrong principles of law or has taken into account relevant matters which it ought to have not taken into account or has failed to take the same into account, the Appellate Court, will not hesitate to set aside the judgment. See *Sandy v. Hotogua* (19..) 14 WACA 18 @ 20; *Lions Building Ltd, v. Shadipe* (1976) 12 S.C. 135 citing *Macaulay v. Tukur* 1 NLR 35; *Otogbolu v. Okeluwa & ors.* (1981) 6-7S.C. 99 @ 105 - 107, just to mention but a few.

Also settled, is that it is the Court of first instance that sees witnesses, sifts evidence, evaluates the same and except it fails in its duty of utilizing the advantage of seeing and hearing these witnesses, the Court of Appeal, abides by the findings and it is not permitted to embark on a voyage of its own either of discovery or merely abstruseness; See *Omorogbe & ors. v. Idungienwanye & ors.* (1985) 6 S.C. 150 @ 151 - per Eso, JSC, @ 151 citing the cases of *Lawal v. Dawodu* (1972) 1 All NLR 270) *Mogaji v. Odofin* (1978) 4 S.C. 91 and *Woluchem & ors. v. Gudi* (1981)5 S.C. 291 @ 319.

Thirdly, it is firmly established that it is of intrinsic relevance to the administration of justice in our legal system, that the hearing of an appeal, does not permit the Appeal Court, to enquire into disputes, but into the ways the dispute had been tried and settled. See *Ajadi v. Alhaja Okenihun* (1985) 1 ANLR (Pt. 1) 253. More importantly, an Appellate Court, cannot reject the findings of a trial Judge on the evidence of credible witness or witnesses unless such findings are perverse. See *Ude & 2 ors. v. Chimbo & 3 ors.* (1998) 12 NWLR (Pt. 577) 169 @ 186 - 187, (1998) 10 SCNJ. 23

The learned Counsel for the Appellants, can thus, see that while he is on one side exclusively prosecuting the case of his clients, the trial Court and the Court below that place the case of the parties, on an imaginary scale, and sees where the balance tilts, are always in a better position, to review and evaluate the evidence and come to a just decision. Afterwards, it is now settled that it is the duty of every Court, to come to a just decision.

In conclusion, from the impeccable evidence before the trial Court including that of the DW1, I hold that the Court below, was justified and right in upholding the decision of the trial Court. It is from the foregoing and the fuller Judgment of my learned brother, Oguntade, J.S.C., that I too find as a fact and hold that there are in this case leading to this appeal, concurrent findings of fact by the two lower Courts and none of them being perverse, I cannot interfere. This appeal is grossly frivolous and must fail and it fails. I too, dismiss it and I accordingly affirm the said decision of the Court below affirming the decision of the trial Court. I abide by the consequential order in respect of costs.