IN THE SUPREME COURT OF NIGERIA

Suit No: SC256/2001

Petitioner: Alhaji Aransi Bello Okomalu
And
Respondent: Chief Aminu Akinbode & 2 ors

Date Delivered: 2006-04-07

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina Alu , Niki Tobi , Ignatius Chukwudi Pats-Acholonu , Aloma Mariam Mu

Judgment Delivered

The case of the plaintiff/appellant is as follows: He belongs to Okomalu family of Osegere. He is the Mogaji of the family. Oyoside Okomalu, a hunter and warrior, the ancestor of the plaintiff/appellant and founder of Osegere village came from Ikire Ilo near Oyo town. Okomalu first sojourned at Ajanla compound in Ibadan and from there he founded the first Osegere. As a result of war, Okomalu and his family escaped to Kadolu compound in Ibadan. After the war, Okomalu returned to re-establish Osegere. After sometime, people came to settle with him and he gave them land to build houses and to farm. The 1st defendant\'s ancestor, Oshunimiyiwa Abobiosan, was one of such people. Dangbowi, Odarinlo, Aroola and Ajayi Obaniyi were some of the others. Those mentioned were later made chiefs in the village by Okomalu, who was himself the Baale of Osegere. He was the first Baale there. On his death, his nine-year old son, Sangomakinde, succeeded him. On the death of Sangomakinde, his younger brother, Durokilu succeeded him. Sangoyoyin succeeded Durokilu. Sangoyoyin was the son of Okomalu, who was the father of the plaintiff/appellant. Sanni, a descendant of Okomalu succeeded Sangoyoyin. Jimoh Oyckan, a descendant of Okomalu succeeded Sanni and Jimoh Oyckan died in November, 1980.

No outsider from Okomalu family had ever become Baale of Osegere. The Government of Western State paid the Okomalu family compensation for land acquired for the Asejire Water Dam in 1974. Some years back, Oyelose, not from the family of the plaintiff/appellant, became the Bale. The matter was taken to court and Oyelose was sent packing. After the death of Oyckan, the family nominated the plaintiff/appellant as the next Baale of Osegere, which nomination was sent to Akinbiyi, the Olubadan. On hearing over the radio that the 1st defendant/respondent was to be appointed the next Baale of Osegere, the family of Okomalu sent a petition to Akinbiyi the Olubadan and his Council. An inquiry was ordered. It decided that the family of Okomalu had exclusive right to the stool. The Report of the Inquiry was sent to the Olubadan who did nothing on it till he died. The 1s1 defendant/respondent was never installed the Baale of Osegere. It was Asanike who succeeded Akinbiyi as Olubadan that installed the plaintiff/appellant as Baale of Osegere.

Again, it was announced on radio that the 1st defendant/respondent was appointed the Baale of Osegere by the Oyo State Governor, the 2nd defendant/respondent. A petition was sent to the governor by the lawyer of the plaintiff/appellant. The lawyer of the Olubadan also wrote a petition to the Governor. Thereafter the plaintiff/appellant sued, seeking for four declaratory reliefs and two injunctive reliefs in respect of the Chieftaincy of Baale of Osegere.

The case of the defendants/respondents is different. Amusa Lawal, DWI, the chairman of Osegere Descendant Union gave evidence as follows: Akinsoro Ajaku, alias Osogirank\' agbamolo and Majobo were the founders of the first Osegere. They wore warriors. Ladojobi was one of the followers of Akinsoro at the time. Ladojobi was the father of Amusan and Awujoola, a woman. Awujoola was the mother of Oyosilo Okomalu. Daba Sango was a lodger in Ladojobi\'s compound. Ilo married Awujoola and consequently fathered Okomalu.

The 1st defendant/respondent is a descendant of Osuntola, alias Ahobiosan who was also one of the followers of Akinsoro who found the first Oscgcrc. The first and second Osegcres were destroyed by war. The third Osegcre was founded by the same community. To prevent the hazard of another war, they erected a wall around the town. It was after this that they all decided and installed Amusan as Baale, Bangbowi as Balogun and Oderinlo Amojiogbo as the Otun Baale. Later, Odorinlo was installed as Baale after the death of Amusan who reigned for twelve years. Odorinbo reigned

for fourteen years. Sangomakinde, Okomalu\'s son, reigned after Odorinlo. Amusan and Odorinlo were not related to Okomalu. Durokilu from Okomalu family reigned after Sangomakinde and he reigned for three years. Oyekunle reigned after Durokilu and he was not from Okomalu family. He reigned for forty-five years. After Sangoyoyin, Sanni Shatilo\'s son reigned for one year. Oyoloso reigned after Sanni. He reigned for one year and he was from Ladojobi family. Jimoh Oyekan from Ajala\'s family reigned after him.

Jimoh Oyekan died in November 1980. After his death, the whole town appointed the lst defendant/respondent as the next Baale of Osegcre as was the custom. On 14/5/81, the Olubadan invited all the parties, including Okomalu family representatives to the palace of the Olubadan where all approved the appointment of the 1st defendant/respondent as the next Baale of Osegerc. On the death of Oba Akinbiyi, Oba Asanike re-opened the matter and the plaintiff/appellant was appointed the Baale of Osegere. On 20/9/84, on approval by the Governor of Oyo State, the 1st defendant/respondent was installed the Baale of Osegere

I have narrated the evidence of the parties in some detail. I do not regret what 1 have done. The learned trial Judge granted claims (d), (e), and (f). He refused claims (a), (b), and (c). He ordered that the case should be sent back to the Division in the Military Governor\'s office charged with the responsibility of chieftaincy matters for a final decision. The Judge said in the final paragraph:

\"All in all, the whole matter should go back to the Division in the Military Governor\'s office charged with the responsibility of Chieftaincy matters, so that it can take a final decision because of the special knowledge given to it by the Security Report.\"

On appeal to the Court of Appeal by the plaintiff/appellant, that court dismissed the appeal. Dissatisfied, the plaintiff/appellant has come to this court.

Briefs were filed and duly exchanged. The appellant formulated the following issues for determination:

\"1. Whether or not the Court of Appeal was right in affirming the decision of the trial court declining to grant appellant\'s reliefs a, b, and c contained in paragraph 51 of the Appellant\'s Amended Statement of Claim directing that the case should go back to the office of the Governor of Oyo State for final decision on the Chieftaincy matter in this case'

2. Was the Court of Appeal right by not ordering the retrial of the case having found that:

(i) the trial court failed to make findings on the question as to how the Chieftaincy title in dispute is to be filed; and

(ii) there is no way a proper evaluation of the evidence led by the parties could be made without depending on the credibility of the witnesses'

3. Was the Court of Appeal right in holding that the trial Judge was wrong to have held that the decision of the Commissioner for Chieftaincy Affairs contained in Exhibit 17 was taken without any inquiry or without hearing the appellant\"

The 1st respondent formulated the following issues for determination:

\"3.02. Whether it was right for the Court of Appeal to affirm the judgment of the lower court and thereby refuse to grant the declarations sought for in paragraph 51 (a), (b) and (c) of the amended statement of claim of the Plaintiff/Appellant having regard to the Lower Court findings that the Oyo State Government had not completed action on the Chieftaincy matter before this suit was instituted by the Plaintiff/Appellant.

3.03. Whether the Court of Appeal was right to have affirmed the judgment of the trial judge after its finding that the Lower Court did not make any findings of fact on the question whether the Chieftaincy title in dispute was to be filled only by members of the Appellant\'s family or that it was open to any male member of the Community as claimed by the

1st Respondent.

3.04. Whether it was proper for the appellate Court to affirm the judgment of the Lower Court that ordered the parties to go back to the Chieftaincy Division of the Governor\'s office before it could take a final decision on the matter.\"

The 2nd and 3rd respondents formulated the following issues for determination:

\"3.01. (a) Whether it was not right for the lower court to affirm the decision of the learned trial judge to refuse to grant the declarations sought for in paragraph 51 (a), (b) and (c) of the amended Statement of Claim having regard to his findings that the State Government had not completed action on the Chieftaincy matter before the appellant instituted this suit.

3.02. (b) Was it right to order re-trial of this case when the lower court affirmed the decision of the learned trial judge that the parties should go back to the Chieftaincy Division of the Governor\'s office so that it could lake final decision on the matter.

3.03. (c) Whether or not the lower court relied on Exhibit 17 to give judgment in favour of the respondent.\"

Learned counsel for the appellant, Mr. Roland Otaku, submitted on Issue No.1 that the jurisdiction of the trial court was properly and competently invoked by the appellant for the determination of reliefs 51 (a), (b) and (c) and that there was no legally justifiable reason for the trial court to have declined adjudication over the reliefs. He contended that the validity or invalidity of the acts of the 2nd and 3rd respondents are subject to the declaratory action of the appellant. He cited Fawehinmi v. I.G. P. (2000) 7 NWLR (PL 665) 481, Ikinc v. Edierode (2002) 10 WRN 46; Adigun v. A. G. Oyo State (1987) 1 NWLR (Pt. 53) 6; Eguamwcnse v. Amaghizcmwcn (1993) 9 NWLR (Pt. 315)1:Chief Osagie II v. Chief Offor (1998) 3 NWLR (Pt. 441) 205; Adesola v. Abidove (1999) 14 NWLR (Pt. 637) 28 and Abu v. Odugbo 7 NSCQR 624.

Arguing that the order that the matter be sent to the chieftaincy division in the office of the Governor was wrong, learned counsel called the attention of the court to Exhibit 10 where the 2nd respondent peremptorily stated that the plaintiff should regard the matter as closed.

Learned counsel submitted on Issue No. 2 that the Court of Appeal was wrong in not ordering a retrial of the case, after coming to the conclusion that (i) the trial court failed to make findings on the question as to how the Chieftaincy title in dispute is to be filed and (ii) there is no way a proper evaluation of the evidence led by the parties could be made without depending on the credibility of the witnesses. He cited Duru v. Onwumelu (2000) 7 WRN 1

On Issue No. 3, learned counsel argued that an appellate court has no business whatsoever to deal with any matter, which has not been identified by the appellant. He submitted specifically that the learned trial Judge was wrong in his view that Exhibit 17 was irregular, null and void and of no effect whatsoever. He urged the court to allow the appeal.

Learned counsel for the 1st respondent, Mr. Benjamin Ogunleye submitted on Issue No. 1 mat where the powers vested in a Commission of Inquiry are of advisory, deliberative or investigatory character, the Commission cannot make binding and conclusive pronouncements, since whatever decision it makes or recommendation it makes will have no legal binding effect until it is accepted and confirmed by the authorising body. He cited The Governor of Oyo State v. Oba Folayan (1995) 8 NWLR (Pt. 413) 292 at 328. He argued that the reliefs in paragraph 51 (a), (b) and (c) which were not granted by the High Court and the Court of Appeal arc quite independent of the ones granted and they could not have been granted because sub-paragraph (d), (e) and (f) were granted.

Learned counsel, while conceding that the learned trial Judge did not evaluate and make any specific findings on the traditional evidence in respect of the Bale of Osegere, argued that as the administrative remedy provided by law under Section 22(5) of the Chiefs Law, Cap.21, Laws of Oyo State of Nigeria, 1978 had not been exhausted by the appellant before filing the action, the trial Judge could not have evaluated the evidence in respect of reliefs in paragraph 51 (a), (b) and (c); and that the Court of Appeal was right in affirming the judgment of the trial court. He cited Wilson v. Oshin (2000) FWLR (Pt. 14) 2311 at 2317.

On customary law relating to the selection of chief, learned counsel submitted that it is not the business of the courts to make declaration of customary law relating to the selection of chiefs under the Chiefs Law. He cited Ikinc v. Edierode (2002) FWNR (Pt. 92) 1775 at 1783; Abu v. Oduabo (2001) FWLR (Pt. 69) 1260 at 1265 and Adigun v. A. G. Ovo State (1987) 1 NWLR (Pt. 53) 678.

Taking Issue No. 3, learned counsel submitted that the trial court and the Court of Appeal were perfectly in order in relying on the evidence to hold that the-administrative remedy had not been exhausted by the appellant and accordingly ordered the parties to go back to the Oyo State Government for its final decision on the chieftaincy matter. He urged the court to dismiss the appeal.

Learned counsel for the 2nd and 3rd respondents, while conceding that by section 236 of the 1979 Constitution, a trial court has the power to make a declaration in respect of a chieftaincy dispute, argued that declarations are not made as a matter of course and that the plaintiff must be able to satisfy the court that he is entitled to such declarations and that there is no co'existing factors debarring the court from making the declarations having regard to the circumstances of the case. He said that the traditional evidence relied upon by the two parties was seriously contested by their respective witnesses. Learned counsel basically and essentially justified the decisions of the High Court and the Court of Appeal. In so doing, he relied on Brawal Shipping Ltd, v. F.I.Qnwadikc Co. Ltd. (2000) 11 NWLR (Pt. 678) 387; The Governor of Oyo State v. Oba Folavan (1995) 8 NWLR (Pt. 413) 328 at 330; Obayiuwama v. Ede (2003) FWLR (Pt. 136) 1027; Ogolo v. Fubara (2003) FWLR (Pt. 109) 1285 at 1324 and 1035; Chinwendulu v. Ambali (1980) 3 -4 SC. 31; Okulaia v. Adefulu (1992) 5 NWLR (Pt.244) 752 at 763; Adcdcii v. Police Service Commission (1967) 1 All NLR 67; Kanda v. Government of Malasia (1962) AC. 322; Kawo v. Kawo (1975) 2 SC. 15 and Edun v. Odan Community (1980) 11 SC. 103.

On the issue of retrial, learned counsel submitted that there was no legal basis for that and urged the court to dismiss the appeal.

The first issue is whether there was any legal basis for ordering that the case 'should go back to the Division in the Military Governor\'s office charged with the responsibility of chieftaincy matter so that it can take a final decision because of the special knowledge given to it by the Security Report.\" The order affects only reliefs a, b and c. The reliefs are as follows:

'(a) A declaration that the plaintiff is rightful Baale of Osegcre in accordance with the Customary Law governing the said chieftaincy having been so validly appointed by Oba Yesufu Oloyede Asanike 1 the Olubadan of Ibadan in his capacity as the sole prescribed authority for the Baale of Osegere Chieftaincy as contained in his letter of appointment/consent dated 26/3/84.

(b) A declaration that only Okomalu family of Osegere is entitled by the custom and tradition of Osegere to provide the Baale of Osegere.

(c) A declaration that the appointment of the 1st defendant by the Late D. T. Akinbiyi the Olubadan of Ibadan as Baale of Osegere is null and void.\"

The submissions of both counsel for the 1st respondent and 2nd and 3rd respondents arc alike. They both argued that as reliefs a, b and c are separate and distinct from reliefs (d), (e) and (f), the learned trial Judge was right in granting reliefs d, e, and f, and refusing reliefs a, b, and c.

With the greatest respect, that argument is without substance and it docs not improve the case of the respondents one bit. I think learned counsel for the appellant advanced more serious argument based on law and I agree with him. It is elementary law that High Courts have jurisdiction to grant declaratory reliefs in chieftaincy matters and they exercise that jurisdiction without equivocation. Here one can rely on some of the cases learned counsel for the appellant referred to: Fawehinmi v. IGP (2000) 7 NWLR (Pt. 665) 481 at 528; Adigun v. A. G. Ovo State (1987) 1 NWLR (Pt. 53) 6; Eguamwcnsc v. Amaghizcmwcn (1993) 9 NWLR (Pt. 315) 1; Chief Osegie II v. Chief Offer (1980) 3 NWLR (Pt. 441)

205; Adesola v. Abidovc (1999) 14 NWLR (Pi. 637); Abu v. Odugbo 7 NSCQR 624; Ikine v. Edierode (2002) 10 WRN 46 at 711.

While it is good law that a court has no jurisdiction to make declarations of customary law relating to the selection of chiefs under an enabling law, it is also good law that a court has jurisdiction to make a finding of what the applicable customary law is and apply that law in respect of any declaratory relief. I have carefully examined the three reliefs and I have no difficulty in coming to the conclusion that they have nothing to do with declarations of customary law relating to the selection of chiefs; rather they are all to do with making a finding of what the applicable customary law is in respect of the Baale of Osegere Chieftaincy.

There is yet another aspect and it has to do with Exhibit 10. I should take the exhibit in the light of the order the learned trial Judge made, an order, which was affirmed by the Court of Appeal. In a protest letter to the 2nd respondent by the appellant in respect of the revocation of his appointment as Baale of Osegere, the 2nd respondent wrote inter alia:

\"Sir,

RE: Baale of Osegere Chieftaincy

1. I am directed to refer to your letter dated 27th September, 1985 in which you sought for an audience with the Military Governor in connection with the above-mentioned subject, and to inform you that the Military Governor has decided not to grant you audience on the Baale of Osegere Chieftaincy tussle.

2. I am to add that the Government stands by the subsisting decision on the matter, which recognised the appointment of Chief Akinbode as the Baale of Osegere.

Signed:
(Evang. C. A. Kehinde)
For Secretary to the Military
Government and Head of Service.\"

Under cross - examination, Oluwole Oladokun, the Senior Assistant Secretary, said at page 77 of the Record:

\"True enough we wrote exhibit 10, that the Government stood by their existing decision. This was in October 1985. But by the time we got the Sole Administrator\'s Report in 1986 March, we might or might not have changed our mind on his report. We were not given the chance to do this before we were dragged to court.\"

That is a very unfortunate and sad statement. I will not call it an arrogant one though I have the temptation to call it so. Certainly the appellant could not have slept a day longer with that position of \"might or might not,\'\'- because in law, the final decision does not lie or rest with government-but with the courts. And so they were dragged to court, using the expression of Oluwole Oladokun. Why should the appellant not do so' He had a grievance on his hands and in law he had the right to seek relief. That is exactly what he did. And he was right in what he did. The learned trial Judge, in considering Exhibit 10, said:

\"...When the plaintiff reacted and sought audience with the 2nd respondent, a letter was sent to him with a tone of finality that he could not be granted an audience and that the matter should be regarded as closed.\"

With the tone of finality in Exhibit 10, punctuated with some bureaucratic arrogance, the learned trial Judge should not have taken the extra kilometre to give the order. Go back to where, I ask' Go back to the office that has stamped a word of finality, the last word on the matter; sounding like the Almighty God' No. That cannot be justice. That is clear injustice and this court will not be a party to that injustice. Only God and God alone who has the final say in all matters of yesterday, today and forever. And because the respondents are not God, they could not say the final word in this matter as Exhibit10 claimed.

What is more, by the decision in Exhibit 10, the minds of those who look the decision arc biased in favour of the decision and against the appellant. Can the appellant obtain justice from the biased minds in the circumstances I ask' I think not.

Counsels for the respondents have presented section 22(5) of the Chiefs Law, of Oyo State, 1978 as the alpha and omega. I think that subsection empowers the Commissioner designated, to institute enquires in accordance with section 21 of the Chiefs Law into chieftaincy disputes. It appears to be the subsection on exhaustion of remedies available to a party before commencing an action. While I concede that failure to exhaust local remedies will oust the jurisdiction of the court to hear the matter, the response to the petition of the appellant, Exhibit 10, is a very adequate answer and defence to section 22(5). The moment the appellant received Exhibit 10 from the 2nd respondent, he satisfied the local remedy principle enunciated in section 22(5) and he was free like the air to do his thing in the way he liked. And in the practice of the rule of law he chose to go to court, instead of self-help. He could not have made a better choice.

The next issue I should take in this appeal is whether this court should order a retrial of the case. While appellant wants a retrial, respondents understandably do not. They have urged the court to dismiss the appeal.

What is the law on retrial' In what circumstances will a court order a retrial in a civil matter' In what circumstances will a court not order a retrial in a civil matter' I will answer each of these questions. I have read the case law in some detail and I am of the view that this court has the power under section 22 of the Supreme Court Act and Order 8 of Rule 13(1) of the Supreme Court Rules to order a retrial of a case in any of the following instances:

1. An order of retrial will be made where the trial court failed to determine vital issues by appraising and evaluating the evidence before it. The evidence not evaluated must be material and germane to the live issues before the court. And what is more, the evidence must be clear on the record and not a subject of judicial inquiry.

2. An order for retrial will be made where a great deal depends on the credibility and reliability of witnesses.

3. An order for retrial will be made upon proper ground such as when a Judge misdirects himself as to the nature of a party's case or upon wrongful admission or rejection of material evidence or a party has been taken by surprise or on grounds of misbehaviour of the Judge; and when the court makes a wrong approach to the assessment of evidence, such as when it foils to resolve the conflicts in evidence.

4. An order for retrial will be made if there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such character that on the one hand the trial was not rendered a nullity and on the other hand the court is liable to say that there has been no miscarriage of justice.

5. In a proper case, failure of the High Court or the Court of Appeal to deal with a point material to a party\'s case may result in an order for a retrial.

6. Where a court of trial fails to advert its mind to and treat all issues in controversy fully and there is insufficient material before the appeal court for the resolution of the matter; the proper order to make is one of retrial.

7. Where a trial court makes a mistake as to the onus of proof (which may be discharged in the pleadings) and finds against a plaintiff in the mistaken belief that he had not discharged the onus of proof, an appellate court can allow the appeal and order retrial.

8. An appellate court will make an order for retrial even without hearing parties on the issue, if it finds it expedient to do so and in the interest of justice.

9. Where a trial court is evasive in its findings and therefore did not take proper advantage of having seen or heard the witness before him, an order for retrial is appropriate.

10. An order of retrial stems from a discretionary power which must be exercised by an appellate court with utmost caution, judicially and judiciously. It is not an exercise of raw appellate power to police courts inferior to it.

11. Litigation is a very costly venture and courts of law should order retrial only in deserving cases. On the other hand, in deserving eases, appellate courts should not take into consideration the cost of litigation because that must succumb to doing justice in the particular matter.

Appellate courts will not order retrial in the following instances:

1. A retrial will be ordered if it will satisfy the interest of justice. Therefore where a retrial will result in injustice or a miscarriage of justice, an appellate court will not order a retrial.

2. A retrial cannot be ordered as a mere course, routine or fun; it must be based on valid procedural reason or reasons.

3. A retrial cannot be ordered to enable parties to have a second bite at the cherry to repair their case and come back in full force to present a fresh case. That will be a very smart one and appellate courts will not encourage such smartness.

4. A retrial cannot be ordered to compensate a losing party. In other words, a retrial cannot be ordered when the plaintiffs' case has completely failed or failed in Toto, and there is no substantial irregularity in the conduct of the case.

5. An appellate court will not order a retrial on the ground of irregularity or lapses in the conduct of the proceedings if the irregularity or lapses complained of can be corrected by the appellate court. In other words, a retrial will not be ordered in cases where sections 16 and 22 of the Court of Appeal Act and the Supreme Court Act respectively could be invoked in the matter.

6. An appellate court will not order a retrial if there are no special circumstances wan-wanting the retrial. A special circumstance will not be determined in vacuo but in the light of the fact of each case.

Dealing with the issues joined by the parties on the chieftaincy title, the Court of Appeal said at page 155 of the Record and I will quote the court in extenso:

\"As I have already mentioned earlier above, both parties joined issue on the question whether the chieftaincy title in dispute was to be filled only by members of the Okomalu family as claimed by the plaintiff/appellant or that it was open to any male member of the community as claimed by the 1st respondent. The learned trial Judge failed to make any finding of fact on this very important issue despite the fact that each of the parties led copious evidence in support of his stand. It is therefore very ridiculous how the learned trial Judge could have come to the conclusion it reached in the claim before him in respect of the three legs of the claim he granted. However, as there is no cross- appeal in respect of those grants, there is nothing I could do about them.

The law is settled that a trial Judge is required to evaluate and make specific findings of fact on salient and relevant issues raised in the claim before him before coming to any conclusion. Failure to do so will not only vitiate his conclusion but will give the appellate court power to interfere and evaluate such evidence and make proper findings as long as the findings of fact do not depend on the credibility of witnesses: See Ogunlcyc v. Oni (1990)2 NWLR (Pt.135) 745; Ejabulor v. Osha (1990) 5 NWLR (Pt. 148); Umesic v. Onuaguluchi (1995) 9 NWLR (Pt. 421) 515. In the instant case, there is no way a proper evaluation of the evidence led by the parties could be made without depending on the credibility of the witnesses. It follows therefore that such evaluation cannot be safely made at the appellate court level.\"

The Court of Appeal by the above came to a correct conclusion on the law and I cannot fault the court. The court however went wrong when it concluded at page 158 of the Record:

\"In the result, I hold that there is no merit in the appeal and I accordingly dismiss it with N5, 000 costs to the 1st respondent and N5, 000 costs to the 2nd and 3rd respondents.\"

The moment the court held and correctly for that matter that the learned trial Judge failed to make any finding of fact on

whether the chieftaincy title in dispute was to be filled only by members of the Okomalu family or it was open to any male member of the community and that findings on the issue cannot be made without depending on the credibility of the witnesses, there was only one order left for the court and it is an order of retrial. That vindicates items No. 2 above, as it relates and affects the instances when an appellate court will order a retrial.

In sum, the appeal is allowed. The judgment of the Court of Appeal is set aside. It is ordered that the case be sent back to the Chief Judge of Oyo State for a retrial by another Judge of competent jurisdiction. Of course, the Chief Judge has the option of trying the case, as he is also a Judge of competent jurisdiction. I award N10, 000 costs in favour of the appellant.

Judgment delivered by
Idris Legbo Kutigi, JS.C

I read in advance the judgment just delivered by my learned brother Tobi, JSC. I entirely agree with him to allow the appeal and order a retrial of the suit by another judge of the appropriate jurisdiction. I also award N10, 000.00 costs in favour of the Appellant against the Respondents.

Judgment delivered by
Aloysius Iyorgyer Katsina Alu. JSC.

I have had the privilege of reading in draft the judgment of my learned brother Niki Tobi JSC. in this appeal. I also share the view that the appeal has merit.

In the result, I allow the appeal and remit the case back to the High Court of Oyo State to be heard de novo by another Judge. The appellant is entitled to costs of N 10,000.00 against the respondent.

Judgment delivered by
Ignatius Chukwudi Pats-Acholonu

I have read the judgment in draft of my noble and learned Lord Niki Tobi JSC and I agree with him. I have nothing more to add.

Judgment delivered by
Aloma Mariam Mukhtar, J.S.C

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Tobi, JSC.

The bone of contention in this appeal is a minor chieftaincy of Bale of Osegere, which has the Olubadan of Ibadan as the prescribed authority. The appellant who was the plaintiff in the trial court traced the history of the stool to Okomalu who founded Osegere before the intertribal war, having come from Ikire ile on hunting expedition. Osegere was destroyed by war and Okomalu took refuge at Ajanla house in Ibadan. After the war, he went back to establish Osegere, with some people joining him. As Osegere expanded Okomalu conferred Chieftaincy title to the first persons who settled with him, and he as the founder became the first Baale of Osegere. The descendants of Okomalu succeeded one another as the Baale of Okomalu. The plaintiff is a descendant of Okomalu. All stretch of land comprising 19 villages from Olukunle Village to the Bank of River Oshun is the property of plaintiffs' family, and all the occupant\'s are their

tenants. The plaintiff was given power of Attorney to represent his family when the Government of Western Nigeria acquired part of the land. One Oyelese declared himself as Baale of Osegere, and there were court suits that pronounced otherwise. In 1963 there was a Chieftaincy declaration, which stated that there is only one Osegere ruling house, and that is the Okomalu ruling house. The last Baale of Osegere was Jimoh Oyekan Okomoalu, and the plaintiffs name was forwarded to late Oba Akinbiyi who was the prescribed Authority, but they heard of the installation of the 1st defendant on the radio. They petitioned, and a panel of Inquiry was set up, and the panel recommended that the plaintiffs' family is entitled to the Baaleship.

The 2nd and 3rd defendants nullified the appointment of the plaintiff at the instance of the 1st defendant, without hearing from the plaintiff. The plaintiff claimed as follows against the defendants: -

\"a. A declaration that the plaintiff is the rightful Baale of Osegere in accordance with the customary law governing the said chieftaincy having been so validly appointed by Oba Yesufu Oloyede Ashanike 1, the Olubadan of Ibadan in his capacity as the sole prescribed Authority for the Baale of Osegere Chieftaincy as contained in his letter of appointment/consent dated 26/3/84.

b. A declaration that ONLY Okomalu family of Osegere is entitled by the Custom and Tradition of Osegere to provide the Baale of Osegere.

c. A declaration that the Appointment of the 1st defendant by the late Oba D. T. Akinbiyi the Olubadan of Ibadan as Baale of Osegere is null and void and of no effect.

d. A declaration that the act of the 2nd defendant in declaring irregular the appointment of the plaintiff as Baale of Osegere and his subsequent recognition of the 1st defendant as the incumbent Baale of Osegere as contained in the 2nd defendant\'s letter dated 15/8/85 is null and void.
e. An Injunction restraining the 1st defendant from performing the duties of and holding himself out as the Baale of Osegere.

f. An Injunction restraining the 2nd and 3rd defendants or their servants and/or Agents from recognizing and/or continuing to recognize the 1st defendant as Baale of Osegere.\"

The defendants denied most of the allegations, and contended that the action was premature, as the plaintiff has not exhausted the administrative avenues provided by law.

The case went to trial and witnesses gave evidence. Learned counsel addressed the court, and at the end of the day the learned trial judge granted reliefs (d) (e) and (f), but refused to grant reliefs (a), (b) and (c) that are the pivot of his case. The learned trial judge concluded his judgment thus: -

\"All in all, the whole matter should go back to the Division in the military Governor\'s office charged with the responsibility of Chieftaincy matters, so that it can take a final decision because of the special knowledge given to it by the security Report.\"

Dissatisfied with the decision, the plaintiff appealed to the lower court, which in turn affirmed the above decision. Again, the plaintiff was dissatisfied with the judgment of the court of appeal, and it appealed to this court. As is the practice in this court, learned counsel for the parties exchanged briefs of argument. Three issues for determination were raised in the appellant\'s brief of argument. The issues are: -

1. Whether or not the Court of Appeal was right in affirming the decision of the trial court declining to grant appellant\'s reliefs a, b and c contained in paragraph 51 of the appellant\'s amended statement of claim and directing that the case should go next to the office of the Governor of Oyo State for final decision on the Chieftaincy matter in this case'

2. Was the Court of Appeal right by not ordering retrial of the case having found that:

(i) the trial court failed to make findings on the question as to how the Chieftaincy title in dispute is to be filled; and

(ii) there is no way a proper evaluation of the evidence led by the parties could be made without depending on the credibility of the witness'

3. Was the Court of Appeal right in holding that the trial judge was wrong to have held that the decision of the commissioner for Chieftaincy Affairs contained in exhibit 17 was taken without any inquiry or without hearing the appellant' The two sets of respondents also formulated issues in their two briefs of argument.

It is on record that the court below in affirming the judgment of the trial court found thus:

\"The question of allowing this appeal therefore does not arise. All that can be said of the three legs of the claim granted by the learned trial judge amounts to mere attempt to maintain the status quo ante by the parties until the state Government takes the required decision on the appellant\'s complaints, if that decision is still yet not taken.\"

I am at a loss as to the required decision; when in fact the plaintiff/appellant had been told in no uncertain terms that the matter was closed, and he would not be granted any audience, vide Exhibit 10. The very act of writing Exhibit 10 gave the whole affair an air of finality that gave the plaintiff/appellant no hope of redress from the 2nd and 3rd respondents. The door was shut in his face, so to speak, and the only option opened to him was to seek legal redress in court, which he did. Exhibit 10, which emanated from the office of the Military Governor, and was dated 31st October, 1985, and addressed to the plaintiff/appellant, contained the following: -

\"1. I am directed to refer to your letter dated 27th September, 1985 in which you sought for an audience with the Military Governor in connection with the above - mentioned subject, and to inform you that the Military Governor has decided not to grant you audience on the Baale of Osegere Chieftaincy tussle.

2. I am to add that the Government stands by the subsisting decision on the matter which recognized the appointment of Chief Akinbode as the Baale of Osegere.\"

There is no gainsaying that with the above correspondence, the plaintiff/appellant, despaired, as he had prior to resorting to the 2nd respondent for redress exhausted the other avenues administratively opened to him by petitioning the prescribed authority. Now, if the learned trial judge had taken the trouble of evaluating the evidence before him he would have made findings on them, and in so doing found that Exhibit \'10\' made the whole dispute an open and shut case. This, he did not do and that is a part of the appellant\'s complaint. Having received Exhibit \'10\' could the appellant have known what was operating in the 2nd respondent\'s mind, on whether or not it was going to reopen the matter' I think not. Even the evidence of the Senior Assistance Secretary in the 2nd respondent\'s office, (which the learned trial judge relied upon) was on the side of being speculative. The piece of evidence reads: -

\"In February, 1986, as a result of further petitions we received in our office, we wrote to the Sole Administrator Lagelu Local Government to make an Inquiry. He did and sent us a report. Before we could act on the Report, we got a summons for this case. So we suspended further action. If we had not got a summons we could have continued action on the report of the Sole Administrator and perhaps we would have re-confirmed our letter - Exhibit 17 or reversed it.\"

[Underlining is mine]

The lower court in its judgment pronounced the correct position of the law on the issue of evaluation of evidence when it said: -

\"The law is settled that a trial judge is required to evaluate and make specific findings of fact on salient and relevant issues raised in the claim before him before coming to any conclusion. Failure to do so will not only vitiate his conclusion but will give the appellate court power to interfere and evaluate such evidence and make proper findings as long as the findings of fact do not depend on the credibility of witnesses. See Ogunleye v. Oni (1990) 2 NWLR (pt. 135) 745:

Eiabulor v. Osha 1990 5 NWLR (pt. 148): and Umesie v.Onnaguluchi (1995) 9 NWLR (pt.421) 515. In the instant case, there is no way a proper evaluation of evidence led by the parties could be made without depending on the credibility of the witnesses. It follows therefore that such evaluation cannot be safely made in the appellate court level.\"

There were much documentary evidence like Exhibit 10, apart from the oral evidence, but no proper evaluation was made, nor was specific findings made. I am thus in full agreement with the reasoning and conclusion reached in the lead judgment that the appeal deserves to be allowed and the case remitted to the High Court of State Oyo State for retrial. I abide by the orders made in the lead judgment.