

IN THE SUPREME COURT OF NIGERIA

Suit No: SC107/2002

Petitioner: Mallam Jimoh Salawu ,Mallam Hassan Akogun (For and on behalf of Akogun Family)

And

Respondent: Mallam Aliyu A. Yusuf Arojjoye II The Oba of Babanla Audu Ajide Agboola

Date Delivered: 2007-05-11

Judge(s): Aloysius Iyorgyer Katsina-Alu, Niki Tobi, Francis Fedode Tabai ,Ibrahim Tanko Muhammed ,Pius Olayiwola Aderem

Judgment Delivered

This is an appeal against the judgment of the Court of Appeal, Ilorin Division in Appeal No. CA/IL/5/2000 delivered on the 14th of June 2001 dismissing the appeal against the judgment of the High Court of Justice of Kwara State sitting at Ilorin in Suit No. KWS/2C/96: Mallam Jimoh Salawu and Mallam Hassan Akogun versus Mallam Aliyu A. Yusuf and Audu Ajide Agboola in which the trial court had dismissed the suit and entered judgment in favour of the defendants/counter-claimants on the 11th of May 1999. The plaintiffs (hereinafter referred to as the appellants) had at the trial court claimed against the defendants (hereinafter referred to as the respondents) as per paragraph 14 of the amended Statement of Claim the following reliefs: -

\\"1. A declaration that the purported appointment of the 2nd defendant by the 1st defendant is null and void as it is against the native law and custom of Akogun family of Babanla

2. A perpetual injunction restraining the 1st defendant from further recognising and from further dealing with the 2nd defendant as Akogun of Babanla.

3. A perpetual injunction restraining the 2nd defendant from further parading himself and acting in the office of Akogun of Babanla.\\"The defendants sub-joined a counter-claim to their further amended statement of defence - and in paragraph 34 thereof, they counter-claimed against the plaintiffs/appellants as follows: -

\\"1. A declaration that the Chieftaincies of Akogun compound in Babanla are hereditary and are limited and exclusive lo the respective families of the compound as follows: -

Akogun Chieftaincy

Ikukominlola Family

Akaponna & Asaulu Chieftaincies

Ogtmbiyi Family

Asoni Family.

2. A declaration that Chief Audu Agboola Akogun is the present Akogun of Babanla having been properly appointed and installed as such under native law and custom of Akogun Chieftaincy of Babanla.

3. A perpetual injunction restraining the plaintiffs/ defendants to counter-claim - their privies and successors from claiming any right to the Akogun Chieftaincy of Babanla and from further challenging and/or disturbing the 2nd defendant in the performance of his functions and enjoyment of the perquisites of office.\\"The final amended pleadings fided, with the leave of court, and exchanged between the parties arc the amended statement of claim and further amended statement of defence and counter-claim. Both sides called evidence in proof of the averments contained in their respective pleadings. And sequel to the addresses of the different counsel to both sides, the learned trial judge, in a reserved judgment delivered on the 11th of May 1999, dismissed the plaintiffs/appellants\ suit in toto but upheld the counter'claim of the defendants/respondents. Being dissatisfied with the said judgment, the plaintiffs now the appellants appealed to the court below via a Notice of Appeal, dated 20th July 1999 but filed on 21st July 1999 which Notice contains ten grounds of appeal. Distilled therefrom for determination by the court below are three issues formulated by the appellants and set out on page 171 of the record. For their part, the respondents raised only two issues for determination by the court below; they are contained on page 196 of the record. Sequel to the adoption of the briefs of the parties by their respective counsel, the court below, in a reserved judgment delivered on the 14th June 2001, dismissed the appeal. Again being dissatisfied with the judgment of the court below, the appellants are now approaching this court by a Notice of Appeal dated 12th September 2001.Three issues were raised by the appellants for determination by this court and as set out in their brief of argument, they are in the following terms: -

\n1. Whether the court below was correct to have upheld the way and manner the learned trial judge ignored the principles enunciated in the case of *Kojo v. Bonsie* (1957) 1 WLR 1223 at 1226 and whether this has not led to a miscarriage of justice in this case against the appellant.

2. Whether having regard to the evidence tendered by the parties and the numerous material contradictions in the case of the respondents and when from the totality of the case of the parties the respondents' case ought to fail.

3. Whether the court below was right to have agreed with the trial court picking and choosing from the testimonies of the witnesses for the respondents, speculate on facts not before him and decided not to countenance all the arguments advanced on Exhibits P1 and P2 as canvassed under issue No. 3 at the court.\nFor their part, the respondents formulated two issues for determination by this court, as contained in their brief of argument, they are as follows: -

\n1. Whether in view of the apparent conflict in the evidence of traditional history of the parties, the Court of Appeal was right in affirming the decision of the trial court which applied the principle in *Kodjo v. Bonsie* in the determination of this matter.

2. Whether the judgment of the Court of Appeal, which upheld the findings of facts by the trial court, was supported by evidence.\nWhen this appeal came before us on the 12th of February 2007 for argument, Mr. Eleja, learned counsel for the appellants referred to and adopted his clients' brief of argument filed on the 16th of May 2003 and urged us to allow the appeal. Mr. Daramola, learned counsel for the 12th of February 2001 and urged this court to dismiss the appeal. A careful examination of the issues raised by the parties leaves me in no doubt that issue No. 1 on the appellants' brief is similar to issue No. 1 in the respondents' brief and therefore both can be taken together. While issues Nos. 2 and 3 on the appellants' brief can be taken along with issue No.2 on the respondents' brief. I shall therefore treat the issues in the order I have set out. On issue No. 1, the appellants in their brief, argued that the trial judge did not properly apply the principle enunciated in *Kodjo v. Bonsie* (1957) 1 WLR 1223 although he (the judge) had correctly stated the principle in that case in the body of his judgment; this submission, they set out to justify by quoting a number of holdings of the trial judge which the court below confirmed, although the two courts (the court of first instance and the court below) did not state expressly in their judgments adding that the fact that after Ogunbiyi, from the lineage of the appellants, his (Ogunbiyi) successors to Akogun of Babanla title were from Bogun lineage was not such recent act from which to test the testimonies as, according to them, the testimonies of the respondents were contradictory and, they further argued, contradictory and unbelievable evidence cannot constitute facts or acts in recent years with which to test conflict in traditional evidence. The rule in *Kojo v. Bonsie*, it was finally submitted on this point, was not properly articulated by the two courts below; reliance being placed on decisions in (1) *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 and (2) *Olanrewaiu v. Gov. of Oyo State* (1992) 9 NWLR (Pt. 265) 335 at 360 and 361. For their part and in their brief of argument, the respondents submitted that the parties gave conflicting traditional evidence of who the founder of the Chieftaincy of Akogun of Babanla was and how that Chieftaincy title was founded. And after reviewing the evidence led at the trial court, they further submitted that the evidence, which the trial court believed was not evidence of traditional history but evidence of the acts of the witnesses who said they saw and, partook in the recent activities. The court below (Court of Appeal) was therefore right, after reviewing the whole case, in upholding the decision of the trial court; while placing reliance on decisions such as (1) *Jariah v. Goodhead* (1997) 4 NWLR (Pt. 500) 453 and (2) *Oladoye v. Adm. Osun State* (1996) 10 NWLR (Pt. 476) 38 at 60-61. I shall begin the consideration of these two crucial but similar issues by saying that the fundamental point that calls for determination in this appeal is whether the Chieftaincy title of Akogun of Babanla is exclusive to Ikukomilola (Bogun) family of Akogun compound or whether the Ogunbiyi family living in the same compound are also entitled to it. The case of the plaintiffs/appellants as could be gleaned from their pleadings is that the Akogun title is exclusively the affairs of Akogun family which title is that of a compound; the first Akogun of Babanla was Ogunbiyi who according to them was the founder of Akogun of Babanla. It was also their case that Bogun family who adopted the name Ikukomilola was a guest of Akogun family; he got integrated into the family and although he was allowed to assume the title of Akogun no member of his family was ever allowed to hold the title or assume the authority of the/head of Akogun family. On the other hand, the case of the defendants/respondents as could be gathered from their further amended statement of defence and counter'claim is that the plaintiffs/appellants only belong to Akogun Compound of Babanla and that Akogun family is exclusively the family of the 2nd defendant/respondent; that Akogun Chieftaincy title, the, subject-matter of this suit is a native Chieftaincy of Babanla and it is hereditary; that Ikukomilola was the first Akogun of Babanla and all subsequent Akoguns of Babanla up to the 2nd defendant/respondent have been his (Ikukomilola) descendants. Ajogbejo Ogunbiyi, the progenitor of the plaintiffs/appellants took refuge under Ikukomilola as he was then been pursued by Emir of Lafiagi. The intervention of Ikukomilola resulted in the Emir of Lafiagi forgiving Ogunbiyi. Neither members of Ogunbiyi family nor members of

Asuni family who were settled by Oba Dada with Ikukomilola were entitled to become Akogun of Babanla and that issue of plaintiffs/appellants family were ever presented for the title, which has never been in dispute. A period of 30 years elapsed before the installation of Akogun Adeniyi who was very young at the death of Akogun Ikukomilola, his father; although there were many grown up men in the family of the plaintiffs/appellants during the period of interregnum but because this family were not entitled to become an Akogun, none was presented from them. Going by the case presented by each party, both of them are relying, for the success of their different cases, on traditional history. Then, what was the evidence led before the trial judge' PW1 - one Hassan Alade Salawu under cross-examination said: -"At the meeting of the Ogunbiyi family for the selection and appointment of an Akogun, people who are not members of the Ogunbiyi family are normally considered for selection.".....The chieftaincy title of Akogun was first established by Ogunbiyi who donated the title to Bogun his visitor. The title was meant to be hereditary but was donated to Bogun by Ogunbiyi whom Bogun served very faithfully. Ogunbiyi said that the title should be extended to Bogun after he (Ogunbiyi) would have died.'I pause to say that the first leg of the reliefs \Sought by the plaintiffs/appellants wherein they claim for a declaration that the purported appointment of the 2nd defendant (a confirmed member of Bogun and/or Ikukomilola family) cannot stand since they (appellants) \said that even though the title of Akogun is hereditary, it was donated to Bogun by Ogunbiyi who even went on to make a declaration that after his (Ogunbiyi) death, the title should still be extended to Bogun. That evidence by Hassan Alade Salawu is an admission against interest. Continuing his evidence, Salawu said: -'I am not surprised that a hereditary title was donated to a non member of the family entitled to (he Akogun ChieftaincyI agree that after Ogunbiyi no member of the Ogunbiyi family has ascended the Akogun stool.....After Ogunbiyi's reign as Akogun, there was a long gap between the reigns of Bogun and Lawani. For that long period of time there were suitable candidates in the Ogunbiyi family but they were not appointed as AkogunMr. Ogunbiyi family had not presented any candidate to the 1st defendant for appointment as Akogun before 1994. My family did not protest the appointment of the 2nd defendant to the chiefs in Babanla apart from the 1st defendant. I now say my family protested his appointment to the other chiefs in Babanla who directed my family to the 1st defendant as the appointor of the Akogun.'PW2 - Muhammed Alabelapo who was a member of the appellants' family in his testimony under cross-examination said: -"After Ogunbiyi who was the first Akogun of Babanla, the title went to Bogun to whom he had donated the title.'PW3 - Kadiri Alabelapo Akogun in his evidence said: -"After the death of Bogun there was a long gap before Adeniyi was appointed. My Ogunbiyi family did not nominate anybody as Akogun during that time. There were able-bodied persons in my family who could then be made Akogun but some of them refused because they had embraced Islam and they with (sic) their religion.".....The interregnum did not occur because there was no appointable person in my family.'DW2 was Abolarin Bsiwain, a man of about 120 years old; in his testimony he said:"Akogun compound comprises three distinct families. The three families are Ikukomilola, Ogbe and Okudeji.'DW2 -Kadiri Ashoni said: -

"There are three distinct families in Akogun Compound. They are Akogun, Ikukomilola Ogunbiyi Ajogbejo and Ashoni families".....Although members of the three families live in the same Akogun Compound, each family came separately to live with Akogun, Ikukomilola in the town from different places. Akogun Ikukomilola was the first to found the compound ... Akogun. Ikukomilola was the first Chief in Akogun Compound.".....After Akogun Ikukomilola was Akogun Adeniyi, then Akogun Lawani and Akogun Audu (2nd defendant) Ogunbiyi was never an Akogun in Babanla."DW4 - Yusuf Arojjoye II the Oba of Babanla - the 1st defendant/respondent in this case stated in his evidence: -"The Akogun in Babanla is a kingmaker and the title is hereditary. It is a chieftaincy title for Ikukomilola family in Babanla. No other family is entitled to that chieftaincy. Ikukomilola was the first person in Babanla to ascend the stool of Akogun of Babanla

".....There have been three other Akoguns in Babanla after Ikukomilola. They are Adeniyi, Lawani and Audu Ajide. They are all members of Ikukomilola family. I know the plaintiffs. They are members of Ogunbiyi family. The plaintiffs have no connection with Akogun chieftaincy.".....The plaintiffs are not entitled to the Akogun Chieftaincy title because they are not descendants of Ikukomilola and are not members of the same family as the Ikukomilola family. ".....After the death of Ikukomilola the title of Akogun of Babanla was vacant for over 30 years and nobody ascended the stool because the children of Ikukomilola were not of age. There were grown up people in Ogunbiyi family at that time yet none of them vied for the vacant stool of Akogun of Babanla.This was because the older generation of Ogunbiyi family knew that they were not entitled to the Akogun Chieftaincy.'It is clear that the evidence presented by both parties constitutes conflicting and inconclusive historical accounts. One thing that emerges from this case is that when traditional history is put forward by the parties, it is imperative that a clear and positive statement should be made by the trial judge showing which story he (the learned trial judge) accepted and which side he disbelieved before any

finding is made. This is called the trial of the issue before a finding is made one way or the other. The trial judge was of the clear view while evaluating the evidence that the account of traditional history as narrated by both parties vis-à-vis their respective claims to entitlement to the Akogun Chieftaincy is inconclusive when he said: -"The evidence of traditional history as narrated by both parties in this case in relation to their families' entitlement to the Akogun Chieftaincy is inconclusive."The trial judge following the above statement now proceeded to consider what facts or acts, if any, exist in recent years in order to determine which of the two versions is more probable. The crucial issue is which of Ogunbiyi family or Bogun (Ikukomilola) family is entitled to the Akogun Chieftaincy. I pause here to say that while it is forbidden, in law, for a trial judge to resort to the use of the rhetoric terms "I believe" and "I don't believe" in resolving the conflict, the conventional duty of a court of trial in assigning probative value to the evidence adduced and making findings predicated on the totality of the evidence by the parties, must not be lost sight of. The learned trial judge then made the following findings: -"There is evidence from the defence, which I believe, that Adeniyi from Ikukomilola family was the Akogun after Bogun and was succeeded by Lawani also from Ikukomilola Family. I find that it could not be mere coincidence that Bogun, Adeniyi, Lawani and Audu Ajide, all from the same lineage to the exclusion of any member of Ogunbiyi family were installed as Akogun of Babanla in that order after the death of Ogunbiyi if the title actually belonged to Ogunbiyi family and was merely donated to Bogun. My conclusion is that Bogun (Ikukomilola), Adeniyi, Lawani and Audu Ajide have been the Akogun in Babanla and that Ogunbiyi was never an Akogun in that town. I find that the Ogunbiyi family is not entitled to the Akogun of Babanla Chieftaincy and that no member of that family has ever ascended or aspired to ascend the stool """"I therefore find that Akogun Chieftaincy in Babanla is hereditary and exclusive to Ikukomilola or Bogun family. I find that Ogunbiyi family is only entitled to Ajapenna and Asanlu Chieftaincies""..

Having found that the Ogunbiyi family has no relationship with the Ikukomilola or Bogun family and therefore does not belong to the ruling family for the Akogun Chieftaincy, I found that the same Ogunbiyi family cannot have any business nominating, selecting or presenting any candidate to fill any vacancy in that stool by native law and custom."""""I find the counter-claim of the defendants established and I hold that the 2nd defendant, Audu Ajide Agboola was rightly nominated by his Ikukomilola family and duly presented by Salami Oloto the Bale and Head of that family accompanied by other members of the family to the 1st defendant who appointed him in accordance with the native law and custom of Akogun Chieftaincy. On the preponderance of available evidence and on the balance of probabilities, the plaintiffs' claims fail in their entirety and are dismissed. The counter-claim of the defendants succeeds and I accordingly declare that Audu Ajide Agboola (2nd defendant) is the present Akogun of Babanla..."The court below, in appraising the judgment of the trial court vis-à-vis the evidence led before it and the findings together with the conclusion reached, said: -"Having gone through the evidence of both parties contained in the record of proceedings, it is my considered view that that evidence of uninterrupted succession of the 2nd respondents' family at all times within living memory qualifies as evidence of a long interregnum of over 30 years during which the appellants' family could have filled the vacancy if they were entitled to the throne but this was not to be so until a candidate of the 2nd respondent became of age and was appointed to occupy the stoolWhat is more since both parties agreed that two or three from the defendants/respondents' side ascended the throne, this becomes evidence of recent past which buttressed the fact in the defendants' traditional history that only their own side can ascend the throne. With the above evidence of recent past, the learned trial judge was on the right course when at page 145 of the records he averred thus: -I find the evidence of the defence more probable than that of the plaintiff """"In the circumstance I resolve this 1st primary issue also in favour of the respondents and against the appellants."The appellants have vigorously attacked the judgment of the trial judge on the ground that it fell back on the phrase "I believe" which he (the trial judge) had, in the course of his judgment, said he was going to discard in the application of the rule in *Kodjo v. Bonsie*. I cannot bring myself to be persuaded by this tenuous argument. A careful reading of the whole record shows conclusively that what the learned trial judge believed was not the traditional evidence but the testimonies as they relate to the acts within recent memory which the witnesses said they saw and partook. The judgment of the court below, which cannot be faulted, made this point vividly clear. This approach is in line with the decisions of this court in (1) *Oladoye v. Administrator, Osun State* (1996) 10 NWLR (Pt. 476) 38 and (2) *Chikere & ors v. Okegbe & ors* (2000) 12 NWLR (Pt. 681) 274. The court below was absolutely right in not interfering with the judgment of the court of first instance. I therefore do not hesitate in answering issue No. 1 on each of the appellants' brief of argument and the respondents' brief of argument in the affirmative. And I do so.I now proceed to issues Nos.2 and 3 in the appellants' brief and issue No.2 on the respondents' brief. The main complaint in issue No.2 on the appellants' brief is that having regard to what they called numerous material contradictions in the evidence presented by the respondents, the trial court ought not to have allowed the counter-claim of the defendants/respondents, and the court below should have so held and

consequently dismissed the counter-claim. It is true that pieces of evidence from the defendant/counter-claimants/respondents as to the names of the three families that made up Akogun's family in Babanla are conflicting; while one witness gave the names as Ikukomilola, Ogunbiyi and Asoni, another gave the names as Ikukomilola, Ogbe and Okudeji and yet another witness gave the names as Akogun Ikukomilola, Ogunbiyi ajogbejo and Ashoni families. Yes, they contradicted themselves as to the names given, but these contradictions are absolutely immaterial contradictions as to the determination of who is entitled between Ikukomilola (otherwise called Bogun) and Ogimbiyi to the Akogun Chieftaincy. Those contradictions are of no consequence. Similarly, the evidence of DW1 to the effect that one Ataba was the progenitor of the appellants' family is absolutely irrelevant to the determination of the fundamental issue identified supra. No use was made of that evidence by the trial judge; "Ataba" was not pleaded and by not making use of it in his judgment, the trial judge had ignored it. The crucial issue which is who between Ikukomilola and Ogimbiyi was entitled to the Akogun Chieftaincy was adequately and satisfactorily determined by the trial judge based on the credible evidence before him. And based on what I have said supra, the court below - an appellate court though possessing the power to intervene and set aside any findings which are perverse on the face of the records - is right in not interfering with the evaluation of the evidence by the trial judge; as I have said the findings of the trial judge cannot be faulted, issue No.2 on the appellants' brief is thus answered in the affirmative; that is against the appellants, while I resolve issue No.2 in the respondents' brief in their favour. On issue No.3 on the appellants' brief, I do not want to repeat myself, on what I have said about the evidence of DW1. Suffice it to say that the evidence is not material to the determination of this case. The appellants - have made heavy weather of Exhibits P1 and P2 tendered in the course of trial. Exhibit P1 captioned "Statutory Declaration of Age" relates to Audu A. Akogun, the second respondent, that Exhibit put his age at 35 years when it was sworn to in May 1984; while Exhibit P2 dated 30th August 1989 is the M.C.E. final examination result of one Kadri A. Akogun as given by Kwara State College of Education. To my mind, the trial judge was right in not attaching any evidential value to them. And the court below was on a firm terra in ignoring them. Issue No.3 is, consequently resolved against the appellants. In conclusion, it is my judgment that this appeal is unmeritorious. It must be dismissed. I hereby affirm the judgment of the court below upholding the counter-claim, as did the trial court. And I affirm the judgment of the court below which upheld the trial court's verdict dismissing the plaintiff/applicants' suit in toto. For the avoidance of any doubt, this appeal is hereby dismissed with N10,000.00 costs in favour of the respondents but against the appellants.

Judgment Delivered By

Aloysius Iyorgyer Katsina-Alu, J.S.C.

I have had the advantage of reading in draft the judgment delivered by learned brother Aderemi J.S.C. I agree with it and for the reasons he gives, dismiss the appeal. I abide by his order as to costs.

Judgment Delivered By

Niki Tobi, J.S.C.

This is yet another chieftaincy dispute. It is a regular dispute in the courts. Nigerians love chieftaincy titles. They parade themselves in them when they have the slightest opportunity to do so. They can hardly part with them when they are convinced that it is theirs. But the point is that no two parties are entitled to one chieftaincy title at any one given time and moment. And so the litigations will go in favour of one of the parties. This one is in respect of the Akogun Chieftaincy title of a town called Babanla in Kwara State. In this case, there are claims and counter-claims. The appellants as plaintiffs claim title to the chieftaincy. The respondents as defendants also lay similar claim to the chieftaincy. To them, it is hereditary and not limited and exclusive to the respective families. They sought a declaration that Chief Audu Agboola Akogun is the present Akogun of Babanla having been properly appointed and installed as such under native law and custom of Akogun Chieftaincy of Babanla. The appellants do not agree with that. To them, appointment of Chief Akogun is null and void as it is against the native law and custom of Akogun family of Babanla. As it is, both parties rely on the customary law or custom of Akogun family of Babanla.

The learned trial Judge dismissed the claim of the appellants. He granted the counter claim of the respondents. An appeal to the Court of Appeal was dismissed. They have come to this court. As usual, briefs were filed and duly exchanged. The appellants formulated three issues. The respondents formulated two issues. The case of the appellants is that the learned trial Judge ignored the principles enunciated in the case of *Kodjo v. Bonsie* (1957) 1 WLR 1223 and the Court of Appeal was wrong in upholding the decision of the trial court, particularly on the issue of conflicting evidence. It is also the case of the appellants that the Court of Appeal was wrong in upholding the decision of the trial court on the face of the numerous material contradictions in the case of the respondents. The final issue is that the Court of Appeal was wrong in agreeing with the trial court picking and choosing from the testimonies of the witnesses of the

respondents, speculate on facts not before the court and decided not to countenance all the arguments advanced in Exhibits P1 and P2. The case of the respondents is that the learned trial Judge was right in resolving the conflicting traditional evidence by resorting to the rule in *Kojo v. Bonsie* (supra). It is also the case of the respondents that the judgment of the Court of Appeal, which upheld the findings of fact of the trial Judge, was supported by evidence before the court. As it is the rule in *Kojo II v. Bonsie* (supra) is the "focus, centre pin and fulcrum of so much of this appeal; let me therefore begin with the rule. Lord Denning stated the rule as follows in that Ghanaian case (at the material time) *Gold Coast* at page 1226: "Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable." The rule entails so much. In the first place, the rule can only apply and therefore be invoked where a case involves traditional history. In other words, the rule can only be invoked if the parties lead evidence as to title on the basis of traditional evidence spreading through the years to an ancestor or an ancestral home in the occupation of a virgin land. In such a case, the chain of traditional evidence must flow; the story must be consistent in the sense of oneness of: purpose and not disconnected or disintegrated in material particulars. Where the story is punctuated with material contradictions, the trial Judge is entitled to disbelieve the evidence. There is also the reverse position and it is this. Where traditional evidence is so accurate to the minutest detail in the sense of mathematical accuracy, the trial Judge is entitled to suspect the veracity or authenticity of the evidence. This is because there is a possibility of some tutoring at the pre-trial stage. How can evidence of hundred years be that exact to the smallest detail? In human life, the memory fails and in these times of racing economic inflation resulting in poverty, memories fail more regularly. For two or more witnesses to give an account by way of traditional evidence to the smallest or minutest detail should expose such evidence to the suspicion of the court. Lord Denning correctly stated that although there could be conflict in the traditional evidence of both parties, there is the possibility that both parties honestly believe in the evidence they give. This is because the evidence they give is the one passed to them from generation to generation. Parties normally have sentiment or emotions for their cases and such sentiments and emotions may give rise to a slant, which may not necessarily be a lying product as far as the witness is concerned. That explains why Lord Denning said that there could be a mistaken belief but the witness is honest in the belief. What will the trial Judge do in such a situation or circumstance? Lord Denning correctly said that the trial Judge should place the traditional evidence side by side with facts in recent times in his search for the truth. Lord Denning did not define what he meant by "recent times". Of course, he cannot or better, he should not. What amounts to "recent times" will be determined in the light of the facts of the case and not in vacua or in a vacuum. It will depend on the facts of a given case. But the trial Judge should know that recent really mean recent. I do not think I have said anything useful. The dictionary meaning of recent is "having happened or came into existence only a short time ago as one can talk of recent history". But the dictionary meaning will be of not much use if it is interpreted to convey the adverb "recently" as not long ago. I will be more comfortable if the expression "recent years" means years outside the traditional history which events are more concurrent than the traditional history. For instance, asserting title or ownership on the land in dispute after the traditional history, should qualify as evidence of recent history, although the evidence of asserting title or ownership was quite some years ago. The point I am struggling to make is that any act of title or possession coming after the traditional history should qualify as evidence of recent years. I do not want to interpret the word "recent" in the dictionary as event that happened on a short time ago. Although the expression, a "short time ago" is fluid and generic and not capable of a precise meaning and interpretation, it seems to have the connotation of nearness more than the construction I have placed on the expression above. Lord Denning again correctly stated that in the situation in *Kojo* demeanour is little guide to the truth. He was modest. I will say that demeanour is of no guide at all in, such a situation to the truth searching process. Demeanour, in the context of a witness, relates to his physical appearance, his outward bearing or behaviour in court. This, the court sees from the way he talks, in a particular situation to a particular question, his mannerisms and habits here and there. If the witness is a vocal talker and he talked aggressively during examination in-chief but he suddenly mellows down or even stammers in cross-examination, the court is entitled to ask: why the sudden change? But in evidence of traditional history, the trial Judge cannot see that. After all, witnesses put all the enthusiasm and zeal when they give evidence of what they saw or have seen and that instinctively show expression in their demeanour. But the position is not so when they give evidence of dry and drab history passed to them by generational ancestors that they did not see or hardly know their names. The evidence is almost a dead story and demeanour therefore cannot assist the trial Judge. I entirely agree with Lord Denning. Having predicated the rule in *Kojo* in what I think in a proper perspective, I should take the evidence to see who is right: appellants or respondents.

Learned counsel for the appellants quoted the following passage from the judgment of the learned trial Judge at pages 143 and 144 of the Record: "This conflict in traditional evidence cannot be resolved by merely saying I believe the evidence of one side and disbelieve the other without actually testing such evidence against the background of other facts as established by the totality of the evidence on record in order to be able to decide which version of the traditional evidences to accept as the more probable." Learned counsel tried to fault the trial Judge, contending that the Judge "curiously used the expression "I believe" which he had rightly earlier held had no place under the rule in *Kojo II v. Bonsie* (supra). With the greatest respect, counsel got it all wrong. The learned trial Judge used the expression, "I believe" in the course of his evaluation of facts of recent years and I know of no law, which says he cannot do so. Perhaps the point I am making will be clearer if I quote what the learned trial Judge said at page 145 of the record: "There is evidence from the defence, which I believe, that Adeniyi from Ikukomilola family was the Akogun after Bogun and was succeeded by Lawani also from Bogun; Adeniyi, Lawani and Audu Ajide all from the same lineage to the exclusion of any member of Ogunbiyi family were installed as Akogun of Babanla in that order after the death of Ogunbiyi if the title actually belonged to Ogunbiyi family and was merely donated to Balogun. My conclusion is that Bogun (Ikukomilola), Adeniyi, Lawani and Audu Ajide have been the Akogun in Babanle and that Ogunbiyi was never an Akogun in that town." That takes me to the submission of learned counsel for the appellants that the rule in *Kojo* says that a declaration cannot be made or based on mere admission made by a party. This is in apparent submission to what the learned trial Judge said in respect of paragraph 9 of the Amended Statement of Claim which admitted that "from the time Akogun(s) have been appointed, they have always been presented to the Obas by the family head of Ogunbiyi..." On the basis of the averment in paragraph 9 thereof, the Judge said at page 145 of the Record: "To me this was an admission by the plaintiffs that Adeniyi was once an Akogun although he was not presented to the reigning Oba by the head of Ogunbiyi family." Contrary to the submission of learned counsel for the appellants, I do not see anywhere in the rule in *Kojo* which says that a declaration cannot be made based on an admission. Certainly the rule quoted above does not contain that. Admission of a party in law is the best evidence, in the sense that the opposing party need not make any effort to prove the admitted fact. A court of law is entitled to give judgment based on admission by a party if the admission is relevant to the facts in issue. See *Salmatu v. Biba* (1975) NNLR 176. In civil cases, admission by a party is evidence of the facts asserted against him. Unless explanations are given which satisfy the court that admissions should not be so regarded, due probative weight should be given to them as such. See *Okai Ayikai* (1946) 12 WACA 3. A party who admitted a fact in his pleading is bound by such admission and he is estopped from denying the fact admitted. Learned counsel for the appellants tried to fault the Court of Appeal when that court said at page 226 of the Record: "With the above evidence of recent past, the learned trial Judge was on the right course when on page 145 of the records he averred thus: I find the evidence of the defence more probable than that of the plaintiff." Counsel submitted that by the above the two courts below did not follow the rule in *Kojo v. Bonsie* (supra) because they did not identify or consider other fact or facts that existed in recent years to test the stories of the parties. With the greatest respect, learned counsel is wrong. The two courts below did consider other fact or facts that existed in recent years and there are clear findings and conclusion in the judgments that they did. I will deal with the second issue and I will be done. It is that there were numerous material contradictions in the case of the respondents, so much so that the Court of Appeal was wrong in upholding the decision of the High Court dismissing the appellants case and acceding to the counter-claim of the respondents, Learned counsel for the appellants submitted that the evidence of the respondents and two other witnesses was a great muddle, like a house divided against itself that ought to collapse but for the prop extended to it unwittingly by the trial Judge and sustained by the court below. This is a most unwarranted attack on the two courts. The duty of counsel is to place before this court in the best traditions of advocacy the case of his Client and not cast aspersions on Judges for no reason. That is bad advocacy and I so hold. If counsel had stopped in his submission that the case of the respondents was in a muddle, I will not raise any eyebrows because he is entitled to say so. Whether he is correct or not is a different thing. But to go further to submit that the trial Judge unwittingly assisted the respondents, an assistance that the Court of Appeal sustained, is to say the least, unfortunate. And what is more, there is no basis for the submission. In evidence of traditional history, conflicts and contradictions are bound to arise. This is because the parties are grappling with evidence of a long interregnum and history. And history has a way of changing as it passes from one hand to the other. If the changes are not material or substantial, the court will not pay any attention to them. It is only when the changes are material or substantial that the court will not assign probative value to the evidence. That is the position of the law, which says that conflicts and contradictions can only avail the adverse party if they are material or substantial. In other words, where contradictions are not material or substantial, the party will not suffer from them by denial of assigning probative value to them. And what is more, the so-called contradictions of the evidence of traditional history were cleared by the learned trial Judge by the application of the rule in *Kojo II v. Bonsie*

(supra). I think I can stop here. I need not take Issue No 3. In the light of the above and the more detailed reasons given by my learned brother, Aderemi, J.S.C., I too dismiss the appeal. I abide by his order as to costs.

Judgment Delivered By
Francis Fedode Tabai, J.S.C.

I had a preview of the leading judgment of my learned brother Aderemi, J.S.C. and I agree entirely with the conclusion that the appeal lacks merit. The case centres around the issue of evaluation. In his judgment the learned trial judge satisfactorily evaluated the evidence and found at page 146 of the record as follows: "There is evidence from the Plaintiffs which I believe that their Ogunbiyi family supported the candidature of the 1st Defendant as the Oba of Babanla. The 1st Defendant confirmed this when he said in his evidence in chief that he was a very friendly with the Plaintiffs' family and as such will not deny that family its entitlement and find (hat he did not entertain the Plaintiffs protest on the appointment of the 2nd Defendant as Akogu of Babanla because the Ogunbiyi family is not entitled to that chieftaincy. I therefore find that Akogu family in Babanla is hereditary and exclusive to Ikukomilola or Bogun family. I find that Ogunbiyi family is only entitled to Ajapona and Asanlu chieftaincies..."

The foregoing finding was supported not only by the Defendants/Respondents but also by the evidence from the PW1 PW2 and, PW3. And at page 225-226 of the record, the court below also examined the evidence on record and in its reaction said: "Having gone through (he evidence of both parties contained in the record of proceedings, it is my considered view that the evidence of uninterrupted succession of the 2nd Respondent's family at all times within living memory qualifies as evidence of long interregnum of over 30 years during which the Appellant's family could have filled the vacancy if they were entitled to the throne but this was not to be so until a candidate of the 2nd Respondent because of age and was appointed to occupy the stool..." On the whole there is no basis whatsoever for disturbing the concurrent findings of the two courts below. For the foregoing and the fuller reasons contained in the leading judgment of my learned brother, I also dismiss the appeal for lack of merit.

Judgment Delivered By
Ibrahim Tanko Muhammad, J.S.C.

The facts giving rise to this appeal were ably and concisely set out learned brother, Aderemi, J.S.C., in his leading judgment. I need not to same. One of the grudges of the appellants is that the court below ought have affirmed the decision of the trial court as the learned trial Judge ignored the principles of law enunciated in the case of *Kojo v. Bonsie* (1957) 1 WLR 1223 at page 1236 which occasioned a miscarriage of justice against the appellants. Now, what is the test established in the case of *Kojo v. Bonsie* (supra) 'When does it apply' It is clear from the pleadings that both sides: the appellants and the respondents, each, gave its own side of the traditional of the Chieftaincy in disputed. Let me start by answering the last question and in doing so I will only refer to the case of *Mogaji v. Cadbury Nig. Ltd.* (1985) 2 N.W.L.R. (Pt. 7) 393 at page 430 paragraphs G-H where this court held as follows: - "It is only where the conflict arises between the traditional history given by one side and the traditional history given by the other side that the test in *Kojo v. Bonsie* is resorted to in the ascertainment of the true history." As for the test or principle of law established in *Kojo v. Bonsie* (supra), I think, we should first have the benefit of the facts of the case and then be guided by the pronouncement of the Supreme Court on the matter. It was a suit concerning title to a piece of land at Bonkwaso in the Kumasi district of Ashante. It appeared to be a tract of forestland a few square miles in area. The present caretaker was one Kwadwo Bonsie, but he did not live on the land. He lived about 10 miles away at Nerebehi, but he had a cottage at Bonkwaso and visited it from time to time. He took all the profits from the land and handed them to his superior, the Odikro (Chief) of Nerebehi. Those profits consisted of tribute to his overlord, the Bantamahene (Head Chief of Bantama) whom he served. Such was the present position and, indeed, for some time past Bonsie and his ancestors had been caretakers who had paid tribute to the Odikro of Nerebehi who in turn had paid a proportion to the Bantamahene. Despite that long enjoyment by the present occupants, the Atwimahene (Head Chief of Atwima) now laid claim to the land. He lived many miles away at Kumasi: but he said that that piece of land at Bonkwaso was given to his ancestor as a reward for his services in the war against Abrimoro some 20 years ago. The Atwimahene gave evidence by way of traditional history about the war, identifying himself with his ancestors, and speaking as though i.e. himself was present in person. He told how the Bantamahene appointed him with other chiefs to chase Abrimoro and he got as far as Bonkwaso when he was stricken with smallpox and got no further, he was given the land at Bonkwaso as a reward for his services in that campaign. Three other chiefs, the Hiahene, the Akwaboahene and the Besiashene, supported his evidence, describing the campaign as if they themselves were there and it only happened yesterday. The Atwimahene said that, after the war, he gave a portion of the land away, but that he kept the rest (the part he claimed in this action)

and his hunters brought him venison, snails and fish from it. About 80 years ago, however, he became in need of money and borrowed '6 in gold dust from one Kwabena Tenteng of Nerebehi - who was not his subject but was staying on the land - and he said that he pledged this piece of land with Kwabena Tenteng to secure repayment, giving to Kwabena Tenteng the right to enjoy the profits of the land until the loan was repaid. When Kwabena Tenteng died successors of Kwabena Tenteng had continued to be caretakers on this land until in due course it came to the hands of the present caretaker Kwadwo Bonsie. In 1948 the Atwimahene sent bearers with '6 in money to be paid to Kwadwo Bonsie in redemption of the pledge: but Bonsie denied there was any such pledge. Thereupon the Atwimahene brought this action against Bonsie claiming a declaration of title to the land and an injunction. The Odikro of Nerebehi applied to become a party because he claimed to have an interest in the land and he was made a defendant. The defendants said that the land never belonged to the plaintiff but was given to the Odikro of Nerebehi at the end of the Abrimoro war. The Odikro of Nerebehi gave evidence, by way of traditional history, saying that he did not go with the first contingent (Hiahene, Akwaboahene and the other warrior chiefs) to chase Abrimoro, but that was sent later to search for the first contingent. He met them on the Supong stream as they were returning victorious. Afterwards he was given the land up to the Supong stream, which included the land at Bonkwaso now in dispute. The Bantamahene (the head clan chief of both contestants) supported the traditional history of the Odikro of Nerebehi. He said that at the end of the war 'I called Nerebehi Dikro and told him to take and possess the land up to the 'valuables on the land to be given a share thereof. Kwadjo Bonsie said that he and his ancestors had been caretakers of the land from time immemorial for the Odikro of Nerebehi. The case was tried at first instance in the Asantehene's B Court, consisting of three chiefs. They heard evidence on several days from February 27, 1950, to July 28, 1950, and eventually on August 4, 1950, found in favour of the defendants in a unanimous judgment delivered by the President, Nana Mensah Yiadom, Amakomhene. The plaintiff appealed to the Native Appeal Court (the Asantehene's A Court), consisting of three, head chiefs, who heard the case on several days and examined the parties in person. In the result on December 9, 1950, the appeal was allowed by a majority of two to one 'the Ankobiahene and the Akyempimhene being in favour of the plaintiff; and the Nkwantahene (the President of the court) in favour of the defendants. The defendants appealed to the Supreme Court (Land Court) at Kumasi (Wintor-Aubrey J.) who, on November 15, 1951, allowed the appeal and restored the decision of the Asantehene's B Court in favour of the defendants. The plaintiff then appealed to the West African Court of Appeal (Foster Sutton P. Coussy J. A. and Korsah J.) who, on January 9, 1953, dismissed the appeal. The plaintiff appealed to Her Majesty in council. The judgment of the lordships was delivered by Lord Denning who in his own clear; unambiguous terms stated, among other things, as follows: -'The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognized that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is title guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable' The point of dissimilarity to be noted between Kojo's case (supra) and, this appeal is that in Kojo's case the subject matter before the courts was land. In the present appeal, the subject matter is Chieftaincy affairs. Apparently, there is no correlation between the two. But what is significant and of interest to me is the remarkable statement of the law made by the Privy Council on conflicting traditional history in contrast with recent facts established by evidence. After having evaluated the evidence led before him by the parties the learned trial Judge found that the entire evidence had been based on traditional history. He went on to say: -'The evidence of traditional history narrated by both parties in this case and in relation to their families' entitlement to the Akogun Chieftaincy is inconclusive. To resolve the conflict in the traditional histories relied upon by both parties therefore, I shall proceed to consider what facts or acts, if any, exist in recent years to ascertain which of the two versions is the more probable.'

In the end, the learned trial Judge concluded as follows; 'I find the evidence of the defence more probable than that of the plaintiff.' Thus, on preponderance of evidence and on balance of probabilities the learned trial Judge found the plaintiffs' claim unmeritorious and dismissed same. He however entered judgment for the defendants on their counter-affidavit by granting all the declaratory reliefs sought. The court below affirmed the trial courts decision. In the rule established in Kojo v. Bonsie (supra) the lower court observed: -'As we narrated supra, the appellants contended that it was Ogunbiyi, their progenitor who was the founder of the chieftaincy which he brought from his homestead while the respondent affirmed that it was their progenitor Ikukomilola who founded the chieftaincy which he brought from his own homestead. From these claims we have conflicting and inconclusive evidence on this single issue. In consequence, the

Rule in *Kojo v. Bonsie* supra becomes applicable'. In his brief of argument, the learned SAN for the appellants (page 9) argued that the courts below did not state expressly in the judgments the recent acts they found proverb by the respondents to entitle them to succeed on their counter-claim. I do not have this view with the learned SAN. The trial court in several places stated clearly what the recent acts were and the court below summarized such recent acts in the following words: - 'Having gone through the evidence of both parties contained in the record of proceedings, it is my considered view that the evidence of uninterrupted succession of the 2nd respondents family at all times within living memory qualifies as evidence of a long interregnum of over 30 years during which the appellants' family could have filled the vacancy if they were entitled to the throne but this was not to be so until a candidate of the 2nd respondent became of age and was appointed to occupy the stool. Similarly on page 145 of the records the lower court after reviewing the evidence of both parties held as follows: 'To me, this was an admission by the Plaintiffs that Adeniyi was once an Akogun, although he was not presented to the reigning Oba by the head of the Ogunbiyi family). What is more since both parties agreed that two or three from the Defendant/Respondents, side ascended the throne, this becomes evidence of recent past which buttressed traditional history that only their own side can ascend the throne. With the above evidence of recent past, th'an the right course when on page 145 of the records he averred thus: -'I find the evidence of the defence more probable than that of the plaintiff'\This statement of the learned trial Judge was as a result of the text by the Judge of the traditional histories as given by the parties, by reference to the facts in recent years as established by the evidence of the parties and their witnesses supra.' Thus, in a plain and more mathematical language, the recent acts referred to in the judgments of the two lower courts found to be beyond dispute are;

- (1) Uninterrupted succession of 2nd respondent's family at all times within living memory.
- (2) Evidence of a long period of interregnum of over 30 years during which the appellants' family could have filled the vacancy if entitled, but could not do so.
- (3) That the stool had to wait for 2nd respondent to grow of age and occupy same which he did.
- (4) There was found by the trial court an admission by the plaintiffs that Adeniyi was once an Akogun. This, in law, as stated by learned brother, Aderemi, J.S.C., is an admission against interest and. is relevant. It binds the maker. See: Section 20(3) of Evidence Act Cap 112, LFN, 1990.
- (5) Again, it was not in dispute amongst the appellants that two of three from the defendants' side ascended the throne. These were evidence of recent past, which buttressed the fact in the defendants' traditional history that only their own side was entitled to the throne. I hardly can fault the concurrent decisions of the two lower courts on these points, which were well considered by them. For these and the fuller reasons adumbrated by my learned brother, Aderemi, J.S.C., I too find no merit in this appeal. I dismiss it. I abide by my learned brother's order as to costs.

Counsel

Mr. K. K. Eleja

with him

M. I. Hannatu

S. A. Oke

Miss J.I. Jacob

Miss B. M. Kawu For the Appellants

Olu Daramola

with him

Akin Akintan

Dolun Sowemimo For the Respondents