

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC171/2004

**Petitioner:** Festus Ibidapo Adesanoye, High Chief Akingbule, Attorney-General, Ondo State

And

**Respondent:** Prince Francis Gbadebo Adewole

Date Delivered: 2006-07-14

**Judge(s):** Idris Legbo Kutigi, Niki Tobi, George Adesola Oguntade, Mahmud Mohammed, Walter Samuel Nkanu Onnoghen.

## Judgment Delivered

The Osemawe of Ondo Chieftaincy Stool is the centre of this appeal. Sometimes in August 1991, the stool became vacant following the death of the occupant, His Royal Highness Oba Itiade Ade Kolurejo. The common Nigerian expression is that he has gone to join his ancestors, and so let me use that expression too, although I do not know where the ancestral home is. It looks to me like a bandwagon expression as in paragraph 5 of the Amended Statement of Claim and so I join the bandwagon. Nobody wants to say that an Oba is dead, just like that. To some, it is a taboo to say that.

That brought about the litigation. It is a common occurrence in Nigeria, in contemporary times. We fight for Chieftaincy Stools, at times when we know as a matter of fact and tradition that we had not the fortune to be born into royalty. Nigerians have a way of pushing themselves to things that have some reputation and fame and these days, one green area, if I may, use that expression, for want of a better one, is the Chieftaincy Stool. This is one of such fights. It started in 1991, some fifteen years ago.

Let me tell the story surrounding this litigation. Following the vacancy, the Secretary of Ondo Local Government wrote to the Leyo Ruling House which, the appellants claimed, was Ale Ruling House entitled to present a candidate to fill the vacant stool, to select candidates for presentation to the Kingmakers who would appoint the next Osemawe. Three candidates were presented by the Leyo Ruling House. They were Festus Ibidapo Adesanoye, 1st appellant, Francis Gbadebo Adewole, 1st respondent and Eric Adewole, now deceased. The Kingmakers at a special meeting convened for that purpose on 11th October 1991, elected Festus Ibidapo Adesanoye, 1st appellant, out of the three nominees of the Leyo Ruling House and presented his name to the then Military Governor of Ondo State for approval.

Following the approval of the 1st appellant for appointment as the Osemawe of Ondo, the 1st respondent filed an action claiming two declaratory reliefs and one order restraining the 1st appellant as 1st defendant from parading himself as Osemawe elect.

The case put forward by the 1st respondent is that the 1st appellant was, a great grandson/member of the Leyo Ruling House and that being so, he was not qualified to be appointed Osemawe and that his appointment was not in accordance with prevailing custom in respect of the Chieftaincy and section 8(e) of the Chiefs Edict No 11 of 1984.

The 1st appellant, on his part, contended that his appointment as Osemawe of Ondo was in accordance with the prevailing custom in respect of the Osemawe Chieftaincy, section 8(e) of the Chiefs Edict No 11 of 1984 and the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991.

The learned trial Judge, Obaremo J, gave judgment against the 1st respondent as plaintiff. He dismissed the action. The learned trial Judge held that the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991 had repealed the Osemawe of Ondo Chieftaincy Declaration of 1958 and that under the 1991 Declaration, the persons qualified to be proposed as candidates to fill a vacancy in the Osemawe Chieftaincy are members of the Ruling House of the male line only.

Dissatisfied, the 1st respondent appealed to the Court of Appeal. That Court allowed the appeal, holding inter alia that

the Osemawe of Ondo Chieftaincy Declaration 1991 could not possibly repeal the 1958 Declaration.

The appellants have appealed to this Court.

The appellants formulated the following issues in their brief:

'3.1. Whether the Court of Appeal was right in law in holding that the Osemawe of Ondo Chieftaincy Declaration 1958 was still applicable to the appointment of the 1st appellant.

3.2. Whether assuming that the Osemawe of Ondo Chieftaincy Declaration 1958 was applicable, the 1st Respondent has any locus standi to take the point or file this action.

3.3. Whether the 1st Respondent's pleading relied on the 1958 Declaration as contemplated by the Court of Appeal or his right had become vested under the Declaration before the 1991 Declaration took effect.'

The respondent formulated the following issues in his brief:

'3.1. Whether the 1st Appellant was qualified to be appointed Osemawe of Ondo under the Native Law and Custom pertaining to the Osemawe of Ondo Chieftaincy.

3.2. Whether the Respondent was competent to institute the action challenging the appointment of the 1st Appellant as Osemawe of Ondo.'

The respondent filed a cross-appeal and formulated the following issues for determination:

'a) Whether or not the provision in Section 26(1)(a) of the Chiefs Law O.D.S. No 11 of 1984 could have been invoked by the Court of Appeal in nullifying the appointment of the 1st Cross-Respondent as Osemawe of Ondo.

b) Whether or not the 1st Cross-Respondent would have been qualified to be appointed Osemawe of Ondo even if the Ondo Chieftaincy Declaration 1991 Exhibit O had been found to be applicable to the selection process.'

The following issue was formulated in the 1st and 2nd Respondents' brief to the cross-appeal:

'Whether or not the provision in Section 26(1)(a) of the Chiefs Law O.D.S. No 11 of 1984 could have been invoked by the Court of Appeal in nullifying the appointment of the 1st Cross-Respondent as Osemawe of Ondo.'

On Issue No 1, learned Senior Advocate for the appellant, Mr. F. O. Akinrele did not submit in clear language that the Osemawe of Ondo Chieftaincy Declaration 1958 was not applicable to the appointment of the 1st appellant; the fulcrum of Issue No 1. He dealt in some detail with the Ondo Chieftaincy Declaration, 1991. He traced the history of the 1991 Declaration to the Military Government of Ondo State where the Military Governor of Ondo State in the exercise of his power under section 6A of the Chiefs Edict, 1984, made the Declaration. He examined the retroactive nature of the Declaration and the issue of registration and came to the conclusion that the 1st appellant being a member of Leyo Ruling House of the male line was qualified to be appointed Osemawe of Ondo. He cited *Olatunbosun v. NISER Council* (1985) 3 NWLR (Pt. 80) 25; *Afolabi v. Governor of Oyo State* (1985) 2 NWLR (Pt. 9) 734 at 764; *Adesanoye v. Adewole* (2002) 9 NWLR (Pt. 671) 127; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 at 392 and *Ifezue v. Mbadugha* (1984) 1 SCNLR 427 at 447. He also cited seven other cases on interpretation of statutes.

On Issue No 2, learned Senior Advocate submitted that the 1st respondent, being a grandson of Aromorayi was not qualified to be appointed Osemawe of Ondo under the 1958 Declaration as the Declaration excluded grandson from the throne. To learned Senior Advocate, the 1st respondent lacked the locus standi in the matter as he failed to show or establish a direct interest in the throne. He cited *Momoh v. Olotu* (1970) 1 All NLR 117 at 123; *Adewunmi v. Attorney-General of Ekiti State* (2002) 2 NWLR (Pt. 751) 174 and *Oloriode v. Oyebi* (1984) 15 NSCC 286 at 292.

On Issue No 3, learned Senior Advocate pointed out that the 1st respondent did not plead the 1958 Declaration as the applicable Chieftaincy Declaration, which he intended to rely upon. Contending that parties are bound by their pleadings, learned Senior Advocate cited *NIPC v. Thompson Organisation* (1969) 1 All NLR 138 at 142 and 143; *Peenok Ltd. v. Hotel Presidential Ltd.* (1982) 12 SC 1; *Adeyemi v. Yori* (1976) 9-10 SC 31; and *Mobil Oil Ltd. V. Coker* (1976) 3 SC 176.

On the decision of the Court of Appeal in respect of vested right, learned Senior Advocate submitted that the 1st respondent had no legal right that can vest in him under the 1958 Declaration. He cited *Wilson v. Oshin* (2000) 9 NWLR (Pt. 673) 442. He urged the Court to allow the appeal.

Learned Counsel for the 1st respondent, Mr. Adegboyega Thompson, submitted on Issue No 1 that the customary law applicable is the customary law in existence at the time the cause of action arose and that customary law was the 1958 Chieftaincy Declaration which was in existence when the cause of action arose on 21st August, 1991 on the death of the previous holder of the title. He cited *Afolabi v. Governor of Oyo State* (1985) 2 NWLR (Pt. 9) 734 and 764 and *Lipede v. Sonekan* (1995) 1 NWLR (Pt. 374) 668 at 690.

Learned Counsel submitted that the repeal of the Osemawe of Ondo Chieftaincy Declaration 1958 by the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991 did not have any effect on the law applicable at the time the cause of action arose. He cited *Adesanoye v. Adewole* (2000) 9 NWLR (Pt. 671) 127 at 150 and *Uwaifo v. Attorney-General of Bendel State* (1982) 7 SC 124. The Osemawe of Ondo (Chieftaincy Declaration) Order 1991 could not have applied in the matter because by the date it was published, i.e. 24th October 1991, the respondent's action at the High Court had been filed. Since the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991 is a Statutory Order, it could only have taken effect from the date of its publication, Counsel further submitted. He cited *Popoola v. Adeyemo* (1992) 8 NWLR (Pt. 257) 1 at 25-26.

Counsel argued that having filed the action on 14th October 1991, the respondent already acquired a vested right with regard to the action of the Osemawe of Ondo (Chieftaincy Declaration) Order 1991 even though passed with retrospective effect; could not have affected the respondent's accrued right in the action. He cited *OHMB v. Garba* (2002) 14 NWLR (Pt. 788) 538 at 567. To learned Counsel, as far as the matter is concerned, the Osemawe of Ondo Chieftaincy Declaration 1958 was not affected by any provision in the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991.

Learned Counsel submitted that the Court of Appeal was right to have relied on the Osemawe of Ondo Chieftaincy Declaration, 1958. Citing *Jokanola v Military Governor of Oyo State* (1996) 5 NWLR (Pt. 446) at 14, learned Counsel submitted that once there is a registered Chieftaincy Declaration in place, it is to be regarded as the customary law. On the issue of pleadings, Counsel relied on what the Court of Appeal said and it is that the 1958 Ondo Chieftaincy Declaration need not be specifically pleaded if the plaintiff pleads that the 1st defendant was not qualified in accordance with the custom.

On the 1991 (Chieftaincy Declaration) Order, learned Counsel submitted that the Order does not apply in the case. He pointed out that the Order was not duly registered, a situation which was contrary to the provision of section 6(2) of the Chiefs (Amendment) Edict) 1991. Counsel contended that it is unnecessary to repeal the provision of section 6(2) of the Chiefs Law 1984 in the Chiefs (Amendment) Edict 1991 because the latter forms part of the former. On whether section 6(2) of the Chiefs Law, 1984 was repealed, Counsel contended that it was not; arguing that a statute cannot be repealed by implication but must do so specifically and clearly. He cited *Asimi Nig. Ltd. v. LBRD Authority* (2002) 8 NWLR (Pt. 769) 349 at 364.

Taking the issue of retroactivity of the Osemawe of Ondo Chieftaincy Declaration Order 1991, learned Counsel argued that as the 1991 Order is a subsidiary legislation, which derives its validity and authority from the Chiefs Law, 1984, as amended by the Chiefs (Amendment) Edict 1991, the 1991 Order does not have the capacity to extend such authority. He cited *Secretary Iwo Central Local Government v. Adio* (2000) 8 NWLR (Pt. 667) 115 at 131. Accordingly, the 1991 Order cannot have retrospective operation in that the Chiefs Law, 1984 which gives it validity clearly states in section 6(2) that a Chieftaincy Declaration made under it will come into force only after it has been registered. Conceding that

some provisions of the 1991 Order provide for retroactivity where vested rights are not affected, he argued that others in the same statute may be prospective. He cited Ibrahim v. Barde (1996) 9 NWLR (Pt. 474) 513 at 577.

Learned Counsel submitted that as Exhibit O, the Osemawe of Ondo (Chieftaincy Declaration) Order 1991, is inexhaustive of the customary law, it is the requirement of the law that oral evidence of custom be given to fill the lacuna in the Declaration. He cited Edewor v. Uwegba (1987) 1 NWLR (Pt. 50) 313 at 345 and Lipede v. Sonekan (1995) 1 NWLR (Pt. 374) 668.

On Issue No 2, learned Counsel submitted that the 1st respondent, having taken part as one of the candidates in the contest in which the 1st appellant was appointed Osemawe of Ondo, had locus standi to institute an action challenging the decision of the Kingmakers on the ground that the 1st appellant was not qualified by custom to be so appointed. He relied on the Statement of Claim and the decision of Owodunni v. Reg. Trustees of CCC (2000) 10 NWLR (Pt. 675) 315 at 335. He submitted that the issue of locus standi should be decided on consideration of the plaintiff's pleadings only. Relying on Thomas v. Qlufosoye (1985) 3 NWLR (Pt. 13) 523 at 536, learned Counsel pointed out that the issue of disqualification of the respondent under any law or custom was not raised in the Statement of Claim. He urged the Court to dismiss the appeal.

Learned Counsel for the cross-appellant, Mr. Adegboyega Thompson, submitted on Issue No 1 of the Cross-appellant's brief that even if the 1958 Chieftaincy Declaration is inapplicable for any reason whatsoever, what should be applied in determining the qualification of candidates to the Chieftaincy is evidence of custom as stipulated by section 26(1)(a) of the Chiefs Law on the ground that at the time the vacancy occurred, i.e. on 21st August 1991, Exhibit O had not yet become operative.

Taking Issue No. 2, learned Counsel submitted that the oral evidence before the Court, which was not challenged, was that the 1st appellant was not qualified by custom, he being a great grandson of a previous title holder. He urged the Court to allow the cross-appeal.

Chief Akinrele, SAN, submitted on Issue No. 1 that the Court of Appeal could not have invoked section 26(1)(a) of the Chiefs Law to nullify the appointment of the 1st appellant in view of the provisions of section 24(1)(a) and (2)(a) of the Chiefs Law. He pointed out that as at the date of the death of the former Osemawe on 21st August 1991, the 1958 Declaration ought to have been submitted by the Secretary to the Chieftaincy Committee to the Commissioner for approval and registration before it could regain its efficacy. Accordingly, by the operation of section 24(2)(a) of the Chiefs Law, the 1958 Declaration ceased to have effect, thus became inoperative.

An existing Declaration submitted for re-approval and re-registration does not automatically gain such re-approval and re-registration because section 24(2)(b) of the Law makes the provision of section 3 of the Law applicable to such application and the section invests upon the Executive Council with a discretion as to whether or not such Declaration should be approved, learned Senior Advocate submitted.

On the evidence of custom, learned Senior Advocate submitted that the best evidence of custom as at the date of the death of the former Osemawe was the Morgan Chieftaincy Report, Exhibit L, on the issue. Counsel pointed out that it was Exhibit L that eventually crystallized into Exhibit D, the 1991 Declaration, hence the latter was given a retrospective effect.

On Issue No. 2, learned Senior Advocate submitted that the argument of Counsel for the respondent in the cross-appeal, regarding the qualification for appointment as Osemawe, failed to draw a distinction between the word, "suitability" used in Paragraph (V)(f) of the Schedule to the 1991 Declaration and the word "qualification" under Paragraph 111 of the same Schedule. He examined the difference in the brief.

Disagreeing with Counsel for the cross-appellant that there is a lacuna in Paragraph 111 of the Schedule to the 1991 Declaration, learned Senior Advocate contended that the Court only need to invoke its interpretative jurisdiction to arrive at the meaning of the words used in the paragraph. He urged the Court to apply the Noscitur Sociis rule of interpretation. He referred to Garba v. FCSC (1988) 1 NWLR (Pt. 71) 449; Stone v. Yeovil Corporation (1896) 1 CPD 691 at 701;

Bronik Motors Ltd, v. Wema Bank Ltd. (1983) 1 SCNLR 296 at 316 and FCSC v. Laoye (1989) 2 NWLR (Pt. 106) 652 at 723. He urged the Court to dismiss the appeal.

The first issue I should take is the applicable Declaration in this matter. Is the applicable Declaration the Osamawe of Ondo (Chieftaincy Declaration) 1958 or the Osamawe of Ondo (Chieftaincy Declaration) Order 1991' Let me take the first principle of law and it is that the applicable law is the law in existence at the time the cause of action arose and not the law in force at the time the jurisdiction of the Court was invoked. See Prince Mustapha v. Governor, Lagos State (1987) 2 NWLR (Pt. 58) 539; Uwaifo v. Attorney-General of Bendel State (1982) 7 SC 124; Adeyeye v. Ajiboye (1987) 3 NWLR (Pt. 61) 432; Alao y. Akano (1988) 1 NWLR (Pt. 71) 431; Ojokolo v. Alamu (1987) 3 NWLR (Pt. 61) 377.

The cause of action arose in August 1991 when his Royal Highness Oba Itiade Ade Kolurejo died. Learned Senior Advocate made submissions on the 1991 Declaration, all in his effort to say that it is the applicable Declaration. Let me take the arguments. Did the 1991 Declaration repeal the 1958 Declaration' And that touches on the issue of registration. The submission of learned Senior Advocate is in two parts. First, is that the Declaration was registered. Second is that registration is not a pre-condition for the effectiveness of Declarations made under section 6A(1) of the Chiefs Edict, 1984. Is the second submission made in the alternative' Learned Senior Advocate did not say so. Unless the second submission is made in the alternative, it can be superfluous. If the first submission is that the 1991 Declaration was registered, then the second submission should not arise as a complement to the first one. It can only arise as an alternative submission. It is only then it can make any meaning.

The above should not stop me from taking the merits of the submission. The first is the submission that the Declaration was registered. Learned Senior Advocate relied on the evidence of 2nd defence witness, Johnson Olabisi when he said:

'It was Chieftaincy Declaration of 1991 that led to the writing to Leyo Ruling House. I received: the Chieftaincy Declaration in my office. It was registered in the Local Government.'

In accepting the above evidence, the learned trial Judge said at page 252 of the Record:

'I believe that Exhibit O was registered. See Section 150 of the Evidence Act.'

Exhibit O is the 1991 Declaration.

The Court of Appeal did not find the above conclusion of the learned trial Judge that useful. That Court thought that a material particular, in respect of the date of registration was required in the evidence of Johnson Olabisi. The Court said at page 334 of the Record:

'One thing is clear that the evidence before the lower Court does not provide the registration date. Up till today learned Counsel for the Respondents could not say, in so many words, the date the Osemawe of Ondo Chieftaincy Declaration was registered or re-'registered. The lower Court and this Court were left in darkness as to that point.'

I entirely agree with the Court of Appeal. Registration, a legal act, involves documentation. The documentation invariably includes a date. I say 'invariably' because I cannot see how a document of registration will not include the date of registration. Johnson Olabisi did not give any evidence in respect of the date of registration.

As the issue of a trial Judge accepting parol evidence in respect of a document, without laying the necessary foundation to explain away the inability of tendering the document, is not canvassed, I shall not go into that area. But the issue before the Court is the absence of the date of registration in the determination of retrospectivity of the 1991 Declaration.

The second submission of learned Senior Advocate is in respect of the effect of failure to register an Order vide section 6A(2) of the Chiefs (Amended Edict) No 4 of 1991. Section 6A(1) and (2) provides in the following terms:

'(1) Notwithstanding anything contained in this Edict the Military Governor, in the interest of peace, order and good government may, by order revoke or amend an existing declaration or make a new declaration in respect of any

chieftaincy to which this part applies.

(2) Any declaration made in pursuance of this section shall be registered and kept in safe custody by such officer as the Military Governor may direct.'

By section 6A(1), the Military Government has had the power to revoke or amend an existing declaration or make a new declaration in the interest of peace, order and good government. Section 6A(2) requires any declaration made pursuant to section 6A(1) to be registered. It is the submission of learned Senior Advocate that the sub-section does not impose the restriction as to non-effectiveness in the event of failure of registration. I am in some difficulty to go along with the submission. Where a statute clearly provides for a particular act to be performed, failure to perform the act on the part of the party will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. In such a situation, the consequences of non-compliance with the statutory provision follow notwithstanding that the statute did not specifically provide for a sanction. The Court can, by the invocation of its interpretative jurisdiction, come to the conclusion that failure to comply with the statutory provision is against the party in default. Taking the above in the light of the specific provision of section 6A(2), and particularly with the peremptory 'shall' conveying some command, the Court could not have waited for any other provision in the words of learned Senior Advocate, 'as to non-effectiveness in the event of failure of registration as contained in section 6...'

It is the submission of learned Senior Advocate that registration is not a pre-condition to the effectiveness of the 1991 Declaration having been made by the Governor under section 6A(1) of the Edict as amended. With respect, I do not agree with him. Section 6A(2) clearly makes registration a pre-condition and this becomes clear by a community reading of the two subsections. Section 6A(1) empowered the Governor by order to revoke or amend an existing declaration or make a new declaration. Section 6A(2) begins with the words 'Any declaration'. In my view, the word 'declaration' vindicates existing declaration or new declaration, within the meaning of section 6A(1). It is not correct to say that registration is not a pre-condition to the effectiveness of the 1991 Declaration having been made by the Governor under section 6A(1) of the Edict, as amended.

And that takes me to the issue of retrospectivity. The learned trial Judge said at pages 262 and 263:

'The issue of retrospectivity raised by Mr. Thompson does not arise at all. There was no vested interest of the plaintiff that was retrospectively taken away from him... From the above proposition, it seems clear that the 1991 Declaration is a document to be treated prospectively and NOT retrospectively relative to the plaintiff's suit filed on 14th October 1991. It is a pending suit to which the 1991 Declaration becomes applicable.'

The Court of Appeal said at pages 334 and 336 of the Record:

'The whole 1984 Declaration does not contemplate retrospectivity... Enough is said about the 1st issue, suffice it to say that any Chiefs Law or Chieftaincy Declaration cannot be valid and proper if it contains retrospectivity. Whenever there is proper amendment such amendment must be registered before it can be recognised by the law. I cannot see where the said Ondo State Chiefs Law of 1984 showed any intention to be retrospective.'

Retrospectivity, the synonym of retroactivity, as it relates to statute, means when the date of commencement of the statute is earlier in point of time than the date of enactment. See *Afolabi v. Governor of Oyo State* (1985) 2 NWLR (Pt. 9) 734. In other words, where a statute extends its scope or effect to matters that have occurred in the past, such a statute is said to have retrospective effect. A statute having a retrospective effect takes care of past matters in the sense that it draws forward such matters to have legislative effect with all the currency of the new statute. While Courts of law frown upon retrospective legislation as they are not the best in the development of the rule of law and more particularly the concept of fair hearing, they are not unconstitutional and therefore part of our jurisprudence. This is because the Legislatures have the constitutional right to enact a statute and make it apply retrospectively. In so far as such a statute is donated by section 4 of the Constitution, Courts of law do not have the jurisdiction to question the vires of the statute. See *Adesanoye v. Adewole* (2002) 9 NWLR (Pt. 671) 127.

The Court of Appeal merely restricted itself to the 1984 Law on the issue of retrospectivity. That was where, with respect, the Court fell into some error. If the Court had examined the provisions of the 1991 Order closely, it could not

have arrived at the decision.

Perhaps the point I am making will become clear if I reproduce the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991:

'In exercise of the powers conferred upon me by Section 6A of the Chiefs Edict, 1984 and by virtue of all other powers enabling me in that behalf, I NAVY CAPTAIN ABIODUN OLUKOYA, Military Governor of Ondo State of Nigeria hereby make the following Order:

1. The declaration contained in the Schedule to this Order is hereby made in respect of the Osemawe of Ondo Chieftaincy in the Ondo Local Government Area.
2. The Osemawe of Ondo Chieftaincy Declaration of 1958 made under the Appointment and Recognition of Chiefs Law 1954 is hereby revoked.
3. This Order may be cited as the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991 and shall be deemed to have come into force on 3rd day of January, 1984.'

Paragraph 1 makes cross reference to the Schedule of the Order which provides for three ruling houses, the order of rotation in which the respective ruling houses are entitled to provide candidates to fill successive vacancies, the persons qualified to be proposed as candidates, and the Kingmakers. Paragraph 2 clearly and unequivocally revoked the Osemawe of Ondo Chieftaincy of 1958 made under the Appointment and Recognition of Chiefs Law 1954. Paragraph 3 contains the citation and date of commencement as 3rd day of January 1984.

The Court of Appeal held tenaciously to the 1958 Declaration. That Court did not see the Declaration revoked. The Court said at page 336:

'The Osemawe Chieftancy Declaration was therefore intact and was not affected by the amended Chieftaincy Declaration. The appointment of any Osemawe therefore must be made within the four corners of 1958 Ondo Chieftaincy Declaration. For the avoidance of any possible doubt, Osemawe of Ondo Chieftaincy Declaration of 1991 is not potent enough to take the position of the 1958 declaration, which is the applicable law in this matter.'

With the greatest respect, I cannot go along with the Court of Appeal. Where a subsequent legislation or Order revokes an earlier legislation or Order, Courts of law do not have the jurisdiction to still rely on the revoked legislation or Order. It is trite law that a revoked legislation or Order has no more force of law from the date of the revocation and a Court cannot by its interpretative jurisdiction revive the revoked legislation because it is moribund or dead from the date of the revocation. By the doctrine of separation of powers, it is the constitutional function of the Legislature to make laws, including amendment and revocation and our duty in the Judiciary is to interpret the amendment or revocation to achieve the intention of the Legislature. Where the intention of the Legislature is clear and unambiguous, Courts of law must so interpret the provisions of the legislation. We cannot go outside the legislation in search for greener pastures for one of the parties. See *Ahmed v. Kassim* (1958) 3 FSC 51; *Lawal v. GB Ollivant* (1972) 3 SC 124; *Adejumo v. The Military Governor of Lagos State* (1972) 3SC 45; *Qjokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377.

There cannot be a clearer provision than paragraph 2 in terms of revoking the Osemawe of Ondo Chieftaincy Declaration of 1958. Because of its clarity, the paragraph does not and cannot admit any other interpretation. It is not the Court's jurisdiction to determine whether a legislation or Order is "potent enough" to take the position of another legislation or Order. Once an amending legislation is within the constitutional legislative powers of the Legislature, it is not open to Courts of law to question the vires of the legislation on grounds of potency or on any other ground.

In the instant case, the Military Governor of Ondo State, the person empowered to make laws during the military regime at the material time, was the person who made the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991. And what is more, the preamble to the Order made clear reference to the parent Edict, which gave him the power to make the Order and it is Section 6A of the Chiefs Edict, 1984. I had earlier dealt with the section and so I will not take it any

further.

There is still another aspect of the 1991 Order. It is clearly an Order with retrospective effect. This is because on the authority of *Afolabi v. Governor of Qyo State*, the commencement date is earlier in point of time than the date of enactment.

Relevantly the commencement date of the 1991 Order is 3rd January 1984 and the date of enactment is 2nd day of September 1991. As the cause of action in this matter arose on 21st August 1991, the applicable law is the 1991 Order, which commenced retrospectively from the 3rd day of January, 1984. The issue is as exact as that. There are no two ways of approaching the issue.

In the event that I am wrong that the applicable law is the 1991 Declaration, then I should take the alternative position that the applicable Declaration is the 1958 Declaration. And this is only in the alternative. I do not succumb to the view that the 1958 Declaration is the applicable Declaration. That is the position of the respondent. Learned Senior Advocate submitted that the respondent has no locus standi to file the action under the 1958 Declaration. He pointed out that the 1958 Declaration provided for five ruling houses, did not mention Leyo House and the rotation of succession was to be Jilo. Succession was only by a son of a previous Oba and not grandson. Learned Counsel for the respondent relied on paragraphs 6, 8, 11 and 12 of the Amended Statement of Claim and submitted that the respondent had locus standi to institute the action. He submitted also that having taken part as one of the candidates in the contest he had locus stand/to institute the action.

Let me reproduce paragraphs 6, 8, 11 and 12 of the Amended Statement of Claim to see whether his claim donates locus standi to sue:

'6. Consequent upon the vacancy and in accordance with necessary law, the Secretary of the Ondo Local Government wrote to the Leyo Ruling House requesting the family to select candidate or candidates for presentation to the 2nd to the 4th Defendants for the appointment of Osemawe.

8. The Plaintiff was duly nominated and the 1st Defendant also was nominated.

11. The Plaintiff protested to the 2nd to 4th Defendants at meeting with them that the 1st Defendant was not qualified to be appointed as Osemawe on ground of custom. Other people including the entire Otunba Community also protested to the 2nd to 4th Defendants against the candidature of the 1st Defendant both in writing and orally on the ground that the 1st Defendant was not qualified by tradition to be appointed Osemawe of Ondo.

12. Notwithstanding the various protests and in breach of tradition and the law, the 2nd to 4th Defendants purported to appoint the 1st Defendant as the Osemawe for the approval of the 5th Defendant's principal Executive Council on the 11th of October 1991.

As it is, the claim to locus standi on the above paragraphs is based essentially on the fact that the respondent was nominated and he contested for the position of Osemawe and the fact that he protested that the 1st appellant was not qualified to be appointed as Osemawe. I do not agree that the above averments are capable of donating locus standi on the respondent. The mere fact that he was selected to contest the title does not necessarily mean that he has locus in the matter. He could be picked in error, if in reality he is not qualified to contest by the applicable chieftaincy rules. And this is the view I hold, in the light of the evidence before the learned trial Judge.

It is elementary law that in order to determine locus standi of the plaintiff, the only Court process to look at is the Statement of Claim. It is the Statement of Claim that should exclusively donate locus standi. See *His Pre-Eminence Bolaji v. Bamgbose* (1986) 4 NWLR (Pt. 37) 632; *Adefulu v. Oyesile* (1989) 5 NWLR (Pt. 122) 377; *Owodunni v. Registered Trustees of Celestial Church of Christ* (2000) 10 NWLR (Pt. 675) 315; *Agwaramgbo v. UBN* (2001) 4 NWLR (Pt. 702) 1. I am afraid, I do not see paragraphs 6, 8, 11 and 12 of the Amended Statement of Claim donating standing on the part of the respondent to sue.

The above apart, learned Senior Advocate called the attention of the Court to the 1958 Declaration in his brief of argument. He pointed out that the 1958 Declaration, on which the respondent relies has some basic requirements indicated (them) above. I should indicate them here for ease of reference and for completeness. There are 5 Ruling Houses, without LEYO House. It provides that rotation of succession next will be JILO and most importantly succession is by the son of a previous Oba only, not grandson.

The contestant, in my view, must fit into all the above to be qualified to contest and be elected. A contestant who meets only one or two of the requirements cannot be appointed Osemawe. It is the case of the appellants that the respondent being a grandson of the Aroworayi is not qualified to occupy the post.

I should at this stage take some evidence on the issue. In his evidence in-chief, Dr. Festus Olaniyi Adewole, first witness for the 1st respondent said at pages 157 and 158 of the Record:

'I belong to Leyo ruling family from my father's side. My father was the son of Aroworayi. He was my grandfather. Aroworayi reigned as Oba of Ondo in 1900 and died in 1901. I know the plaintiff. He is my brother. The plaintiff is the grandson of the Aroworayi.'

Under cross-examination, he said at page 161 of the Record:

'The 1958 Declaration gave Ondo 5 ruling houses whereas the Morgan gave Ondo 3 ruling houses merging the five into three. The 1958 Declaration gave Fidipote, Tewogbaye, Jilo and Aroworayi, which is now Leyo, the merger of Tewogbaye and Fidipote as Foyi. The 1958 Declaration says succession shall be by direct son of an Oba.'

Witness said in clear language at page 160:

'The 1958 Declaration excluded grandson from the throne.'

The 1st respondent in his evidence also said at page 164 of the Record.

'I am a native of Ondo town. I was born to Prince Josiah Adewole who was the son of Oba Aroworayi.'

The above is clear as to the family status of the respondent as a grandson of an Oba.

The learned Judge, in the light of the above evidence and more, referred to the 1958 Declaration and said at pages 247 and 248 of the Record:

'Oba Tewogboye II reigned between 1942-1974 and it was during his said reign, for the first time in the history of Ondo dynasty, that the Ondo Chieftaincy Declaration was promulgated in 1958. It identified 5 rotatory Ruling Houses among them was Aroworayi which according to the evidence before me would not produce a candidate or candidates for many years to come. Under the 1958 Declaration, the Leyo Ruling House suffered another setback in that under it, eligibility to the throne descended from father to direct son.'

It is clear from the above that the respondent being a grandson had no locus standi to institute the action. There is no other way of looking at the matter. The Court of Appeal held that the applicable Declaration was the 1958 Declaration and not the 1991 Declaration. The Court said at page 337 of the Record:

'My Lords in the matter at hand, the Osemawe Chieftaincy is subject to the provisions of the 1958 Ondo Chieftaincy Declaration. It does not therefore lie in the mouth of the respondents' Counsel to submit that that law or Declaration was never pleaded or is inadmissible. Laws and statutes, it goes without saying, were not required to be pleaded. The appeal therefore is pregnant with merits, same is allowed.'

With respect, I do not agree with the Court of Appeal that the applicable law was the 1958 Declaration. Assuming that the Court is correct, the appeal before it should have been dismissed because the 1958 Declaration clearly provided that

succession to the throne was to be by direct son and the respondent is the grandson.

Learned Senior Advocate took the wider issue of locus standi in Chieftaincy matter. He cited some cases. I should take the issue a bit further. In the Amended Statement of Claim, the respondent averred that he is a prince of the Leyo Aroworayi Ruling House. I should say right away that being a prince of a chieftaincy house is by itself not enough to sue in respect of appointment in the Chieftaincy house. The plaintiff has to go further to prove intimacy with the Chieftaincy house to the extent and in the sense that he has the right to contest the Chieftaincy if and when vacant. He must clearly state the extent of his interest in the Chieftaincy and such an interest should be that he is, by his royal blood, entitled to the throne. A trial Judge will not accept a caricature of an interest or a bloated interest, which does not flow naturally from and to the Chieftaincy. As a matter of fact, Courts of law will never encourage a party to force himself to the Chieftaincy for recognition; rather, the Chieftaincy should naturally embrace the person because he is one of its own.

Although the Chieftaincy institution has been commercialised in recent times resulting in infiltrations by stranger elements, the institution remains and maintains a class of its own traceable and, as a matter of genealogy, traced to a royal home or royalty. The word "royalty" conveys a King or a Queen. As it does not convey its other meaning of payment made to the writer of a book, it is not an open room but a closed one for only those who have the royal blood and who can show that they have the right to contest the stool. And they know themselves and they also know when a Chieftaincy House is entitled to present a candidate on the death of the incumbent. Let us be patient and take our turn. Royalty is a most revered and orderly institution. We can only change the guards at the appointed time. We cannot change the guards when it is convenient to us.

For the avoidance of doubt, I should not be interpreted to say that the respondent is a stranger element in this matter, in the sense that he is not a prince and he calls himself one. No. That is not the point I am making. After all, the 1st appellant admitted the averment of the respondent that he is a prince. A prince certainly is not a stranger, like me, in a Chieftaincy. My problem here is that the 1958 Declaration disqualified him from contesting the Chieftaincy, he, being a grandson. There is nothing I can do to assist him. All I can do and I have done is to interpret the documents before me. So be it and let it be so.

The Court of Appeal held that the respondent had vested right by the 1958 Declaration. Let me hear what the Court said at page 337 on this vested right matter:

'The appellant's right in the suit had since become vested before the Osemawe of Ondo Chieftaincy declaration 1991 took effect. I hold therefore that the 1st Respondent herein is not qualified to be appointed Osemawe of Ondo under the 1958 Ondo Chieftaincy Declaration.'

First, let us call a spade its correct name of a spade. Let us not call a spade a machete because it is not one, although they may look alike. It is not the case of the 1st appellant that he was qualified to be appointed the Osemawe by the 1958 Declaration. No, that is not his case. His case is that he was correctly appointed as the Osemawe by the 1991 Declaration. I think he is correct. The position of the law, as I have analysed above, is clearly in his favour.

And that takes me to what the Court of Appeal called vested right. A vested right is a right held by somebody in something to his advantage and interest. A vested right accrues to the owner or holder, who has it for keeps as the allodial owner.

In order to lay claim to and enjoy a vested right, it should not be encumbered or weighed down by any other competing right. A vested right can be so recognised by law, if it is really vested in the holder. Where a vested right is founded or predicated on a document which, in law and in fact, does not and cannot donate the so-called right, then no right in law passes to the claimant of the right. This is because the document, which is assumed or presumed to pass the right, did not do so in law. In other words, where a claim to a vested right is premised on a wrong footing, the so-called vested right must collapse and with no ado or fanfare.

So much of legalism. Let me now apply the above to the real matter. The respondent relied entirely and heavily on the 1958 Declaration. I have held that the Declaration did not help him, as he is not a son of the Oba but a grandson. And so

his case collapsed. The Court of Appeal came to the conclusion that the respondent had vested right, based on the 1958 Declaration. In the light of my decision, that is no more the situation. Since the conclusion of the Court of Appeal on the 1958 Declaration has collapsed, so too the conclusion of the Court on vested right, and I so hold.

I realise that I jumped the gun by not taking the issue of the respondent not pleading the 1958 Declaration. Instead of going that way, I took the Declaration on the assumption that it was pleaded. I do not think I have any apologies for that. I decided to take the meat of the case, rather than the bone, which could hook me down. I felt I should go straight to the substance rather than chasing the technicality of the case. I hope I have succeeded.

In sum, this appeal has merit and it is allowed. The decision of the Court of Appeal is set aside. The decision of the High Court, Ondo dismissing the case of the respondent, is hereby upheld. The cross-appeal fails and it is dismissed. I must commend the learned trial Judge Obaremo, J, for a very beautiful judgment. I award N10,000. 00 costs in favour of the appellants.

Judgement delivered by Idris Legbo Kutigi. J.S.C.

I have had the privilege of reading in advance the judgment just delivered by my learned brother Niki Tobi JSC. I agree with his reasoning and conclusions. It is doubtless that the Plaintiff/Respondent relied on the Osemawe of Ondo Chieftaincy Declaration of 1958. And being a grandson (not a son) of the Oba, the 1958 Declaration was of no assistance to him. The case of the Appellant was that he was validly appointed under the Osemawe of Ondo Chieftaincy Declaration Order of 1991, which was deemed to have come into effect on 3rd January 1984. I think on the facts and the applicable laws, the trial High Court rightly dismissed Plaintiff/Respondent's claims and the Court of Appeal erred when it reversed the judgment. I will therefore allow the appeal and dismiss the cross-appeal. The judgment of the Court of Appeal is set aside while that of the trial High Court is restored. I endorse the order for costs.

Dissenting Judgement delivered by George Adesola Oguntade. J.S.C.

This appeal raises the question whether or not the deceased 1st appellant was validly enthroned as the Osemawe of Ondo in 1991. The contest centred mainly on the applicability to the succession of the Ondo Chieftaincy Stool of either the Osemawe of Ondo Chieftaincy Declaration, 1991 or the Osemawe of Ondo Chieftaincy Declaration of 1958. It was the case of the Respondent, who was the plaintiff at the trial Court that the 1958 Declaration applied. On that supposition, only members of the Ruling House of the male line who are the direct sons of a previous Oba or Osemawe of Ondo could become the Oba. Under the 1958 declaration, five Ruling Houses were recognized. The Ruling House of both the 1st appellant and the plaintiff, the Leyo Ruling House, was not one of the five. However, the 1991 Chieftaincy Declaration, not only made the Leyo Ruling House one of the eligible Ruling Houses, it in addition, allowed the grandson of a former Osemawe of the male line to become the Osemawe.

It was undisputed that the 1st appellant was a grandson of the male line of a previous Osemawe. He would have been ineligible for the stool under the 1958 Declaration. But the amendment to the 1958 Declaration effected by the 1991 Declaration enabled the 1st appellant to qualify for the stool.

The High Court in its judgment held that the 1991 rather than the 1958 Declaration applied. It then came to the conclusion that the 1st appellant was validly enthroned as the Osemawe of Ondo. The plaintiff's suit was accordingly dismissed. Dissatisfied, the plaintiff brought an appeal before the Court of Appeal sitting at Benin (hereinafter referred to as the Court below). In allowing the appeal, the Court below took the view that the Osemawe of Ondo Chieftaincy Declaration, 1991 was a retroactive legislation which affected the accrued right of the plaintiff, and further that the said

Declaration was not registered as it ought to have been done pursuant to Section 6(A) of the Ondo State Chiefs Law 1984. Now Section 6A(1) and (2) of the Chiefs law 1984 provides:

"(1) Notwithstanding anything contained in this Edict the Military Governor, in the interests of peace, order and good government may, by order, revoke or amend an existing declaration or make a new declaration in respect of any chieftaincy to which this part applies.

(2) Any declaration made in pursuance of this section shall be registered and kept in safe custody by such officer as the Military Governor may direct."

In striking down, the 1991 Declaration, the Court below said at pp.334 and 336:

'The whole 1984 Declaration does not contemplate retrospectivity..... enough is said about the 1st issue, suffice it to say that any Chiefs Law or Chieftaincy Declaration cannot be valid and proper if it contains retrospectively. Whenever there is proper amendment such amendment must be registered before it can be recognised by the law. I cannot see where the said Ondo State Chiefs Law of 1984 showed any intention to be retrospective.'

And in coming to the conclusion that it was the 1958 Declaration rather than the 1991 Declaration that applied, the Court below said:

'The Osamawe Chieftaincy declaration was therefore intact and was not affected, by the amended Chieftaincy declaration. The appointment of any Osemawe therefore must be made within the four corners of 1958 Ondo Chieftaincy declaration. For the avoidance of any possible doubt, Osemawe of Ondo Chieftaincy Declaration is not potent enough to take the position of the 1958 Declaration which is the applicable law in this matter.'

Let me say that the reasoning that the 1991 Declaration was retroactive was hinged on the fact that when the same was made on 24/10/91, the plaintiff's action had been filed on 14/10/91. Further too, the concomitant argument that the 1991 Declaration did not apply was based on the fact that it was not registered as required under Section 6A (1) and (2) of the Ondo State Chiefs Law, 1984.

I agree that the Court below was right to conclude that the 1991 Declaration could not be relied upon for the twin reasons identified by the Court below. I do not think it is sound law or logic to reason that the 1991 Declaration applied in so far as it repealed the 1958 Declaration and at the same time that it did not apply to make the Leyo Ruling House and a grandson eligible for the Chieftaincy. That ambivalence would not be justifiable.

But where does that conclusion lead me in relation to this appeal? It was undisputed that the Plaintiff belonged to Leyo Ruling House. There was evidence that the plaintiff was a grandson to a former Osemawe. Under the 1958 declaration, the plaintiff, whose Ruling House was not one of the five recognised, would not have been eligible to contest for the Osemawe Chieftaincy. This was the more so since he is a grandson. This then brings me to the locus standi or standing of the plaintiff to bring the suit. In *Momoh v. Olotu* [1970] 1 All N.L.R. 121 at 123 (Reprint), this Court decided that a person who brings a suit to challenge the appointment of another to a chieftaincy office must himself show the basis of his interest in the particular chieftaincy. This Court per Ademola C.J.N said:

'We now turn to other aspects of the matter. The plaintiff brought this action in his personal capacity, but paragraph 2 of his statement of claim reads :

'2. The plaintiff brings this action on behalf of himself and other members of Owalukare ruling house.'

The Court below, rightly in our view, took no notice of paragraph 2 and treated the action as a personal action. This brings us to the question of the position of the plaintiff in this matter. Plaintiff has not claimed that he has a standing in this matter, which entitles him to bring an action or that he is representing a certain ruling family in this matter whose interests are affected and who are to be benefited by the declaration sought in the writ or that his existing right or his family's existing right has been infringed. See *Lawani Odusanya and others v. Bakare Odefodurin and others W.A.C.A.*

3016 (Cyclostyled reports) decided 19th October 1949.

Mr. Ayoola for the plaintiff agreed before us that since the action was not instituted as a representative action, the Court cannot take notice of paragraph 2 of the statement of claim and that this is purely a personal action. On that score, we fail to see the position of the plaintiff, who cannot say and has not alleged that his personal rights have been infringed.

In view of the above premises we fail to see how the plaintiff can maintain an action on the statement of claim filed. We think that the learned trial Judge was in error when he ruled that the matter before him was not a chieftaincy matter, and that on the face of it, the statement of claim disclosed a cause of action, or that the plaintiff has a locus standi or that the 1st defendant had signed a declaration about which the plaintiff can justifiably complain. The learned trial Judge was clearly wrong in refusing to strike out the statement of claim and/or the action before him. We are of the view that the action should have been dismissed and we will accordingly so order.'

In the course of hearing this appeal on 25/4/06, we asked Respondent's Counsel Mr. Thompson, the basis of the interest of the respondent in bringing the suit, if the position as found by the Court below, was that it was the 1958 rather than the 1991 Declaration that applied to the Osemawe of Ondo Chieftaincy stool. Counsel said that the issue was not raised on the pleadings of parties. With respect to Counsel, I think that, in a civil suit, the standing of the plaintiff to bring the suit cannot always be taken for granted. The plaintiff, in his amended statement of claim before the trial Court had pleaded that he and two others including the 1st appellant had had their names brought before the Kingmakers by the Leyo Ruling House and that the Kingmakers invalidly recommended the 1st appellant for appointment. On that basis, the trial Court was right not to raise the issue of the plaintiff's standing to sue as all the three candidates belonged to Leyo Ruling House.

The Court below however, by its judgment held that, the 1991 Declaration which gave the Leyo Ruling House an eligibility on the Chieftaincy did not apply to the chieftaincy. It held that the 1958 Declaration applied. That finding, in its effect, effectively destroyed the basis of the plaintiff's standing to bring the suit. It is not the right of every Ondo son and daughter to bring a suit to challenge the appointment of the Osemawe of Ondo. Only those shown to have an interest in the office can bring the suit. The Court below, having found as it did, that the plaintiff's Leyo ruling House, which was not recognised under the 1958 Declaration had no interest in the chieftaincy other than that derived under the 1991 Declaration, which it held inapplicable, should have proceeded further to consider the standing of the plaintiff to bring his suit.

It seems to me that the plaintiff's suit is misguided in that sufficient consideration was not given by plaintiff to the succession interest of Leyo Ruling House in the manner this suit was pursued. It's like throwing the baby away with the bath water.

It is my firm view that the only platform of the plaintiff to bring this suit was his membership of the Leyo Ruling House and that derived from the 1991 declaration.

Since as rightly held by the Court below, the 1991 Chieftaincy Declaration did not apply, I would dismiss this appeal. I must make the order, which the Court below on the basis of its finding should have made. I set aside the judgment the trial Court and strike out the suit by the plaintiff. I make no order as to costs.

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

I am in complete agreement with my learned brother, Niki Tobi JSC in his judgment just delivered, the draft of which I had the opportunity to read before today.

The dispute between the parties is on the stool of the Osemawe of Ondo Land in Ondo State, which became vacant in 1991 on the death of the occupant. Upon the occurrence of the vacancy, the Secretary to the Ondo Local Government

Council acting in accordance with the provisions of the Chief Edict invited the Eleyo Ruling House of the 1st Respondent to present candidates to fill the existing vacancy.

The Eleyo Ruling House in response presented three candidates made up of the 1st Appellant, the respondent and one other candidate now deceased. The King makers at the end of their deliberation, recommended the 1st Appellant whose appointment was duly approved by the Ondo State Executive Council and was subsequently installed as the Osemawe of Ondo Land.

However, the Respondent who was aggrieved by the selection and appointment of the 1st Appellant challenged the appointment at the High Court of Justice of Ondo State where after hearing, the learned trial Judge Obaremo J. dismissed the Appellant's claims. The Appellant's appeal to the Court of Appeal yielded fruits to him where the appeal was allowed and the judgment of the trial Court was set aside resulting in the present appeal in this Court by the appellants.

The main issue in this appeal is the determination of the law applicable in the resolution of the dispute between the parties. While in the decision of the trial Court, the applicable law was the Osemawe of Ondo Chieftaincy Declaration of 1991, the Court below was of the view that it was the 1958 Declaration that was applicable. However, looking at the 1991 Declaration which was made on 2-9-1991, but came into force retrospectively on 3-1-1984, and which specifically repealed the 1958 Declaration, there is no doubt whatsoever that the current legislation applicable to the dispute between the parties in this appeal is the 1991 Declaration as rightly found by the trial Court. In this respect, the Court below was in error in reviving and applying the 1958 Declaration in its judgment now on appeal.

For the foregoing and other cogent reasons given by my learned brother Niki Tobi JSC, in his lead judgment, I also allow this appeal and abide by all the orders made in the lead judgment including the order on costs.

Judgment delivered by Walter Samuel Nkanu Onnoghen, J.S.C.

This is an appeal against the judgment of the Court of Appeal, Benin Division, in appeal No CA/B/145/2002 delivered on 16th July 2004 in which the Court allowed the appeal of the present respondent against the judgment of the Ondo State High Court, holden at Ondo in suit No. HOD/99/91 delivered on 14th January 2002 in which it dismissed the action of the present respondent.

The facts of the case are that sometime in August 1991, the Osemawe of Ondo Oba Itiade Adekolurejo joined his ancestors by the customs and traditions of his people thereby rendering the stool of Osemawe of Ondo Land vacant and making it necessary for the secretary to the Ondo Local Government Council acting in accordance with the Chiefs Edict 1984 to invite the Leyo Ruling House which is the ruling house of the 1st appellant and 1st respondent to present candidates to fill the vacancy. The said ruling house presented three persons to the King makers for selection. Those presented were the 1st appellant, 1st respondent, and one Eric Adewole who later died. The King makers met on 11th October 1991 and selected the appellant and presented his name to the then Military Governor of Ondo State for approval which was eventually done. The 1st respondent felt aggrieved by the appointment of the 1st appellant and consequently instituted the action in which he claimed the following reliefs:-

- (i) A declaration that the purported approval of the 1st Defendant as Osemawe of Ondo published in the Official Gazette Chief Edict No. 11 of 1984 Notice is ultra vires void and of no effect whatsoever.
- (ii) A declaration that the purported appointment of the 1st Defendant as Osemawe of Ondo is contrary to the custom appertaining to the Chieftaincy, void and of no effect.
- (iii) Order restraining the 1st Defendant from parading himself as Osemawe elect.'

The case of the 1st respondent at the trial is that the 1st appellant was a great grandson/member of the Leyo Ruling

House and as such was not qualified to be appointed Osemawe and that his said appointment was not in accordance with the prevailing custom in respect of the chieftaincy and section 8(e) of the chiefs Edict No 11 of 1984. On the other hand, the 1st appellant contended that his appointment was in accordance with the prevailing custom in respect of the Osemawe Chieftaincy, section 8(e) of the Chiefs Edict No 1 of 1984 and Osemawe of Ondo Chieftaincy Declaration Order 1991.

As stated earlier in this judgment the learned trial Judge, Obaremo, J. found that the Osemawe of Ondo (Chieftaincy Declaration) Order 1991 had repealed the Osemawe of Ondo Chieftaincy Declaration of 1958 and that under the 1991 Declaration, the persons qualified to be candidates for the stool are members of the Ruling House and of the male line only and that 1st appellant met the requirements.

On the other hand, the Court of Appeal held, inter alia, that the Osemawe of Ondo Chieftaincy Declaration 1991 could not possibly repeal the 1958 Declaration that there was no evidence of the date of registration of the 1991 Declaration and even if it contains some amendments, it ought to have been re-registered in view of the provisions of section 6(2) of the Chiefs Law 1984, that the 1991 Declaration is to be taken to have been registered on 24th October 1991 being the date of its publication, that the applicable law to the vacant stool of Osemawe as at 14th October 1991 when the action was instituted was the 1958 Declaration, and, that the 1st appellant was not qualified under the 1958 Declaration to be appointed Osemawe of Ondo, and, as stated earlier in this judgment, allowed the appeal.

The 1st appellant is not satisfied with the said judgment and has consequently appealed to this Court. The issues for determination as formulated by learned senior Counsel for the appellants are as follows:-

'3.1. Whether the Court of Appeal was right in Law in holding that the Osemawe of Ondo Chieftaincy Declaration 1958 was still applicable to the appointment of the 1st appellant.

3.2. Whether assuming that the Osemawe of Ondo Chieftaincy Declaration 1958 was applicable, the 1st respondent has any locus standi to take the point or file this action.

3.3. Whether the 1st respondent's pleading relied on the 1958 Declaration as contemplated by the Court of Appeal or his right had become vested under the Declaration before the 1991 Declaration took effect.'

It should be noted that the 1st respondent filed a cross-appeal against the judgment of the Court of Appeal and learned Counsel for the cross-appellant formulated two issues for the determination of the cross-appeal. The issues are as follows:-

'(a) Whether or not the provision in section 26(1) (a) of the Chiefs Law O.D.S No. 11 of 1984 could have been invoked by the Court of Appeal in nullifying the appointment of the 1st Cross-Respondent as Osemawe of Ondo.

(b) Whether or not the 1st Cross-Respondent would have been qualified to be appointed Osemawe of Ondo even if the Ondo Chieftaincy Declaration 1991 Exhibit O had been found to be applicable to the selection process.'

In arguing the appeal, learned senior Counsel for the appellants submitted that the 1958 Declaration relied upon by the Court of Appeal in coming to its decision was not pleaded by the 1st respondent and therefore that Court ought not to have relied on same, that even if it was competent for the Court of Appeal to rely on the 1958 Declaration, the 1st respondent has no locus standi to take the point that the 1st appellant was not qualified to be appointed Osemawe under the said Declaration, and, finally that the 1991 Osemawe of Ondo Declaration Order validly repealed the 1958 Declaration and the 1st appellant was qualified to be appointed Osemawe under the said order and urged the Court to allow the appeal.

On the cross-appeal, learned Counsel for the appellants/cross-respondents submitted that section 26(1) (a) of the Chiefs Law of Ondo State could not have been invoked by the Court of Appeal against the 1st appellant to nullify his appointment particularly as a proper interpretation of paragraph 111 of the Schedule to the 1991 Declaration would show that the 1st appellant was qualified to be appointed the Osemawe of Ondo, since he is a male member of the male

line of the Ruling House. Counsel then urged the Court to dismiss the cross-appeal.

On his part, learned Counsel for the respondent submitted that the finding by the Court of Appeal that 1st appellant is not qualified by custom to be appointed Osemawe of Ondo is right, that the 1958 Ondo Chieftaincy Declaration is the declaration in existence at the time the cause of action arose and therefore applicable to the action and not the 1991 Chieftaincy Declaration which had not been registered as at the time respondent filed his action.

Submitting further and in the alternative, learned Counsel stated that even if for any reason the 1958 Declaration is held to be applicable the Chiefs Law 1984 specifically states that oral evidence of custom be used in determining the custom applicable and that the only oral evidence of custom at the trial and which was not challenged, was that the 1st appellant was not qualified, that that evidence is supported by documentary evidence authored by the 2nd appellant and DW1. Turning to the issue of locus standi, learned Counsel submitted that the contention of the appellants that the respondent has no locus standi to institute the action is untenable particularly as the respondent was a candidate in the contest and being dissatisfied with the decision of the King makers has the right to institute the action challenging that decision on the ground that the person appointed was not qualified by custom.

On the cross-appeal, learned Counsel for the respondent/cross-appellant submitted that the Court of Appeal having found that the vacancy for the stool occurred on 21st August 1991 while Exhibit O became operative on 24th October 1991, it should have invoked the provision in section 26(1) (a) of the Chiefs Law 1984 in nullifying the appointment of the 1st cross-respondent as Osemawe of Ondo even where it is found that the 1958 Chieftaincy Declaration is applicable to the selection process, that the evidence of custom adduced at the trial showed that no great grandson had ever been made Osemawe of Ondo but that the Court of Appeal did not follow that finding of fact by invoking the provision in section 26(1) (a) of the Chiefs Law, 1984 to nullify 1st cross-respondent's appointment.

Learned Counsel further submitted that even if exhibit O is found to be applicable to the selection process, the 1st cross-respondent would still not be qualified for appointment as Osemawe of Ondo because exhibit O enjoins the kingmakers to apply custom in selecting a candidate, and that since the custom to be applied is not stated in the said Declaration, evidence of custom was necessary and that the only evidence of custom adduced at the trial showed that 1st cross-respondent was not qualified and the lower Court ought to have nullified his appointment on that point having accepted the evidence of custom in issue. Learned Counsel then urged the Court to dismiss the appeal and allow the cross-appeal.

I have carefully gone through the submission of Counsel for the parties to the appeals, the record and authorities cited and relied upon in support of their contending positions and I have no doubt at all that the Osemawe of Ondo Chieftaincy Declaration of 1958 relied upon by the lower Court in setting aside the judgment of the trial Court was revoked by the Osemawe of Ondo (Chieftaincy Declaration) Order, 1991, and I hold the view that with that revocation, the 1958 Declaration ceased to have any legal effect since, in the eyes of the law, it has ceased to exist.

For avoidance of any doubt, it is necessary to reproduce the 1991 Declaration, which expressly revoked the 1958 Declaration. It provides as follows:-

'In exercise of the powers conferred upon me by section 6A of the Chiefs Edict, 1984 and by virtue of all other powers enabling me in that behalf, I, Navy Captain Abiodun Olukoya, Military Governor of Ondo State of Nigeria hereby make the following order:

1. The declaration contained in the schedule to this order is hereby made in respect of the Osemawe of Ondo Chieftaincy in the Ondo Local Government Area.
2. The Osemawe of Ondo Chieftaincy Declaration of 1958 made under the Appointment and Recognition of Chiefs Law 1954 is hereby revoked.
3. This order may be cited as the Osemawe of Ondo (Chieftaincy Declaration) order 1991 and shall be deemed to

come into force on 3rd day of January, 1984.'

Emphasis supplied by me.

Despite the provisions of paragraph 2 of the above order, which expressly revoked the 1958 Declaration, the Court of Appeal, at page 336 of the record held thus:

'The Osemawe Chieftaincy Declaration was therefore intact and was not affected by the amended Chieftaincy Declaration. The appointment of any Osemawe therefore must be made within the four corners of 1958 Ondo Chieftaincy Declaration. For the avoidance of any possible doubt, Osemawe of Ondo Chieftaincy Declaration of 1991 is not potent enough to take the position of the 1958 Declaration, which is the applicable law in this matter.'

In the first place the 1991 Declaration did not amend the 1958 Declaration, as the lower Court seemed to think but revoked it, thereby putting an end to its existence. Legally speaking, what is amended continues in existence in its new form (as amended), which is not what the 1991 Declaration intended by its express provision in paragraph 2, supra.

The second point that needs to be mentioned here is as regards the retrospective effect of the 1991 Declaration as provided for in paragraph 3 of the said order. It is the case of the respondent, which was accepted by the lower Court that the vacancy in issue between the parties became available from the 21st day of August, 1991 when the former occupant of that stool died or as is customary to say, joined his ancestors, and that since the 1991 Declaration was enacted on 2nd September 1991 but published on 24/10/91 (which date of publication is deemed by the lower Court to be its date of registration) while the action was instituted on 14/10/91 in a cause of action that accrued on 21st August 1991, the 1991 Declaration was inapplicable to the action, rather it is the 1958 Declaration that is applicable. The argument of the respondent in this regard loses sight of the fact that by paragraph 3 of the 1991 Declaration, the said Declaration is expressly given retrospective effect - it is deemed to have come into effect on the 3rd day of January 1984. It therefore does not matter whether the Declaration was enacted and published or registered after the cause of action arose and the action instituted in the High Court, the truth being that since the 1991 Declaration came into effect on 3rd January 1984, while the cause of action arose on 21st August 1991, it is the 1991 Declaration that applies to the action particularly as paragraph 2 of the 1991 Declaration expressly revoked the 1958 Declaration and paragraph 3 states that the Declaration came into effect on the 3rd day of January, 1984. It is therefore my considered view that the lower Court was in error in holding that it was the 1958 Declaration that applied to the facts of this case.

Even if it is conceded, which I do not, that it is the 1958 Declaration that is applicable, it is clear from its provisions that the respondent has no locus standi to institute the action as he, by the evidence before the Court, particularly his own admissions, he is a grandson of an Osemawe, not the son of an Osemawe, and therefore has no interest capable of being protected or enforced by action in relation to that Chieftaincy. In other words, the respondent has no locus standi in instituting the action if his claim, as decided by the Court of Appeal, is based on the 1958 Declaration.

On the contrary, evidence abound on record to the effect that it is the 1991 Declaration that is applicable because in the first place, it is that Declaration that conferred on the 1st appellant and respondent, the right to contest for that stool since they are not the sons of a former Osemawe as would have been the case if the 1958 Declaration were to be applicable. 1st appellant and respondent are male children of the male line of an Osemawe and therefore, qualified under the 1991 Declaration. Not only that, their Ruling House was recognised as such by the 1991 Declaration, not the 1958 Declaration. The argument of learned Counsel for the respondent that the locus standi of the respondent lies in his being a candidate for the selection begs the question, in my view. I hold the considered view that for one to be a candidate in any Chieftaincy, he must belong to the ruling family or Ruling House of the Chieftaincy and be nominated to contest. In the instant case under the 1958 Declaration there are five Ruling Houses, which did not include LEYO House being the Ruling House the contesting parties come from and it provides that rotation of succession to be JILO House and further, that succession is by the son of a previous Oba or Osemawe only, not a grandson - which respondent and 1st appellant are.

In conclusion I agree with the lead judgment of my learned brother TOBI, JSC that the appeal is meritorious and should be allowed while the cross-appeal is without merit and ought to be dismissed. I order accordingly and abide by other

consequential orders contained in the said lead judgment including the order as to costs.

Appeal allowed while the cross-appeal is dismissed.