**PIUS UMEADI & ORS**

**V.**

**VICTOR CHIBUNZE & ANOR**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 13TH DAY OF MARCH, 2020

SC.395/2015

**LEX (2020) - SC.395/2015**

**OTHER CITATIONS**

3PLR/2020/41 (SC)

(2020) LPELR-49566 (SC)

**BEFORE THEIR LORDSHIPS**

OLABODE RHODES-VIVOUR, JSC

MARY UKAEGO PETER-ODILI, JSC

CHIMA CENTUS NWEZE, JSC

AMINA ADAMU AUGIE, JSC

EJEMBI EKO, JSC

**BETWEEN**

1. PIUS UMEADI

2. JONAS UMEADI

3. CLEMENT UMEADI

4. CHIGOZIE UMEADI

5. CHARLES UMEADI

6. NKEKE UMEADI

7. TOCHUKWU ECHEZONA

8. OKECHUKWU ECHEZONA

9. ANTHONY ECHEZONA

10. MARCEL NWANA

11. NWANKWO NGENE - Appellant(s)

AND

1. VICTOR CHIBUNZE

2. WILLIAMS CHIBUNZE - Respondent(s)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, ENUGU DIVISION

2. HIGH COURT OF ANAMBRA STATE

**REPRESENTATION**

Ifeanyi Obiakor, Esq. - For Appellant

AND

Fidelis O. Anyanegbu, Esq. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - FAMILY PROPERTY/LAND:- When will cease being family-owned as to become the exclusive property of one of its members – Customary arbitration by way of rite of ordeal – Removal of juju believed to be deadly placed on the land by rival claimants to the land – Where removed by one member without assistance or support by other members of his family but with their acknowledgment – Legal effect

REAL ESTATE AND PROPERTY LAW - FAMILY PROPERTY/LAND – LOCUS STANDI: Definition of family property – “Family land is land which vests in a group of persons and their children. It could also refer to land which had vested upon individuals who have descended from a common ancestry or pedigree, and including, of course, those such as domestics and strangers who have been incorporated into the family by the founder” – Principle that every member of a family has an interest in the family property – Whether every member of the family has or enjoys a locus-standi to institute an action in respect of any wrong or illegal dealings with the property

REAL ESTATE AND PROPERTY LAW – LAND – CUSTOMARY LAW PROOF OF TITLE:- Proof of title through customary arbitration - Practice by which a person or persons who successfully removes juju planted on a disputed land automatically becomes the owner of that land in dispute if he survived the oath he took – Claim that the person underwent the ordeal on behalf of/with support of family members as to render the land secured a family land instead of his exclusive estate – Onus of proof thereto – On whom lies – Relevant considerations

REAL ESTATE AND PROPERTY LAW – LAND – CUSTOMARY LAW PROOF OF TITLE:-Where parties decide to be bound by traditional arbitration resulting in oath taking – Whether common law principles in respect of proof of title to land no longer apply – Whether in such situation, the proof of ownership or title to land will be based on the rules set by traditional arbitration resulting in oath-taking

REAL ESTATE AND PROPERTY LAW – LAND – CUSTOMARY LAW PROOF OF TITLE:- Proof of title by ordeal through juju oath-taking – Where a person survives after taking the oath – Whether acquires title to the land regardless of possession remaining in the rival party

CUSTOMARY LAW - OATH TAKING:- Oath-taking during customary law arbitration – Validity and basis of

CUSTOMARY LAW - OATH TAKING:- Parties who believe in the efficacy of juju – Where they resort to oath-taking to settle a dispute through customary arbitration – Bindingness of – Whether the outcome of such arbitration is exempt from the common law principles in respect of proof of title to land

CUSTOMARY LAW – PROOF OF CUSTOM:- Burden of proving an asserted custom which has not been judicially noticed by courts – On whom lies – Nature of evidence required to succeed - Sweeping assertion that such a custom in fact exists – Attitude of court thereto

CUSTOMARY LAW – PROOF OF CUSTOM:- Hear-say evidence – Principle that evidence of tradition and traditional practices is hearsay upon hearsay and is admissible evidence by virtue of Section 66 of the Evidence Act, 2011 - When hearsay evidence of an asserted tradition/event is placed side by side with an opposing evidence of an eye-witness of the alleged institution of the custom – Whether the direct evidence should be preferred by Court

CUSTOMARY LAW – PROOF OF CUSTOMS – ACADEMIC CONCLUSIONS OF EXPERT:- Published positions of academic experts regarding a precedent of the Supreme Court regarding the proof of any custom – Attitude of Supreme Court thereto

ALTERNATIVE DISPUTE RESOLUTION – CUSTOMARY ARBITRATION:- Principle that in arbitration under customary law, the applicable law is customary law and not the common law principle with their characteristic certainty and ossification – Arbitration mediated by juju oath-taking – Party instrumental to the exercise of the oath-taking – Whether can validly resile from it

ALTERNATIVE DISPUTE RESOLUTION – CUSTOMARY ARBITRATION:- Resolution of dispute as to ownership of land - Where parties decided to be bound by traditional arbitration resulting in oath taking – Whether ousts common law principles in respect of proof of title to land - Whether proof of ownership or title to land will be based on the rules set by traditional arbitration resulting in oath-taking

RELIGION AND LAW – BELIEF IN JUJU AND CUSTOMARY ARBITRATION:- Recognition of arbitral rites of ordeals by way of oath-taking by the Supreme Court – Placement of juju believed to be deadly on land and inviting a rival claimant to title over the land to remove same in the presence of witnesses – Recognition of title as inhering in a party who survives the ordeal – Attitude of Courts of Nigeria to invitation to enforce same

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S):- Attitude of the Supreme Court to invitation to interfere with concurrent findings of fact(s) made by Lower Courts – What must be shown for the court to intervene

EVIDENCE - PROOF OF CUSTOM/CUSTOMARY LAW: Position of the law as regards proof of customary law in relation to oath taking in land matters – Burden of proof of custom – On whom lies

EVIDENCE - PROOF OF CUSTOM/CUSTOMARY LAW:- Burden of proof of custom that has not been judicially noticed by courts – On whom lies – Nature of evidence that the courts would accept

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF: Principle that in a claim for declaration of title of land, the onus is on the Plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the Defendant – Duty of plaintiff to satisfy the Court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought – Effect of failure thereto

EVIDENCE - CUSTOMARY LAW – BURDEN OF PROOF/ONUS OF PROOF:- On whom lies the onus of proof of an asserted custom – Invocation of hear-say evidence – Principle that evidence of tradition and traditional practices is hearsay upon hearsay and is admissible evidence by virtue of Section 66 of the Evidence Act, 2011 - When hearsay evidence of an asserted tradition/event is placed side by side with an opposing evidence of an eye-witness of the alleged institution of the custom – Whether the direct evidence should be preferred by Court

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

At the trial court, the respondents as plaintiffs, took out a Writ of Summons against the appellant seeking among others the following declaratory and injunctive reliefs:

(a) A declaration that the land in dispute is the exclusive property of the plaintiffs and are entitled to the customary right of occupancy in and over the said land called "Ishiekpe;"

(b) A mandatory injunctive order on the defendants to rebuild the damaged house of the first plaintiff which they destroyed;

As per their Amended Statement of Claim, the respondents claimed to be the customary occupiers of the land in dispute which they held as a family land. Upon the land being trespassed by one Emmanuel Uba, a member of Umuogbocha kindred in Egbeagu village, Amansea, Chibunze, the respondents' father challenged Emmanuel Uba's trespassory acts. The Egbeagu village intervened in the dispute and invited both Umuogbocha and Umuofuony kindreds for arbitration. The Egbeagu village decided that Umuogbocha kindred should bring a juju and place it on the land in dispute for the Umuofuonye kindred to swear by removing same.

According to the Respondents, their father, Chibunze, without the support of other members of the Umuofuonye kindred (who were afraid of killed by the Ngene Olineru juju) rose to the occasion. On account of that, their father, Chibunze, became the exclusive owner of the Isiekpe land and had since exercised diverse acts of possession on the land such as farming and planting agricultural palms thereon and before his death, allotted portions of the land in dispute to his male children. Years later, the Defendants/descendants of the extended kindred (who had cowered before the Juju) now began to trespass on the land to the extent of pulling and burning bungalows of the children of the said Chibunze. Their claim: that the land remained part of the entire land which was founded by Ofuonye, the great ancestor of the entire kindred.

The trial Court gave judgment for Chibunze’s family which was affirmed by the Court of Appeal.

DECISION(S) APPEALED AGAINST

The Court of Appeal, Enugu Division, dismissed the defendants/appellants' appeal, and affirmed the Trial Court's judgement that it was proved that a custom exist which made a person owner of a land over which he publicly swore a juju under the customary arbitrage of elders and witnesses. And that there was no custom to the effect that any member of a member who swore an oath relating to family land did so on behalf of the whole family if there was in fact no evidence that the family supported him or mandated him to do so as their proxy.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1. Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitle them to the declaration they sought?

2. Was the Court below right when it affirmed the decision of the Trial Court that burden of proof shifted to the appellants when the Respondent failed to discharge the initial burden of proof?

*BY RESPONDENTS*

[Adopted issues for determination presented by Appellant]

*AS ADOPTED BY COURT*

[Resolved appeal based on issues for determination presented by Appellant]

DECISION OF SUPREME COURT

Two issues resolved against appellant.

1. There is no evidence that the alleged custom of the people of Amansea and Igbos in general relating to oath- taking has been judicially noticed by our Courts. In effect, the burden of proof was on the appellants to prove by evidence that in Amansea, in particular, and Igbo land, in general, that practice of oath taking in land dispute must be supported had been applied for long period of time that is has now obtained the force of law.

2. Customary law is a question of fact to be proved by evidence. Respondent proved their claim on the admitted evidence and laid down principle by this Court in Onyenge and Ors v Ebere and Ors [2004] 6 SCNJ 126. Concurrent findings and decisions of the Lower Courts affirmed.

**MAIN JUDGMENT**

CHIMA CENTUS NWEZE, J.S.C. (Delivering the Leading Judgment):

At the High Court of Anambra State, [Trial Court, for short], the respondents in this appeal, as plaintiffs, took out a Writ of Summons against the appellant herein, [as defendants]. They sought the following declaratory and injunctive reliefs:

(a) A declaration that the land in dispute is the exclusive property of the plaintiffs and are entitled to the customary right of occupancy in and over the said land called "Ishiekpe;"

(b) A mandatory injunctive order on the defendants to rebuild the damaged house of the first plaintiff which they destroyed;

(c) N10,000 (Ten Thousand Naira only) (sic) damages for trespass;

(d) A perpetual injunction to restrain the defendants by themselves, agents, privies, servants, workmen or whomsoever from further acts of waste and trespass on the land.

Upon the settlement and exchange of pleadings, trial commenced on October 19, 2005. Five witnesses testified on behalf of the plaintiffs. On the other hand, the defendants called four witnesses. The trial Court, in its judgment, found for the respondents, [plaintiffs, as they then were]. The defendants at the Trial Court, [appellants at the Lower Court], approached the Court of Appeal, Enugu Division, [Lower Court, for short], which Court, upon dismissing the defendants/appellants' appeal, affirmed the Trial Court's judgement.

They [the defendants/appellants], further, appealed to this Court entreating it to determine their two issues: issues which the respondents adopted in their brief. Before returning to these issues, a factual background of the case may not be out of place.

FACTUAL BACKGROUND

As per their Amended Statement of Claim, the respondents made the case that they are members of the Chibunze family in Egbeagu village, Amansea in Awka Local Government area of Anambra State of Nigeria. They and the appellants are of the Umuofuonye kindred in Egbeagu village, Amansea. They claimed to be the customary occupiers of the land in Amansea.

They made the case that the land in dispute was part of the family land of Umuofuonye kindred when in about 1940, one Emmanuel Uba, a member of Umuogbocha kindred in Egbeagu village, Amansea, trespassed into the Isi-ekpe land of Umuofuonye kindred.

Chibunze, the respondents' father challenged Emmanuel Uba's trespassory acts.

The Egbeagu village intervened in the dispute and invited both Umuogbocha and Umuofuony kindreds for arbitration. The Egbeagu village decided that Umuogbocha kindred should bring a juju and place it on the land in dispute for the Umuofuonye kindred to swear by removing same.

They further claimed that their father, Chibunze, without the support of Umuofuonye kindred - the other members of the kindred, because of the fear of being killed by the Ngene Olineru juju, stayed away, rose to the occasion. On account of this, their father, Chibunze, became the exclusive owner of the Isiekpe land. He, Chibunze, thereafter exercised diverse acts of possession on the land such as farming and planting agricultural palms thereon. Before his death, he, Chibunze, allotted portions of the land in dispute to his male children. In 2004, the appellants pulled down and burnt the bungalows of the first plaintiff, now deceased, bungalows allotted to him by their father, Chibunze. This prompted their action in Court.

The defendants/appellants, on their part, maintained that the land in dispute forms part of the entire land which was founded by Ofuonye, the great ancestor of the appellants and the respondents. The said Ofuonye, during his life time, gave birth to sons who, in turn, gave birth to the present kindred known as Umuofuonye in Egbeagu village of Amansea. The land in dispute, according to them, known as and called Isiekpe is the family land of Umuofuonye kindred.

Their further case was that sometime in 1940, a dispute arose between the Umuogbocha and the Umuofuonye families over the Isiekpe land. The Egbeagu village decided that Umuofuonye should take oath for Umuogbocha family. The appellants maintained that the other members of Umuofuonye family assisted the respondents' father to remove the juju placed on the Isiekpe land by the Umuogbocha kindred. They averred that, after the oath-taking exercise, the respondents' father never claimed exclusive ownership of the Isiekpe land as other members of the Umuofuonye family continued to farm on the land collectively unhindered.

As indicated earlier, following the affirmation of the trial Court's judgement, they [the defendants/appellants], further, appealed to this Court entreating it to determine their two issues: issues which the respondents adopted in their brief. The two issues were couched thus:

1. Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitle them to the declaration they sought?

2. Was the Court below right when it affirmed the decision of the Trial Court that burden of proof shifted to the appellants when the Respondent failed to discharge the initial burden of proof?

ARGUMENTS OF COUNSEL

ISSUE ONE

Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitled them to the declaration they sought?

APPELLANT'S SUBMISSIONS

At the hearing of this appeal on December 16, 2019, Learned Counsel for the appellants, Ifeanyi Obiakor, adopted the appellants' brief filed on August 24, 2015. He first referred to I. A. Umezulike's book, A.B.C of Contemporary Land Law in Nigeria (sic) at pages 295 to 297.

In his submission, every member of the family has or enjoys the locus standi to institute an action in respect of any wrong or illegal dealings with the property. He maintained that any member of the family, no matter how insignificant he may be considered, can bring an action to protect family land. He went further to state that the respondent did not establish, by cogent evidence, the custom whereby they claimed that their father, Chibunze, by taking oath on behalf of Umuofonye family in respect of isi-ekpe land alone became automatically the exclusive owner of the dispute land.

He submitted that the respondents must therefore satisfy the Court that, upon the pleadings and evidence which they adduced, they are entitled to the declaration sought, Eya v Olopade [2011] 5 SCNJ 98; Odunukwe v Ofomata [2010] 12 SCNJ 516, 548-549. He referred to the Amended Statement of Claim, pages 38 - 41 of the record; paragraphs 5 to 6 of the Amended Statement of Claim, pages 38 - 46 of the record; the evidence in chief of PW1, Nathaniel Chibunze, pages 54 and pages 53 and 54 of the record. He equally drew attention to his statement under cross-examination, pages 60 and 62 of the record.

He further referred to the evidence of the PW2 at page 70 of the record and the answers in cross-examination at pages 72 to 73 of the record. He then submitted that apart from the complaint of the appellants that the respondent did not plead and establish by evidence the custom that a family land by oath taking, automatically becomes the exclusive owner of such family land and the evidence of P.W1, P.W2 and P.W.4 as to whether Chibunze Anumba took oath over the disputed land as his personal land or as to the land of Umuofuonye family was also contradictory.

He further submitted that on the issue of contradictory evidence of the respondents' witnesses, that where two pieces of evidence one (evidence of a particular witness) of which affirms the contrary or opposite of what the other witnesses says, they are inconsistent in nature, one contradicts the other and the Court cannot pick and choose which one to credit and which to discredit. The Court must therefore reject the two pieces of contradictory evidence as unreliable and of no probative value, Asariyu v State [1987] 4 NWLR (pt. 67); 709; Okonkwo v State [1998] 8 NWLR (Pt 561) 210.

He therefore submitted that the Lower Court erred in law when it affirmed the decision of the trial Court which was based on these contradictory evidences of PW1; PW2 and PW4 as to the original ownership of the disputed land as to whether the respondent's father, Chibunze, took the oath in contention on his personal capacity or on behalf of Umuofuonye Family. He submitted that parties are bound by their pleadings and evidence. As such, evidence not pleaded goes to no issue, Ojiogu v. Ojiogu [2010] 3 SCNJ 418; Nwokorobia v. Nwogu [2009] 5 SCNJ 218.

He canvassed the view that, from the averments in Paragraph 5 of the Amended Statement of Claim, it was manifestly clear that the findings of the Lower Courts were not based on the custom that a person who defends the family property by oath taking becomes exclusive owner of such family land which is a corporate entity. He submitted that the Lower Courts misconceived the difference between where two persons agreed to take oath to resolve ownership of a personal property and where a family member defends family land by oath taking and which makes him the exclusive owner of the land. This misconception, in his view, led to miscarriage of justice in the appellants' case.

He contended that this custom of Amansea alleged by the respondents that, once a person single-handedly defends family property by oath taking, automatically becomes the exclusive owner of that family land was not strictly proved by their evidence. He cited Orlu v. Gogo-Abite [2010] 1 SCNJ 322, 333; Odunukwe v. Ofomata [2010] 12 SCNJ 548; Onyenge v. Ebere [2004] 13 NWLR (pt 889) 20; Ume v. Okoronkwo [1996] 12 SCNJ 404. He urged the Court to resolve this issue in favor of the appellants.

RESPONDENT'S CONTENTION

On his part, Fidelis Anyanegbu, learned counsel for the respondents, adopted the respondent's brief deemed, properly, filed on June 6, 2018. He contended that, where parties who believe in the efficacy of a juju resort to oath- taking to settle a dispute, they are bound by the result, Onyenge and Ors v. Ebere[2004] 13 NWLR (pt. 889) 20, 40 - 41.

He also pointed out that the averments and evidence respecting the land in dispute on the traditional history of the land in dispute from both parties in this appeal prior to 1940 no longer applied in this appeal. The applicable law is the customary law arbitration, one of methods known to customary law establishing the truth of matter, Ume v Okoronkwo [1996] 10 NWLR (pt. 477) 133.

He submitted that the rule of the custom of oath taking in Amansea Town, according to the evidence of the respondent, is that, if a person removed a juju placed on a disputed land and survives after a period of twelve days, he will barb his hair. If he survives after twenty one days, he will go to the market to celebrate his survival and thereafter he will be declared to be the owner of the land in dispute. Thus, if one man takes oath and he survives, exclusive ownership of the property goes to him.

He pointed out that the respondent has established by cogent evidence the custom that a family member who defends family land by oath taking automatically becomes the exclusive owner of such family land so as to entitle the respondents to the declaration they sought.

RESOLUTION OF THE ISSUE

My Lords, the address of the appellants' counsel is a vain attempt at the obfuscation of the very straight forward issues which the Lower Courts brilliantly articulated and resolved. In this judgement therefore, I have a duty to contextualize the submissions within the narrow framework of the questions which the lower courts dealt with.

On the first issue, [Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitled them to the declaration they sought?], the learned trial Judge consistent with the prescription in Mogaji v Odofin [1975] 4 SC 91, constructed the legendary imaginary scale, [pages 128 - 129 of the record] where he weighed the evidence of the plaintiffs and defendants.

He concluded thus:

It is my view that the defendants failed to prove the existence of the alleged custom (sic, in) relation to oath- taking. The evidence of the defendants and their witnesses was only a sweeping assertion that such a custom in fact exists. This, in my opinion, falls short of what is required to prove a disputed custom. It is my view that the defendants who alleged the existence of the disputed custom ought to have gone further to show instances where the alleged custom had been applied either in Amansea or Ibo (sic) land in general. The evidence of the PW2 which I had earlier accepted as true that only Chibunze removed the juju placed on the land in dispute supports the plaintiffs' case that such custom does not exist. [pages 129 - 130 of the record; italics supplied for emphasis]

At page 129 of the record, the learned trial Judge had made it clear that in:

...the case in hand, there is no evidence that the alleged custom of the people of Amansea or the Igbos (sic) in general relating to oath taking has been judicially noticed by Courts. It is therefore for the defendants to prove by evidence that in Amansea and in Igbo land in general the practice that a person taking an oath in a land dispute must be supported has been applied for a long period of time that it has now obtained the force of law. [Italics supplied for emphasis]

As noted earlier, the Trial Court concluded that "the evidence of the defendants and their witnesses was only a sweeping assertion that such a custom in fact exists”, page 129 of the record. On appeal to the Court of Appeal, Enugu Division, the Court observed quite rightly, as follows:

Customary law rule being a question of fact, it varies from place to place excepting of course where that custom or practice has assumed the notoriety of such dimension that the Courts would take judicial notice of it...It is for this reason that the cases cited by counsel to the appellant on this point ... have to be applied with caution. We need to look inwards to the facts as dictated by circumstances in each case.

The peculiar fact and circumstance in this current case on appeal is the practice by which a person or persons who successfully removes juju planted on a disputed land automatically becomes the owner of that land in dispute if he survived the oath he took.

The Court identified the narrow and peculiar question that fell for determination. According to the Court: 'the question now is whether the respondents succeeded in proving that their father took the oath and survived the oath alone to become the exclusive owner of the property in dispute. [pages 194 - 195 of the record; italics supplied for emphasis]

Like the Trial Court, the Lower Court, in the context of the Mogaji v Odofin (supra) prescription, placed the testimonies of the parties on the imaginary scale of justice. Listen to this fascinating conclusion sequel to the Lower Court's admirable concurrent findings of facts:

The respondents and witnesses called by them i.e. first respondent, PW2, PW3 and PW4 gave evidence at the trial in support of the assertion or claim that the first respondent's father was, who single-handedly took the oath without the support of his brethren who deserted him but he lived to survive the customary period of oath taking and thereafter became the exclusive owner of the land in dispute according to native law and custom. PW2 was not just a witness, he gave an eye witness account of the proceedings during the oath taking which took place in 1940. The family of Umuogbocha, to which he belong, (sic), had planted the juju and he said so but it was first respondent's father, Chibunze, who resisted the claim of Umuogbocha family to the land in dispute to put his on the line. He survived it. Evidence of this witness was not contradicted by the appellants. The Trial Court believed the respondents. This is what it takes to prove the custom and practices as pleaded by them. [page 197 of the record; italics supplied for emphasis]

Again, like the Trial Court, the Lower Court found that:

By dint of those averments, [paragraphs 9, 10 and 11 of the Statement of Defence], especially, facts pleaded under paragraph 11 of the Statement of Defence that, by the native law and custom of Amansea and Igbo land in general, one man does not swear to juju or oath alone in land matters. The appellants have by that put up a rule of customary practice and are bound to prove that fact or custom being the party who assert the existence of that custom or practice. In their bid to prove that custom, DW1, DW3 and DW5 all gave evidence among others to suggest that Chibunze, plaintiffs' father was not alone on the occasion of the oath taking rather he was supported by Nweke Nwatu Irueto, Aguma Umeadi among others. What is noticeable in the evidence of DW1, DW3 and DW5 on this point at issue is the fact that, themselves were told of the story that Chibunze was assisted by other persons in the family during the proceedings of oath taking. In other words, evidence from defence witnesses, particularly, DW1, DW3 and DW5 was not first hand information or evidence as can be classified as direct evidence as to dislodge the eye witness account of the event as narrated by PW2.

Evidence of tradition and traditional practices is hearsay upon hearsay which is admissible evidence by virtue of Section 66 of the Evidence Act, 2011, but the fact is that such evidence is still hearsay. When therefore such hearsay evidence is placed side by side with the evidence of the person who saw the event take place, who saw the outcome of that event, the latter piece of evidence should be preferred. [Pages 198 - 199 of the record; italics supplied for emphasis]

In the concurrent findings of the Lower Court, the question of the supersession of hearsay evidence by direct evidence was not the only ground for preferring the plaintiffs/respondents' side of the story to that of the defendants/appellants. The Lower Court cited further instances as follows:

The Trial Court in any case in the course of the review of evidence of witnesses had cause to question the credibility and evidence of defence witnesses, in particular, evidence of DQ1 when the Court observed that he had an axe to grind with the first respondent such that his evidence cannot be taken as the whole truth or as proving the existence of custom they allege hence the defence also failed to discharge the onus cast upon them to prove their assertion. The Trial Court also in its findings observed that no any instance of the custom alleged by the appellants was cited either from Amansea or from Igbo land, generally. It is not correct, therefore, as submitted by learned appellants' counsel that it was the trial Court that shifted the onus of proof of the existence of a particular custom to the defendants to prove. The Trial Court did not. Rather, the law did, but the appellants as defendants failed to discharge the thrust on them, lheanacho v. Chigere [2004] 10 NWLR (pt 1001) 130, 160. [pages 199 - 200 of the record]

My Lords, before proceeding further on this point, I think it would be fair to acknowledge the academic protestations against the, somewhat, discordant judicial views on the criteria for validating an award under customary arbitration. These protestations are growing by the day: G. Ezejiofor, The Law of Arbitration in Nigeria (Ibadan: Longman Nigeria Plc, 1997) 22-29; A. I. Okekeifere, "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court," in Abia State University Law Journal, (1998) Vol 5 No 2; C. E. Ibe, "Legal Effect of Submission to Arbitration under Customary Law: A Critique of the case of Duruaku Eke and Ors v Udeozor Okwaranya and Ors"in UNIZIK Law Journal, Vol 4, No 1, 295-303.

Others include: O. D. Amucheazi, "Validity of Customary Law Arbitration in Nigeria: A Review of Egesimba v Onuzurike", in Nigerian Bar Journal, Vol 1, No 4, 2003, 515-524; O. K. Edu, "The Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight", in (2004) Vol 25, JPPL 43-53; N. M. Umenweke, "The Ingredients of a Binding Customary Arbitration Revisited: A Critique of the case of Egesimba v Onuzurike [2002] 15 NWLR (pt 791) 466", in UNIZIK Law Journal Vol 5, No 1, 2005, 130-139; E. S. Nwauche, "The Features of Customary Law Arbitration: Eberev Oyenge"in Abia State University Law Journal Vol 7, 2000, 45-47; C. A. Ogbuabor, "Recurrent Issues in the validity of Customary Arbitration in Nigeria," in O. D.Amucheazi and C. A. Ogbuabor (eds), (supra) 89-115.

These protestations notwithstanding, the truth is that, as Tobi, JSC, explained in Onyenge and Ors v Loveday Ebere and & Ors [2004] 6 SCNJ 126:

where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such situation, the proof of ownership or title to land will be based on the rules set by traditional arbitration resulting in oath-taking. In arbitration under customary law, the applicable law is customary law and not the common law principle with their characteristic certainty and ossification.... [Italics supplied for emphasis]

Indeed, it was as if Tobi, JSC, was addressing the appellants in the instant appeal when in Onyenge and Ors v Loveday Ebere and Ors (supra), His Lordship held that:

It was wrong for the appellants who were instrumental to the exercise of the oath-taking to resile from it. Such a position is not available to them in law. In view of the fact that the respondents survived after taking oath, the parties were not bound by the niceties of the law as suggested by counsel for the appellants that possession is nine-tenths of ownership. That may well be so under common law but certainly not the position under the customary law under which oath was taken.

From the above principle, it is clear that the parties in this instant matter decided to be bound by traditional arbitration resulting in oath taking; thus, common law principles in respect of proof of title to land no longer applied in this instant case. In the instant matter, the proof of ownership or title to land will be based on the rules set by traditional arbitration resulting in oath-taking, Onyenge and Ors v Loveday Ebere and Ors (supra). I find no merit in the misleading submissions of counsel for the appellants. I have no hesitation in resolving this issue in favour of the respondents. Like the Lower Courts, I find that the respondents established, by cogent evidence, the custom that a family member who defends family land by oath taking, automatically, becomes the exclusive owner of such family land. They (the respondents) are entitled to the declaration they sought.

In a word, it would seem obvious that the appellants' counsel was either completely oblivious of, or that he totally underrated what a distinguished scholar called the prerequisites of customary arbitration, G. Ezejiofor, "The Prerequisites of Customary Arbitration," (1992-1993) Vol 16, Journal of Private and Property Law, 32. Let me explain. Learned counsel assumed that pleading what, in his view, evidenced customary arbitration, sufficed to warrant the Lower Court's favourable finding in that regard. Now, notwithstanding the apocryphal view in Okpuruwu v Okpokam (1988) 4 NWLR (pt 90) 554, 573 that "there is no concept known as customary or native arbitration in our jurisprudence," there are a plethora of superior authorities to the effect that if customary arbitration was pleaded and proved as such, it was binding on the parties and capable of constituting estoppel, Nruamah and Ors v. Ebuzoeme and Ors [2013] All FWLR (pt 681) 1426, 1445-1446; Agala and Ors v. Okusin and ors (2010) LPELR -221 (SC) 42; Okoye and Anor v. Obiaso and ors (2010) LPELR-2507 (SC) 33; Okereke and Anor v. Nwankwo and Anor(2003) LPELR-2445 (SC) 13; Egesimba v Onuzurike (2002) LPELR-1043 (SC) 24; Odonigi v. Oyeleke(2001) LPELR-2230 (SC) 19; Eke and Ors v Okwaranyia and Ors (2001) LPELR- 1074 (SC) 29; Uzoewulu v Ezeaka [2000] 14 NWLR (pt 688) 679; Obioha v Akukwe [2000] 5 NWLR (pt 658) 699; Agu v. Ikewibe [1991] 3 NWLR (pt 180) 385; Awosile v Sotunbo (1992) LPELR- 658 (SC) 29, Paragraph E; Ohiaeri v Akabeze [1992] 2 NWLR (Pt 221) 1; Ume v. Okoronkwo [1996] 10 NWLR (pt 477) 133; Akpan v. Otong [1996] 10 NWLR (pt 476) 108. Igwego v Ezeugo [1992] 6 NWLR (pt 249) 561; Anyabunsi v Ugwunze (1995) LPELR-503 (SC) 23; Oparaji and Ors v Ohanu and Ors (1999) LPELR-2747(SC) 18; Okala v. Udah [2019] 9 NWLR (pt 1678) 562.

I resolve this issue against the appellants and in favour of the respondents.

ISSUE TWO

Was the Court below right when it affirmed the decision of the Trial Court that the burden of proof shifted to the appellants when the respondents failed to discharge the initial burden of proof?

APPELLANT'S SUBMISSIONS

With regard to this issue, learned counsel for the appellants submitted that it is incontestable that it is a party that will lose if no evidence is adduced by both parties that owes the burden of proof. He cited Section 133(1) of the Evidence Act, 2011 as amended; Oyovbiare v Omamurhomu [2001] FWLR (pt 68) 129, 129.

He drew the attention of the Court to the respondents' pleading which admitted that the land in dispute was part of the communal land of Umuofuonye kindred in Egbeagu Village.

He also submitted that the respondent failed to discharge the burden of proof that a person who defends family land single-handedly by oath taking becomes the exclusive owner of the said land.

He further maintained that the onus of proof will not shift to the appellants when the respondents, who asserted that a family member who defends family land alone by oath-taking, automatically becomes the exclusive owner of such family land, have not established such custom. He also contended that the respondents, having failed to discharge that primary burden of proof on them, the burden of proof cannot shift to the appellants.

He urged this Honorable Court to resolve this issue in favour of the appellants.

RESPONDENT'S CONTENTION

On his part, learned counsel for the respondents pointed out that the respondents pleaded the customary arbitration of oath-taking in paragraphs 5 and 6 of the Amended Statement of Claim. They went about proving the existence of the said custom. This included the fact that one man can take oath in Amansea. They proved the custom, he pointed out, that if one man takes oath and survives the oath-taking, he becomes the owner of the property in respect of which the oath was taken. If members of his family support him, the land will be family property, [pages 39; 53 -54; 69-70; 76-77; 82-83 of the record.

He pointed out that the appellants, on the other hand, in paragraph 11 of the Statement of Defence pleaded that, under native law and custom of Amansea town and Igbo Land in general, one man does not swear to a juju placed on the land in dispute, page 11 of the record.

He submitted that the above averment is an assertion which the appellants were bound to prove since he who asserts must prove. Simply put, the burden of proving any fact is on the party who asserts the affirmative of an issue. The burden of proving the alleged custom of the people of Amansea that one man cannot remove a juju placed on the land in dispute was on the appellants who alleged the existence of the said custom. He drew the Court's attention to Section 16 (1) and (2) of the Evidence Act, 2011; Iheanacho v Chigere [2004] 20 NWLR (pt.901) 130, 160.

Learned counsel for the respondents agreed with the Lower Courts that, in the instant case, there was no evidence that the alleged custom of the people of Amansea and the Igbo in general relating to oath-taking has been judicially noticed by our Courts.

He therefore maintained that was the duty of the appellants to prove by evidence that in Amansea in particular, and Igbo land in general, the practice that a person taking an oath in land must be supported, has been applied for long period of time that it has now obtained the force law.

He urged the Court to resolve this issue in favour of the respondents.

RESOLUTION OF THE ISSUE

My Lords, at the risk of repetition, I am under obligation to return to the brilliant resolution of this issue by the Lower Courts. As shown above, the learned trial Judge consistent with the prescription in Mogaji v. Odofin [1975] 4 SC 91, constructed the legendary imaginary scale, [pages 128 - 129 of the record] where he weighed the evidence of the plaintiffs and defendants.

He concluded thus:

It is my view that the defendants failed to prove the existence of the alleged custom (sic, in) relation to oath- taking. The evidence of the defendants and their witnesses was only a sweeping assertion that such a custom in fact exists. This, in my opinion, falls short of what is required to prove a disputed custom. It is my view that the defendants who alleged the existence of the disputed custom ought to have gone further to show instances where the alleged custom had been applied either in Amansea or Ibo (sic) land in general. The evidence of the PW2 which I had earlier accepted as true that only Chibunze removed the juju placed on the land in dispute supports the plaintiffs' case that such custom does not exist. [pages 129 - 130 of the record; italics supplied for emphasis]

At page 129 of the record, the learned trial Judge had made it clear that in:

...the case in hand, there is no evidence that the alleged custom of the people of Amansea or the Igbos (sic) in general relating to oath taking has been judicially noticed by Courts. It is therefore for the defendants to prove by evidence that in Amansea and in Igbo land in general, the practice that a person taking an oath in a land dispute must be supported has been applied for a long period of time that it has now obtained the force of law. [Italics supplied for emphasis]

As noted earlier, the Trial Court concluded that "the evidence of the defendants and their witnesses was only a sweeping assertion that such a custom in fact exists," page 129 of the record. On appeal to the Court of Appeal, Enugu Division, the Court observed quite rightly as follows:

Customary law rule being a question of fact, it varies from place to place excepting of course where that custom or practice has assumed the notoriety of such dimension that the Courts would take judicial notice of it... It is for this reason that the cases cited by counsel to the appellant on this point ... have to be applied with caution. We need to look inwards to the facts as dictated by circumstances in each case.

The peculiar fact and circumstance in this current case on appeal is the practice by which a person or persons who successfully removes juju planted on a disputed land automatically becomes the owner of that land in dispute if he survived the oath he took.

The Court identified the narrow and peculiar question that fell for determination. According to the Court: 'the question now is whether the respondents succeeded in proving that their father took the oath and survived the oath alone to become the exclusive owner of the property in dispute.' [pages 194 - 195 of the record; italics supplied for emphasis]

Like the Trial Court, the Lower Court, in the context of the Mogaji v Odofin (supra) prescription, placed the testimonies of the parties on the imaginary scale of justice.

Listen to this fascinating conclusion sequel to the Lower Court's admirable concurrent findings of facts:

The respondents and witnesses called by them i.e. first respondent, PW2, PW3 and PW4 gave evidence at the trial in support of the assertion or claim that the first respondent's father was, who singlehandedly took the oath without the support of his brethren who deserted him but he lived to survive the customary period of oath taking and thereafter became the exclusive owner of the land in dispute according to native law and custom. PW2 was not just a witness, he gave an eye witness account of the proceedings during the oath taking which took place in 1940. The family of Umuogbocha, to which he belong, (sic), had planted the juju and he said so but it was first respondent's father, Chibunze, who resisted the claim of Umuogbocha family to the land in dispute to put his on the line. He survived it. Evidence of this witness was not contradicted by the appellants. The Trial Court believed the respondents. This is what it takes to prove the custom and practices as pleaded by them. [page 197 of the record; italics supplied for emphasis]

Again, like the Trial Court, the Lower Court found that:

By dint of those averments, [paragraphs 9, 10 and 11 of the Statement of Defence], especially, facts pleaded under Paragraph 11 of the Statement of Defence that, by the native law and custom of Amansea and Igbo land in general, one man does not swear to juju or oath alone in land matters. The appellants have by that put up a rule of customary practice and are bound to prove that fact or custom being the party who assert the existence of that custom or practice. In their bid to prove that custom, DW1, DW3 and DW5 all gave evidence among others to suggest that Chibunze, plaintiffs' father was not alone on the occasion of the oath taking rather he was supported by Nweke Nwatu Irueto, Aguma Umeadi among others. What is noticeable in the evidence of DW1, DWW3 and DW5 on this point at issue is the fact that, themselves were told of the story that Chibunze was assisted by other persons in the family during the proceedings of oath taking. In other words, evidence from defence witnesses, particularly, DW1, DW3 and DW5 was not first hand information or evidence as can be classified as direct evidence as to dislodge the eye witness account of the event as narrated by PW2.

Evidence of tradition and traditional practices is hearsay upon hearsay which is admissible evidence by virtue of Section 66 of the Evidence Act, 2011, but the fact is that such evidence is still hearsay. When therefore such hearsay evidence is placed side by side with the evidence of the person who saw the event take place, who saw the outcome of that event, the latter piece of evidence should be preferred. [Pages 198 - 199 of the record; italics supplied for emphasis]. In the concurrent findings of the Lower Court, the question of the supersession of hearsay evidence by direct evidence was not the only ground for preferring the plaintiffs/respondents' side of the story to that of the defendants/appellants. The Lower Court cited further instances as follows:

The Trial Court in any case in the course of the review of evidence of witnesses had cause to question the credibility and evidence of defence witnesses, in particular, evidence of DQ1 when the Court observed that he had an axe to grind with the first respondent such that his evidence cannot be taken as the whole truth or as proving the existence of custom they allege hence the defence also failed to discharge the onus cast upon them to prove their assertion. The Trial Court also in its findings observed that no any instance of the custom alleged by the appellants was cited either from Amansea or from Igbo land, generally. It is not correct, therefore, as submitted by learned appellants' counsel that it was the Trial Court that shifted the onus of proof of the existence of a particular custom to the defendants to prove. The Trial Court did not. Rather, the law did, but the appellants as defendants failed to discharge the thrust on them, lheanacho v. Chigere [2004] 10 NWLR (pt 1001) 130, 160. [pages 199 - 200 of the record]

Thus, in this instant matter, there is no evidence that the alleged custom of the people of Amansea and Igbos in general relating to oath-taking has been judicially noticed by our Courts. In effect, the burden of proof was on the appellants to prove by evidence that in Amansea, in particular, and Igbo land, in general, that practice of oath taking in land dispute must be supported had been applied for long period of time that is has now obtained the force of law.

Customary law is defined as an unwritten and it depends on what the appropriate authority believes or is persuaded to believe by evidence as customary law, Omaye v Omagu [2008] 7 NWLR (pt 1087) 447; that is customary law is a question of fact to be proved by evidence. However, in all, from the eloquent submissions of the respondent's counsel, submissions anchored on the admitted evidence and laid down principle by this Court in Onyenge and Ors v Ebere and Ors [2004] 6 SCNJ 126, I have no hesitation in affirming the concurrent decisions of the Lower Courts. This appeal is devoid of any redeeming feature. Appeal is hereby dismissed. I affirm the concurrent findings and decisions of the Lower Courts.

**OLABODE RHODES-VIVOUR, J.S.C.:**

I read in advance a copy of the leading judgment delivered by my learned brother NWEZE JSC. I agree with His Lordship's reasoning and conclusion that concurrent findings of the two Courts below are unassailable. I too dismiss the Appeal.

**MARY UKAEGO PETER-ODILI, J.S.C.:**

I am in total agreement with the judgment just delivered by my learned brother, Chima Centus Nweze JSC and to underscore the support in the reasonings from which the decision emanated, I shall make some remarks.

This appeal is commenced by the appellants against the judgment of the Court of Appeal, Enugu Division or Court below or Lower Court, Coram. Massoud Abdulrahman Oredola, Tom Shaibu Yakubu and Saidu Tanko Hussaini JJCA which decision was delivered on the 13th day of February 2015, affirming the judgment of the Trial Court delivered on 4th September, 2006 and dismissed the appeal.

BACKGROUND FACTS:

The Respondents as Plaintiffs at the Trial Court took out a Writ of Summons against the appellants as defendants and claimed in their Statement of Claim dated 28th day of February, 2005, the following reliefs:-

"a) A declaration that the land in dispute is the exclusive property of the plaintiffs and are entitled to the customary right of occupancy in and over the said land called "Ishiekpe".

b) A mandatory injunctive order on the defendants to rebuild the damaged house of the 1st plaintiff which they destroyed.

c) N10,000.00 (Ten Thousand Naira Only) damages for trespass.

d) A perpetual injunction to restrain the defendants by themselves, agents, privies, servants, workmen or whomsoever from further acts of waste and trespass on the land."

Pleadings were exchanged and the respondents filed a Reply to the Statement of Defence on 22nd July, 2005. At the trial of this suit which commenced on the 19th day of October, 2005, parties called witnesses in proof of their cases. The respondents called four (4) witnesses while the appellants called five (5) witnesses in proof of their cases. The respondents called four (4) witnesses while the appellants called five (5) witnesses.

The respondent's case as pleaded in their Amended Statement of Claim is that they are members of Chibunze family in Egbeagu Village, Amansea in Awka North Local Government Area of Anambra State of Nigeria. The appellants are of Umuofuonye Kindred in Egbeagu Village, Amansea. They claimed that they are the customary occupiers of the land in Amansea. The respondents stated that the land in dispute was part of the family land of Umuofuonye Kindred when sometime in 1940, one Emmanuel Uba a member of Umuogbocha kindred in Egbeagu Village, Amansea trespassed into the Isi-ekpe land of Umuofuonye kindred which Chibunze, the respondents' father challenged the said Emmanuel Uba. The Egbeagu village intervened in the dispute and invited both Umuogbocha and Umuofuonye kindred for arbitration. The Egbeagu village decided that Umuogbocha kindred should bring a juju and place it on the land in dispute for the Umuofuonye kindred to swear by removing same.

The respondents further claimed that their father Chibunze, single handedly without the support of Umuofuonye kindred, because of the fear of being killed by the Ngene Olineru juju. They stated that thereafter their father became the exclusive owner of the Isi-ekpe land and he exercised diverse acts of possession on the said land such as farming and planting agricultural palms thereon They stated that their father before his death allotted portions of the land in dispute to his male children. They said that in 2004, the appellants pulled down and burnt the bungalows of the 1st plaintiff allotted to him by their father which led to the institution of this case.

On the other hand, the appellants in their Statement of Defence asserted that the land in dispute forms part of the entire land which was founded by Ofuonye the great ancestor of both the appellants and the respondents. The said Ofuonye during his lifetime gave birth to sons who in turn gave birth to the present kindred known as Umuofuonye in Egbeagu Village of Amansea. The land in dispute known and called Isi-ekpt is the family land of Umuofuonye kindred.

It is the appellants' case that sometime in 1940 a dispute arose between the Umuogbocha and the Unmuofuoye family over the Isi-ekpe land. The Egbeagu village intervened and decided that Umuofuonye should take oath for Umuogbocha family.

The appellants averred that the other members of Umuofuonye family assisted the respondents' father to remove the juju placed on the Isi-ekpe land by the Umuogbocha kindred. The appellants insisted that after the oath taking, the respondents' father during his lifetime never claimed exclusive ownership of the Isi-ekpe land as other members of the Umuofuonye family continued to farm the land collectively unhindered.

The appellants further asserted that it was sometime in 2004, that the respondents trespassed into the Isi-ekpe land commonly owned by the Umuofuonye kindred and started clearing the land for building purposes which the appellants warned them to desist from. But they contended that the disputed land belongs to them exclusively by virtue of the oath which was taken by their father single-handedly, hence they instituted the action that led to this appeal.

The Trial Court after the consideration of the evidence led by both parties delivered its judgment on the 4th day of September, 2006 and found for the respondents in line with the reliefs they sought.

On the 16th day of December, 2019 date of hearing, learned counsel for the appellants, Ifeanyi Obiakor Esq., adopted the brief of argument filed on 24/8/2015 and in it were distilled two issues for determination, viz:-

(i) Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitled them to the declaration they sought? (Grounds 1, 2, 3 and 5).

(ii) Was the Court below right when it affirmed the decision of the Trial Court that the burden of proof shifted to the appellants when the respondents failed to discharged the initial burden of proof. (Ground 4).

Learned counsel for the respondents, Fidelis O. Anyanegbu Esq., adopted the brief of argument filed on 21/4/2016 and deemed filed on 6/6/18 and equally adopted the issues as identified by the appellants.

ISSUES 1 AND 2:

1. Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitle them to the declaration they sought.

2. Was the Court below right when it affirmed the decision of the Trial Court that the burden of proof shifted to the appellants when the respondents failed to discharge the initial burden of proof.

Advancing the position of the appellants, learned counsel contended that the respondents did not establish by cogent evidence the custom whereby they claimed that their father, Chibunze by taking oath on behalf of Umuofuonye family in respect of Isi-ekpe land alone became automatically the exclusive owner of the disputed land. That the evidence of -the witnesses for the plaintiff/respondents was contradictory and fell short of the requirement for proof of the assertion. He cited Asariyu v State (1987) 4 NWLR (Pt.67) 709; Okonkwo v State (1998) 8 NWLR (Pt.561) 210.

That the respondent did not prove the custom of Amansea that a family member who defends family land by oath taking without support of members of the family automatically becomes the exclusive owner of such family land and it is to be noted that parties are bound by their pleadings and so evidence not pleaded goes to no issue. He relied on Chukwuemeka N. Ojiogu v Leonard Ojiogu (2010) 3 SCNJ 418, Nwokorobia v Nwogu (2009) 5 SCNJ 218.

It was further submitted for the appellants that it is the plaintiff who seeks the decree of declaration of title that has the burden of proof and he must succeed on the strength of his case and not on the weakness of the defence except where the case of the defence supports that of the plaintiff. He cited Odunukwe v Ofomata (2010) 12 SCNJ 516; Orlu v Gogo-Abite (2010) 1 SCNJ 322 at 332; Oyovbiare v Omamurhomu (2001) FWLR (Pt.68) 129; Eya v Olopade (2011) 5 SCNJ 98 at 114.

That the respondent failed to discharge the burden of proof and it cannot shift to the defendant/appellants.

Learned counsel for the respondents countered the stance of the appellants by stating that where parties believe in the efficacy of a juju, resort to oath taking to settle a dispute they are bound by the result. He cited John Onyenge & Ors. v Chief Loveday Ebere (2004) 13 NWLR (Pt.889) 20 at 40-41; Ume v Okoronkwo (1996) 10 NWLR (477) 133.

That the respondents adequately established by cogent evidence the custom that a family member who defends family land to oath-taking automatically became the exclusive owner of such family land so as to entitle the respondents to the declaration they sought.

That the respondents pleaded the customary arbitration of oath-taking and set about proving the existence of the said custom including the fact that one man can take the oath in Amansea and the implication that he becomes the owner of the property in respect of which he took the Oath. That the appellants disputing that assertion had the onus of showing the contrary and since the appellants failed in that regard, the position put across and established by the respondents is the one the Court should accept as happened in this instance. He cited Section 16 (1) and (2) of the Evidence Act, 2011, Iheanacho v Chigere (2004) 20 NWLR (Pt.901) 130 at 160; Section 258 of the Evidence Act, 2011, Omaye v Omagu (2008) 7 NWLR (Pt.1087) 447.

In a nutshell, the stance of the appellants are captured thus:-

i) The respondents did not establish by cogent evidence the custom of Amansea Town that a family member who defends family land alone by oath taking automatically became the exclusive owner of such family land.

ii) The Court below was wrong when it affirmed the decision of the Trial Court which was based on the contradictory evidence of PW1, PW2 and PW4 as to the original ownership of the disputed land and as to whether the respondents' father took the oath on his personal capacity or on behalf of the Umuofuonye family.

iii) The onus of proof will not shift to the appellants in this case when the respondents who asserted exclusive ownership of family land have not discharged with primary burden of proof on them.

On the other side of the divide the respondent held firmly to the position that the Trial Court as well as the Court below properly stated that the burden of proof of the particular rule of oath-taking that one man does not remove a juju placed on the land in dispute is on the appellants as the onus of proof had shifted to the appellants in respect of that custom that in Amansea in particular and Igbo land in general one person cannot remove a juju placed on the land in dispute and this was for the appellants to prove and they failed to do so.

The angst of the appellants as I can discern stems from the fact that the land in dispute is family land and so could never translate to the exclusive ownership of one member of the family even though he took an oath to prove his family's ownership of it.

That position the respondents who are descendants of the oath taker vehemently challenge contending that since other members of the family ran away in the fear of the possible consequences of the oath taking, the man who dared and placed his life on the line, by surviving, was by that venture the exclusive owner of the land since it was only his own life that was at risk.

That stance was captured in the pleadings of the plaintiffs/respondents in the Amended Statement of Claim at the Trial Court thus:-

"A declaration that the land in dispute is the exclusive property of the plaintiff and are entitled to the statutory right of occupancy in and over the said land called "Isi-ekpe land."

At paragraphs 5 and 6 of the said Amended Statement of Claim the plaintiffs/respondents averred as follows:-

"5. Egbeagu Village, Amansea intervened in the matter and gave a decision that Umuogbocha Kindred should bring juju of their choice for Plaintiffs' father to take an oath to show that the land belong to him in accordance with Amansea native law and custom.

6. Thereupon Umuogbocha Kindred brought "Ngene" juju and placed it on the land in dispute. The Plaintiffs' father then took the oath without the support of the members of his kindred who deserted him. Plaintiffs' father later survived the customary period of oath taking and celebrated the survival in accordance with the Amansea native law and custom.”

In proof of their claim, PW1, Nathaniel Chibunze, the first Plaintiff at the Trial Court, in his evidence in Chief in lines 10-15 at page 54 of the record of appeal averred thus:-

“Under Amansea native law and custom, if a person removes a juju placed on a disputed land and survives after a period of 12 days, he will barb his hair if he survives as (sic) 12 days, he will go to the market 21 days after he took the oath. After going to the market to celebrate his survival, he will then be deemed to be the owner of the land in dispute.”

Further in his evidence, PW1 at pages 53 and 54 stated thus:-

The Defendants and the Plaintiffs are of the same Kindred Unit. The name of the Kindred is Umuofuonye Kindred, Egbeagu Village, Amansea. My father's name is Chibunze Anumba. My father acquired title to the land in dispute in 1940. In that year, there was a dispute between Umuogbocha people and my father. The dispute was between Emmanuel Uba from Umuegbocha kindred and my father. Emmanuel trespassed unto the land in 1940. My father told him that that land was his own.

He stated further thus:-

“The matter was referred to an arbitration panel. Both parties called members of their respective kindred but members of my father's kindred union refused to turn up. The arbitration were asked to bring juju for my father to swear to. They brought a juju called Ngene Shrine. The juju was placed on the land in dispute and my father was asked to remove the juju if he owns the said land. My father removed the juju single-handedly.

Under Amansea native law and custom, if a person removes a juju placed on a disputed land and survives after a period of 12 days, he will barb his hair if he services as 12 days, he will go to the market 21 days after he took the oath, he barbed his hair and celebrated his survival at the market, he became the owner of the land in dispute." (Underlining for emphasis).”

Under cross-examination, PW1 admitted that Ofuonye was the founder of the land in dispute and in answer to other questions put to him said thus:-

Q. Isi-ekpe land was not personal land of Anumba but land owned by the entire Umuofuonye family?

A. In the past, it was owned by the entire Umuofuonye family originally but it now belongs exclusive to my father and members of his family.

Q. Umuofuonye family owned the land before 1940?

A. It is true. That is what I was told by my father.

Q. Can an individual authorize another person to place a juju on a land that is owned by family?

A. I cannot. He must seek permission of other family members. (See page 60 of the Record). Further at page 62, PW1 answered as follows:-

Q. During the Egbeagu Village arbitration, did your father claim Isi-ekpe as belonging to him exclusively or as a land that belongs to Umuofuonye?

A. My father was claiming the land as that of Umuofuonye.

Q. Did Emmanuel Uba claim the land as his own or that of Umuogbocha family.

A. He also claimed the land as that of Umuogbocha family,

PW2 stated thus;-

“I was present during the oath taking, when he carried away the Ngene juju placed on the land in dispute, we all dispersed. I am familiar with the custom of Amansea relating to oath taking. The custom of my people with regard to oath-taking is that if a person takes oath and survives after twelve days, he will go to the market and celebrate. He will be regarded as the owner of the land. The Plaintiffs’ father did all these things.”

Under cross-examination of this witness, he stated thus at lines 15-20 and 332 of page 73 and lines 1-8 of page 73 of the record:-

Q. Did Chibunze Anumba claim that the land belong to him exclusively or that it belonged to Umuofuonye family during the arbitration?

A. Chibunze claimed that the land belongs personally to him through his father.

Q. Did he mention the name of his father?

A. He said that his father's name was Anumba.

PW2 continued as follows:-

Q. You agree with me that the arbitration and the taking of the juju had nothing to do with Umuofuonye family?

A. The decision was that Chibunze should take the oath.

Q. Since the arbitral panel decided Chibnze only should take the oath and that the Umuofuonye family had nothing to do with the oath taking, how did you conclude that members of Umuofuonye family deserted Chibunze?

A. I said so because he was the only person that carried away the juju.

On the issue of family land, I. A. Umezulike J. in his Book, A.B.C. of Contemporary Land Law in Nigeria pages 295 to 297 stated it as it is thus:-

"By definition, family land is land which vests in a group of persons and their children. It could also refer to land which had vested upon individuals who have descended from a common ancestry or pedigree, and including, of course, those such as domestics and strangers who have been incorporated into the family by the founder. At the death of the founder, all the empty land, farm land and houses acquired by him in his life time become family property. In plain language, the land belongs to the family of the said founder as a corporate entity in which case they become inalienable (which means that family land belongs to a vast family of which many are dead, few are living and countless are still unborn) or they become distributable to the members of the founder's family as defined by him during his lifetime."

The learned Author went further in this his book to say that under this land holding, every member of a family has an interest in the property.

"Hence, every member of the family has or enjoys a locus-standi to institute an action in respect of any wrong or illegal dealings with the property. And the right of action to protect family property avails the individual member even if he has not the authority of the family to bring the action. In other words, any member of family no matter how insignificant he may be considered can bring an action to protect a family land. This tends to make sale of family property uncertain and insecure. We say so because conveyancers approach such sale with the defective eye. This is because a disgruntled member of the family can emerge at anytime or many years after sale to raise sundry objections. A purchaser of a family land does not therefore know how many years he would enjoy the land before counting his blessing. This is because after a decade or more, the sale could be truncated at the suit of an aggrieved family."(Underlining for emphasis).

The learned jurist and author said it as it is and again it is trite and quite settled that in a claim for declaration of title of land, the onus is on the Plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the Defendant. The plaintiff must therefore satisfy the Court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought. See the cases of Eya v Olopade (2011) 5 SCNJ 98; Odunukwe v Ofomata (2010) 12 SCNJ 516 at 5458-549.

The above legal principle cannot be applied in vacuo since it has to be contextualised within the prevailing facts and unique circumstances such as has presented in the case at hand.

I need to place on record in reiteration that where parties who believe in the efficacy of a juju resort to oath-taking to settle a dispute they are bound by the result and so the common law principles in respect of proof of title to land no longer applies since the proof of ownership of title to land will be based on the rules set out by the traditional arbitration resulting to oath-taking. See John Onyenge & Ors. v Chief Loveday Ebere (2004) 13 NWLR (Pt.889) page 20 at 40-41.

From the pleadings and evidence led at the Trial of this suit, it is clear that there was a dispute in 1940 between Emmanuel Uba of Umuogbocha family and Respondents' Father of Umuofuonye family all of Egbeagu Village, Amansea over the land in dispute. The dispute was referred to Egbeagu village, Amansea for resolution. Egbeagu Village resolved that members of Umuogbocha family should place any juju of their choice on the land in dispute for the people of Umuofuonye family to remove. Umuogbocha family placed "Ngene Olineru" juju on the said land in dispute. All the averments and evidence respecting the land in dispute on the traditional history of the land in dispute from both parties in this appeal prior to 1940 no longer apply in this appeal. What is now applicable in this appeal is the customary law of oath-taking.

Oath-taking is a valid process under customary law arbitration and it is one of the methods known to customary law for establishing the truth of a matter. For this statement of law, I refer to the case of Ume v Okoronkwo (1996) 10 NWLR (Pt.477) 133.

The rules of the custom of oath-taking in Amansea according to the evidence of the respondents are that if a person removed a juju placed on a disputed land and survives after a period of twelve days, he will barb his hair. If he survives after 21 days, he will go to the market to celebrate his survival and thereafter he will be declared to be the owner of the land in dispute. One man can take oath in Amansea. If one man takes oath and survives the oath, he becomes the owner of the property in respect of which the oath was taken. If the person is supported by his relations the land will become family land or property. From the records, it is seen that respondents gave evidence that only the respondents' father removed the juju placed on the land in dispute by Umuogbocha family without the support of members of Umuofuonye family. The implication of respondents' father removing the juju alone is that the juju would kill only the respondents' father. After the oath-taking, he barbed his hair after period of twelve days. He celebrated his survival in the market place after 21 days. Thereafter members of Umuogbocha family conceded the land in dispute to Respondents' father. After the evaluation of the evidence adduced by both parties respecting the proof of the ownership of the land in dispute via the customary rules of oath-taking applicable in Amansea, the Trial Court believed the evidence of the respondents which he preferred to that of the appellants. Consequent upon that, declared that the Respondents are entitled to the customary right of occupancy over the land in dispute.

In the same vein, the Court below concurred with the decision of the Trial Court and affirmed that the evidence of Respondents' father was supported by some members of Umuofuonye family because the later evidence was not first-hand information or evidence as can be classified as direct evidence as to dislodge the eye witness account of the event as narrated by PW2.

The Respondents established by cogent evidence the custom that a family member who defends family land by oath-taking automatically becomes the exclusive owner of such family land so as to entitle the respondents to the declaration they sought.

The Respondents pleaded the customary arbitration of oath-taking in paragraphs 5 and 6 of the amended statement of claim and went about proving the existence of the said custom which includes the fact that one man can take oath in Amansea.

They stated that if one man takes oath and survives the oath, he becomes the owner of the property in respect of which the oath was taken. If members of his family support him the land will be family property.

On the other hand, the appellants in paragraphs 11 of the statement of defence pleaded that under native law and custom of Amansea town and Igbo land in general, one man does not swear to a juju or oath in a land dispute.

This assertion of the appellants was left hanging in the air without a corresponding evidence in proof thereof, thereby running contrary to Section 16 (1) and (2) of the Evidence Act, 2011 which stipulates that proof of custom is a matter of evidence and as in this instance where that custom has not been judicially noticed, it behoves the appellants carrying the burden of proof to establish that custom which they assert. See Iheanacho v Chigere (2004) 20 NWLR (Pt.901) 130 at 160. Also relevant is Section 258 of the Evidence Act, 2011 which defines "custom" as a rule which in a particular district, has from long usage obtained the force of law. It is difficult to fault the learned Trial Court and the Court below that in this case there is no evidence that the alleged custom of the people of Amansea and the Igbos in general relating to oath-taking has been judicially noticed by our Courts. It is therefore for the appellants to prove by evidence that in Amansea in particular and Igbo land in general the practice that a person taking an oath in land dispute must be supported had been applied for a long period of time that it has now obtained the force of law. DW1 gave evidence that he was told by his grandfather (i.e. Respondents' father) that one individual does not swear to an oath. This evidence of DW1 was cancelled by that of PW1 who stated during evidence-in-chief that "it is not true that a man alone cannot remove a juju place on a disputed land. A man can remove a juju." This piece of evidence of PW1 was supported by PW2 and PW4. PW2 was over hundred years old when he gave the evidence and was an eye witness to the oath-taking event in 1940. They all gave evidence to the effect that a person can swear to an oath. The evidence of DW5 that one person cannot remove a juju under Amansea native law and custom was merely a sweeping assertion. It does not amount to the proof of that particular custom which is disputed. I refer to the case of Omaye v Omagu (2008) 7 NWLR (Pt. 1087) 447, where it was held that "Customary Law is unwritten and it depends on what the appropriate authority believes or is persuaded to believe by evidence as the customary law.” In other words, Customary Law is a question of fact to be proved by evidence. Indeed, with the firm standing of the plaintiffs/respondents, the burden shifted to the appellants as defendants do dislodge the assertion of the plaintiffs that one man could not take over ownership of family land in a given circumstance such as happened here. Therefore, since the appellants did not cover that lacuna, the position put across by the respondents remained the state of affairs acceptable to the Court. It follows that nothing has happened to energize this Court to interfere with the concurrent findings of fact of the two Lower Courts based on which they decisions rested.

In the light of the foregoing and the better reasoned lead judgment, this appeal I adjudge lacks in merit and I dismiss it. I abide by the consequential orders made.

**AMINA ADAMU AUGIE, J.S.C.:**

I had read the lead Judgment just delivered by my learned brother, Nweze, JSC. He dealt with all the Issues raised decisively, and I will simply adopt his reasoning as mine and hereby dismiss the appeal.

**EJEMBI EKO, J.S.C.:**

The two issues proposed for the determination of this appeal are:

1. Whether the Respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically become the exclusive owner of such family land so as to be entitle them to the declaration they sought?

2. Was the Court below right when it affirmed the decision of the trial Court that the burden of proof shifted to the Appellants when the Respondent failed to discharge the initial burden of proof?

In substance, by the issues, the Appellants challenge the concurrent findings of fact by the two Courts below in favour of the Respondents herein.

The Respondents, descendants of one Chibunze, are a lineage of Umu-Ofuonye larger family. The Appellants are also members of the said Umu-Ofuonye family. The dispute was largely an intra family dispute - over piece of land known and called ISI-EKPE land.

In 1940, a dispute over the said Isi-Ekpe land arose between the Umu-Ofuonye family and Umu-Ogbocha family. The Egbeagu village intervened and successfully arbitrated in the dispute. The parties submitted to the arbitration and oath taking procedure was adopted. The Umu-Ogbocha argreed that if the Umu-Ofuonye family successfully took the traditional oath the land became theirs. The Umu-Ogbocha placed juju on the land. Within the Umu-Ofuonye family only Chibunze agreed to take the oath. He eventually took the oath and survived. Thereafter the said Chibunze and his descendants had laid claim to the ownership of the Isi-Ekpe land to the exclusion of other members of Umu-Ofuonye family (represented by the Appellants herein) who insist that the land remained the joint property of the entire Umu-Ofuonye family.

At the trial the Appellants relied on traditional history (which is a tolerable hearsay evidence) against the direct evidence of the PW.2 offered by the Respondents. The trial Court, finding that the PW.2's evidence supports the case of the Respondents, held inter alia:

The evidence of the PW.2 which I had earlier accepted as true that only Chibunze removed the juju placed on the land in dispute supports the Plaintiffs' (Respondents') case that such Custom does not exist.

It had earlier found, among other things, that "the evidence of the Defendants (Appellants) and their witnesses was only a sweeping assertion that such custom (as asserted by the Appellants) was only a sweeping assertion that such a custom in fact exists", and that such sweeping assertion "falls short of what is required to prove a disputed custom". The Lower Court, on appeal, affirmed the decision of the trial Court premised largely on facts. The Appellants have not been able to establish that the concurrent judgments of the two Courts below were perverse or unreasonable, and that they occasioned any miscarriage of justice to them. Those are the only grounds or bases for the Apex Court to intervene and disturb such concurrent judgments on facts. I agree with my learned brother, CHIMA CENTUS NWEZE, JSC, that this further appeal lacks substance. Accordingly, I also dismiss the appeal in its entirety. Appeal dismissed.