**NTUFAM JAMES BASSEY ATAGBOR**

**V.**

**NTUFAM IGNATIUS OKON NDIFON OKPO AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 23RD DAY OF JANUARY, 2013

CA/C/96/2010

**LEX (2013) - CA/C/96/2010**

OTHER CITATIONS

2PLR/2013/137

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

UZO I. NDUKWE-ANYANWU, JCA

ONYEKACHI A. OTISI, JCA

**BETWEEN**

NTUFAM JAMES BASSEY ATAGBOR - Appellant(s)

AND

1. NTUFAM IGNATIUS OKON NDIFON OKPO

2. NTUFAM CLEMENT EMAYIP (Paramount Ruler, Akamkpa LGA)

3. TRADITIONAL RULERS COUNCIL, AKAMKPA

4. CROSS RIVER STATE GOVERNMENT

5. ATTORNEY-GENERAL, CROSS RIVER STATE - Respondent(s)

**REPRESENTATION**

C.A.C. OGBOGU - For Appellant

AND

M. E. UKWENI - For the 1st Respondent

P. A. AKPOKE

E. A. OTU (Mrs.)

A. K. ARING

R. E ALAO (Mrs.)

E. O. ABBA

A. U. BASSEY - For 2nd â- 5th Respondents (Director Ministry of Justice Akamkpa)

- For Respondents

**ORIGINATING COURT**

CROSS RIVER STATE HIGH COURT

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

CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING:- Fair hearing within the meaning of Section 36(1) of the 1999 Constitution – Meaning - A trial conducted according to all the legal rules formulated to ensure that justice is done to the parties – Requirement that the twin pillars of the Rules of Natural Justice namely, Audi alteram partem and nemo judex in causa sua be observed – True test of fair hearing – Whether is the impression of a reasonable person who was present of the trial, whether from his observation; justice has been done in the case

CUSTOMARY LAW - CHIEFTANCY MATTERS - APPOINTMENT OF VILLAGE HEAD:- Appointment process of a new village head – Whether a question of fact - Whether it is the business of the court to make declarations of customary law relating to the selection of chiefs but to make a finding of what the customary law is and apply the law for declarations

CUSTOMARY LAW – EVIDENCE:- Evidence required to prove existence of an asserted customary law rule or tradition – Where uncorroborated – Attitude of court thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION - CLAIMS: Where no evidence is led to establish the claims made before a court – Whether such claims will be dismissed for want of evidence -

ACTION - DUTY OF A PARTY: Whether a party is only entitled to judgment if a trial judge believes and accepts his evidence and if such evidence supports his case

ACTION - PLEADINGS:- A party who seeks judgment in his favour – Duty by law to produce evidence to support his pleadings - Where he fails – Whether the averments in his pleadings are deemed abandoned

EVIDENCE - CUSTOMARY/TRADITIONAL EVIDENCE:- Rule that the success of a plaintiff's case does not depend on the number of witnesses he calls - Area of customary law and traditional evidence – Whether desirable to accept a corroborated existence of any asserted customary law and tradition – Attitude of court to statement of only person asserting the existence of a custom as conclusive

EVIDENCE - EVALUATION OF EVIDENCE:- Evaluation of relevant and material evidence before the court and the ascription of probative value to such evidence – Whether are the primary functions of the trial court, which saw, heard and assessed the witnesses while they testified – Where properly done - Whether it is not the business of the Appellate court to substitute its own views for the views of the trial court

EVIDENCE - PROOF OF CUSTOM:- Rule of law that native law and custom must be strictly proved - Quality of evidence required to prove a custom – Whether has nothing to do with multiplicity of witnesses – Whether still not enough that one who asserts the existence of a custom should be the only witness

EVIDENCE - STANDARD OF PROOF IN CIVIL CASES:- Rule that onus of proving an allegation is on the plaintiff and the onus does not shift until he has proved his claim on the preponderance of evidence and balance of probabilities – Duty of parties in civil suits to prove their cases on preponderance of evidence and on balance of probabilities – Where a party fails to discharge this burden – Whether a party must prove its case on credible evidence of its witnesses and is not of liberty in law to make a case or rely on the weakness of its opposite party in order to succeed

INTERPRETATION OF STATUTE - SECTIONS 135 &137 OF THE EVIDENCE ACT:- Interpretation of

**MAIN JUDGMENT**

UZO I. NDUKWE-ANYANWU, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Cross River State sitting in Akamkpa delivered on 31st March, 2010.

The appellant and the 1st Respondent are both from Nsan village in Akamkpa Local Government Area and were in a tussle for the position of village head of Nsan. The 1st Respondent was selected as village head. A letter to that effect was written and sent to the Akamkpa Traditional Rulers Council on 27th March, 2006 Exhibit F. The Akamkpa Traditional Council recognized the 1st Respondent vide the minutes of the meeting of page 22-27 of the Record of Appeal.

Being dissatisfied with the selection and recognition of the 1st Respondent, the Appellant as plaintiff filed a suit in the High Court of Akamkpa challenging it. The Appellant in his suit claimed as follows:

(a) A declaration that the plaintiff is the rightful person to be recognized installed and issued with the certificate of recognition as the Village Head of Nsan Village, Akamkpa Local Government Area.

(b) An order directing the 4th Defendant to issue certificate of recognition to the plaintiff as the Village Head of Nsan Village, Akamkpa Local Government Area.

(c) An order restraining the 2nd, 3rd and 4th Defendants from recognizing, installing and issuing certificate of Recognition to the 1st Defendant as Village Head of Nsan village.

(d) An order of perpetual injunction restraining the 1st Defendant from parading himself as the Village Head of Nsan Village, Akamkpa Local Government Area.

(e) General damages of N2m (Two Million Naira). (See page 3 of the record).

The suit was contested by the 1st Respondent. After a full trial, the trial judge delivered his considered judgment and refused all the claims of the Appellant.

Being dissatisfied again, the Appellant filed his notice and 5 grounds of appeal on 27th April, 2010. From the 5 grounds of appeal, the Appellant articulate 4 issues for determination couched thus:

4.1 Whether the learned trial judge was right in dismissing the evidence of the Plaintiff /appellant as to the custom and procedure of selecting him as Village Head of Nsan Village simply because the Plaintiff/Appellant did not call witnesses to corroborate the said evidence.

4.2 Whether the trial judge was right in placing an obligation on the Plaintiff /Appellant to prove the additional condition of being married with children to become a Village Head of Nsan Village, a condition being surplusage, and extraneous.

4.3 Whether from the totality of the evidence adduced at the lower court, the learned judge was right in rejecting the evidence of the Plaintiff/Appellant as to his selection as the Village Head of Nsan Village.

4.4 Whether the fundamental right of fair hearing of the Plaintiff/Appellant was breached when the trial court failed to consider the petition which led to the suspension of the swearing in of the Plaintiff/Appellant as the Village Head of Nsan.

The 1st Respondent filed his brief on 10th February, 2012 but deemed property filed and served on 19th March, 2012. The 1st Respondent articulated two issues for determination as follows:

1. Whether from the totality of the evidence before him, the learned trial judge was right in dismissing the case of the Appellant and in coming to the conclusion that the appellant failed to lead credible evidence in proof of his claim? (Grounds 1, 2, 3, and 5).

2. Whether, in the circumstances of this case, the fundamental right of the appellant was breached by the learned trial judge? (Grounds 4)

The 2nd-5th Respondents filed their brief on 16th March, 2012 but deemed properly filed and served on 19th March, 2012.

On 26th November, 2012 the date set for hearing, all the counsel for the parties adopted their various briefs. The Appellant's counsel urged the court to allow this Appeal whilst the counsel to the 1st Respondent and that to the 2nd - 5th Respondents urged the court to dismiss this appeal and affirm the judgment of the trial court.

The Appellant articulated 4 issues for determination. The first 3 issues are challenging the probative value the trial judge ascribed to the totality of evidence gathered during the trial. The 4th issue was whether the fundamental rights of fair hearing of the Appellant was breached.

The 1st Respondent's two issues for determination capture the essence of the issues in controversy and I intend to use them. They are simply couched like this:

1. Whether from the totality of the evidence before him, the learned trial judge was right in dismissing the case of the Appellant and in coming to the conclusion that the appellant failed to lead credible evidence in proof of his claim? (Grounds 1, 2, 3, and 5).

2. Whether, in the circumstances of this case, the fundamental right of the appellant was breached by the learned trial Judge? (Grounds 4)

ISSUE 1

Learned counsel to the Appellant submitted that the Appellant led quality evidence as to the custom of Nsan Village relating to the selection of a Village Head. The evidence of the Appellant did not need to be corroborated. See Usiobaifo v. Usiobaifo (2005) 4 MJSC page 82. Counsel argued that the trial judge was wrong to have held that the plaintiff's failure to prove the customs of Nsan Village as regards his emergence as the village head was fatal to his case. Counsel submitted that the strength of a party's case is not determined by the number of witnesses called but on the quality of the evidence of the witnesses called. See Njoku v. Eme (1973) 5 SC page 293 Nnorodim v. Ezeani (2001) 2 SCNJ Page 1.

Counsel contended further that the Appellant does not have to prove the additional conditions that, for a person to qualify for the post of village head of Nsan, he must be married with children. Furthermore, Counsel submitted that the Appellant led evidence that he was selected on 5th March, 2006 and again on 17th March, 2006. Also that the evidence of PW1 and PW2 was consistent on this issue. Counsel urged the court to resolve this issue in favour of the Appellant.

The learned counsel to the 1st Respondent submitted that for the Appellant to be entitled to the reliefs sought in his suit in the lower court he had a duty to show that:

i. He was qualified under the customs and tradition of Nsan people of Akamkpa Local Government to be the Village Head; and

ii. He was duly selected in accordance with the rules and procedure laid down under the customs and tradition of Nsan People of Akamkpa Local Government Area to be the village Head of Nsan.

This counsel contended was the intendment of S. 6(1) and (11) (1) of the Traditional Rulers Law Cap. T4 Laws of Cross River State of Nigeria 2004. Counsel referred the court to paragraphs 7, 8, 9 and 14 of the Appellant's statement of claim where he set down the requirements that a candidate vying for the post of village head must have, to emerge. This, the Appellant did not lead evidence to prove that he possessed all those requirements to emerge as a candidate. Counsel stated that it was the Appellant who asserted that in addition to coming from one of the ruling families, "an indigene of Nsan village who desires to be village head must be married with children". See paragraph 9 of the Statement of Claim

The Appellant cannot on appeal contend otherwise. See the cases of N.I.P.C. v. Thompson Organisation (1969) 1 All NLR Page 138, Chabasaya v. Anwasi (2010) 10 NWLR pt.1201 page at 181, Baloil (Nig) Ltd. v. Navcon (Nig) Ltd. (2010) 16 NWLR pt.1220 page 619 at 633. Counsel re-iterated that he who alleges must prove those allegations vide S. 135 (1) Evidence Act See PDP v. Abari (2009) All FWLR pt.496 page 1907, Enechukwu v. Nnamani (2009) All FWLR pt.492 page 1087.

Counsel referred the court to paragraph 10 of the Appellant's Statement of Claim and the 1st Respondent's denial in his para.7 of Statement of Defence where he set out the procedure for the selection of the Village Head of Nsan.

Counsel argued that the appellant testified in person and called the 2nd Respondent as PW2 to testify in proof of his assertion as to the selection of the Village Head of Nsan village. The PW2 in his testimony stated that he is not from Nsan Village, hence had no knowledge of their customs and tradition. PW2 did not help to strengthen the case of the Appellant.

On the contrary, the 1st Respondent testified in person and called DW2 and DW4 who are versatile with the customs and tradition of Nsan people. Counsel contended that the Appellant cited the case of Usiobaifo v. Usiobaifo (supra) but it does not avail him in the instant case. The Appellant needed to call on indigene of Nsan to corroborate his evidence. Counsel re-iterated that both the Appellant and PW2 were not conversant with the customs and tradition of Nsan people.

Learned counsel to the 1st Respondent concluded that the Appellant did not prove his case especially with the contradictions in his case. The Appellant had stated that he was selected on 5th March, 2006 but Exhibit B showed that as of 17th March, 2006 no village head had been selected. Counsel referred the court to the evidence of PW2, the Paramount Ruler of Akamkpa, Ntufam Clement Emoyip. See the cases of Ajide v. Kelani (1985) 2 NWLR pt.12 page 248, Ekpe v. Oke (2001) FWLR pt.54 page 214, Abubakar v. Yar'Adua (2009) All FWLR pt.207 page 1a 139 where Tobi JSC held as follows.

"A party must be sure of his case and he must present it in one lung breath; not in two-lung breath. If a party makes a case bearing two opposing positions; which positions affect the substance or merits of the issue, it crumbles. A court of law is not competent to make a choice or repair the case and give the party in default judgment."

Finally, learned counsel for the 1st Respondent submitted that before the case of Usiobiafo v. Usiobiafor (supra) the Supreme Court had held in the case of Ekpenga v. Ozogula II (1962) 1 SCNLR page 423 on (1962) 1 All NLR pt.1 Page 265 (reprint) where it propounded the Law on the issue of customs in the case of Lipede v. Sonekan (1995) 1 NWLR pt.374 page 668 and Onu JSC held;

"In cases of Customary Law and traditional evidence, it is good law that it is desirable that a person other than the person asserting it should also testify in support thereof. Since Native Law and Custom must be strictly proved, it is, therefore, unsafe to accept the statement of the only person asserting the existence of a custom, as conclusive.”

See also Adigun & Ors v. Attorney General of Oyo State (1987) 1 NWLR pt.53 page 678 where it was held.

"It is not the business of the Court to make declarations of customary law relating to the selection of Chiefs under the Chiefs Law. But it is the business of the Court to make a finding of what the customary law is and apply the law for declarations".

See also Orlu v. Gogo-Abite (2010) All FWLR pt.524 page 1, Magomya v. Attorney General Adamawa State (2007) 5 NWLR pt 1028 page 567, Adegbenro v. Akintillo (2010) 3 NWLR pt.1182 page 541.

Counsel submitted that the trial judge held that:

"The evidence of the plaintiff in regard to his selection as village Head of Nsan Village, under Nsan custom is not qualitative. Consequently, he ought to have called evidence of witnesses who hail from his Community, to corroborate his evidence."

On this, the learned trial judge dismissed the Appellant's suit as he failed to prove his case. See the case of Adekeye v. Adesina (2010) 18 NWLR where Rhodes Vivour JSC held:

"a plaintiff swims or sinks with his pleadings. Judges cannot assist a plaintiff to win his case, because cases are not decided on emotions, sentiments or some misguided consideration. Cases are won on pleaded facts supported by compelling evidence.”

Counsel finally urged the court to resolve this issue against the Appellant.

The first 3 issues articulated by the Appellant are all based on evidence and subsumed in the 1st Respondent's 1st issue. The appraisal of evidence and ascription of probative value is the primary duty of the trial court and where the issue turns on credibility of witnesses, the opinion of the trial court must be respected Osolu v. Osolu (2003) 11 NWLR pt. 832 page 608.

The Appellant in his statement of claim especially paragraphs 7, 8, 9 and 14 stated what the requirements for qualification of a village head. The Appellant asserted all these and therefore he was duty bound to prove his claims to ensure that he would get the reliefs sought. In proof of his case, the Appellant testified as PW1 and called the paramount Chief of Akamkpa as PW2. This witness did not testify as to the customs and tradition of Nsan to help the Appellant's case. The PW2 stated in his evidence that he is not from Nsan village and therefore cannot say anything about their customs. This witness was intended to corroborate the Appellant's evidence. This did not happen.

The evidence of the Appellant was weak to say the least. He had vied to be the Village Head of Nsan and cannot get a credible witness from that village to support his assertions. He cannot stand alone.

Where no evidence is led to establish the claims made before a court, such claims will be dismissed for want of evidence. Remi v. INEC (2005) 6 NWLR pt.920 page 56.

In civil cases the onus of proving on allegation is on the plaintiff and the onus does not shift until he has proved his claim on the preponderance of evidence and balance of probabilities. Parties in civil suits must prove their cases on preponderance of evidence and on balance of probabilities. It is after the burden of proving the case has been discharged in accordance with the above principle of law that the burden shifts and continues to shift. But where a party fails to discharge this burden then the opponent needs not prove any fact and the party alleging cannot rely on the opponent's case. A party must prove its case on credible evidence of its witnesses and is not of liberty in law to make a case or rely on the weakness of its opposite party in order to succeed.

- Iman v. Sheriff (2005) 4 NWLR (pt.914) 80

- Elias v. Omo-Bore (1982) 5 SC 25

- GBI v. Ogbeh (2006) 11 NWLR (pt.990) 65.

A party is only entitled to judgment if a trial judge believes and accepts his evidence and if such evidence supports his case - See Bello v. Aruwa (1999) 8 NWLR pt.615 page 454.

The Appellant pleaded certain facts in his pleadings which he fell short of proving. Pleadings are not synonymous with evidence and cannot be used in determining the merit of a case.

A party who seeks judgment in his favour is required by law to produce evidence to support his pleadings. Where he fails the averments in his pleadings are deemed abandoned. See Arabambi v. Advance Beverage Ind. Ltd. (2005) 19 NWLR pt.959 Page 1.

The appellant in his evidence stated that he was selected on 5th March, 2006 and another re-selection on the 17th March, 2006. The Appellant's witness PW2 stated that there was no selection of any sort before 17th March, 2006. PW2 had mandated the clan head of Nsan on the 17th March, 2006 to set in motion the process of selection of a village head for Nsan. These contradictions in the evidence of the Appellant did not aid his case.

The Appellant set out to prove the customs and tradition of Nsan village as regards the selection of a village head. Customs and tradition are matters of evidence to be decided on the facts presented before the court and must therefore be proved in any particular case. The Appellant has failed to prove the various averments in his pleadings as regards the requirements needed in the selection of a village head. The Appellant's evidence was not cogent enough to prove the case and the burden was squarely on him. The Appellant failed to provide any witness from the whole village, he claimed selected him to corroborate his claims towards proving his case. Agbobiaka v. Saibu (1998) 10 NWLR pt.571 page 534, Onyejekwe v. Onyejekwe (1999) 3 NWLR pt.596 page 482.

As a general rule, the success of a plaintiff's case does not depend on the number of witnesses he calls. However, in the area of customary law and traditional evidence, it is desirable that a person other than that person asserting the existence of such customary law and tradition should also testify in support of the existence of such, as it is unsafe to accept the statement of the only person asserting the existence of a custom as conclusive. Adeogun v. Ekunrin (2004) 2 NWLR (pt.856) 52.

It is settled that native law and custom must be strictly proved. Although, the quality of evidence required to prove a custom has nothing to do with multiplicity of witnesses, it is however, not enough that one who asserts the existence of a custom should be the only witness.

- Ekpengo v. Ozogula II supra

- Osolu v. Osolu (supra)

- Okene v. Orianwo (1998) 9 NWLR (Pt.566) 409.

The Appellant relied on the case of Usiobaifo v. Usiobaifo (supra) to state that the Appellant's evidence was enough to prove his assertion. It is desirable for another witness to support the assertion of the Appellant. The issue as to who is qualified to ascend to become the village head is subject to the customs and tradition of Nsan village. It is therefore a question of fact to be proved by calling evidence. Mafimisebi v. Ehuwo (2007) 2 NWLR pt.1018 page 385, Olowu v. Olowu (1985) 3 NWLR pt 1018 page 385.

The appellant need not call many witnesses to prove his case but he definitely needs credible witnesses to help him prove his assertions. Calling one witness that did not help his case is a blunder. The appeal font needed witnesses to support his own assertions. It looks suspect that in the whole of Nsan Village the Appellant could not find a witness to support his claims.

Whereas the burden of proving his case was on the Appellant he failed to do so. The Appellant's evidence was not cogent together with the contradictions in the evidence of the Appellant and PW2 as regards the dates of selection.  
In defending the suit against him in the trial court, the 1st Respondent called witnesses to buttress his pleadings. The evidence of DW2 is instructive. DW2 Kingsley Njok of Nsan village is a civil servant. He says he has been the secretary of Nsan Village Council. A position he had held for almost 20 years. I will recite his evidence in Chief for clarity.

As Secretary of the council, I take minutes, of the council meetings. I send out Notices and Circulars from the council. As Secretary I know the custom of Nsan village. It is not true that there are only 6 ruling families.

There are seven ruling families headed by men. The seven ruling families are:-

1. Ebungu Itakayen

2. Itogar Akorekpin

3. Ofuobi Achomachen

4. Agunrimon Oko

5. Itasenghe Era

6. Ikeh Ekong

7. Ntufam Ogar.

It is not true that Okpa Ikey family produces only the Chief Priest of Mgbe Shrine as maintained in paragraph I of the plaintiff's statement of claim. Late Ntufam Egbungu was an Eyamba but he is not from that family. The present Eyamba Ntufam Bassey Nyong is not from that family. He is from Itogar Akorekpin family.

It is not true as maintained by the plaintiff that Ntufam Okpa Okey is the oldest man in Nsan Village. The oldest man is Ntufaom Micheal Oke Agurimon. The process for appointing a new village head for Nsan is by:

1. The village council through the oldest man will call the ruling families to a secret meeting, to choose somebody who will take the leadership of the community.

2. When that has been done, they report back to the village council.

3. The village council will now fix a day to formerly pronounce the person to the whole community.

4. A bell will be rang to invite all to the village square.

5. The chief of Mgbe hall will open the Mgbe hall with a key in his custody.

6. Then a wooden gang is played to symbolize the importance of the assembly.

7. The man newly appointed is declared known to the community inside the Mgbe hall.

8. Then the person appointed is taken to the clan head and shown to the clan head as the new village head.

9. The clan head will enquire from the people three times whether he should pour libation to accept the person as a new village head. If they say yes, he proceeds.

10. Upon that acceptance, there will be drinks merriment and dances from there to the village square.

I am not aware that the plaintiff passed through the above processes to become named as a village, head of Nsan.

It is not true as alleged by the plaintiff that the 1st defendant was properly selected as the village head of Nsan. He was properly selected and I wrote a letter as Secretary of the community to the Traditional Ruler Council, Akamkpa on 25th March, 2006, notifying them of the development. They also wrote bock to me. This is the letter I wrote to the Traditional Rulers Council.

This is the testimony of a witness who have come to clarify the issue and state categorically the customs and traditional of Nsan people. The DW2 has been the secretary of Nsan village for almost twenty years. A position of authority that puts him in a good stead to relate to the court what the customs and tradition of Nsan village is. He knows the two contestants and he recounted to the court what transpired. As secretary he wrote Exhibit F to the Akamkpa Tradition Council on behalf of the 1st Respondent and not for the Appellant. He wrote on a proper letter head. Exhibit A was the letter presenting the Appellant. A comparison of Exhibit F and Exhibit A leaves no one in doubt which is the authentic letter. The DW2 was talking from a position of authority in the community. That is what is called a credible witness giving evidence. He left no one in doubt about his narrative of the events leading to the selection of 1st Respondent.

In comparison to the evidence of DW2, the Appellant as PW1 had this to say:

It is true that I was selected as village head. After my selection, what was left to be done to make me a village head are:-

1. For me to be taken to the front of Mgbe hall at Nsan village, and to present me to the whole of Nsan village in front of the Ekpe hall; and call for the ancestors to bless me.

2. To present me to Akamkpa Traditional Ruler's council.

3. To be sworn in as a village head.

I am aware that after the swearing-in, the Government of Cross River State will issue me with a Certificate of Recognition. I have not been presented to Akamkpa Traditional Ruler's Council. I have not been given a Certificate of Recognition by the Government.

It is not true that in paragraphs 32 and 33 of my statement of claim that I stated that I am aware that the 1st defendant has been presented to Akamkpa Tradition Rulers' Council.

From the above, it shows that even the so called selection the Appellant claimed could not be complete without being taken to the front of Mgbe hall of Nsan Village to present him to the whole village. Selection of the appellant without the aforementioned seems to me, to be devoid of the approval of the village. The DW2 stated succinctly, what needed to be done for a village head to emerge. That does not seem to be the case with the Appellant's so called selection. The appellant had to succeed on the strength of his case and not on the weakness of the 1st Respondent's case. Here the 1st Respondent's case is stronger in content.

The trial court in civil matters decide the case on a balance of probabilities or on the preponderance of evidence. The trial Judge places on an imaginary scale the evidence adduced by both parties and weighs them together. The court will thereafter assess the weight of the evidence not on the number of witnesses called by the parties but by the quality of probative value of the testimony of the witnesses Adebayo v. Adusei (2004) 4 NWLR pt.862 page 44, Olusile v. Maiduguri Metro Council (2004) 4 NWLR pt.863 page 290, Faybenro v. Arobadi (2006) 7 NWLR pt.978 page 174.

The evaluation of relevant and material evidence before the court and the ascription of probative value to such evidence are the primary functions of the trial court, which saw, heard and assessed the witnesses while they testified. Where the trial court unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Appellate court to substitute its own views for the views of the trial court. Agbi-Ogboch (2006) 11 NWLR pt.990 page 65, Bashanya v. State (1998) 5 NWLR pt.550 page 351, Sha v. Kwan (2000) 5 SC page 178, Fagbenro v. Arobedi (2006)7 NWLR pt.978 page 174.

The trial court summarized the evidence of the Appellant thus:

"The evidence of the Plaintiff in regard to his selection as village Head of Nsan Village, under Nsan custom is not qualitative. Consequently, he ought to have called evidence of witnesses who hail from his Community, to corroborate his evidence".

This is the evaluation of the trial judge whose primary function it is. It is only where and when the court fails to evaluate such evidence properly or at all, will an appellate court intervene and re-evaluate such evidence. Adebayo v. Adusei (supra).

I have not seen that the trial court has failed in its primary function of evaluating evidence and I therefore will not interfere with his findings. Rhodes-Vivour in the case of Adekeye v. Adesina (supra) held:

"... a plaintiff swims or sinks with his pleadings. Judges cannot assist a plaintiff to win his case, because cases are not decided on emotions, sentiments or some misguided consideration. Cases are won on pleaded facts supported by compelling evidence."

The appellant has failed to prove his claims by evidence to support his pleadings. The trial judge was therefore right in giving judgment against him. This issue is therefore resolved against the Appellant.

ISSUE 2

The appellant in this issue had explained that his fundamental right of fair hearing was breached. Learned counsel for the Appellant submitted that the Appellant's right of fair hearing was breached when the trial Judge failed to consider the petition which led to the suspension of the swearing-in of the plaintiff/Appellant as the village Head of Nsan village. This fact counsel argued was neither denied or opposed by the Respondents but was admitted by the 2nd Respondent/PW2. The petition was the reason for not installing the Appellant.

Counsel submitted that a trial Court must review of the evidence placed before it. See the Aiyelabegan v. L.G. Services Commission Ilorin, (2009) 22 WRN pg.108 at 125 where the Court held:

"The principal of adjudication that is fundamental to the administration of justice is that the Court is bound to consider every material aspect of the party's case validly put before it particularly where the issue is fundamental."

Counsel submitted that the trial court failed to consider the evidence of the petition which affected the installation and recognition of the Appellant. This failure counsel submitted resulted in a breach of the Appellant's fundamental right of fair hearing. Counsel therefore urged the Court to resolve this issue in favour of the Appellant.

The learned counsel to the 1st Respondent stated clearly that the Appellant did not lead any strong evidence on the issue of the petition -Exhibit "C". PW2 in his evidence stated inter alia:

"Exhibit "C" stopped us from recognizing the Plaintiff as the Village Head of Nsan.

I stopped the presentation of the Plaintiff because of the petition.

When the Plaintiff was presented to my council, there was a petition against him.

I set up a Committee to investigate the petition against the Plaintiff. When the Committee returned its report to my council, I could not do anything again because of this case that the Plaintiff instituted in this Court."

Also the learned counsel contended that the Appellant did not make the petition on issue to be deliberated upon by the Court. The Appellant only made it an issue during his appeal. Counsel argued that the Court is not to act like an investigator but should limit itself to being an adjudicator. The duty of the Court was to determine issues placed before it.

In furtherance of his argument the learned counsel to the Respondents stated that where a party complains of fair hearing, the court normally looks at the totality of events. NEPA v. Eze (2001) 3 NWLR pt.701 page 606 at 619; Kotoye v. CBN (1989) ALL NLR page 76 where Nnaemeko Agu, JSC held thus:

"The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given opportunity of a hearing."

It cannot therefore be said that the Appellant was not given a fair hearing. The Appellant was given every opportunity to air his grievance. See Ezechukwu v. Nnamani (2009) ALL FWLR Pt.492 page 1087. Counsel submitted that the Court must accord both parties a fair hearing Ndu v. The State (1990) 7 NWLR pt.164 page 550.

Counsel finally urged the Court to resolve this issue in favour of the 1st Respondent.

Fair hearing within the meaning of Section 36(1) of the 1999 Constitution means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. It requires the observance of the twin pillars of the Rules of Natural Justice namely, Audi alteram partem and nemo judex in causa sua. Eshenoke v. Gbinije (2006) 1 NWLR pt.961 Page 228.

Our case law is replete with cases that state categorically that once there is a breach of fair hearing, the whole proceeding no matter how well conducted becomes a nullity. ANPP v. INEC (2004) 7 NWLR pt.871 page 16; All Peoples Party v. Ogunsola (2002) 5 NWLR pt.761 page 484 B.O.N. Ltd. v. Adegoke (2006) 10 NWLR Pt.983 page 339.

Can the Appellant in all honesty say that his right of fair hearing was breached? The concept of fair hearing is not a far-fetched one. The Court in the case of Isiyaku Muhammed v. Kano N. A. S.C. 47/1967 (unreported) decided on 31st December, 1968 held that;

"The true test of fair hearing is the impression of a reasonable person who was present of the trial, whether from his observation; justice has been done in the case."

In the present case, the appellant just said in his evidence that he was not sworn in because of the petition, Exhibit C, written against him. PW2 received the petition. He also acknowledged that the Appellant was not sworn in because of the Petition. PW2 also stated that he set in motion on investigative panel to look into the matter. He also advised the clan head of Nsan to resolve the issue of selection in Nsan Village. PW2 also stated that before the panel could finish its investigation, the Appellant filed this suit. The panel could not therefore complete its job.

The Appellant himself did not lead credible evidence as to the importance of the petition to his case. The Appellant did not make an issue of the Petition. The PW2 in his cross examination stated that there was no selection of anybody before the 17th March, 2006. PW2 stated that as of 17th March, 2006.

"No Village Head had been selected in Nsan Village"

There was indeed a petition but, the Appellant did not pursue that. He rather decided to file this suit rather than pursue the petition. Sections 7, 8, 9, and 10 of the Traditional Rulers Law Cap T4 1978 state that all domestic avenues of reconciliation must be explored and when they foil, then a suit in court may be filed. The appellant did not make heavy weather of the Petition so also did the trial court. It is the case of the Appellant. He has the burden of proving his case to the satisfaction of the court. The Appellant has not done so.

The appellant was given all the opportunity to present his case to his own satisfaction. If he failed to utilize the opportunity offered by the court, he cannot then say that he was not given a fair trial. The Appellant enjoyed the opportunity presented by the court. The Appellant's right of fair hearing was not breached in any way.

The Appellant enjoyed a fair trial and cannot in all honesty cannot complain. As the Appellant made his bed so shall he lie on it. There was no breach of the appellant's fundamental right of fair hearing. This issue also is resolved against the Appellant.

All the 2 issues have been resolved against the Appellant. This Appeal is unmeritorious and therefore dismissed. The judgment of the Lower Court is hereby affirmed. The consequential orders in the judgment of the lower court are affirmed by me.

Cost to the 1st Respondent is assessed at N50,000.00 only.

**MOHAMMED LAWAL GARBA, J.C.A.:**

After a reading of the draft of the lead judgment in this appeal written by my learned brother U. I. Ndukwe-Anyanwu, JCA, I am in agreement that the Appellant's appeal is lacking in merit. From the printed record of appeal, the Appellant had pleaded the requirements and procedure for the selection of a village head in Nsan village but failed to adduce evidence as required by law, to prove the facts asserted by him. He it was who desired and so approached the High Court, praying that judgment be entered in his favour on the basis of his pleadings and so in law, he bore the initial evidential burden or obligation to establish his case on the preponderance of evidence by satisfying the High Court that he is entitled to judgment being entered in his favour. See Elomo v. Omolade (1968) NWLR, 359; Elias v. Disu (1962) 1 SCNLR 361; Oyedeji v. Oyedemi (2008) 6 NWLR (1084) 485 at 487; Uzokoro v. Densu Ind. Ltd. (2002) 2 NWLR (752) 528; Buhari v. INEC (2008) (19) NWLR (1120) 246,

'Sections 131(1) and 132 of the 2011 Evidence Act**.**

Sections 135(1) and 137 of the 2004 Act provided thus:

"135(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

137(1) in civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings

(2) if such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

(3) where there are conflicting presumptions, the case is the same as if there were conflicting evidence."

The Appellant did not discharge the legal burden of proof as required by law and he had to succeed or fail on the strength of the case he presented to the High Court. The High Court was right to have dismissed the Appellant's case for his inability and failure to adduce evidence in proof of his pleadings. I join in dismissing the appeal for lacking in merit.

**ONYEKACHI A. OTISI, J.C.A.:**

I have had the advantage of reading the Judgment of my learned brother, Ndukwe-Anyanwu, J.C.A. I am incomplete agreement that the appeal has no merit whatsoever. I abide with the Orders made, including the Order as to costs.