

REVISITING THE JURISDICTION OF THE CUSTOMARY COURT OF APPEAL: THE INTERPRETATION DILEMMA

A PAPER PRESENTED BY HON. JUSTICE P.O. ISIBOR.*

INTRODUCTION:

I must express my profound thanks to the Nigerian Bar Association, Benin Branch, for affording me an opportunity to present this paper. I have no doubt in my mind that the time has come for the legal profession in this country to have a re-appraisal of our entire judicial system in order to give greater prominence to our indigenous courts having become independent from our colonial masters almost fifty years ago.

In a laudable attempt to develop our customary laws and enhance the status of our Customary Courts, the Customary Court of Appeal was first established by the 1979 Constitution. This apex Court in the customary courts hierarchy has infused a new life into the entire Customary Court system.

According to Justice Ogbobine (of blessed memory):

“The Customary Court system has become a living institution in this country, having regard to the approval accorded it in the Constitution of the Federal Republic of Nigeria 1979”^{* 1}

It is, however, sad to note that since its inception, the Customary Court of Appeal has been besieged by a spate of objections to its jurisdiction by legal practitioners. These objections, which continue to come in droves have been

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¹ See the Preface to “An Outline of Customary Court Procedure” (Part 1 (1985) by R.A.I. Ogbobine (J.)

engendered by the very restrictive interpretation of its jurisdiction by the Supreme Court and the Court of Appeal.

Whereas in other common law jurisdictions, the appellate courts have been known “to give life to even dead bones of legislations,” the Nigerian Court of Appeal and the Supreme Court have consistently interpreted the relevant sections of the Constitution spelling out the jurisdiction the Customary Court of Appeal with stultifying narrowness.

This paper seeks to enumerate instances where the restrictive interpretation has produced outlandish and ridiculous results. The paper next discusses what ought to be the proper approach to the interpretation of the relevant sections dealing with the jurisdiction of the Customary Court of Appeal in both the Federal Capital Territory and the States. In addition, proposals for circumventing the restrictive interpretation and the resultant dilemma by a careful drafting of grounds of appeal by legal practitioners are proffered.

As a prelude, it is important to consider the relevance of customary law as this is the law which is the primary concern of the Customary Court of Appeal.

DEFINITION AND RELEVANCE OF CUSTOMARY LAW

Several definitions have been propounded by academics and jurists. Only a few of them will be set out here. According to Okany,² customary law is a body of customs and traditions which regulate the various kinds of relations

² M. C. Okany: The Role of Customary Courts in Nigeria (1984) at page 39.

between members of a given community while for Bairamian F.J.,³ it is “a mirror of accepted usage.” Dr. Elias⁴ posited that for any given community, it is “the body of rules which are recognized as obligatory by its members”

The Supreme Court in Zaidan v. Mohssen⁵ defined customary law from the Nigerian perspective as:

“Any system of law not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.”⁶

It suffices to state that the customary laws of a people form the substratum on which their socio-cultural superstructure rests. The matters with which customary law is principally concerned are simple cases of contract (mainly debt) torts, land, family law and succession.

As A.E.W. Park rightly observed:

“... the vast majority of the inhabitants of Nigeria conduct most of their activities in accordance with and subject to customary law, and if all courts of whatever status are considered, far more cases are decided under customary law than under any other laws in force in the country.”

Customary Courts are grassroots courts which have become renowned for expeditious disposal of cases owing to their simplified procedures thus

³ See Owonyin v. Omotosho (1961) 1 All N.L.R. 304 at 309.

⁴ T.O. Elias: The Nature of African Customary Law at P. 5.

⁵ (1973) 11 S.C. 1

⁶ Also defining customary law from the Nigerian perspective, Obaseki J.S.C. in Oyewumi v. Ogunesan (1990) 3 NWLR (Pt.137) 182 at 207 stated as follows:

“The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it”

enabling the citizenry to obtain justice cheaply and easily. Having regard to the fact that about 80 percent of our rural dwellers patronize these courts, the magnitude of their success is apparent.

The 1999 Constitution of the Federal Republic of Nigeria, like that of 1979, apart from providing for the establishment of Customary Courts of Appeal, gives further recognition to customary law by providing that at least three Justices of both the Court of Appeal and the Supreme Court must be learned in customary law. It is the considered view of this writer that this minimum of six Justices of both appellate Courts ought to be appointed from the Judges of the Customary Court of Appeal in view of the fact that most of them are legal practitioners.⁷

⁷ Section 247 (1) of the 1999 Constitution provides as follows:

“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal and in the case of Appeals from -

(a) a Sharia Court of Appeal if consists of not less than three Justices of the Court of Appeal learned in Islamic personal law, and

(b) a Customary Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Customary law.”

Section 288 (1) further provides as follows:

“In exercising his powers under the foregoing provisions of this Chapter in respect of appointment to the Court of Appeal, the President shall have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law and persons learned in Customary Law.”

Moreover, Section 288 (2) (b) provides as follows:

“For the purposes of subsection 1 of this section – a person shall be deemed to be learned in customary law if he is a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years in the case of a Justice of the Supreme Court or not less than twelve years in the case of a Justice of the Court of Appeal and has in either case and in the opinion of the National Judicial Council considerable knowledge of and experience in the practice of customary law.”

Islamic law is sometimes included under the term, “customary law”. Strictly speaking, customary law must be distinguished from Islamic law as the latter is not indigenous to any ethnic group in Nigeria.⁸

ESTABLISHMENT OF THE CUSTOMARY COURT OF APPEAL

Section 265(1) of the Constitution of the Federal Republic of Nigeria 1999 provides as follows:

“There shall be a Customary Court of Appeal of the Federal Capital Territory, Abuja.”

On the other hand, section 280 (1) of the same Constitution provides as follows:

“There shall be for any state that requires it a Customary Court of Appeal for that State.”

As can be gleaned from the above provisions, while the establishment of a Customary Court of Appeal for the Federal Capital Territory, Abuja, is mandatory, that for a State is optional. A Customary Court of Appeal has since been established for the Federal Capital Territory.

The composition of the Courts are to be found in Sections 265 (2) and 280 (2) respectively while the qualifications for appointment are to be found in sections 266 (3) and 281(3) as the case may be.

⁸ See Akintunde Emiola in The Principles of African Customary Law (1997) p. 7 where the erudite author posited as follows:

“It is sometimes assumed – and erroneously so that Islamic law is a form of Customary Law. This assumption is based on the fact that in certain areas of the northern part of Nigeria, Islamic law has been adopted to regulate the day to day affairs of the people of those parts of the country.”

It is important to stress that while both Sections 266(3) and 281(3) prescribe two alternative qualifications, it is the first arm which is commonly resorted to in the appointment of Judges of the Customary Court of Appeal.⁹ Like Section 266 (3), (a) Section 281 (3) (a) provides *mutatis mutandis* as follows:

“(3) Apart from such other qualification as may be prescribed by a law of a House of Assembly of the State, a person shall not be qualified to hold office of a President or of a Judge of a Customary Court of Appeal of a State unless –
(a) he is a legal practitioner in Nigeria and he has been so qualified for a period of not less than ten years and in the opinion of the National Judicial Council he has considerable knowledge and experience in the practice of customary law.”

As was mentioned in the introductory part of this paper, it was the 1979 Constitution of the Federal Republic of Nigeria that first accorded recognition to the Customary Court of Appeal.¹⁰

The first Customary Court of Appeal in Nigeria, that is, the Plateau State Customary Court of Appeal, was established on the 2nd day of October, 1979 by the Customary Court of Appeal Law 1979 of Plateau State. Since then, Customary Courts of Appeal have been established in the following States, to wit, Edo, Delta, Benue, Imo, Abia, Kaduna, Ebonyi, Nassarawa, Taraba, Rivers, Anambra, Bayelsa and Osun.

⁹ In Edo and Delta States like many other States of the Federation, all the Judges of the Customary Court of Appeal are legal practitioners.

¹⁰ See Paragraph 2 of P.1 (supra).

It is also worthy of note that plans have reached advance stage to establish the Customary Court of Appeal in Akwa Ibom State and many other States of the Federation. It must be emphasized that the Customary Court of Appeal is a superior court of record.¹¹

JURISDICTION

The relevant sections of the 1999 Constitution of Federal Republic of Nigeria relating to the jurisdiction of the Customary Court of Appeal of a State are sections 282 –284.¹² It is important to reproduce them in extenso.

They are as follows:

“282. (1) A customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law.

(2) For the purposes of this section, a Customary Court of Appeal of a State shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which is established.

283. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three Judges of that Court.

284. Subject to the provisions of any law made by the House of Assembly of the State, the President of the Customary Court of Appeal may make rules for regulating the practice and procedure of the Customary Court of Appeal for the State.”

¹¹ See Section 6 (3) and (5) of the 1999 Constitution of the Federal Republic of Nigeria where the Customary Court of Appeal is classified as one of the six superior courts of record. Others are the Supreme Court, Court of Appeal, Federal High Court, High Court of a State and the Sharia Court of Appeal of a State (including the Federal Capital Territory, Abuja).

¹² The equivalent provisions relating to the jurisdiction of the Customary Court of Appeal of the Federal Capital Territory, Abuja are Sections 267, 268 and 269 of the 1999 Constitution.

It is intended to show that section 282(1) has been interpreted by the Supreme Court and the Court of Appeal in such a way as to paralyse the functioning of the Customary of Appeal. It is submitted that section 282 (1) has often been interpreted without taking cognizance of section 284. This is because all procedural matters have been jettisoned from the jurisdiction of the Court notwithstanding the fact that the Constitution in section 284 clearly provides for the making of rules regulating procedure in the Customary Court of Appeal. It is further submitted that to insist on the exclusion of all procedural matters from the provisions of section 282(1) is to give a perverse interpretation to the wordings of that section.

Moreover, a cursory look at section 282(1) shows that nothing is said about grounds of appeal therein. It is therefore puzzling that both the Court of Appeal and the Supreme Court of Nigeria have consistently held that in determining whether questions of customary law are raised in any matter before the Customary of Appeal, it is the grounds of appeal **alone** which must be examined. They have contended that it is not material whether the subject matter of the case which gave rise to the appeal relates to purely customary law matters like customary law marriage, succession under customary law, customary land law etc. It is also immaterial that the matter on appeal emanated from a Customary Court.

The narrow and restrictive interpretations of the jurisdiction of the Customary Court of Appeal by the Supreme Court and the Court of Appeal are best illustrated by decided cases.

In Golok v. Diyalpwan,¹³ the plaintiff/respondent instituted an action in the Area Court Grade 1 of Ron/Kulere sitting at Bokkas in Plateau State against the defendant/appellant, claiming the recovery of a piece of farmland which the plaintiff alleged that the defendant borrowed from him about fifteen years ago. Judgment was given against the defendant, who appealed against the decision to the Customary Court of Appeal, Plateau State. The appeal was allowed and the decision of the Area Court was set aside. The plaintiff then appealed to the Court of Appeal on the following grounds of appeal:

- “1. The judgment is against the weight of evidence.
2. The learned President and Justices of the Customary Court of Appeal, Jos erred in law by quashing the judgment of the trial court without more.
3. The learned President and Justices of the Customary Court of Appeal, Jos erred in law in holding that the appellant (as plaintiff in the trial court) failed to prove his case.
4. The learned President and Justices of the Customary Court of Appeal erred in law in considering matters and issues not raised in the only ground of appeal.”

¹³ (1990) 3 NWLR (Pt.139) 411

For the purposes of this paper, it suffices to state that whereas the Court of Appeal held that grounds 3 and 4 raised questions of customary law, the Supreme Court held that only ground 3 raised a question of customary law and that the other grounds raised purely questions of fact and should be struck out.

In Pam v. Gwom,¹⁴ the grounds of appeal filed before the Court of Appeal and which that Court ruled were incompetent having regard to the provision of S.247(1) of the 1979 Constitution (which is in *pari materia* with S.282(1) of the 1999 Constitution) were as follows:

- “(1) The judgment of the Customary Court of Appeal, Jos is against the weight of evidence.
- (2) The learned Justices of the Customary Court of Appeal misdirected itself (sic) and resolved the appeal on the basis of loan.
- (3) The learned Justices of the Customary Court of Appeal, Jos erred in law when it (sic) assumed that the land in dispute was either given out as loan or gift and thus required the presence of witnesses.
- (4) The learned Justices of the Customary Court of Appeal Jos erred in law when it (sic) held that under Berom Native Law and Custom one cannot bury his dead on another’s man (sic) land.
- (5) The learned Justices of the Customary Court of Appeal, Jos erred in law when it (sic) failed to take cognizance of the fact that it was dealing with the decision of an Area Court.
- (6) (Additional Ground of Appeal) The hearing, proceedings and judgment of the Customary Court of Appeal, Jos in appeal No. CCA/168A/88 over the judgment of Grade 1 Area, Foron in Suit No. CV/59/88 is a nullity, because the appeal court

¹⁴ (2000) 74 LRCN 22.

was not properly constituted in accordance with the law and thus lack (sic) jurisdiction.”

On a further appeal, the Supreme Court sustained only Ground 4 since it raised the question of Berom customary law relating to the burial of one’s dead on a parcel of land belonging to another.

In Subor v. Asemakeme,¹⁵ the Court of Appeal commenting on an appeal from the Bomadi Area Customary Court to the Edo State (formerly Bendel State) Customary Court of Appeal, re-affirmed that where the grounds of appeal are on the omnibus ground and a misdirection, no questions of customary law are raised. It also re-affirmed the holding of the Supreme Court in Golok v. Diyalpwan (supra) to the effect that:

“Whether an appeal raises an issue of customary law or not, is to be gathered from the grounds of appeal and their ‘particulars’ and not from the arguments in the brief.”

The Court of Appeal nonetheless held that two of the grounds of appeal in that case raised questions of customary law.

THE DILEMMA

In Golok v. Diyalpwan (supra) and Pam v. Gwom (supra) the Supreme Court sustained only one of the several grounds of appeal in both cases.

The consequence of the Supreme Court and the Court of Appeal decisions on the interpretation of the jurisdiction of the Customary Court of Appeal is that where an appeal from a trial Customary Court complains about

¹⁵ (1997) 4 NWLR (Pt. 502) 671.

the applicable customary law in some of the grounds while some other grounds complain about procedure, weight of evidence and other ancillary matters, only grounds of appeal complaining about the applicable customary law would be cognizable in the Customary Court of Appeal while the other grounds would be cognizable in the High Court.

As a single appeal cannot be heard partly at the Customary Court of Appeal and partly at the High Court, the appellant would be in a dilemma as to where and how to pursue his appeal fully. If he goes to either Court, he would only get half or part judgment. The Supreme Court warned against this scenario in *Alhaji Umaru Abba Tukur v. Government of Gongola State*¹⁶ where it held that it was improper to approach a Court that is competent to determine only some of the issues. It went on to stress that, “there should be no room for half – judgment in any matter brought before either Court.” It is submitted that it is only proper that an appeal from a Customary Court in respect of a customary law matter should go to the Customary Court of Appeal where all complaints about the applicable customary law and other ancillary matters like, procedure, misdirection and weight of evidence can be exhaustively dealt with.

Any argument that the High Court has unlimited jurisdiction in all matters is not sustainable in view of the holding of Ogundare J.S.C. in the case

¹⁶ (1989) 4 NWLR (Pt.117) 517.

of Ahmadu Usman v. Sidi Umaru.¹⁷ Expounding the jurisdictions of the three courts, that is, the High Court, the Sharia Court of Appeal and the Customary Court of Appeal under the 1979 Constitution (which is in *pari materia* with the 1999 Constitution in this respect) the learned jurist had posited as follows:

“The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by sections 242 and 247 conferring jurisdictions on the two other courts in respect of the areas of specialty ... In my humble view, the superior court to which the appeal goes would be determined by the nature of the question raised by the appeal. If the appeal raises issues of general law, it goes to the High Court. But if it raises questions of Islamic personal law, it goes to the Sharia Court of Appeal. And if it raises questions involving customary law, the appeal goes to the Customary Court of Appeal ... I can hardly, however, visualize a case where any two of these three courts will have concurrent jurisdiction to entertain an appeal.”¹⁸

One must, however, concede that the approach suggested by Ogundare J.S.C. above is rather simplistic as an appellant who is aggrieved by the decision of an inferior Customary Court may find it compelling to formulate his grounds of appeal to straddle more than one sphere of the divide. For instance

¹⁷ (1992) 7 NWLR (Pt. 254) 377

¹⁸ For a more definite provision limiting the jurisdiction of a State High Court, see section 251 of 1999 Constitution spelling out the jurisdiction of the Federal High Court in civil causes and matters.

questions of general law are often added to questions of customary law in order to bring into focus all the complaints of an appellant. This was what happened in the cases of Golok v. Diyalpwan (supra) and Pam v. Gwom (supra).

It is submitted that since the relevance or applicability of customary law is dependent on conformity with general principles of justice and compatibility with the law, having regard to the repugnancy and incompatibility doctrines, it is neither sensible nor practicable to make any rigid distinction between customary law and general law. A court deciding questions of customary law must also be in a position to decide questions relating to general principles of law and justice. Furthermore, it is outlandish to deny a Customary Court of Appeal of the right to evaluate evidence since any court properly so called must be in a position to weigh evidence in order to arrive at the justice of a case. A Customary Court of Appeal in order to function effectively must have incidental powers to deal with all ancillary or associated matters in so far as the subject matter relates to customary law. The submission is reinforced by S.10 (2) of the Interpretation Act which provides as follows:

“An enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to doing it.”

OTHER PROBLEMS

One of the undesirable consequences of the narrow or restrictive interpretation of section 282(1) the 1999 Constitution is that legal practitioners now raise objections to fundamental principles of law in the Customary Court of Appeal. Thus, objections are raised to grounds of appeal questioning general principles of law like fair-hearing, *locus standi* and even the issue of jurisdiction. Their contention is that these are not issues or questions of customary law.

In the case of Customary Court of Appeal, Edo State v. Aguele¹⁹ the Benin Division of the Court of Appeal held *inter alia* as follows:

“In the instant case, grounds one to three in the appeal to the Customary Court of Appeal from the trial court all related to questions of fair learning and the service of process on the respondent before the trial court. None of them related to question of customary law.”

This holding that the question of fair hearing is not cognizable before a Customary Court of Appeal is rather surprising in view of the earlier holding of the Court of Appeal, Jos Division in Gumau v. Bukar²⁰ where the Court stated the correct position as follows:

“In our constitution and government and with reference to the decision of Olatubosun v. Niser (1988) 3 NWLR (Part 80) 25. ‘The right to be heard is such an important radical and protective right that the courts strain every nerve to uphold it and even to employ it where a statutory form of protection will be less effective if it do not carry with it the right to be heard.

¹⁹ (2006) 12 NWLR (Pt. 995) 545

²⁰ (1991) 1 NWLR (Pt.168) 439

Any tribunal adjudicating on a complaint about the deprivation of the right to fair hearing which transcends all laws generally recognized (underlining supplied), should bear the foregoing observation in mind and assume the judicial duty to protect it, unless it is clearly shown to have been withdrawn, diminished or suspended by the Constitution. I can hardly imagine a situation where ‘the natural sense of what is right and wrong’ – an instinct for justice – could be erased from the judicial mind.”

It also strange for counsel to contend before a Customary Court of Appeal that the issue of locus standi does not raise a question of customary law. In a recent case of Mabel Oviosun v. Friday Ohonya ²¹ the preliminary objection raised by counsel to the respondent was that issues relating to *locus standi*, proper evaluation of evidence and abridgement of time do not raise issues of customary law. The Edo State Customary Court of Appeal rightly held that the issue of *locus standi* is a principle of general application, which cuts across all recognized systems of law including customary law. The Court agreed with the submission of the learned counsel for the appellant, that it will be unimaginable to conceive of a situation where a complete stranger, who has no interest in the subject matter, would be allowed to institute or defend any matter under our customary law. The Court emphasized that the issue of *locus standi* is germane and cognizable in civil proceedings at the Customary Court of Appeal, as to hold otherwise, would amount to a legal absurdity. The preliminary objection was overruled without much ado.

²¹ (Unreported) Appeal No. CCA/13A/2008 decided by the Edo State Customary Court of Appeal sitting at Auchi on 28th April, 2009.

In Eke v. Military Administrator, Imo State,²² the Court of Appeal rightly held that “the issue of locus standi is a condition precedent and is thus fundamental to any action before a court. It goes to the root of the entire action. Thus, once the issue is raised at any stage of the proceedings, the court, be it the trial or appellate has a duty to rule thereupon because locus standi affects the jurisdiction of the court before which an action is brought. If there is no locus standi to file the action in the first place, the court cannot properly found jurisdiction to entertain the matter.”

The same point was made in C.B.N v. Kotoye²³ where it was pointed out that the issue of locus standi is fundamental and intrinsic to the jurisdiction of a court.

It is salutary to note that the Supreme Court in Nwaigwe v. Okere²⁴ has settled the question of whether a Customary Court of Appeal can determine if it has jurisdiction to entertain a matter. In the instructive words of Onnoghen J.S.C.: “... Jurisdiction is the lifewire or blood that gives life to any adjudication in whatever system of law that comes into focus, be it customary law or English law. We should not forget that English law also includes the English Common Law, which does not enjoy a higher legal status than our customary law. It follows therefore that since the concept of jurisdiction is of universal application and known to customary law when applied to Customary

²² (2007) 13 NWLR (Pt. 1052) 531.

²³ (1994) 3 NWLR (Pt. 330) 66.

²⁴ (2008) 13 NWLR (Pt.1105) 445.

Court, an error of jurisdiction by a Customary Court or a Customary Court of Appeal which is a defect intrinsic to the adjudication, is an issue of customary law within the meaning of sections 247(1) and 224(1) of the 1979 Constitution and therefore appealable as an issue of customary law up to the Supreme Court. To hold otherwise is to kill the development of that branch or system of adjudication in this country, as there would be no means of checking the excess or absence of jurisdiction in the relevant courts and thereby encourage adjudication far in excess or absence of jurisdiction in the relevant customary courts, be it of first instance or appellate.”

It is also difficult to fathom why all issues of fact have been jettisoned. This is more worrisome in the case of the omnibus ground of appeal. In Golok v. Diyalpwan (supra) and in the more recent case of Hirnor v. Yongo,²⁵ the Supreme Court held that an omnibus ground of appeal which complains that a judgment is against the weight of evidence deals purely with facts and has no connection with customary law. A motion to file and argue additional ground of appeal may also not be cognizable in the Customary Court of Appeal as something cannot be added to nothing or to use the latin maxim – “ex nihilo, nihil fit.”

Uwaifo J.S.C. put the matter pointedly when he warned thus:

“... legal practitioners should therefore understand the futility of filing omnibus grounds of appeal from judgments of Customary

²⁵ (2003) 9 NWLR (Pt. 824) 77.

Courts since it will only lead to a ‘cul de sac’ in the judicial process to develop customary law precedents even by the highest court of the land.”

It is, however, noteworthy that at a seminar for Judges of the superior Courts held in Sokoto in 1994 under the auspices of the National Judicial Institute, Bello C.J.N. was said to have expressed the view that when the judgment of a Customary Court is said to be against the weight of evidence, all that is questioned is the weight of evidence of custom adduced in support of the customary law envisaged to be proved. It is submitted that this is the better view.

THE NEED FOR A LIBERAL INTERPRETATION

The dilemma and the problems highlighted in this paper as the consequences of the narrow interpretation of the jurisdiction of the Customary Court of Appeal by the Supreme Court, and the Court of Appeal, make it imperative for these two higher appellate Courts to adopt a liberal interpretation in this regard.

Paul R.V. Belabo, Dean of Law, Benue State University in his paper entitled “The Development of Customary Law: The Interpretative Jurisdiction of the Court of Appeal and the Supreme Court under the 1999 Constitution” delivered at the “All Nigeria Conference of Customary Court of Appeal Judges” held in Makurdi, Benue State in November, 2000 brought to the fore a

dangerous development occasioned by the refusal of the Court of Appeal and the Supreme Court to entertain grounds of appeal not raising questions of customary law. He posited that the Customary Court of Appeal has been unwittingly made the final appellate court in such matters as the channel of appeal to the Court of Appeal and ultimately to the Supreme Court has been blocked at the level of the Customary Court of Appeal. According to him:

“... it cannot be conceived that our fathers in the Constituent Assembly intended that the channel of appeal of litigants in customary law matters should be blocked at the level of the Customary Court of Appeal. This reason alone calls for a broader interpretation of the appellate powers of the Court of Appeal with respect to appeals from the Customary Court of Appeal.”

This learned writer has not been alone in this call for a broader interpretation of the jurisdiction of the Customary Court of Appeal. Many other jurists and academics have repeated this call.

Hon. Justice J.O. Olubor, President, Customary Court of Appeal, Edo State in a paper titled: “Customary Court of Appeal in Nigeria: Focus on the Jurisdiction” presented at the All Nigeria Judges Conference held in Kano 1995 had recommended as follows:

“In order to satisfy what I believe is the intendment of legislators, in order not to frustrate genuine appeals, and in

order to remove a possible legal impasse in the legal system, it is humbly submitted that the Supreme Court should, at the very earliest opportunity give a more liberal and less restrictive interpretation to section 247(1) of the [1979] Constitution²⁶ with the aim of allowing the Customary Courts of Appeal entertain all issues arising from appeal on claims based on customary law without undue emphasis on how the grounds of appeal are formulated.”

It is sad to note that 14 years after this clarion call, very little has been done by the Supreme Court as shown in this paper. The judicial courage demonstrated by the Supreme Court per Onnoghen J.S.C. in the case of Nwaigwe v. Okere (supra) that an error of jurisdiction by a Customary Court or a Customary Court of Appeal is an issue of customary law is to be commended. It should be noted that in the earlier case of Pam v. Gwom (supra) one of the grounds of appeal was on an error in respect of jurisdiction but the Supreme Court had surprisingly held that same was not cognizable.

A worthy effort in this direction had earlier on been made in the case of Gobang v. Shelim²⁷ by the Court of Appeal per I.T. Muhammad (J.C.A.) (as he then was). As this is a landmark judgment, it is necessary to quote him in extenso as follows:

“I have had a look at the grounds. It appears to me that ground one raises the issue of customary law. This is because, failure of the appellant to prove his claim as alleged is failure to lead the required evidence in accordance with the customary law within the jurisdiction of the trial court upon which the trial court is called upon by the parties to

²⁶ It has been stated earlier on in this paper that section 247(1) of the 1979 Constitution is in pari materia with section 282(1) of the 1999 Constitution.

²⁷ (2003) 3 NWLR (Pt. 807) 286

adjudicate. See: Golok v. Diyalpwan (1990) 3 NWLR (Pt. 139) 411. Ground of appeal No. 2 raises the issue of arbitration. This arbitration, from the facts, was referred to customary chiefs or elders of the community within which the parties lived. Can there be anything more customary? I do not think [so]. The case of Akaose & 2 Ors v. Nwosu & Anor (1997) 1NWLR (Pt. 482) 478 lays out the ingredients of a valid customary arbitration.²⁸ Ground 2 in my view raises the issue of customary law. Ground 3 raises the issue of acts of possession to wit: shrines were mentioned as proof of ownership of the land in dispute. It is a ground of customary law. Ground No. 4 questions the evaluation of evidence. It has to deal with the evaluation of the evidence placed before the trial court which administered customary law. This ground too in my view, is that of customary law. The last of the grounds, i.e. Ground No.5 is on the jurisdiction of the lower court. The lower court as its name suggests deals essentially with customary laws of the area within which it operates. A challenge to its jurisdiction is a challenge to customary law. ...Accordingly, it is my finding that all the grounds of appeal set out by the appellant were grounds raising issues of customary law.”

The erudite Judge dismissed the preliminary objection and held that all the grounds of appeal filed raised questions of customary law. This is how it should be.

One is at a loss as to why the jurisdiction of the Customary Court of Appeal has hitherto been construed with stultifying narrowness. As stated earlier on in this paper, there is nothing in section 282(1) of the 1999

²⁸ It should be noted that in the case of Okpuruwa v. Okpokam (1988) 4 NWLR (Pt. 90) 554, the Court of Appeal surprisingly held that the concept of customary arbitration was unknown to the Nigeria Law and that elders or natives cannot constitute themselves as customary arbitrators to decide on title to land or other disputes with binding effect on disputants.

For a fuller discussion of the absurdity of that case, See O.K. Edu “Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight” published in University of Benin Law Journal (2004) 7(1) UBLJ at P.1.

Constitution spelling out the jurisdiction of the Customary Court of Appeal which talks about “grounds of appeal.”

Admittedly, one cannot question the decision of a court without formulating grounds of appeal. Nonetheless, this is no justification why the provisions of a statute and more importantly the provisions of a Constitution should be construed as to lead to a manifest absurdity.

And as Lord Denning remarked in his “Discipline of Law” at p.15:

“The literal method is now completely out of date and has been replaced by what Lord Diplock called ‘the purposive approach’ in order to ‘promote the general legislative purpose’ underlying the provision. It is no longer necessary for the judges to wring their hands and say there is nothing they can do about it. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy by reading words in, if necessary, so as to do what parliament would have done had they had the situation in mind.”²⁹

In the case of Rabiu v. The State³⁰ Sir Udo Udoma J.S.C. laid down the correct approach to the interpretation of 1979 Constitution as follows:

“My Lords, in my opinion, it is the duty of this Court to bear constantly in mind the fact that the present Constitution has

²⁹ See also Seaford Court Estates Ltd. v. Asher (1949) 2 K.B. 498 – 499.

³⁰ (1981) 2 NCL.R. 293. The approach suggested in that case is applicable to the 1999 Constitution as most of the provisions are in *pari materia*

been proclaimed the Supreme law of the land, that it is a written organic instrument meant to serve not only the present generation, but also several generations yet unborn ... And where the question is whether the Constitution has used an expression in the wider or in the narrower sense, in my view, this court should whenever possible and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects of the Constitution.

My Lords, it's my view that the approach of this Court to the construction of the Constitution should be, and so it has been one of liberalism, probably a variation of the theme of the general maxim '*ut res magis valeat quam pereat.*' I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."

One very much wishes that our Lordships of the Court of Appeal and the Supreme Court would adopt the laudable approach propounded above in their interpretation of the jurisdiction of the Customary Court of Appeal.

DRAFTING GROUNDS OF APPEAL

Until the Court of Appeal and the Supreme Court resort to the enlightened approach suggested by Udo Udoma J.S.C. above in the interpretation of Sec. 282(1) of the 1999 Constitution, legal practitioners should be very careful in drafting grounds of appeal in order to raise issues or questions of customary law.

As Dr. Durobo Narebo, Judge of the Delta State High Court, observed in his book Customary Courts: their Relevance Today (1993) at p. 124 thereof:

“It seems to be a dangerous and negative trend if the jurisdiction of a State Customary Court of Appeal must depend on how counsel formulates his grounds of appeal. For instance, there may be factual averments in the plaintiff’s statement of claim and particulars, and also sufficient evidence in the lower court which raise issues of customary law. But, may be learned counsel inadvertently failed to formulate his grounds of appeal to include an issue of customary law, should this without more deprive an aggrieved party of the right to appeal to a Customary Court of Appeal.?”

As the law stands, both the Court of Appeal and the Supreme Court have consistently answered the question in the affirmative as shown in this paper. The only real exception is the case of Gobang v. Shelim (supra).

In the light of this, the following suggestions are proffered. Firstly, legal practitioners should avoid using general principles of English law expressed in latin like res judicata, locus standi, lis pendens, jus tertii, stare decisis, res ipsa loquitor, restitutio in integrum, non est factum etc. in their ground of appeal. Lawyers raising preliminary objections to grounds of appeal will readily contend erroneously that such principles are unknown to customary law. Even English common law doctrines like the doctrine of standing by, laches and acquiescence etc. should be ordinarily explained and preceded with the formula:

“The trial Court or Court below erred in customary law.”

Secondly, recognized issues of customary law like inheritance under customary law, marriage under customary law, customary land law, custody and guardianship of children under customary law etc should be made the primary focus.

Thirdly, in the case of the omnibus ground of appeal, it is expedient to heed the advice of Uwaifo J.S.C. in the Hirnor v. Yongo (supra). The learned jurist, had maintained that the omnibus ground of appeal can be avoided by merely stating that the learned trial Court or the Customary Court of Appeal erred in law in holding that the plaintiff failed to prove his case . He relied on

Ground 3 in Golok v. Diyalpwan (supra) which was similarly held to be a ground of appeal raising a question of customary law. According to him, such a formulation “provides some considerable leeway for an insightful counsel to skillfully draw up competent grounds of appeal to meet appropriate grievances within the limitation imposed by section 245(1)³¹ of the Constitution.”

CONCLUSION

It is the view of this writer that section 282(1) of the 1999 Constitution dealing with the jurisdiction of the Customary Court of Appeal has been given a narrow and unimaginative construction rather than being interpreted in the light of what must have been the intention of the framers of the Constitution and what contemporary Nigerian legal system requires.

No doubt, the Customary Court of Appeal which was established as a specialized court to develop and enhance the status of our customary laws and courts is being hampered from achieving these lofty goals by the restrictive interpretation apparent in most of the decisions of the Court of Appeal and the Supreme Court. It has been noted earlier on in this paper that nothing is said about “grounds of appeal” in sections 267 and 282(1) as being emphasized by these two higher appellate Courts.

One wonders how a Court of justice can operate without procedure. As argued earlier on, section 282(1) has been interpreted without regard to section

³¹ This section governs the jurisdiction of the Court of Appeal to entertain appeals from the Customary Court of Appeal and is almost in *pari materia* with section 282(1) of 1999 Constitution. It should be similarly construed to cover all appeals where the subject matter relates to customary law.

284 of the 1999 Constitution which empowers the President of a Customary Court of Appeal of a State to “make rules regulating the practice and procedure of the Customary Court of Appeal of the State.” It is submitted that by shutting out matters of procedure, the Court of Appeal and the Supreme Court desire the Customary Court of Appeal to operate “in vacuo,” that is, in a vacuum.

It is a recognized canon of interpretation that the Court in interpreting the provisions of a statute or a Constitution must read together related provisions in order to discover the true meaning of the provisions.³²

In my paper titled “Customary Courts Directorate: Jurisdiction Rules and Procedures ” delivered at the 2005 N.B.A. Conference, Benin Branch, I had pointed out that the battle against Customary Courts, although not fought with arms and ammunitions, has been fierce and relentless since the introduction of the English type Courts in Nigeria. This battle is yet to abate. Our entire approach to customary law and Customary Courts must change. The conditions given for the application of customary law by the colonial judges must also change.³³

It is submitted that section 282(1) of the 1999 Constitution ought to have been construed to vest the Customary Court of Appeal with appellate and supervisory jurisdiction in civil proceedings where the subject matter relates to customary law even without any legislative intervention by way of an

³² For a better understanding of this canon of interpretation see the cases of Obayuwana v. Governor of Bendel State (1983) 4 NCLR 96; Awolowo v. Shagari (1976) 6-9 SC 51 and Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) r. 26 at P.255.

³³ See the views of Oputa J.S.C. in Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523 at 530.

amendment. The reluctance of the Court of Appeal and the Supreme Court to adopt this enlightened approach consonant with the purposive interpretation, which is now the vogue in most common law jurisdictions, can only be explained by the fact that both superior appellate Courts have often treated the Constitution as “a closed book permitting of no additions, even where it is obvious that in tandem with its spirit, the additions are permissible”³⁴ One only hopes that the Court of Appeal and the Supreme Court would, in no distant future, replicate what now obtains in most common law jurisdictions.

³⁴ See in particular the Supreme Court decision in Angustine Mojekwu v. Mrs Theresa Iwuchukwu (2004) 4 SCNJ 180.

