IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE AGENEBODE JUDICIAL DIVISION
HOLDEN AT AGENEBODE
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON MONDAY THE
17TH DAY OF JULY, 2017.

BETWEEN **SUIT NO: HAG/O1/2016**

1. CHIEF CHARLES ADOGAH, SAN
(National President, Ukhuomunyio Community, Okpella)
2. DR. GODWIN L. UMORU
(National President, Iddo Development Union, Okpella)
3. BARNABAS AGBUEGBA
(National Secretary, Ukhuomunyio Community, Okpella)
4. MALLAM UMAR FAROUK HARUNA
(National Secretary, Iddo Development Union, Okpella)
5. DR. AYUBA GIWA
6. BARRISTER EDWARD SADO
7. MALLAM YAYA KADIRI
(For themselves and for and on behalf of the OTEKU Sub-Clan/Ruling House of OKPELLA, Edo State, except those supporting the Defendant if any)

……..CLAIMANTS

AND

ALHAJI A.Y.E. DIRISU, JP OON
The Okuokpellagbe of Okpella …….. DEFENDANT

JUDGMENT

The Claimants filed an Originating Summons on the 25th of January, 2016 for the determination of the following questions:

Whether or not the Defendant herein can operate outside the letter and content of the clear language of the Edo State Traditional Rulers and Chiefs Edict 1979 (as amended) and or amend same suo motu to transmute himself into a king ruling over an "Okpella kingdom" rather than the "Clan Head" of "Okpella Clan" as enacted in the Law.

AND/OR

Whether or not, the Defendant herein can suo motu amend the Edo State Traditional Rulers and Chiefs Edict 1979 (as Amended) By removing the word "CLAN" used to name, describe and or define OKPELLA in the Edict/Law and substituting therefore, the word "KINGDOM" as the Defendant now holds the Okpella clan out to be.

If the answers to the aforesaid questions are in the negative, then the Claimants claim against the Defendant as follows:

1. ***A declaration that under and by virtue of the Edo State Traditional Rulers and Chiefs Edict 1979 (as amended) now the Traditional Rulers Law of Edo State, Okpella is a "CLAN" headed by a Clan Head which clan headship rotates among the two sub-clans of Ogute and Oteku, named therein as the two Ruling Houses and not a kingdom ruled over by a KING; and***
2. ***An order of perpetual injunction restraining the Defendant herein whether by himself his servants, agents, privies, minions, volunteers or howsoever from parading himself or holding himself out as a "King" ruling over an "Okpella Kingdom".***

Any other relief or reliefs, order or orders or further or other order or orders as this Honourable Court may deem fit to make/grant, having regard to the circumstances and justice of this case.

The Summons is supported by a 30 paragraphs affidavit to which are attached several exhibits and a Written Address of Counsel.

Upon receiving service of the Originating Summons, the Defendant filed a Memorandum of Conditional Appearance. The Defendant also filed a Notice of Preliminary Objection dated 4th of March, 2016, filed on the 8th of March, 2016. This Preliminary Objection was later struck out and replaced with another Preliminary Objection dated 27/5/16 and filed on 1/6/16. That is the subsisting Preliminary Objection.

In the Preliminary Objection, the Defendant is seeking the following orders:

1. ***AN ORDER of this Honourable Court striking out, and or dismissing the Originating summons of the Claimants/Respondents in this suit as same is incompetent;***

2. ***AN ORDER of this Honourable Court setting aside the issuance of the said undated Originating Summons and undated Written Address in support thereof of the Claimants/Respondents for incompetence as same is an invalid document in law.***

3. ***AN ORDER of this Honourable Court striking out, and, or dismissing the Claimants/Respondents suit initiated by an invalid document whose authorship is unknown and has no efficacy in law, as same constitutes a gross abuse of Court Process, thereby robbing this Honourable Court of the requisite jurisdictional competence to entertain same.***

AND FOR SUCH FURTHER ORDER(S) that this Honourable Court may deem fit to make in the circumstances of this case.

The Grounds for the objection are as follows:

1. ***This suit as presently constituted and initiated by the Claimants/Respondents is in flagrant non-compliance with the Statutory Provision and Rules of this Honourable Court.***

2. ***The undated Originating Summons and Written Address of the Claimants/Respondents whose authorship is unknown as filed in this suit constitute an abuse of the process of court.***

3. ***The Originating Summons and Written Address of the Claimants/Respondents did not indicate who signed the said court process and therefore is incompetent ought to be, and should be deservedly struck out or dismissed by this Honourable Court.***

The said Notice of Preliminary Objection is supported by a 7 paragraphs affidavit and a Written Address of counsel.

In opposition to the Preliminary Objection, with the leave of Court, the Claimants filed a Counter Affidavit and a Written Address of counsel, dated 13th of June, 2017, filed on the 16th of June, 2017.

In opposition to the Originating Summons, with the leave of the Court, the Defendant filed a Counter Affidavit of 19 paragraphs together with a Written Address of counsel dated and filed on 18/8/16.

On the 6th of June, 2017 all the counsel adopted their Written Addresses and proffered additional oral arguments in support.

It is settled law that when the defence raises a preliminary objection in an action, the Court must dispense with it before proceeding to determine the substantive case. See: ***Nwosu vs. Imo State Environmental Sanitation Agency & Ors (1990) 2 NWLR (Pt.135) 688; Olosunle & Ors. vs. Chief Eyialegan & Ors. (2005) All FWLR (Pt.242) 503 at 510.***

Consequently, I will consider the Preliminary Objection before I determine the substantive suit.

In his Written Address on the Preliminary Objection, the learned counsel for the Defendant, D.L.Aimofumeh Esq., formulated three Issues for Determination as follows:

ISSUES FOR DETERMINATION

1. ***Whether from the surrounding circumstances of the filing of the Claimants/Respondents undated Originating Summons and Written Address before this Honourable court on the 25th day of January, 2016, wherein there was neither signing nor sealing of the originating process by the Registrar of this Honourable Court nor the Judge of the court, before same process was issued for service as contemplated by the extant rules of this court is regular;***

2. ***Whether by reason of the obvious and flagrant non-compliance with the rules of this Court by the Claimants/Respondents aforestated, the jurisdictional competence of the court has been properly invoked to assume jurisdiction to entertain the suit of the Claimants/Respondents herein; and***

3. ***Whether the Claimants/Respondents Originating Process before this Honourable Court which did not indicate the true identity of the author is a competent process before this Honourable Court.***

In their Written Address in opposition, the learned counsel for the Claimants, Chief Charles Adogah SAN, formulated four Issues for Determination as follows:

ISSUES FOR DETERMINATION

1. ***Whether or not, a Defendant in an action brought by originating summons ought not to file his defence to the action so that everything can be taken together to avoid undue delay capable of arising from a prosecution of a preliminary objection beyond the trial court.***
2. ***Whether or not, the current High Court Civil Procedure Rules of Edo State contemplate the kind of process filed by the Defendant in this suit and purportedly brought pursuant to order 37 rules 1 and 2.***
3. ***Whether or not, this entire processes/Notice of preliminary objection ought to be countenanced by this Honourable Court and not dismissed peremptorily in view of the clear pronouncement of the Supreme Court of Nigeria in the case of anyanwoko v. okoye (2010) All FWLR (Pt. 515) p. 214 at 227, paras E-F; 231 paras E-F and 233 paras D-E under the doctrine of stare decisis or judicial precedence.***
4. ***Whether or not, there is indeed any merit, substance or catch in all the limbs of the so called preliminary objection of the Defendant after all and for whatever it is worth.***

Upon a careful examination of the Issues formulated by both counsel, I am of the view that the Issues formulated by the Defendant's are more germane to the resolution of this preliminary objection and I hereby adopt them.

Opening his arguments in support of the Preliminary Objection, D.L.Aimofumeh Esq., leading Prince A.Y.E.Dirisu (jnr.) submitted that the suit is incompetent. He adopted the arguments contained in their Written Address in support of the Preliminary Objection dated 27/5/16 and filed on 1/6/16.

ISSUE ONE

Arguing Issue one, learned counsel submitted that this court is governed by the State High Court (Civil Procedure) Rules, 2012, which said rules of court, must be complied with in initiating any process before the court. He referred to: Order 6, Rules 2 (1),(2) & (3) of the Edo State High Court (Civil Procedure) Rules, 2012 which states *inter alia;*

"SIGNING AND SEALING OF ORIGINATING PROCESS

(1) The Registrar shall sign and seal every originating process whereupon it shall be deemed to be issued.

(2) A Claimant or his Legal Practitioner shall, on presenting any originating process for signing and sealing, leave with the Registrar as many copies of the process as there are Defendants to be served and same copy for endorsement of service on each Defendant.

(3) Each copy shall be signed by the Legal Practitioner or by a Claimant where he sues in person".

He submitted that from the forgoing, it is manifestly clear that the Claimants/Respondents in this suit were too much in a hurry to file and serve their originating process on the Defendant that they did not only fail to properly date their processes before bringing same to the court, but also failed to comply with the rules of court, with regards to signing and sealing of the originating processes, whereupon same would have been deemed to be properly issued.

He contended that what the Claimants/Respondents simply did was to hurriedly file and serve the said originating Summons on the Defendant/Applicant. He submitted that this procedure is not permitted by law. Counsel maintained that the court shall at all times ensure that its rules are obeyed by all parties and referred the Court to the case of: **IHEDIOHA & ORS V. OKOROCHA & ORS (2015) 10 MJSC, 110 AT 115, RATIO 4.**

Furthermore, he submitted that an undated document whose author is unknown is inadmissible in law and not within the ambit of documents which can be admissible by consent of the parties. He maintained that parties cannot by consent or otherwise admit an invalid document and relied on the decisions in the cases of: **LAWSON V. AFANI CONTINENTAL CO. LTD (2000) 2 NWLR (Pt. 752) 585 R. 17 (CA Kaduna Division), YERO V. REG. TRUSTEES, C.C.C.G & ANOR (2002) 1 NWLR (Pt. 749), 675 at 683 R. 9.**He therefore urged the Court to so hold.

Concluding his arguments on Issue One, learned counsel submitted that by the provision of Order 1 Rule 3 of the Edo State High Court (Civil Procedure) Rules 2012, an originating process means any court process by which a suit is initiated, and it is trite that this is the foundational basis upon which the suits depends. He said that the same Order 1 Rule 3, contemplates a "return date", which is the day endorsed thereon. He stated that Order 3 Rule 12 (2) of the Edo State High Court (Civil Procedure) Rules 2012 makes it explicitly clear and mandatory, and this same Order 3 Rule 12 (2) clearly states that

same cannot be altered after it is sealed, except upon application to a Judge. He submitted that the Claimants/Respondents have failed to do this thereby rendering their originating process incompetent, as this is not just affecting the procedural jurisdiction, but also the substantive jurisdiction. For this, he relied on the case of: ***O.O.M.F. LTD V.N.A. &CB LTD (2008) 7 MJSC 157 at 160, R.2*** and urged the Court to so hold.

Responding to the arguments under this first Issue, in his Written Address the learned Senior Advocate submitted that the most vehement aspect of the Preliminary Objection is that the Registrar did not sign the originating summons in this case. He submitted that the Claimants cannot be punished for the alleged breach because they have no control whatsoever over the Registrar of the Court or the Judge who is alleged not to have signed the summons. For this he relied on the decision of the Supreme Court in the case of:

> **Anyanwoko v. Okoye & 4 ors (2010) All FWLR, Pt 515 pg 214 at 227 paras E-F, 231 paras E-F and** ***233 paras D-E :***
> ***Ratio 1***
>
> ***Effect of breaches of rule of court on statutorily conferred Jurisdiction-***
>
> ***The jurisdiction of a court donated either by the Constitution or by statute remains unaffected by breach of rule of court. In the instant case, the originating summons filed by the respondents was not signed by the registrar of court as enjoined by Order 6, rule 8 of the rules of the Court. The sustained challenge of this issue of jurisdiction founded on the breach of Order 6, rule 8 of the Federal Capital Territory High Court Rules was grossly misplaced, not worth the time and trouble of the court even counsel for the parties.***
>
> ***RATIO II***
>
> ***Effect of failure of court registrar to sign originating summons as per Order 6, rule 8, High Court of Federal Capital Territory Rules-***
>
> ***The non-signing of the originating summons by the registrar of the trial court or an official of that court duly authorized to sign same is a mere lapse on the part of the registrar concerned. It is non-compliance with the rule of court by a statute. It has nothing to do with the jurisdiction of the court.***
>
> ***RATIO 12***
>
> ***Court not to penalize litigant for act or omission of court officials-***
>
> ***A matter is properly before the court upon filing in the registry and payment of prescribed filing fees. The omission or mistake of registry official will never be visited on the litigant except where such litigant has instigated, encourage or condoned the mistake or omission.***

Upon a careful examination of the provisions of: ***Order 6, Rules 2 (1),(2) & (3) of the Edo State High Court (Civil Procedure) Rules, 2012*** earlier quoted, it is evident that it is the duty of the Court registrar to sign and seal the originating process. The failure was on the part of the Court officials and

not that of the party or their counsel. I agree with the learned counsel for the Claimants that the error of the Court officials cannot be visited on a party. See the case of: ***Fanfa Oil Ltd. vs. A.G of the Federation (2003) 18 NWLR (Pt.852) 453 at 469; and Anyanwoko v. Okoye & 4 ors*** *(supra).*

Sequel to the foregoing, Issue one is resolved in favour of the Claimants.

ISSUE TWO

On Issue Two, counsel submitted that where there is non-compliance with a stipulated pre-condition for setting a legal process in motion, any suit instituted in furtherance of such non-compliance is incompetent, and the court has no jurisdiction to entertain same. He posited that it is trite law that a court is empowered and competent to prevent the improper use of its machinery to harass, oppress, vex or irritate an adverse party in litigation. He said that where such a situation arises, the court will rightly dismiss such a claim. He referred to the cases of: **OJO & 3 ORS. V.OLAWORE & 5 ORS. (2008) 6-7 S.C. (PT II) 54;** and **DINGYADI & ANOR V. INEC & 2 ORS. (2010) 4-7 S.C. (PT. 1) 75.**

On the competence of a court to hear a matter, learned counsel referred to the case of **UDOETE V. HELL (2003) FWLR part (43) p. 362 at 403, para H – C,** which followed the **locus classicus** of: **MADUKOLU & ORS. V. NKEMDILIM (1962) ANLR, part 2, P. 581 at 583**.

He submitted that it is now clear that the issue of competence is tied to the jurisdiction of the court to hear a matter and referred to the case of: **MINISTRY OF WORKS V. TOMAS (Nig.) Ltd. (2002) 2 NWLR (Pt 752) P. 740 at p 788, para H – A**.

He maintained that while conceding that the failure by the Registrar of the court to sign the Originating Summons before same was issued may not necessarily vitiate the proceedings with respect to the jurisdictional competence of the court to entertain the suit, same cannot be said of the procedural default in form of the Originating Summons and the Written Address of the Claimants/Respondents, which was undated.

He contended that by the Provisions of Order 6 Rule 1 of the Edo State High Court (Civil Procedure) Rules 2012, the originating process shall be prepared by a Claimant or his Legal Practitioner. According to him, it follows that same is expected to be dated before filing and any error or omission inherent therein cannot be attributed to the court officials, but to the maker of the said originating process.

He argued that where a Statute clearly provides for a particular act to be performed, failure to perform the act on the part of the party will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the Statutory Provision. He maintained that in such a situation, the consequences of non-compliance with the statutory provision follows notwithstanding that the Statute did not specifically provide for a sanction. He stated that the Court can, by the invocation of its interpretative jurisdiction come to the conclusion that failure to comply with the statutory provision is against the party in default. He referred to the case of: ***ADESANOYE & 2 ORS. V. ADEWOLE (2006) 7 S.C. (PT. III) 19*** and urged the court to set aside, and strike out the Originating Summons of the Claimants/Respondents in this suit as same is incompetent.

Responding to this Issue, learned Counsel for the Claimants submitted that there is a date which is the relevant date on the Originating summons, which is the date it was filed, that is: 25th January, 2016.

Furthermore, learned counsel referred the Court to the Defendant's counsel's address where he stated thus:

> **"By the provisions of order 6 rule 1 of the Edo State High Court Civil Procedure Rules 2012, the originating process shall be prepared by a Claimant or his Legal practitioner, <u>and it follows that same is expected to dated before filing"</u>** (underling supplied by him.)

He then submitted that it is based on these underlined words of counsel himself which are not derived from any law or rule of law or the order quoted that counsel has mounted this assault on the jurisdiction of the Court based on his 'ought' expressed as an expectation. He submitted that such expectations either of Counsel or the Defendant himself have no place in law. He maintained that it is a trifling expedition of counsel to embark on an assault on the jurisdiction of the court and cause a delay in the administration of justice based on expectations or suppositions.

He maintained that the court does not concern itself with trifles or fancies expressed (*de minmis non curat lex).*He also referred the Court to the case of: ***Adebisi Adegbuyi v. APC & 2 ors (2014) All FWLR Pt 720, pages 137 at 1385, para E.***

I am of the view that this Issue is very similar to the first Issue. It is the duty of the Court officials to date a Court process. I am fortified in this view by the express provisions of Order 6, Rule 3 of the Edo State High Court Civil Procedure Rules, 2012 which states as follows:

> ***"What is to be done after signing and sealing:***
> ***The Registrar after signing and sealing an originating process, file and note on it the <u>date of filing</u>***(underlining, mine) ***and the number of copies supplied by a claimant or his legal practitioner for service on the defendants. The Registrar shall then make an entry of the filing in the cause book and identify the action with a suit number that may comprise abbreviation of the Judicial Division, a chronological number and year of filing."***

From this, it is obvious that the Claimant cannot be sanctioned for failure to date the originating process. As a matter of fact, there is no requirement under the rules for the claimant to date the process. I agree with learned counsel for the Claimants that the expectations or suppositions of counsel cannot supplant the rules of Court.

In the event, I resolve Issue two in favour of the Claimants.

<u>ARGUMENT ON ISSUE THREE</u>

Arguing this Issue, the learned defence counsel submitted that the authorship of the Claimants' Originating Summons and Written Address filed before this Honourable Court on the 25th day of January, 2016, is unknown and this is a fundamental defect in the said originating process.

According to him, a careful perusal of the said originating process would indicate that all you have is a consortium of lawyers, and it was not indicated amongst the list of lawyers who signed the said originating process. He maintained that same is liable to be struck out as a document which does not identify its signature is as worthless as an unsigned document which has no efficacy in law. He submitted that a worthless document cannot be efficacious and relied on the case of: ***OMEGA BANK NIG. PLC V. OBC LTD (2005) 1 S.C. (Pt 1) 49 at 74.*** Counsel submitted that it is trite law that a document speaks for itself and oral testimony is inadmissible to vary, add to or take away from the contents of a document. He referred the Court to the cases of: ***NIDB V. OLALOMI INDUSTRIES LTD***

(2002) 5 NWLR (PT. 761) 532 R. 7, BIJOU NIG LTD. V. OSIDAROHWO (1992) 6 NWLR (PT. 249, R 2. AMIZU V. NZERIBE (1989) 4 NWLR (PT. 118) 755, S. 131 (1) Evidence Act 2011, and submitted that an unsigned document or a document whose authorship is unknown has no efficacy in law.

He emphasized that the Originating Summons and Written Address are incompetent and invalid documents that cannot be entertained by this Honourable Court.

Arguing further learned counsel contended that the Originating Summons and Written Address are incompetent as they were allegedly signed by an unknown and unidentified person. He posited that although on the face of the documents there is an inscription that is in the form of a signature, it is impossible to tell who amongst the list of seven (7) persons whose names appeared under the signature represents the person who actually signed the said court processes. He said that the court cannot begin to guess or speculate on the identity of the person who signed. For this view, he referred the Court to the following decisions: ***AREMU V. SHIBA & ORS (2004) LPELR – 22445 (CA); ADENEYE V. YARO (2013) 3 NWLR (Pt 1342) P. 625 at 633, paras D-E;*** *and* ***AISIEN V. AKINNULI & ANOR (2012) LPELR – 9700 (CA).***

He submitted that the assumption that a particular signature belongs to one person from the range of Legal Practitioners whose names are stated under the signature, does not fall under one of the facts that the court is called upon to take judicial notice of pursuant to the provisions of Section 122 of Evidence Act, 2011.He concluded that the failure of the Claimants to so indicate and identify the signature renders the entire process incompetent and he urged the Court to strike them out.

Responding to this Issue, the learned silk submitted that the case of: **AISIEN V. AKINMULI** (supra) cited by learned defence counsel is not relevant. He submitted that pertinent as that decision may be, all the arguments surrounding it are not applicable to the facts of this case. He referred the Court to the affidavit of the 6th Claimant (himself a lawyer) filed in response to the objection, where he stated clearly that:

1. The summons was signed by Chief Charles Adogah (SAN).
2. That Chief Charles Adogah (SAN) affixed the legal practitioners stamp bearing his name on the originating summons to show that it was signed by him.
3. That this is the new way and requirement by which a counsel can show that he is the one that signed a legal document as required by the new Rules of professional conduct which the Court takes judicial notice of.
4. That there is no other way averred or provided for showing same.
5. That although other lawyers appear below Chief Charles Adogah's name, their stamps are not affixed to the summon meaning that they are not the ones that signed it but the Solicitor whose stamp is affixed.

Counsel submitted that in the face of the above incontrovertible facts, it is preposterous for the Defendant or his Counsel to argue that either they do not know the lawyer who signed the process or that the signatory (Chief Charles Adogah SAN) is not a lawyer as the authorities relied upon forbid. *A fortiori*, when Chief Charles Adogah (SAN) is both a co-plaintiff and lead counsel in the case, signing for himself and for a firm of solicitors.

In the circumstance, he submitted that this ground of objection lacks merit, is baseless and ought to be discountenanced as the authorities relied upon are inapplicable to the peculiar facts of this case.

This Issue is on the identity of the person who signed the Originating Summons and the Written Address of Counsel. It is common ground that the aforesaid processes must be signed by either the party or his counsel. See: Order 6, Rule 2(3) Edo State High Court Civil Procedure Rules, 2012.There is no doubt that the issue of signing of the processes is quite germane to their validity.

I must state from the onset that the authorities cited by the learned defence counsel are mostly on the contention that a court process must be signed by a legal practitioner in order to be valid. The issue at stake here is the identity of the particular counsel among the seven who actually signed the processes. This calls for a close examination of the processes.

Upon a close scrutiny of the Originating Summons and the Address, it is observed that the names of seven lawyers are listed therein, with one signature on top. The first name on the list is that of the lead counsel: Chief Charles Adogah SAN. His NBA seal is affixed beside the signature. I think the affixing of the seal of the learned silk has clearly identified him as the owner of the signature.

My finding is predicated on the provisions of: ***Rule 10 of the Legal Practitioners Rules of Professional Conduct 2007,*** which states as follows:

> ***"10. ----- (1) A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any Government department or ministry or any corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association (underlining, mine).***
> ***(2) For the purpose of this rule, "legal documents" shall include pleadings, affidavits, depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents."***

By virtue of Rule 10(1) above, it is evident that the stamp and seal should be that of the lawyer who signed the process. In the case of: ***Yaki vs Bagudu (2015) 18 NWLR (Pt.1491)288 at 301*** the Court stated thus: ***"Ordinarily, any responsible member of the noble profession of lawyers will not sign or present any legal document which does not have his seal and stamp on it***(underlining, mine).

The learned counsel for the Defendant has seriously contended that that the failure of the Claimants to so indicate and identify the signature renders the entire process incompetent and he urged the Court to strike them out. I do not think that the failure to clearly indicate the identity of the signatory is of any moment since there is circumstantial evidence which sufficiently identifies the learned silk as the signatory.

In a quite similar case, that of: ***Williams vs. Adold/Stamm International (Nig.) Ltd. (2017) 6 NWLR (Pt.1560) 1 at pp.8-9***, the Supreme Court held thus:

> "***A process prepared and filed in court by a legal practitioner must be signed by the legal practitioner,…The grouse of the respondents appeared to be that there was no mark beside either of the two names to identify which of them signed the process…The court was satisfied that there was no doubt as to who signed the process and that he is a legal practitioner whose***

name is on the roll. <u>The omission to place a tick beside the name of Chief Ladi Rotimi Williams SAN did not mislead the respondents or the court as to who signed the process, and such omission could not invalidate it</u>. Therefore, the applicant's written address filed on 16/11/2015 was competent."(Underlining, mine).

Applying the above decision to the instant case, I am satisfied that the Originating Summons and the Written Address were signed by Chief Charles Adogah SAN, a legal practitioner whose name is on the roll. The omission to tick his name did not mislead the Defendant or the Court as to who actually signed the processes, and such omission cannot invalidate the processes.

In the event, I resolve this Issue in favour of the Claimants.

Having resolved all the Issues in the Preliminary Objection in favour of the Claimants, I hereby overrule the objection and it is accordingly dismissed.

We now come to the merits of the substantive suit.

Addressing the Court in the substantive suit, Dr.Ayuba Giwa leading: E.I. Sado Esq. and Dr. G.L. Umoru for the Claimants adopted his Written Address as his arguments in this suit. In his further oral arguments, he submitted that where the court accedes to the second prayer of the Defendants that the issue cannot be resolved by affidavit, the Court cannot dismiss the suit but pleadings should be ordered. For this view, he relied on the following decisions: ***UKPAKA V TORONTO HOSPITAL NIGERIA LTD. (2010). All FWLR (Pt.532) 1709 at 1730 par. B-G Issue No. 7 at 1713:*** and ***AKINYAJI V UNILORIN & ANOR (2011) All FWLR (Pt. 569) 1080 at 1108, par D-H.***

Submitting further learned counsel contended that it is inconsistent on the part of counsel to contend that the action be dismissed while he insists that the evidence is insufficient to sustain the claim.

Alternatively, he submitted that their claim is for a declaration of the status of their community namely: whether it is a clan with two sub clans and a rotational clan headship as contained in the extant law or a monarchy with a potentate and a Majestic kind with a rule of primogeniture.

Counsel then referred the Court to the case of: ***ABEJE V ALADE & ANOR (2011) All FWLR (Pt.593) 1969 at 1990-1991;*** *and* ***OLAREWAJU V OYESOMI (2014) All FWLR (Pt.742) 1828 at 1852 – 1853 par. E – H.*** on the power of the court to interpret a Chieftaincy Declaration.

In his Written Address Chief Charles Adogah SAN submitted that the Issues for Determination in this suit are as framed in the Questions raised in the Originating Summons thus:

> ***"Whether or not the Defendant herein can operate outside the letter and content of the clear language of the Edo State Traditional Rulers and Chiefs Edict 1979 (As amended) and or amend same suo motu to transmute himself into a king ruling over an "Okpella Kingdom" rather than the "Clan Head" of "Okpella Clan" as enacted in the Law".***
>
> ***AND/OR***
>
> ***"Whether or not, the Defendant herein can suo motu amend the Edo State Traditional Rulers and Chief Edict 1979 (As amended) by removing the word***

"CLAN" used to name, describe and or define OKPELLA in the Edict/Law and substituting therefore, the word "KINGDOM" in the Edict/Law and substituting therefore, the word "KINGDOM" as the Defendant now holds the Okpella clan out to be".

Learned Counsel submitted that the answers to either or both of the above questions in the circumstances must be in the negative.

He submitted that the crux of this suit is the interpretation and enforcement of the provisions of the Traditional Rulers and Chief Edict 1979 (As Amended). He maintained that the challenge is that the Defendant is unilaterally removing some words or at least a word from a law and substituting it with the one he prefers. He said that this therefore raises the sub question of whether the Defendant is vested with any such legislative powers or at all.

He contended that he Traditional Rulers and Chiefs Edict 1979 (As Amended) or the Traditional Rulers Law of Edo State, was made by the Edo State Government and its predecessors pursuant to the legislative powers conferred on that 2nd tier of the Government of Nigeria by the Constitution of the Federal Republic of Nigeria 1999 and its preceding grundnorm. He posited that power has not been delegated to the Defendant herein, either by the Chiefs Law itself or by any other law, to amend the law unilaterally.

He submitted that it is thus *ultra vires* the Defendant to re-designate Okpella as "a kingdom" even if he is allowed to fantasize or see himself as a king by whatever prefixes, suffixes or appellations.

He contended that Section 4(7) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is very clear as to who can make laws (*eo ipso*) amend laws for Edo State. It states:-

> **(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say**
>
> **(b) Any matter included in the concurrent Legislative list set out in the first Column of Part II of the Second Schedule to this Constitution…..**

He maintained that pursuant to the above section, the Traditional Rulers and Chiefs Law of Edo State stands as a law. He said that throughout the length and breadth of the law, there is no where that a Traditional Ruler is empowered to *suo motu*, amend the law and/or change the designation of a Clan into a "Kingdom".

He said that an exercise of powers that do not exist in law is an exercise in futility, but it is best to always have such an exercise corrected or set aside. For this view, he cited the case of: **Sken Consult V. Ukey (1981) 1 SC 6.**

Learned counsel also referred the Court to the case of: ***Goyang Kayili V Esley Yilbuk & others Appeal No. SC/92/2005*** decided on Friday, 13th February, 2015, where the Supreme Court affirmed the position that a Chieftaincy declaration merely enacts the customary law of the people and where one exists or is contemplated which does not reflect the custom of the people, the appropriate place to challenge it is the High Court.

He said that in this case, the Defendant is seeking to impose a new custom on the people outside what is already stated in the law without passing through the normal process of duly amending the existing law.

He submitted that once it is not the custom of the people, it cannot be forced down their throats even by the legislature much less the Defendant who has no legislative powers at all.

Counsel submitted that from the evidence in this case that dates back to 1931, (the Captain Jewel Report), Okpella has always been a Clan made up of 2 sub-clans. He said that it cannot all of a sudden, become a single Kingdom of the Defendant and all it attendant dictatorship and oppression. He maintained that Okpella and the Claimants have a right to uphold their custom of having two sub-clans and two Ruling houses as one clan and where that right is violated, there must be a remedy.

He quoted the maxim: ***Ubi jus ibi remedium*** (where there is a violation of a right there must be a remedy) and cited the Supreme Court case of: ***Eze & 147 others V. Gov. Abia State & 2 others (2015) All FWLR (pt. 791) 1418.***

He submitted that the Defendant cannot be heard to say that the change he has effected to the designation of Okpella is immaterial or that they are the same. He maintained that they are not and if they are the same, then he asked: why the change? Furthermore, he argued that if they are not the same, as they truly are not, what authority did he have to do so? He said: None!

Learned counsel posited that both ***"Clan"*** and ***"Kingdom"*** are English words and he referred to the English Dictionary mentioned in the Affidavit in support of the Summons which he said clearly brought out the difference as follows:

Clan – "A large group of families that often share the same name"

Kingdom – "A country ruled by a king or queen"

He maintained that the Oxford Dictionary meanings of the words are neither ambiguous nor confusing and none was stated as a synonym of the other. He said that the golden rule of construction of Statutes is that words bear their ordinary meaning without more, particularly in a situation like this where the word used by the enactment: "Clan" is not in any way ambiguous or confusing. He said the Defendant is therefore bound to abide by the law and not change it *suo motu*.

He said he could even stop at "Okpella" if he does not want to add "Clan" as it is in the Law, but surely, not to go further to unilaterally change "Clan" into "Kingdom".

On the implication of having a chieftaincy declaration embodied in a Law, learned counsel referred to the dictum of the Supreme Court in the case of: ***Olarewaju v. Oyesomi(2014) All FWLR (Pt. 740) pg. 1828 at 1851, paras E-F and 1852, paras G-C***

3. Purport of a registered Chieftaincy Declaration –

"Chieftaincy Declarations came into existence to stop the need for frequent calling of evidence in proof of the customary law and traditions of the people in relation to any particular recognized Chieftaincy title/stool or throne. The purpose of a registered Chieftaincy Declaration is to embody in a legally binding written statement of fact, the customary law of the relevant area in which the method of regulating the nomination and selection of a candidate to fill a vacancy is clearly stated so as to avoid uncertainty.

4. On whom lies duty of making Chieftaincy Declarations –

The duty/function/responsibility of making Chieftaincy Declarations lies with the executive arm of the relevant State Government and is usually exercised by a Chieftaincy Committee on behalf of that Government and where a declaration in respect of a recognized chieftaincy is validly made and registered, the matter therein stated is deemed to be the customary law regulating the selection of a person to be the holder of the recognized chieftaincy to the exclusion of any other customary usage rule. The declaration is therefore in the eyes of the law, the tradition, customary law and usages pertaining to the selection and appointment to a particular chieftaincy stool, which of necessity, dispenses with the required need of proof by oral evidence of the relevant custom, tradition and usages each time the need arises to determine the matter/succession to the stool or throne or chieftaincy title. Where such a Chieftaincy Declaration exists, the duty of the Court is to apply the provisions of the declaration to the facts of the case as established by evidence, particularly as the court has no power to assume the functions of the Chieftaincy Committee as regards the making or amendment of customary laws government the selection and appointment of a traditional Chief."

Learned counsel maintained that customary law is often regarded by the Courts as ***"A mirror of accepted usage"***. See the cases of **Owoniyi v. Omotosho (1961) 1 All NLR (Pt. 304) 309, Pyawunmi v. Ogunesan(2001) 11 NWLR p. 137, Ojisua v. Aiyebelehin (2001) 11 NWLR pt. 723 p. 44, Kindey & ors v. Gov. of Plateau State (1988) 2 NWLR pt. 77 p. 445, Lewis v. Bankole (1931) AC 662 N.P. 673.**

According to him, when a custom is touted as a custom in the circumstances that have given rise to this case, the acceptance of such a "custom" unchallenged can cause it to metamorphose into a "customary law" which then becomes binding on even those unborn before it was acquiesced to. He said that this suit is a loud and clear protest that Okpella is a clan under a rational clan headship the Claimants Ruling House of OTEKU and the Defendant's own Ruling House of OGUTE and not a Kingdom ruled by a king with subjects and under a succession of primogeniture.

He contended that from the affidavit evidence in this case, it is obvious that the Defendant is not prepared to adhere to the reality of his office, but to expand same and act ultra vires. He referred the Court to the Defendant's letter to the Dangote Cement Group where he unilaterally and without circumspection purportedly permitted the recipient to enter an undefined acreage of land in the Claimant's Communities of Komunio and Iddo inclusive to explore for any and every mineral possible on the surface and beneath the earth. He said these are powers of alienation and or easement which only a King can exercise; whereas no land in Edo State or Okpella is vested in any Traditional Ruler.

He maintained that this is an attempt to act as a King or Potentate ruling over a personal Kingdom. He said this is more so, when none of the Claimants' people were consulted before such an encyclopaedic "alienation" or purported alienation of their rights was undertaken by the Defendant.

He submitted that the only option left for the Claimants is to seek the reliefs in this suit to protect their constitutional right to belong to a community in which they and their forebears are indigenous and under acceptable customs and traditions but not otherwise.

In conclusion, Counsel urged the Court to grant the reliefs sought in this suit.

In his reply, the learned counsel for the Defendant, D.L.Aimofumeh Esq., adopted his Written Address and made some further oral submissions. In his oral arguments, he submitted that the Claimants have not placed any document before this court to show the wrongful act of the defendant and how it has affected them to seek the intervention of the court.

He maintained that there is no dispute whatsoever whether the Defendant can use any prefix or name and referred to paragraph 18 of the Affidavit in support of the originating summons.

He posited that the fundamental question is: what is the wrong which the Claimants are asking the court to resolve. He said that it is trite law that there must be a clear cause of action with the resultant losses or damages before a claimant can claim any relief.

See**: *DIAMOND PETROLEUM INTERNATIONAL LTD V. GOVERNOR OF C.R.N. (2015) 14 NWLR (Pt. 1478) 179, 186, ASUWOYE V. BOSERE (2017) 1 NWLR (Pt.1546) 256 at 269.***

He said that the claimants have not disclosed any cause of action. See: ***RE BOLD INDUSTRIES LTD V. MAGREOLA (2015)8 NWLR (Pt. 1461) 210 at 217.ODUNTAN V AKIBU (2000) 7 S.C. (Pt. 11) 106:WAEC V. ADEYANJU (2008) 4 S.C. at 27.***

Again he maintained that where the Law has amply made a pronouncement on any issue, it is superfluous for any party to ask the court to make another declaration.

He submitted that the Claimants have not shown the court what wrong they have suffered to be entitled to obtain a perpetual injunction against the Defendant.

He contended that the Court can only confine itself to the case presented by the parties. See: ***OHOCHUKWU V A.G. RIVERS STATE 6 NWLR (Pt. 1324) 53 and MOROHUNSOLA V. KWARA TECHNICAL (1990) 4 NWLR (Pt. 145) 506 at 527 – 528.***

In his Written Address, learned Counsel formulated two Issues for Determination as follows:

1. ***Whether the Claimants Originating Summons as presently filed before this Honourable Court is a valid document that can be acted upon by this Honourable Court in the face of inherent deficiencies contained therein;***
2. ***Assuming, but without conceding that the Claimants Originating Summons as filed before this Honourable Court is a valid document, whether same contains contentious and disputed facts which discloses any cause of action whatsoever and howsoever against the Defendant in this suit before this Honourable Court.***

Thereafter, he articulated his arguments on the two Issues.

Going through his arguments, I observed that the first issue is on the signing and sealing of the originating processes which I have already considered in the preliminary objection. Having decided that issue, I cannot re-consider it again at this stage. I will only consider his arguments on Issue Two.

Arguing Issue Two, learned counsel submitted that the Claimants in their Originating Summons, the affidavit in support, and the Written Address have raised contentious issues, arguments and legal conclusions, all in their depositions *simpliciter*, which would ordinarily require further evidence in proof of same. He submitted that the Claimants affidavit in support of the Originating Summons is enough to disclose disputed facts and the hostile nature of the proceedings. He maintained that it is manifestly clear that the suit cannot be effectively determined by an Originating Summons procedure as presently adopted by the Claimants. He referred to the affidavit in support of Originating Summons of the Claimants and the case of: ***OSSAI V. WAKWAH (2006) 2 SC (Pt. I) 19***.

He submitted that it is trite that the Originating Summons procedure is a means of commencement of action where facts are not in dispute or there is no likelihood of their being in dispute and when the sole or principal question in issue is or is likely to be on directed at the construction of a written law, constitution or any instrument or of any deed, will, contract or other document or other question of law or in a circumstance where there is not likely to be any dispute. He said that in actions commenced by Originating Summons, pleading are not required rather affidavit evidence are employed.

He posited that in the present case, the Claimants have merely alleged that the Defendant has amended a document without placing same before the court, and urging the court to interpret same and make a declaratory order with regards to the said document that is not before the court. He urged the Court to refuse this procedure as adopted by the Claimants and relied on the case of: ***DAPIANLONG & ORS V. DARIYE (2007) Vol. 152 LRCN 155 at 173, R.8***.

Furthermore, learned counsel submitted that the Claimants' action as disclosed by their Originating Summons and affidavit in support thereof is largely speculative hypothetical, and an academic exercise. For this view, he relied on the cases of: ***ABUBAKAR V. BEBEJI OIL & ALLIED PRODUCTS LTD & 2 ORS (2007) 2 S.C. 48;***and ***ODUNTAN V. AKIBU (2000) 7. S.C. (Pt. II) 21***.

Counsel further submitted that the fact that the Defendant has filed a Counter affidavit does not change the position that the Claimants Originating Summons filed before this Honourable Court is

riddled with several disputed facts. He relied on the cases of: ***OSSAI V. WAKWAH (Supra); PAM & ANOR V. MOHAMMED & ANOR (2008) 5 – 6 S.C. (Pt. 1) 83; INAKOJU V. ADELEKE (2007) 1 S.C. (Pt 1) 1.***

He therefore urged the Court to dismiss this claim in its entirety, or in the alternative make an Order that pleadings be filed by parties, as the suit as presently constituted contains disputed facts, baseless assertions and constitutes a gross abuse of the court's process. He maintained that it is trite that a court of law is not competent to pick depositions in affidavit which are not consistent with, or which violates Section 87 of the Evidence Act and he referred to the case of: ***BUHARI V. INEC & 4 ORS (2008) 12 S.C. (Pt. 1) 1***.

On the whole, he urged the Court to dismiss this suit with substantial punitive costs, as same is incompetent, baseless, unmeritorious, an abuse of the process of court and a waste of the precious judicial time.

I have carefully examined all the court processes filed in this suit together with the arguments of learned counsel on the merits of this suit. From all the arguments canvassed, I think it is expedient for me to first consider the arguments articulated by the learned counsel for the Defendant on the propriety of commencing this suit by way of originating summons. I would have expected the defence to have incorporated this issue in their preliminary objection since it is a threshold matter which is not on the merit of the suit. Be that as it may, the issue is crucial enough to be considered first.

It is settled law that originating summons should only be applicable in circumstances where there is no dispute on questions of fact or even the likelihood of such dispute. See: ***National Bank of Nigeria vs. Alakija and Anor.(1978) 2 L.R.N. 78.***

Normally, originating summons is used to commence an action where the issue involved is one of the construction of a written law or of any instrument made under a written law, or of any deed, contract or other document or some other question of law or where there is unlikely to be any substantial dispute of fact. See: ***Order 3 Rule 7 Edo State High Court (Civil Procedure) Rules, 2012; and Keyamo vs. House of Assembly, Lagos State (2000) 15 NWLR (Pt.689) 1 at 17.***

Where the facts are controversial or contentious and cannot be ascertained without evidence being adduced, originating summons should not be appropriately used; and if used it should be discountenanced. See: ***Doherty vs. Doherty (1964) N.M.L.R 144; and Unilag vs. Aigoro (1991) 3 NWLR (Pt.179) 3676***.

In the case of: ***Doherty vs. Doherty (1967) All NLR 260 at 265, Ademola CJN*** reiterated that:

> ***"It is generally inadvisable, however, to employ an originating summons for hostile proceedings".***

In the instant case, the Claimants have consistently maintained that the Defendant has made moves *inter alia* to turn Okpella clan into a kingdom, to change his title from clan head to a king, and to amend the Chieftaincy Declaration regulating the stool of Okpella clan. The following paragraphs of their supporting affidavit will buttress this point:

"15. That I know as a fact that "clan" is not a synonym for "kingdom" either in English Language or in Law.

16. That I know that the legislature that made the law that confirmed the custom and Tradition of Okpella as above (as a Clan and not a Kingdom) is not foolish and no one can be wiser than parliament.

17. That notwithstanding the above, the Defendant herein has suddenly turned himself into a "King" ruling over an "Okpella Kingdom".

18.That this transmutation or attempted transmutation of the Defendant from "Clan Head" which he is to "king" which he is not, and "Okpella Clan" that it is into an "Okpella Kingdom" that it is not has manifested in so many ways.

(b) That without a cloak of authority whatsoever and in pursuance of this unilateral alteration of the law, the Defendant changed his prefix from "His Royal Highness" to "His Royal Majesty" which he now answers till date.

(c)That without any Cloak of Authority, right or justification whatsoever, the Defendant now unilaterally refers to "Okpella Clan" as "Okpella Kingdom" after dismantling or purporting to dismantle the 6(six) Federating Villages that made up the two sub-clans that make up Okpella i.e. Ogute, Awuyemi, Imiekuri and Imiegiele of the Ogute sub-clan; and Komunio and Iddo of the Oteku sub-clan and replaced the 6 with 125 (one hundred and twenty five) non cognizable ones existing only in his books and the air, but not geographically.

(d)That without any cloak of authority, right or justification whatsoever, the Defendant now forbids anybody from using the prefix "His Royal Highness" for him but rather "His Royal Majesty".

(e)That I know as a fact that the Defendant may if he so wishes and for reasons best known to himself, decide to adopt any prefix he so chooses but I also know as a fact that he (Defendant) has no right, power or authority whatsoever to convert Okpella from a Clan to his Kingdom, or a "Kingdom".

(f)That copies of some of the Defendants letter headed papers recently put out to the public and the whole world in the print media are annexed herewith and jointly marked as EXHIBIT B. They are for the purpose of showing how the Defendant now regards and describes himself and Okpella in contra-distinction to the Laws, Legal Notices, gazettes and customs above."

In his counter affidavit, the Defendant has vehemently denied the above position. Some of his denials are as follows:

"4. That as the prescribed Authority of Okpella clan under the Traditional Rulers and Chiefs Law 1979, I have never at any time acted outside the ambit and authority of the extant law.

5. That at all particular time material, I have always acted within the confines of the law in both my actions and utterances and I have never at any time tinkered with, amend, alter or operate outside the clear provisions of all relevant laws, including the Traditional; Rulers and Chiefs Edict 1979 (as amended).

6. That any assertion to the contrary that I operate outside Traditional Rules and Chiefs Edict 1979 (as amended) is within the fertile imagination of such persons, including the Claimants.

7. That the fact that Okpella is a clan duly recognized by law and presently headed by me as the Okuokpellagbe of Okpella is not in doubt and that the clan headship rotates among the two sub-clans of Ogute and Oteku as recognized by the extant law is also not in doubt.

8. That I am aware that the Traditional Rulers and Chiefs Law still recognizes Okpella as a Clan made up of several villages in Edo State, which said law is subsisting and has not been altered by anybody."

From the foregoing, it is evident that the proceedings are quite hostile in nature as there are indeed some substantial dispute of facts raised, having regard to the conflicting assertions of the parties. It was therefore wrong for the claimants to have adopted an unsuitable procedure for a hostile attack.

In the event, I am completely in agreement with the submissions of the learned counsel for the Defendant that the procedure adopted by the Claimants is quite defective. The proper procedure is to come by way of a Writ of Summons where pleadings will be exchanged and witnesses will be given the opportunity to testify and be subjected to cross examination.

Where a suit ought to have been instituted by writ of summons instead of originating summons, it was held in the case of: ***National Bank of Nigeria Ltd. vs. Alakija (1978) 9-10 S.C. 59*** that the originating summons should be treated as if the suit was commenced by way of a writ of summons.

Also, in the case of: ***Emezi vs. Osuagwu (2005) 12 NWLR (Pt.939) 340 at 367***, the Supreme Court held thus:

> ***"When a suit is commenced by an originating summons instead of a writ of summons, the appropriate order to be made by the court is to direct the suit to proceed with the filing of pleadings."***

Again, in the recent decision of the Supreme Court in: ***Olley vs. Tunji (2013) 10 NWLR (Pt.1362) 275 at 315, Ngwuta JSC*** stated thus:

> ***"Declarations sought in this case under the guise of originating summons are in consonance with a suit commenced by a writ of summons and instead of proceeding to determine the matter by way of originating summons, the court should have converted same to a writ of summons and ordered parties to file and exchange pleadings accordingly."***

Sequel to the foregoing, ***it is hereby ordered that the Claimants shall file their Statement of Claim together with the accompanying documents listed in Order 3, rule3 of the Edo State High Court Civil Procedure Rules 2012, within twenty one days from today and the Defendant shall file his Statement of Defence, Set-Off or Counter-Claim within forty two days of the service of the Statement***

of Claim on him. Again, the Claimants shall within fourteen days of service of the Statement of Defence and Counter-Claim if any, file their reply, if any, to such defence or defence to counter-claim.

I award the sum of N20, 000.00 (twenty thousand naira costs) as costs in favour of the Defendant.

P.A.AKHIHIERO
JUDGE
17/07/17

COUNSEL:

CHIEF CHARLES ADOGAH SAN.....CLAIMANTS.

D.L.AIMOFUMEH ESQ…….……DEFENDANT.