1. OBA RUFUS A. ADEJUGBE
2. JAMES BAMIDELE

V.

ENGR. JOSEPH AKANBI OLOGUNJA

SUPREME COURT OF NIGERIA

SC.230/2000

SYLVESTER UMARU ONU, J.S.C. (Presided)
ANTHONY IKECHUKWU IGUH, J.S.C.
NIKITOBI, J.S.C.
DAHIRU MUSDAPHER, J.S.C.
IGNATIUS CHUKWUDI PATS-ACHOLONU, J.S.C. (Read the Leading Judgment)

FRIDAY, 27TH FEBRUARY, 2004

APPEAL- Issues for determination formulated by parties-Whether court can reframe.

CHIEFTAINCY MATTERS - Entitlement to chieftaincy - Whether descendant of slave thereby ineligible - Constitutional right thereof.

CHIEFTAINCY MATTERS - Head of family - Role of in selection of candidate to minor chieftaincy - Whether similar to role of in alienation of family land under customary law - Section 13(4) of Chiefs Law of Ondo State construed,

CHIEFTAINCY MATTERS - Minor chieftaincy - Dispute on succession thereto — Power of prescribed authority to determine - How exercised - Section 13(4) of Chiefs Law of Ondo State construed.

CHIEFTAINCY MATTERS - Minor chieftaincy - Selection of candidate thereto - Procedure therefore - Need to avoid discrimination in respect of.

CONSTITUTIONAL LAW - Entitlement to chieftaincy - Whether descendant of slave thereby ineligible - Constitutional right thereof.

COURT- Case of party - Where misunderstood by court - Effect on decision reached under such misapprehension.

CUSTOMARY LAW - Head of family - Role of in selection of candidate to minor chieftaincy - Whether similar to role of in alienation of family land under customary law - Section 13(4) of Chiefs Law of Ondo State construed.

EVIDENCE-Affidavit evidence - Denial of fact in affidavit - How done - What constitutes effective denial.

JUDGMENT AND ORDER - Case before the court - Where misunderstood by court - Effect on decision reached under such misapprehension.

PRACTICE AND PROCEDURE - Affidavit evidence - Denial of fact in affidavit - How done - What constitutes effective denial.

PRACTICE AND PROCEDURE-Appeal-Issues for determination formulated by parties - Whether court can reframe.

PRACTICE AND PROCEDURE - Case before the court - Where misunderstood by court - Effect of decision reached under such misapprehension.

Issues:

1. Whether the misconstruction of the appellants' case by the Court of Appeal did not occasion a miscarriage of justice fn this case when facts it stated not to be disputed by the parties were in fact disputed.
2. Whether in the light of the provision of section 13(4) of the Chiefs Law of Ondo State applicable to Ekiti State the Court of Appeal was right when it held that the circumstances of the case did not justify the invocation of the power of the prescribed authority under that provision.
3. Whether the Court of Appeal was justified in granting all the reliefs of the respondent including those abandoned by the respondent himself.

Facts:

The 2nd appellant and the respondent were candidates contesting for the minor chieftaincy stool of Edemo of Ado-Ekiti. There were two ruling houses: the Fajemilue house and the Aduloju house. It was the turn of Aduloju to present a candidate and the two contestants are from the Aduloju house. The 2nd appellant was nominated by a faction of the Aduloju ruling house while the respondent was nominated by another faction of the same ruling house.

It was the responsibility of the 1st appellant to appoint the person who will occupy the chieftaincy and in view of the dispute he gave the Elerebi (the eldest member of the families) the responsibility of resolving the dispute. The Elerebi forwarded the name of the respondent to the 1st appellant while another faction also forwarded the name of the 2nd appellant. When the 1st appellant did not act on the recommendation of the Elerebi, the Elerebi wrote two letters urging the 1st appellant, as the prescribed authority, to appoint the respondent as the choice of the Aduloju family to the chieftaincy. They contended that 2nd appellant was not qualified, being descendant of a slave.

Obviously, as a result of the opposition from the other faction, the 1st appellant did not act on the recommendation of the Elerebi but instead caused election to he conducted at his palace which the 2nd appellant won. As a result he commenced traditional rites for the installation of the 2nd appellant to the stool of Edemo of Ado-Ekiti.

In consequence thereof, the respondent instituted an action by way of originating summons seeking an order of certiorari and prohibition against the appellants including an order of injunction restraining the 1st appellant from appointing the 2nd appellant to the stool. He contended that the selection and appointment of the 2nd appellant was not in accordance with tradition.

In the affidavit in support of the application, the respondent deposed that he was the person selected by the kingmakers (i.e. the Elerebi's Committee) relying on copies of the two letters written by the Elerebi to the 1st appellant and that, in the light of the selection, it is

contrary to the tradition for the 1st appellant to appoint the 2nd appellant based on the election conducted by him.

In the counter-affidavit filed by him, the 2nd appellant denied the selection of the respondent by the kingmakers alleging that there was a division among members of the committee occasioned by bribe offered by the respondent to influence his selection which resulted in the two factions recommending different candidates. This resulted in the conduct of the election. He denied the allegation that he was a descendant of a slave.

The letters written by the Elerebi to the 1st appellant by their tenors showed that the 1st appellant gave the Elerebi the privilege to recommend to him a candidate to the throne.

The trial court, after hearing arguments of the parties, dismissed the claims of the respondent. Upon appeal by the respondent to the Court of Appeal, the Court of Appeal set aside the decision of the trial court and granted the respondent's claims.

Being dissatisfied, the appellants appealed to the Supreme Court, contending that the finding of the Court of Appeal that there was no dispute on the facts between the parties was perverse and occasioned a miscarriage of justice and that the Court of Appeal was wrong in holding that selection of a candidate by election was wrong by virtue of section 13(4) of the Chiefs Law of Ondo State applicable to Ekiti State which provides:

"13(4) Where there is a dispute as to whether a person has been appointed in accordance with customary law to a minor chieftaincy the prescribed authority may determine the dispute and the person concerned shall be notified of the decision."

The respondent also cross-appealed against some aspects of the judgment of the Court of Appeal contending that the right route to the prescribed authority was the Elerebi.

Held (Unanimously allowing the appeal and dismissing the cross-appeal):

1. **On Power of prescribed authority to appoint a minor chief under section 13 of Chiefs Law Ekiti State —** By virtue of section 13(4) of the Chiefs Law of Ekiti State, where there is a dispute as to whether a person has been appointed in accordance with customary law to a minor chieftaincy the prescribed authority may determine the dispute and the person concerned shall be notified of the decision. In the instant case, the 1st appellant exercised his power under the law to determine a dispute about succession to the Edemo stool. (P. 66, paras. C-G)

Per PATS-ACHOLONU, J.S.C. at pages 65-66, paras. H-E:

"In their judgment the learned Justices of the Court of Appeal said:

'Section 13(4) of the Chiefs Law of Ekiti State as amended gave the 1st respondent a discretion and power to determine any dispute arising from the appointment of person into a minor chieftaincy like that of Edemo. From the above provision of the Chiefs Law the 1st respondent as the prescribed authority for the Edemo Chieftaincy would seem to be quite

aware that the condition precedent to the exercise of his power under section 13(4) of the Chief's Law supra had not arisen.'

With greatest respect to the opinion held by the Court of Appeal on this matter I beg to disagree. The Elerebi had not been able really to resolve the dispute as to who was chosen. Certain letters as the one supposedly written by the so called Aduloju descendants to the 1st appellant on 5/1/93 and contained at p. 18 of the record and signed by Mr. Ojo Aduloju and Madam Felicia Omolusi naturally were distractions that would make it difficult to have a fair dealing. In the letter under reference, the allegation that the 2nd appellant is a son of a slave was made the main issue. It was manifestly evident that something must give, i.e. that the 1st appellant had to intervene to settle the imbroglio once and for all. The circumstances that were in existence warranted an intervention. He did not meddle unduly in the matter. I do not agree that in this instance the 1st appellant exceeded his jurisdiction."

2. **On Distinction between roles of head of family in selection of candidate to chieftaincy from his role in alienation of a family land-**

The role of the head of family in the sale of family land is not similar to the role of Elerebi, as the head of family, in the appointment of the successor to the minor chieftaincy of Edemo. While in respect of alienation of family land, any sale is void without the consent of the head of family because he holds the land in trust for other members of the family, in this case the Elerebi is not a trustee but merely the eldest member of the family whose duty was to convey to the 1st appellant whoever is selected or nominated by the ruling house to the stool of Edemo. To this extent, the 1st respondent is not bound to approve the candidate recommended to him by the Elerebi as the head of family in the light of the fact that there is a dispute as to right to succession to the stool. [Ekpendu v. Erika (1959) SCNLR 189 referred to and distinguished.] (P. 65, paras. D-H)

3. **On Need to adopt democratic procedure in selecting successors to chieftaincy stools -**

A body vested with power for selection of a candidate for appointment to the stool of a chieftaincy can in appropriate cases, hold an election for the purpose. Nothing can be more demonstrably fair, honest and above reproach than subjecting the selection of the contestants to the peers of the ruling house by way of election. In a democratic society, it is the intention or will of the majority that prevails. [Uhunmwangho v. Okojie (1989) 5 NWLR (Pt. 122) 471; Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377; Adefulu v. Oyesile
(1989) 5 NWLR (Pt. 122) 377 referred to.] (Pp. 66-67, paras. G-A; 67, paras. G-H)

Per PATS-ACHOLONU, J.S.C. at page 67, paras. G-H:

> "We would be regressing into the past if we should allow ourselves to spurn the beautiful and edifying philosophy and ethos underlying the concept of democratic ideals and principles only to take refuge or shelter in archaic tradition that seeks to emasculate or disenfranchise or discriminate the majority of the right thinking members of a community or for that matter any society."

4. On Whether descendant of slave ineligible for a chieftaincy –

A procedure of selection of candidate to a chieftaincy which tends to disqualify a person on the ground that he is a descendant of a slave smack of discrimination and cannot be tolerated bearing in mind the provision of Chapter 4 of the Constitution and the African Charter on Human and Peoples Right (Ratification and Enforcement) Act. In the instant case, in this day and age the only way the 1st appellant could arrive at the truth of the matter is by way of election. It will be a travesty of justice for the 1st appellant to be swayed by a puerile or primordial concept or practice that pervaded the society in the past. (P. 64, paras. A-C) Per PATS-ACHOLONU, J.S.C. at page 68, paras. A-C:

> "The sole reason advanced by the respondent in the candidature of the 2nd appellant is that he was a descendant of a slave. No sane person in our society having regards to the provision against discrimination made patently clear in the 1979 and 1999 Constitutions would support the nihilistic and obtuse stand of the respondent that the appellant was ineligible to contest because of the stigma attached to his name. Such insipid and cruel utterance is negativistic and abhorrent in a modern society. This court should strike down any attempt by anybody or institution to deny anyone of his rights, interest, privileges or benefits on the altar of any concept or practice that tends to consign a fellow citizen to a second class position or make him a non-person."

5. On Effect of court misunderstanding a party's case –

Where a court misapprehends a party's case and goes on to decide the case as misunderstood, its decision will not be right and will be liable to be set aside on appeal. Thus, the misunderstanding of the case submitted by the parties is, according to law, a fundamental vice liable to render that decision indefensible and unsustainable. It is a serious error that attaches to the judgment. In the instant case, the facts misrepresented by the Court of Appeal are crucial and material and its decision would have been different had the facts been correctly appraised and understood. [Oladipo v. Oluwasegun (1974) 4 UILR (Pt. 2) 160; Oyewale v. Oyesoro (1998) 2 NWLR (Pt. 539) 663 referred to.] (P. 70, paras. C-H) Per TOBI, J.S.C. at page 76, paras. C-D:

> "It is the duty of a court of law to take the case of the parties dispassionately and evenly. It must examine and analyse the case of both

parties as in the record. Where a court of law, trial or appellate, misconceives the case as contained in the record and reaches a conclusion in that misconception, this court will .certainly set aside the judgment which is a product of the misconception."

6. **On what constitutes denial of facts deposed to in an affidavit –**
A denial of facts in an affidavit can be express or by necessary implication. Once facts are deposed to in order to negate the general drift of the depositions in the supporting affidavit, then such are deemed denied. [Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266; Nwagboso v. Ejiogu (1997) 11 NWLR (Pt. 527) 173 referred to.] (P. 71, paras. A-B)

7. **On Power of court to re-frame issues for determination for the parties -**
It is not on all occasions that a court must inevitably accept the issues framed by the appellant as though they are immutable particularly when the issues formulated by the respondent address the points in consideration or in controversy much more squarely. Indeed, the court may decide in an appropriate case to suo motu frame issues which though do not and ought not in any way depart from the contents or purports and ramifications of the issues already framed by the parties, and distilled from the grounds of appeal, are much more succinct, precise and readily understandable. [Neka B. B. Manufacturing Co. Ltd. v. African Continental Bank Ltd. (2004) 2 NWLR (Pt. 858) 521 referred to.] (P. 64, paras. D-F)

Nigerian Cases Referred to in the Judgment:
Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377
Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266
Ekpendu v. Erika (1959) SCNLR 186
Fabiyi v. Adeniji (2000) 6 NWLR (Pt. 662) 532
Irom v. Okimba (1998) 3 NWLR (Pt. 540) 19
Neka B. B. Manufacturing Co. Ltd. v. ACB Ltd. (2004) 2 NWLR (Pt. 858) 521
Nwagboso v. Ejiogu (1997) 11 NWLR (Pt. 527) 173
Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377
Oladipo v. Oluwasegun (1974) 4 UILR (Pt. 2) 160
Oro v. Falade (1995) 5 NWLR (Pt. 396) 385
Oyewale v. Oyesoro (1998) 2 NWLR (Pt. 539) 663
Uhunmwangho v. Okojie (1989) 5 NWLR (Pt. 122) 471

Nigerian Statutes Referred to in the Judgment:
Chiefs Law of Ondo State applicable to Ekiti State, S. 13(4) Constitution of the Federal Republic of Nigeria, 1979, Chapter 4

Appeal and Cross-appeal:

This was an appeal against the decision of the Court of Appeal setting aside the judgment of the High Court dismissing the respondent's claim. The respondent cross-appealed against a part , of the judgment. The Supreme Court, in a unanimous decision, allowed the appeal and dismissed the cross-appeal.

Editor's note:

The Court of Appeal's decision which is herein overturned by the Supreme Court is reported in (2001) 11 NWLR (Pt. 724) at page 494.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Sylvester Umaru Onu, J.S.C. (Presided); Anthony Ikechukwu Iguh, J.S.C.; Niki Tobi, J.S.C.; Dahiru Musdapher, J.S.C.; Ignatius Chukwudi Pats-Acholonu, J.S.C. (Read the Leading Judgment)
Appeal No.: SC.230/200
Date of Judgment: Friday, 27th February, 2004
Names of Counsel: Yusuf O. Alli, SAN (with him, Adebayo Adelodun, Esq. and S. A. Oke, Esq.) -for the Appellants O. O. Akeredolu, SAN (with him, Eka Udo-Inyang [Mrs.])
-for the Respondent

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Ilorin
Names of Justices that sat on the appeal: Muritala Aremu Okunola, J.C.A. (Presided and Read the Leading Judgment); Patrick Ibe Amaizu, J.C.A.; Walter Samuel Nkanu Onnoghen, J.C.A.
Appeal No.: CA/IL/80/99
Date of Judgment: Wednesday, 5th July, 2000
Names of Counsel: Chief Akin Olujinmi, SAN (with him, Peju Oguntaye, Esq.) -for the Appellant
Yusuf Ali, SAN (with him, K. K. Eleja, Esq. and S. A. Oke, Esq.) -for the Respondents

High Court:

Name of the High Court: High Court of Ekiti State, Ado-Ekiti
Name of the Judge: Adekeye, J.
Suit No.: HAD/2M/94
Date of Ruling: Wednesday, 22nd November, 1995

Counsel:

Yusuf O. Alli, SAN (with him, Adebayo Adelodun. Esq. and A. Oke, Esq.) — for the Appellants
O. O. Akeredolu, SAN (with him, Eka Udo-lnyang [Mrs.]) -; for the Respondent

PATS-ACHOLONU, J.S.C. (Delivering the Leading Judgment):
The main points in contention in the case are who of the 2nd appellant and the respondent should occupy the relatively minor chieftaincy stool of Edemo of Ado-Ekiti. Following the procedure of appointment by way of election conducted by the 1st appellant as against the advice of Elerebi the eldest of their people the 2nd appellant won the contest and was duly recognized as Edemo, the two contestants having come from the same Aduloju ruling house. The respondent then applied to the High Court and sought for an order of certiorari and prohibition against the appellants. He equally claimed other reliefs and injunction restraining the 1st appellant from appointing the 2nd appellant. The gravamen of his complaint was that the procedure used in the presentation of the 2nd appellant as Edemo was not in accord with their tradition. In the affidavit in support of his prayers in the High Court, he indicted the 1st appellant for refusing to recognize him in spite of all entreaties by the members of the Aduloju ruling house, and referred to a letter from the four people who had hitherto vied the position with him but who later withdrew and canvassed for his appointment. Evidence revealed that the 1st appellant took umbrage at the fact that the Aduloju family had rejected the candidature of the 2nd appellant because he was said to be a descendant of a slave, one late Opokiti. His anger against the 1st appellant the Ewi of Ado-Ekiti in particular was that in his palace the Ewi himself had pleaded with the ruling house of the Aduloju not to refer the 2nd appellant as a son of a slave. The respondent had queried the procedure of making the appointment by way of election which he lampooned as being contrary to the tradition and custom of appointing or nominating an Edemo.

In the High Court, the learned trial Judge dismissed the application stating that the procedure by way of conducting an in election to determine the preference of the candidate of the ruling house was in order and that the appointment of the 2nd appellant was sequel to the majority votes he garnered in the ruling house.

On appeal, the court below allowed the appeal and set aside the judgment of the lower court. The appellants now on record appealed to this court by filing 12 grounds of appeal from which they framed 5 issues for determination. These issues distilled from the grounds of appeal are as follows:-

1. Whether the misconstruing of the appellants' case by the lower court did not occasion a miscarriage of justice when the facts stated to be

undisputed between the parties which were disputed formed the kernel of the decision of the lower court to the detriment of the appellants' case.

2. Whether the lower court was right to have totally abandoned the relevant, pungent and straight forward issues formulated by the parties but instead raised new issues suo motu that were not covered or circumscribed by the grounds of appeal filed in the case.
3. Whether the lower court was right in the way it applied the decision in the case of Ekpendu v. Erika when the decision was totally irrelevant to the case put forward by the parties and this led to a miscarriage of justice against the appellants.
4. Whether the court below was right in the view it took of the provisions of section 13(4) of the Chiefs Laws of Ondo State applicable to Ekiti Stale when ii held that there was no dispute on the Edemo stool to warrant the invocation of the said sub-section and when it held that there was valid nomination and presentation of the respondent to the 1st appellant by the Aduloju family when this was not so.
5. Whether the lower court was right to have allowed the appeal before it by granting all the reliefs claimed in, the originating process by the respondent when many of the reliefs had been abandoned by the respondent and whether from the totality of the facts of the case the respondent was entitled to judgment.

The respondent who cross-appealed framed 5 issues in his brief which apparently took care of the main brief and the cross-appeal as well; to wit:

1. Whether the lower court's view that the material facts in this case are not in dispute is a proper inference from the evidence on record.
2. Whether the principal and the sub-issues formulated by the Court of Appeal properly arose from the grounds of appeal before the court.
3. Whether reference to the principle in Ekpendu v. Erika by the Court of Appeal on the importance of the concurrence of the family head in the sale of family land as an analogy in defining the importance of the role of the family head in the nomination exercise by a ruling house has not occasioned a mi scam age of justice.
4. Whether the lower court was right in its conclusion that the 1st appellant exceeded his jurisdiction under section 13(4) of the Chiefs Law of Ondo State.
5. Whether the lower court was right in allowing the respondents' appeal and granting the reliefs sought by the respondent.

On the 1st issue the learned counsel for the appellants submitted that contrary to the holding by the Court of Appeal that the material facts in the case are not disputed, there is abundant evidence that much was disputed. He referred to the letters by Elerebi to the 1st appellant dated 30th November, 1992 and 24th February, 1993 one of which the Court of Appeal described as a nomination when in fact it was not one of that, it was a letter "written by the Elerebi in which he explained his roles in the selection of a successor to the Edemo stool". They further argued that the facts which the learned Justices of the Court of Appeal said were not in dispute are the very kernel of the case between the parties. The respondent in his contra argument as reflected in his brief contended that what the appellate court stated in its judgment as to facts not in dispute was the correct statement of the matter.

Indeed a careful reading and understanding of the import of the letter by the Elerebi, Pa Matthew Faje shows that he was informing the Ewi of Ado-Ekiti of the name submitted. In the 2nd letter of 24th February, 1993 he staled among other things;

> "You will only permit your Royal Highness to repeat that Engr. Joseph Akanbi Ologunja is the choice of his people and would wish you to give his appointment due consideration."

In this first letter that was dated 30th November, 1992 the Elerebi ended the letter in this manner;

> "I have also the opinion that I have exhausted all avenues necessary to carry out the assignment given by your Royal Highness and to say that Engr. Akanbi Ologunja is the choice of Adeloju ruling house and is hereby recommended for your consent and consequent appointment... It is in your wisdom and God's guidance that you gave me the privilege as Elerebi to advice you on this issue and pray that you would live long enough to enjoy good things of the world."

My understanding of these letters is that they represent the advice given by the Elerebi who merely was requested to make a representation to the Ewi of Ado-Ekiti who may or may not accept the recommendation. It was not and did not mean a final representation by the ruling house. It must be understood that the respondent had alluded to a statement credited to the 1st appellant that the respondent and his supporters should cease describing the 2nd appellant as a son of a slave. There was a dispute as to who was really the nominee of the family.

In the affidavit sworn on 21st March, 1994, the respondent deposed as follows:-

1. That at the meeting there were six contestants and four of them withdrew in my favour while the 2nd respondent (the 2nd appellant of course) insisted on contesting.
2. That as a result of the unwielding nature of the general meeting of the ruling house it was agreed to delegates to a committee of nine the task of selecting a candidate.
3. That nobody raised any objection to this procedure.
4. That six members of the nine-member committee nominated me while three supported the 2nd respondent
5. That the head of Aduloju family then presented me to the Elerebi who in turn presented me to the 1st respondent.
6. That the 2nd respondent's faction also presented him to the 1st respondent.

7. That as a result of this the 1st respondent directed the Elerebi to go back home to resolve the matter and present him with only one candidate.

Further down in that affidavit he deposed at paragraph 21;

> "That the basis of the objection of Aduloju ruling house to the candidature of the 2nd respondent is that he is only the descendant of late Opokiti one of the slaves of Aduloju the ancestor of Aduloju ruling house who was a great warrior."

In reaction to some portions of the affidavit sworn to by the respondent the 2nd appellant, countered with these facts;

1. That I know as a fact that the committee of nine set up by the family compromised its position by accepting gratification from the applicant who gave to the committee five hundred naira, two cartons of beer and one bottle of schnapps before the committee took any decision at all.
2. That I know as a fact that when the other members of the Aduloju family heard this, the committee was immediately dissolved and disbanded and the whole house resumed its duty of picking a candidate.
3. That I know as a fact that the membership of the committee was factionalized due to the bribe offered by the applicant and accepted by some of the members of the committee.
4. That I know as a fact that at the resumed sittings of the family, I was selected by majority of the members and my name was forwarded to the kingmakers who also ratified my selection.

From the two affidavits by the contending or feuding parties it cannot be said that there was not dispute in respect of the factual situation. It is therefore not correct to state that the parties were ad idem in respect of the material facts. The issues in controversy are;

(a) Which of the two was the nominee of the family i.e. representing the opinion or view of the ruling house.
(b) Whether the method finally adopted by the Ewi to know the true opinion of the ruling house by conducting election to know the real view of the majority of the ruling house is correct.

There existed a controversy - nay a dispute. I do not subscribe to the opinion expressed by the Court of Appeal in its holding that there was no dispute. In the event I hold there existed a dispute in the material facts.

On the second question to be answered by this court, the grouse of the appellants is that the lower court sort of abandoned its former stand that it would rely on the issues formulated by the appellants, (otherwise the respondents in the court below) and suo motu framed an issue which tended to crystallise the issues hitherto formulated and indeed made a summary of what it conceived as the issues to be determined by that court. The appellants argued that the court below thereafter based its decisions on its own issues, and this they contended led to the miscarriage of justice.

The learned counsel for the appellants submitted that the appellate court cannot formulate issues "suo motu" outside the grounds of appeal filed, adding further that where the appellate court assumes the duly of framing its own issues such issues must be related to the grounds of appeal. In this connection it is his contention that issues formulated by the court below fell outside the purview, contemplation or intendment of the grounds. He cited Oro v. Falade (1995) 5 NWLR (Pt. 396) 385 at 402, Irom v. Okimba (1998) 3 NWLR (Pt. 540) 19 at 25 and Fabiyi v. Adeniji (2000) 6 NWLR (Pt. 662) 532 at 546.

The respondent replican do submitted that the dispute in which the first appellant intervened was over nomination at the ruling house level. The main point said to have been the bulwark or the plank on which the court below relied to take a decision was as to whether there was a dispute as to who ought to be nominated and therefore appointed. Customarily and traditionally the road or the channel to the Ewi who was to make the ultimate appointment was the Elerebi who incidentally must be eldest person in that place. The supplication of Elerebi clearly made manifest in his letters to the 1st appellant showed him as a humble subject given the onerous duty to present to the Ewi whoever was the choice of the ruling house for the appointment. It is evidence from the facts that the 1st appellant did not put all his reliance on the Elerebi to ascertain who should be the Edemo. This might not be unconnected with reference to the 2nd appellant as the son of a slave. Elerebi's duty appeared merely advisory which may or may not be taken by the 1st appellant. Let us consider this extract from the letter dated 30th November, 1992.

> "Your Royal Highness with all above and with the support of the ruling house and its head - Mr. Joseph Ojo Aduloju and in serious consideration of the fact that the major supporters of Mr. Bamidele William do not belong to Aduloju ruling house, I have no doubt in my mind that the choice of Engineer Akanbi Ologunja is more than proper.
>
> I have also the opinion that I have exhausted all avenues necessary to carry out the assignment given by your g Royal Highness and to say that Engr. Akanbi Ologunja is the choice of Aduloju ruling house and he is hereby recommended for your consent and consequent appointment.
>
> It is in your wisdom and God's guidance that you gave me the privilege as Elerebi to advise you (Italics is mine) on this issue and pray that you would live long enough to enjoy good things of this world." Long may you rein over us your obedient citizen.
>
> PA MATHEW FAJE
> THE ELEREBI
> IDEMO"

Indeed, from the letter dated 24th February, 1993, and set down below the impression gained is that the 1st appellant is the all and all in determining who would be the Edemo

> The Elerebi
> Idemo Quarters

Ado-Ekiti
24th February, 1993

"His Royal Highness,
Oba Rufus Adejugbe Aladesanmi
The Ewi of Ado-Ekiti
EDEMO CHIEFTAINCY TUSSLE MATTERS OF
THE MOMENT

I wish to refer to my letter dated 30th November, 1992 to which your Highness has not reacted. This comes to remind you on the need to have a second look at my submissions which in essence would assist you in giving your most valuable consent to the right choice of the ruling house.

I recall your invitation when you asked if the letter was written by me and my reply confirming, same. It was at that invitation you gave your decision not to use the nine-man committee. This is very welcome. Equally was your decision that day not to use the purported Chiefs was out of great wisdom. I remember you went further to say that Engr. J. A. Ologunja has greater support of the people in consideration of those that came to you on behalf of the two contestants. This comment is definitely not misplaced.

I have since called on you to know when you would invite me to again present Engr. J. A. Ologunja, if that was still necessary, but had not been lucky enough to meet you.

You will only permit me your Highness to repeat that Engr. Joseph Akanbi Ologunja is the choice of his people and would wish you to give his appointment due consideration. I am making this plea as the Elerebi who is of age and could pass away anytime. I cannot mislead you.

Thank you and God bless.

Your obedient citizen,
Pa Mathew Faje,
The Elerebi Idemo".

To the submissions that the reframing or summarizing of the issues made by the lower court fell outside the mainstay of the grounds of appeal, my answer to that is in the negative. That issue framed by the court is on the nature of the question in controversy, to wit whether there was dispute to the extent that the 1st appellant had to conduct an election within the precincts of the ruling house to determine who was the choice. It should be borne in mind that the respondent and his supporters had sought to exclude the 2nd appellant from calculation on the ground that he was a descendant of a slave. To the 1st appellant, this smacked of discrimination which can no longer be tolerated in a decent society. In other words the respondents' supporters had sought to disqualify the 2nd appellant. This stand cannot obviously be tolerated bearing in mind the position of Chapter 4 of the 1979 Constitution then extant, and the African Charter on Human Rights. In this day and age I believe that the only way the 1st appellant could arrive at the truth of the matter is by way of election. It will be a travesty of justice for the 1st appellant to be swayed by a puerile or primordial concept or practice that pervaded the society in the past in

influencing him in making an appointment. I do not think that the issue framed by the court below fell outside the grounds of appeal. In the recent case of Neka B. B. Manufacturing Co. Ltd. v. African Continental Bank Ltd. (2004) 2 NWLR (Pt. 858) 521 this court held thus;

> "It is not in all occasions that a court must inevitably accept the issues framed by the appellant as though they g are immutable particularly when the issues formulated by the respondent address the points in consideration or in controversy much more squarely. Indeed the court may decide in an appropriate case to suo motu frame issues which though do not and ought not in any way depart from the contents or purport and ramifications of the issues already framed by the parties, and distilled from the grounds of appeal, but are much more succinct, precise and readily understandable."

I do not subscribe to the view that the Court of Appeal in summarizing or putting in a precis form the issue to be determined which to my mind is within the precincts of the grounds of appeal, was wrong or has occasioned a denial of justice.

In respect of issues Nos. 3 and 4 which I take together, the appellants had referred to the observation of the court below that the nomination of the 2nd appellant was not in consonance with the decision in Ekpendu v. Erika (1959) 4 SC 79. To this the respondent countered that there is no merit in that submission. The Court of Appeal had opined thus;

> "The situation in my view is akin to the position of the law relating to disposition or alienation of family property where an act of sale earned out by the family head without the concurrence of the principal members is not void but only voidable while an act of sale earned out by the principal members of the family without the concurrence of the family head is void ab initio. See Ekpendu v. Erika supra cited by learned counsel to the appellant."

Now in the judgment of the court below the learned Justices held as follows:-

> "The first respondent ought to have approved the candidate duly nominated by the family with concurrence of the Elerebi and not otherwise and I so hold. The 1st respondent by doing otherwise created non-existing dispute which he purported to settle. In the circumstance I hold that the 1st respondent exceeded his jurisdiction by approving the appointment of the 2nd respondent... See Ekpendu v. Erika)"

There is no way this case can in anyway be likened to Ekpendu v. Erika supra. In this case the Elerebi is a mere messenger to the 1st appellant. 1 had earlier on referred to the supplicative nature of his writings to the 1st appellant. His letters show to my mind, that it is the decision of the 1st appellant that held sway and that is the authority. Elerebi's duty was merely to convey to the 1st appellant whoever the ruling house had chosen. He was powerless beyond that. In respect to alienation of family land, any sale is void without the consent of the head of the family. Why is this so? Because, in a land matter the head of the family holds the land in trust for the other members. In this case he is not a trustee. He was merely the eldest member of the family whose duty was to convey to the 1st appellant who ever was selected or nominated by the ruling house. I must point out that when the Ewi was of the opinion that an attempt was being made to exclude

a potential contestant unjustly, he used his awesome powers even recognized and acknowledged by the Elerebi to effect a more appropriate method that was in accord with fairness and rationality barring other eventualities to find who was the true choice of the people.

In their judgment the learned Justices of the Court of Appeal said:

> "Section 13(4) of the Chiefs Law of Ekiti State as amended gave the 1st respondents a discretion and power to determine any dispute arising from the appointment of person into a minor chieftaincy like that of Edemo. From the above provision of the Chiefs Law the 1st respondent as the prescribed authority for the Edemo Chieftaincy would seem to be quite aware that the condition precedent to the exercise of his power under section 13(4) of the Chief's Law supra had not arisen."

With greatest respect to the opinion held by the Court of Appeal on this matter I beg to disagree. The Elerebi had not been able really to resolve the dispute as to who was chosen. Certain letters as the one supposedly written by the so called Aduloju descendants to the 1st appellants on 5/1/93 and contained at p. 18 of the record and signed by Mr. Ojo Aduloju and Madam Felicia Omolusi naturally were distractions that would make it difficult to have a fair dealing. In the letter under reference, the allegation that the 2nd appellant is a son of a slave was made the main issue. It was manifestly evident that something must give, i.e. that the 1st appellant had to intervene to settle the imbroglio once and for all. The circumstances that were in existence warranted an intervention. He did not meddle unduly in the matter. I do not agree that in this instance the 1st appellant exceeded his jurisdiction. To emphasize the fact that the first appellant did not exceed his power, my view is strengthened by the provision of section 13(4) of the Chiefs Edict, which states as follows:

> "Where there is a dispute as to whether a person has been appointed in accordance with customary law to a minor chieftaincy the prescribed authority may determine the dispute and the person concerned shall be notified of the decision."

Every conceivable effort as indeed adumbrated by the appellants was made to settle the matter but all efforts proved futile. The Court of Appeal appears to me to have given a skewed interpretation to section 13(4) supra. I hold that the words are manifestly clear and explicit in their intendment; that the authorized body could in an appropriate case hold an election. In that way the spirit of the law would be made manifest. See Uhunmwangbo v. Okojie (1989) 5 NWLR (Pt. 122) 471 at p. 490,Ojokohbo and Ors. v. Alamu and Ors. (1987) 3 NWLR (Pt. 61) 377. In my view nothing can be more demonstrably fair, honest and above reproach than subjecting the selection of the contestants to (he peers of the ruling house by way of election.

This court was equally referred to the case of Adefutu v. Oyesile (1989) 5 NWLR (Pt. 122) 377 at 421 to the effect that the nomination or the selection of a candidate was at the ruling house level while appointment should be by king-makers. The case of Adefulu v. Oyesile supra is a chieftaincy matter. There was a chieftaincy vacancy on the death of the Olofin of Ilishan Remo. At the meeting of the ruling house 4 people were nominated and 2 were mentioned. The all six people were presented to the king-makers who selected the 1st defendant. The plaintiff

and the supporters went to court to nullify the appointment. The High Court dismissed their case. On appeal to the Court of Appeal, the judgment of the High Court was reversed. On further appeal to the Supreme Court, the court in considering the case commented as follows amongst other things:

> "The king makers of Ilishan Remo considered other candidates not nominated by the Agaigi ruling house and not only that, they (king makers) went further to select one of the nominated candidates to be appointed and was appointed as the Olofin."

In his judgment in respect of the manner of the choice as to who would be the Olofin, Uwais, JSC (as he then was) reading the lead judgment said:

> "The Agaigi ruling house as a body entitled in nominate candidates for appointment to the stool of Olofin of Ilishan - Remo can in my opinion only act or perform that function through a majority of its members ... Our society being a democratic society, it cannot be said that a legislation requiring such a body to perform an act is complied with if a minority of the members of the body performs the act ... In a democratic society it is the intention or will of the majority that prevails."

We would be regressing into the past if we should allow ourselves to spurn the beautiful and edifying philosophy and ethos H underlying the concept of democratic ideals and principles only to take refuge or shelter in archaic tradition that seeks to emasculate or disenfranchise or discriminate the majority of the right thinking members of a community or for that matter any society.

I really wonder whether the 5th issue is any issue at all but assuming it is, the resolving of the 4th issue hitherto attended, makes the 5th issue an academic exercise or at least "ex abundantia cautela ". The sole reason advanced by the respondent in the candidature of the 2nd appellant is that he was a descendant of a slave. No sane person in our society having regards to the provision against discrimination made patently clear in the 1979 and 1999 Constitutions would support the nihilistic and obtuse stand of the respondent that the appellant was ineligible to contest because of the stigma attached to his name. Such insipid and cruel utterance is negativistic and abhorrent in a modem society. This court should strike down any attempt by anybody or institution to deny anyone of his rights, interest, privileges or benefits on the altar of any concept or practice that tends to consign a fellow citizen to a second class position or make him a non-person.

I once again reinforce the method adopted by the 1st appellant to find a solution to the problem that tasked the aged Elerebi and seemed to have given him sleepless nights and as Shakespeare said;

> "Makes his seated heart knock at his ribs against the use of nature."

In his cross-appeal, the respondent submitted that the right route to the prescribed authority was the Elerebi. I have shown that the Elerebi was a mere messenger, a harbinger. He was an adviser but when his advice went awry then the 1st appellant had to step in. There is no

way the cross-appeal could make any dent in the case as presented and argued and as finally considered by this court. As I said this has been effectively covered in considering issues 3 and 4.

In the final analysis the appeal succeeds and is allowed. The cross-appeal fails and is dismissed and the judgment of the Court of Appeal is set aside. There shall be costs to the appellants assessed at N10.000.00 in this court, and N5, 000.00 in the court below.

ONU, J.S.C.: Having had the opportunity of a preview of the judgment of my learned brother Pats-Acholonu, JSC just delivered, I am in agreement with him that the appeal succeeds and it is accordingly allowed by me.

In adding a few words of mine to the leading judgment in expatiation, I wish only to briefly treat issue 1 out of the five issues distilled from the twelve grounds of appeal as being enough to dispose of those issues formulated there from at the appellants' instance, to wit:

1. Whether the misconstruing of appellants' case by the lower court did not occasion a miscarriage of justice when the facts stated to be undisputed formed the kernel of the decision of the lower court to the detriment of the appellants' case.

It is pertinent to point out that since the respondent cross-appealed, I shall in my consideration of the appeal, bear same in mind.

It is the appellants' contention that the court below took the view that the material facts in dispute between the parties are not disputed. Some of those facts, the appellants have argued, include

(a) The nomination of the respondent by the family

(b) The presentation of the respondent to the 'Elerebi'

(c) The consent of the 'Elerebi' to the nomination

(d) The purported forwarding of the 1st respondent’s name to the appellant by the Elerebi

(e) That it was a faction within the Aduloju family that nominated the 2nd appellant to the 1st appellant.

This submission cannot be correct, for a careful reading of the affidavit in support of the originating process at pages 5 - 10 of the record, the further affidavit at pages 35 - 39, the counter-affidavit at pages 62 - 67, read in conjunction with the documents attached thereto, will reveal beyond per adventure that the material facts which the court below said the parties agreed on, are in fact not borne out by those affidavits and exhibits. For instance, at page 224 of the record the court below stated that the respondent's name was forwarded by the 'Elerebi' to the 1st appellant after the formers nomination through a letter dated 30/11/92. A careful perusal of that letter reveals that it is not a letter of nomination as stated by the court below. Rather, it is a letter purportedly written by the 'Elerebi' in which he explained his role in the selection of a successor to the Edemo stool. To demonstrate beyond doubt that that letter of 30/11/92 constitutes no letter of nomination, the self same 'Elerebi' in his letter of 24/2/93 vide exhibit 'C'. Speaks of representation of the respondent to 1st appellant. A careful appraisal of the evidence on record

exemplifies that the court below misapprehended as well as misunderstood the cases of the parties, thus leading it into error in stating that some material facts were not in dispute between the parties when this was not so. As a matter of fact, the facts which were said not to be in dispute indeed constituted the kernel of the case of the parties and it was because those facts were in that led to the action before the trial court. For example, whether or not the presentation of a candidate for the Edemo stool by the 'Elerebi' to the Ewi of Ado-Ekiti validated such presentation was clearly a matter in dispute between the parties in the peculiar circumstances of the case which required evidence thereof to be adduced.

Also whether or not the nomination of the other party by a faction was also in dispute could only be resolved if only evidence is adduced or an explanation thereof is made.

Where a court misapprehends a party's case like in the case in hand and it goes on to decide the case as misrepresented, its decision will not be right and it will be liable to be set aside. The facts misrepresented by the court below in the instant case are crucial and material and their decision would have been different had the facts been correctly appraised and understood. Thus, the misunderstanding of the case submitted by the parties is, according to law, a fundamental vice liable to render that decision indefensible and unsustainable. It is in my judgment a serious error that attaches to the judgment. See Oladipo v. Oluwasegun & Anor. (1974)4 UILR (Pt. 2) 160 and Jimoh Akani Oyewale v. Zuberu Agboola Oyesoro (1998) 2 NWLR (Pt. 539)663.

Besides, for the court below to have held that the material facts set out in the counter-affidavit before the trial court for review were not in dispute is preposterous and palpably untrue, more so that at paragraph 8 thereof it was untruthfully deposed.

> "That I know as a fact that at the resumed sittings of the family, I was selected by majority of the members and my name was forwarded to the kingmakers who also ratified my selection."

The respondent in paragraphs 7.5, 7.6, 7.7 and 7.8 has stated that paragraphs 5, 6, 7, 8, 10, 13, 14 and 17 of the affidavit in support of the application for judicial review were not denied by the appellants in their counter-affidavit. Further, that those paragraphs are deemed admitted. I take the firm view that should the depositions be read together in their totality and not piece-meal, an equal and commensurate reading of paragraphs 5, 6 and 7 of the counter-affidavit at page 63 of the record are adequate denials of the supporting affidavit set out above.
I therefore agree with the appellants' submission that the totality of

the facts deposed to in the counter-affidavit show beyond doubt that the appellants never intended to admit the facts deposed to in paragraphs 5, 6, 7, 8, 10.13,14 and 17 respectively of the supporting affidavit to the application for judicial review. A denial can be express or by necessary implication. Once facts are deposed to, in order to negate the general drift of the depositions in the supporting affidavit, then such are deemed denied. See Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt. 191)266; Nwagboso v. Ejiogu (1997) 11 NWLR (Pt.527) 173.

In the result, issue 1 is answered in the affirmative.

For the reasons given by me and the fuller ones set out in the judgment of my learned brother, Pats- Acholonu, JSC I too allow the appeal. I make similar consequential orders as therein contained.

IGUH, J.S.C.: I have had the privilege of reading in draft the judgment of my learned brother, Pats-Acholonu, JSC just delivered and I entirely agree with the reasoning and conclusion therein. Accordingly, I, too, allow the main appeal and dismiss the cross-g appeal. I subscribe to the rest of the orders contained in the leading judgment.

TOBT, J.S.C.: The matter concerns a chieftaincy in Ado-Ekiti. The dispute arose over the nomination of a candidate for the filling of the vacancy in the Edemo chieftaincy. There are two ruling houses. Fajemilue is one. Aduloju is the other. It was the turn of Aduloju ruling house to fill the vacancy in the chieftaincy. There was a disagreement within the Aduloju ruling house over the candidate to be presented to the Elerebi (the joint head of the two ruling houses).

Nominations were made to fill the vacant chieftaincy stool of Edemo. The respondent was nominated by a faction within his family. His name was forwarded by the Elerebi to the 1st appellant, the prescribed authority who did not approve the nomination. 2nd appellant was also a candidate for the chieftaincy. 1st appellant appointed him as Edemo of Ado-Ekiti. And so the dispute arose.

The respondent, Engr. J. A. Olugunja, as applicant took out an application for judicial review before the trial court. The matter was heard through affidavits. The learned trial Judge dismissed the claim of the respondent. His appeal to the court of appeal succeeded.

The appellants, being aggrieved, have appealed to this court. Briefs were filed and duly exchanged.

The major complaint of the appellants is that the Court of Appeal misconstrued their case by adopting the issues formulated by the respondent, which did not reflect their case. It is the argument of the appellants that, contrary to the decision of the Court of Appeal the material facts in the case are in dispute. Understandably, the respondent takes a contrary position. To him, the material facts, in the case, are not in dispute.

Who is correct? The answer will be obtained by reference to the affidavit evidence. But before I go to the affidavit evidence, I should take the findings of the Court of Appeal in respect of the material facts which the court held are not in dispute. The court said at page 214.

> "From the affidavit evidence of both parties it appears the material fact of the case are not in dispute. It is not in dispute that there are two ruling houses, Fajemilue and Aduloju, entitled to present candidates for the chieftaincy and that it was the turn of Aduloju ruling house to fill the vacancy of the chieftaincy. The Aduloju ruling house after series of meetings nominated the appellant whose name was forwarded to the Elerebi (the joint head of the two ruling houses). The Elerebi

consented to the appellant's candidature and forwarded his name to the 1st respondent for his approval and installation."

Apart from the finding that the Elerebi consented to the appellant's candidature and forwarded his name to the 1st respondent for approval and installation, all other findings are clearly borne out from the affidavit evidence, as deposed in paragraphs 5, 6, 7 and 8 of the affidavit in support. As the counter-affidavit denied paragraphs 4 and 9 of the affidavit in support in paragraph 2 of the counter-affidavit, the Court of Appeal, in my humble view, was wrong in coming to the conclusion that the Elerebi consented to the appellant's candidature.

In paragraph 2 of the counter-affidavit, the 2nd appellant also denied paragraphs 11, 12, 16, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 39 and 40 of the affidavit in support. I think there is need to reproduce the above paragraphs in order to appreciate the point made by the appellants:

"11. That nobody raised any objection to the procedure.

12. That six members of the nine members committee nominated me while three supported the 2nd respondent.

16. That in compliance with the directive the Elerebi held several meetings of the ruling house and still found that the majority was in my support.

18. That the Elerebi sent a reminder dated 24th February, 1993 to the 1st respondent regarding exhibit 'B' and requested to know when he should re-present me but still there was no reaction from the 1st respondent. A copy of the reminder is attached as exhibit 'C'.

19. That the descendants of Aduloju also by letters and personal visits to the 1st respondent pleaded for the 1st respondent to recognize my nomination by the ruling house but still the 1st respondent refused.

21. That the basis of the objection of Aduloju ruling house to the candidature of the 2nd respondent is that he is only the descendant of late Opokiti one of the slaves of Aduloju the ancestor of Aduloju ruling house who was a great warrior.

23. That from the various meetings held in the palace of the 1st respondent it was clear he was biased in favour of the 2nd respondent as he specifically pleaded with my ruling house not to refer to the 2nd respondent as the son of a slave again and insisted that as far as he was concerned the 2nd respondent is a member of the ruling house.

24. That even long after this dispute over the Edemo chieftaincy had blown into the open the people of Ijesa-Isu had in fact become aware of the controversy, the 1st respondent set up a smokescreen committee to carry out private investigation for him at Ijesa-Isu.

25. That I was not represented on the committee and so had no way of knowing the various sources the committee consulted and also I could not therefore ask questions from such sources.

26. That the 1st respondent furnished the Aduloju ruling house with a copy of the report of the smokescreen committee and the ruling house communicated its views on the report to the 1st respondent as shown in exhibit Dl herewith.
27. That apart from the committee the 1st respondent also on 17th September, 1992 made written contact with the Oba of Ijesa-Isu Ekiti on Opokiti, the late slave grandfather of the 2nd respondent. A copy of the letter is attached as exhibit 'E'.
28. That the 1st respondent did not afford me or Aduloju ruling house the opportunity of seeing and commenting on the response from the Oba of Ijesa-Isu.
29. That the descendants of Aduloju continued to pay visits and writes to the 1st respondent to plead with him to give his blessings to my selection but he kept promising that justice would be done. A copy of such letters dated 8th February, 1994 is attached as exhibit 'F.
30. That while still waiting patiently for the reaction of the 1st respondent to the various appeals lodged with him on this matter by Aduloju descendants I became aware on Friday 18th March, 1994 that the 1st respondent had commenced the rites or rituals for the installation of the 2nd respondent as Edemo of Ado-Ekiti.
31. That I know as a fact that the kingmakers for the Edemo chieftaincy have not made any appointment yet.
33. That contrary to the custom of the chieftaincy the 1st respondent is bent on installing the 2nd respondent who is not a son of Aduloju ruling house.
35. That traditionally there should be at least eight clear days between the 1st and the second stage but the 1st respondent has fixed the 2nd stage for Monday, 21st March, 1993.
36. That I verily believe that the 1st respondent is rushing the installation process to avoid legal intervention.
37. That prior to the 3rd stage the Edemo elect will spend three months in the house of the 3rd respondent where he will perform further rites.
38. That I hereby undertake to pay any damages the respondents may prove to have suffered as a result of the granting of the interim reliefs claimed herein and provided I ultimately lose this action.
39. That it is in the interest of justice to grant this application."

In view of the fact that some of the above paragraphs deal with material facts, it is difficult to agree with the Court of Appeal that the material facts are not in dispute.

That is not all. In addition to paragraph 2 of the counter-affidavit, paragraphs 3, 4, 7, 8, 29, 34, 35, 36 and 37 state a contrary case. Let me read them.

"3. That I know as a fact that I have since completed all the traditional rites pertaining to the Edemo chieftaincy.

4. That I know as a fact that most of the documents attached to the motion paper in particular exhibits B, C, D and Dl were made purposely for this case and were not made with a view to setting any record straight as deposed.

7. That I know as a fact that the membership of the committee was factionalized due to the bribe offered by the applicant and accepted by some of the members of the committee.
8. That I know as a fact that at the resumed sittings of the family, I was selected by majority of the members and my name was forwarded to the kingmakers who also ratified my selection.
29. That I know as a fact that inspite of the overwhelming support for me the applicant still was not satisfied and he had been going round spreading the falsehood that I am a descendant of a slave.
34. That I have also seen the copy of a memorandum submitted to the 1st respondent by eminent sons and daughters of Aduloju and same attached as exhibit ADU IV."
35. That I know as a fact that the interest of Justice will be better served if the application is refused.
36. That I know as a fact that I will suffer irreparable damages if the application is granted.
37. That I know as a fact that the 1st respondent did all the things expected of an impartial and respected traditional ruler in resolving the dispute on the Edemo stool before he consented to my appointment as the Edemo."

Again, I come to the conclusion that in the light of the above contrary depositions, the Court of Appeal was wrong in coming to the conclusion that the material facts in the case were not in dispute. They were clearly in dispute and I so hold. Can any paragraph show dispute more than paragraph 8 of the counter-affidavit which I repeat here at the expense of prolixity?

> "That I know as a fact that at the resumed sittings of the family, I was selected by majority of the members and my name was forwarded to the kingmakers who also ratified my selection."

To me, paragraph 8 of the counter-affidavit clearly joined issues with paragraphs 12 and 16 of the affidavit in support.

It is the duty of a court of law to take the case of the parties dispassionately and evenly. It must examine and analyse the case of both parties as in the record. Where a court of law, trial or appellate, misconceives the case as contained in the record and reaches a conclusion in that misconception, this court will certainly set aside the judgment which is a product of the misconception. This is clearly such a case. See Oyewale v. Oyesoro (1998) 2 NWLR (Pt. 539) 663.

I am clearly of the view that the Court of Appeal misconceived the case of the appellants as deposed to in the counter-affidavit, a misconception which resulted in its adoption of the issues for determination formulated by the respondent in that court. And it is that misconception that resulted in the judgment given in favour of the respondent. That misconception is enough for me to determine this appeal. I do not think I will take other issues canvassed by the parties.

It is in the light of the above reasons and the more detailed reasons given by my learned brother, Pats-Acholonu, JSC in the leading judgment that I allow the appeal and dismiss the

cross-appeal. The judgment of the Court of Appeal is set aside. I abide by my learned brother's orders as to cost.

MUSDAPHKR, J.S.C.: I have read before now, the judgment of my Lord Pats-Acholonu, JSC, just delivered. For the same reasons contained in the aforesaid judgment, which I adopt as mine, I too, allow the appeal and set aside the decision of the Court of Appeal and restore the decision of the trial court. The cross-appeal is dismissed. The appellants are entitled to costs both in the court below and this court assessed on N5.000.00 and N10, 000 00 respectively.

Appeal allowed.