

**ALHAJI MUFUTAU MOHAMMODU GBADAMOSI
ESUWOYE**

V.

- 1. ALHAJI JIMOH ABODUNRIN IMAM BOSERE
(Substituted for ALHAJI SHEU F. OYENIYI) (Mogaji
Olugbense Ruling House, Offa)**
- 2. ALHAJI (PRINCE) ABDULRAUFADEGBOYEGA KEJI**
- 3. PRINCE SAKA KEJI
(For themselves and on behalf of Olugbense Ruling
House)**
- 4. ALHAJI YUNNUS BUKOYE (ESA OF OFFA)**
- 5. ALHAJI KADIR KOLAWOLE BELLO (OJOMU OF
OFFA)**
- 6. ALHAJI OSENI OLANIYI (BALOGUN OF OFFA)**
- 7. ALHAJI ZIKRULLAH KOLA SANI OLABOYE (Shawo
of Offa)**
- 8. ATTORNEY GENERAL OF KWARA STATE**
- 9. GOVERNOR OF KWARA STATE**

SUPREME COURT OF NIGERIA

SC. 890/2014

WALTER SAMUEL NKANU ONNOGHEN. J.S.C. (*Presided and
Read die Leading Judgment*)

OLABODE RHODES-VIVOUR. J S C.

NWALJ SYLVESTER NGWUTA, J.S.C.

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

AMIRU SANUSI, J.S.C.

Friday, 1st JULY 2016

ACTION - Cause of action - Meaning of - What it entails.

*ACTION - Counter-claim - Defence to counter-claim - Duty on
plaintiff to file - Where Jails to do so - Effect.*

ACTION - Counter-claim - Nature, of - Who can be defendant to counter-claim - Whether includes other defendants and third parties.

ACTION - Limitation of action - Issue of whether an action is statute barred or not - Nature of - Whether raises issue of law or equity.

APPEAL - Court of Appeal - Powers of - Where overturns finding of lower court that action is statute barred/ - Duty on Appellant to invoke power under section 15, Court of Appeal Act to resolve dispute.

APPEAL - Evaluation of evidence - Respective duties of trial and appellate court in respect of.

APPEAL - Fresh issue on appeal - Raising of without leave of court - Propriety of.

APPEAL - Ground of appeal - Complaint therein as to what constitutes issue estoppel - Classification of - Whether a ground of law or fact.

APPEAL - Ground of appeal - Need to arise from decision appealed from - Complaint therein that lower court did not decide an issue raised before it - Whether emanates from the decision appealed against.

APPEAL - Issue of whether action is statute barred or not - Nature of - Whether raises issue of law or equity.

APPEAL - Preliminary objection to appeal - Where raised - Duty on court to hear first.

CHIEFTAINCY LAW - Chieftaincy declaration - Power of court to nullify - Whether extant - When exercisable.

CHIEFTAINCY LAW - Chieftaincy declaration relating to stool of a Chief of Offa made in 1970 - Validity of - Whether reflects true customary law thereof.

CHIEFTAINCY LAW - Chieftaincy declaration to stool of a Chief of Offa made in 1970 - Validity of - Whether court has power to nullify.

CHIEFTAINCY LAW - Olofa of Offa Chieftaincy - Number of ruling houses eligible to present candidates thereto - Whether ascension thereto rotational.

CONSTITUTIONAL LAW - Right to fair hearing - Issue estoppel - Where court wrongfully sustains objection based on issue estoppel declining jurisdiction to hear case - Effect on plaintiff's right to fair hearing.

COURT - Chieftaincy declaration - Power of court to nullify - Whether extant - When exercisable.

COURT - Court of Appeal - Powers of under section 15, Court of Appeal Act - Object of - When exercisable.

COURT-Court of Appeal - Powers of under section 15, Court of Appeal Act - Where overturns finding of lower court that action is statute barred - Duty on to invoke power under section 15, Court of Appeal Act to resolve claim.

COURT - Jurisdiction of court - Ingredients of - Where lacking -Effect.

COURT - Supreme Court - Powers of under section 22, Supreme Court Act - Object of - When exercisable.

CUSTOMARY LAW - Chieftaincy declaration relating to stool of Olofa of Offa made in 1970 - Validity of - Whether reflects true customary law thereof.

CUSTOMARY LAW - Customary law relating to Olofa of Offa Chieftaincy - What constitutes.

CUSTOMARY LAW - Nature of customary law - How proved -When can be judicially noticed.

CUSTOMARY LAW - Olofa of Offa Chieftaincy - Number of ruling houses eligible to present candidates thereto - Whether ascension thereto rotational.

ESTOPPEL - Estoppel - Types of estoppel.

ESTOPPEL - Issue estoppel - Raising of - Conditions precedent thereto.

ESTOPPEL - Issue estoppel - What constitutes - Effect where successfully raised.

EVIDENCE - Estoppel - Issue estoppel - Raising of - Conditions precedent thereto.

EVIDENCE - Estoppel - Issue estoppel - What constitutes - Effect where successfully raised.

EVIDENCE - Estoppel - Types of estoppel.

EVIDENCE - Evaluation of evidence - Respective duties of trial and appellate court in respect of.

EVIDENCE - Proof - Customary law - How proved - When can be judicially noticed.

FAIR HEARING - Issue estoppel - Where court wrongfully sustains objection based on issue estoppel declining jurisdiction to hear case - Effect on plaintiff's right to fair hearing.

JURISDICTION - Jurisdiction of court - Ingredients of - Where lacking - Effect.

LIMITATION LAW - Limitation of action - Issue of whether an action is statute barred or not - Nature of - Whether raises issue of law or equity.

PRACTICE AND PROCEDURE - Appeal - Court of Appeal -Section 15, Court of Appeal Act - Where overturns finding of lower court that action is statute barred - Duty on to invoke power under section 15, Court of Appeal Act to resolve claim.

PRACTICE AND PROCEDURE - Appeal - Fresh issue on appeal - Raising of without leave of court - Propriety of.

PRACTICE AND PROCEDURE - Appeal - Ground of appeal - Complaint therein as to what constitutes issue estoppel - Classification of - Whether a ground of law or fact.

PRACTICE AND PROCEDURE - Appeal - Ground of appeal - Need to arise from decision appealed from - Complaint therein that lower court did not decide an issue raised before it - Whether emanates from the decision appealed against.

PRACTICE AND PROCEDURE - Counter-claim - Defence to counter-claim - Duty on plaintiff to file - Where fails to do so - Effect.

PRACTICE AND PROCEDURE - Counter-claim - Nature of - Who can be defendant to counter-claim - Whether includes other defendants and third parties.

PRACTICE AND PROCEDURE - Preliminary objection to appeal - Where raised - Duty on court to hear first.

WORDS AND PHRASES - Cause of action - Meaning of - What it entails.

Issues:

1. Whether the learned Justices of the Court of Appeal were not in error when they struck out issues 1 and 2 raised by the appellant on the basis of the earlier decision in the sister appeal CA/IL/71/2012.
2. Whether the learned Justices of the Court of Appeal were not in error when they failed to exercise their powers under section 15 of the Court of Appeal Act to make consequential order(s) based on the evidence on record in support of the counter claim having held that the counter claim was not statute barred.
3. Whether, in view of the facts and circumstance of this case, the decision of the Court of Appeal that the counter-claim was not statute barred was just and equitable.

Facts:

The last Olofa of Offa, Oba Mustafa Olawore Olanipekun Ariwajoye II, died in March, 2010 thereby rendering the stool vacant. Following the death, the kingmakers called for nominations from the two ruling houses: *Olugbense*, the male

ruling house, and *Anilelerin* the female ruling house to fill the vacancy. The deceased Olofa of Offa was from the female line of the ruling house known as *Anilelerin*. The appellant in this appeal emerged as the candidate of Anilelerin Ruling House while the 2nd respondent was the candidate of *Olugbense* Ruling House. The appellant emerged as the winner of the contest and was presented to the 9th respondent, the Governor of Kwara State, for appointment as the new Olofa of Offa. He was so appointed and given a staff of office and crowned the Olofa of Offa.

Following the coronation of the appellant, the 1st - 3rd respondents, as plaintiffs, instituted suit No. KWS/OF/15/2010 in the High Court of Kwara State, Offa, for themselves and on behalf of *Olugbense* Ruling House of Offa against the appellant and the 4th - 7th respondents who were the kingmakers of the stool of Olofa of Offa and the 8th and 9th respondents being the Attorney General and Governor of Kwara State, respectively.

They sought a declaration that ascension to the stool of Olofa of Offa was rotational between Olugbense (Male) ruling house and Anilelerin (Female) ruling house of Offa and that Anilelerin ruling house having produced the late Oba Mustapha Olawore Olanipekun Ariwojoye II, who ruled for over 40 years, it was then the turn of Olugbense ruling house in law and/or equity to produce the Olofa of Offa on the basis of rotation. They sought a further declaration that the consideration of candidates (2nd claimant and 5th defendant) from the two ruling houses of Olugbense and Anilelerin respectively at the same time by the kingmakers of Offa (1st - 4th defendants) and the acceptance/recommendation of the 5th defendant by the 1st - 4th defendants as Olofa of Offa to the 7th defendant was illogical, wrongful, unlawful, inequitable, unjust, invalid, null and void and of no effect whatsoever.

The plaintiffs predicated their claims on the Chieftaincy Declarations contained in the Kwara State of Nigeria Gazette, No. II Vol. 4 of 12th March 1970 and Legal Notices 3 and 4 of 1969, exhibit J, and that of the process of selection of a candidate for the stool of Olofa of Offa by Anilelerin ruling house and Olugbense ruling house respectively was by rotation and not by competition between the two ruling houses.

The 1st - 5th defendants in the suit, including the present appellant, counter-claimed against the P^c to 3^d respondents contending that the Olugbense ruling house had been disinherited and had gone into

extinction going by the curse placed on them by their progenitor, Oba Olugbense .who decreed that only the female lineage of Anilelerin would occupy the Olofa Stool and that by reason of that fact, since the demise of Oba Olugbense, it was the female lineage of Anilelerin that had been occupying the Olofa Stool and as such the Anilelerin House had become the main and the only ruling house in Offa.

Consequently, they claimed among others a declaration that no rotational policy existed in Offa between the ruling houses in Offa on the appointment of Olofa of Offa whenever a vacancy-occurred in the stool and a declaration that the only ruling house that existed in Offa for the purpose of appointing an Olofa of Offa was the Anilelerin ruling house. They relied on exhibit DFC2 winch was the Sawyer's report on the custom relating to Olofa of Offa on which the chieftaincy declaration in exhibit J was said to have been based. The 1st to 3rd respondents contended that the counter-claim of the 1st - 5th defendants was statute barred.

At the conclusion of the trial, the trial court dismissed the claims of the claimants and upheld the contention that the counterclaim was statute barred. This resulted in an appeal by the 1st to 3rd respondents and a cross appeal by the 1st – 5th defendants numbered as CA/IL/71/2012 and CA/IL/71^A/2012 respectively. The Court of Appeal allowed the main appeal, CA/IL/71/2012, and dismissed the cross-appeal despite the fact that the court found that the trial court was in error in holding that the counter claim, giving rise to the cross appeal, was statute barred. The Court of Appeal dismissed that appeal by holding that the issues raised therein had been determined in appeal number CA/IL/71/2012 and that constituted issue estoppel. The appellant appealed against the decision of the Court of Appeal while the 1st to 3rd respondent's cross-appeal against the decision was that the counter claim of the appellant was not statute barred.

The appellant contended that the Court of Appeal, having found that the counter-claim was not statute barred ought to have exercised its power under section 15 of the Court of Appeal Act and determined the issues raised in the counter-claim, but it failed to do so which led to a miscarriage of justice. He contended that the trial court found that there was no rotation between the Anilelerin ruling house and the Olugbense ruling house and that the Anilelerin ruling house had monopolized the Olofa of Offa chieftaincy and that by the overwhelming evidence before the court, the Court of Appeal ought to have granted his claims and dismissed the claims of the 1st to 3rd respondents.

The 1st - 3rd respondents raised an objection to the main appeal on the grounds:

- (a) that ground 2 in the Notice of Appeal did not emanate from the decisions of the Court of Appeal and it was a new or fresh issue/ground raised for the first time in the Supreme Court,
- (b) That the grounds were on facts/mixed law and facts and no leave of court to appeal was sought and so the court had no jurisdiction to hear the appeal.

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

1. On Kinds of estoppel -

There are two kinds of estoppel by record *inter partes* or *per rem judicatam*, as it is generally known.

These are:-

- (a) *Cause of action estoppel*. This occurs where the cause of action is merged in the judgment. On this principle of law or rule of evidence, once it appears that the same cause of action was held to lie or not to lie in a final judgment between the same parties or their privies on the same subject matter, that is the end of the matter. They are precluded from re-litigating the same cause of action;
- (b) *estoppel inter partes*. This usually occurs where an issue has earlier been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties or their privies. In that circumstance issue estoppel arises. This is based on the principle of law that a party is not allowed to contend or he is precluded from contending the contrary or opposite of any specific-point which having been once distinctly put in issue, had with certainty and solemnity been determined against him. [*Fadiora v. Gbadebo* (1978) 3 SC 219 referred to.] (*Pp. 290-291, paras. E-B*)

2. *On When issue estoppel arises* - Issue estoppel arises where an issue had been adjudicated upon in an earlier suit by a court of competent jurisdiction and the same issue came up in any subsequent proceeding between the same parties or their privies. This is based on the legal

principle that a party is precluded from contending the contrary or opposite of any specific point which having once been distinctly put in issue, has solemnly and with certainty been determined against him. Issue estoppel applies whether the point involved in the earlier decision was one of facts or law or of mixed facts and law. [*Fadiora v. Gbadebo* (1978) 3 SC 219; *Oyerogba v. Olaopa* (1998) 13 NWLR (Pt. 583) 509 referred to.] (P. 304, paras. E-G)

3. *On Conditions precedent to invocation of issue estoppel -*

Three elements must be established for a plea of issue estoppel to apply.

These are:

- (a) The same question must have been decided in both suits;
- (b) The judicial decision relied upon to create the issue estoppel must be final; and
- (c) The parties to the judicial decision or their privies must be the same in both proceedings.

In the instant case, the parties in both appeals were the same but the decision relied upon to invoke issue estoppel was not a final determination thereby rendering the second element not satisfied. Also, the issues involved were not the same. The three elements required for the application of the principles of issue estoppel must be present side-by-side in the case and the absence of any of the elements renders the principle inapplicable. The principle of issue estoppel did not apply to the facts of this case. [*Oyerogba v. Olaopa* (1998) 13 NWLR (Pt. 583) 509 referred to.] (Pp. 304-305. paras. II I); 306-307. paras. G-B)

4. *On Effect of wrongful invocation of issue estoppel -***The consequence of the finding by the Court of Appeal that issue estoppel applied and consequently striking out the two issues involved was that the appellants before that court, including the present appellant, were denied their right to fair hearing as their two issues remained unresolved by the court. It was obvious that the said decision resulted in a miscarriage of justice to the appellants, including the present appellant and the decision relating to the issue of issue estoppel was liable to be set aside for being erroneous in law. (Pp. 307. paras. B-C; 313, paras. E-F)**

5. *On Nature and proof of customary law* -Customary law is unwritten and is a question of fact to be proved by evidence except it is of such notoriety and has been regularly followed by the courts that judicial notice would be taken of it without evidence required in proof thereof. However, where the customary law and tradition of the relevant people has been reduced into writing, it is known as chieftaincy declaration and it regulates the nomination and selection of a candidate to fill a vacancy to avoid uncertainty. [*Giwa v. Erinmilokun* (1961) 1 SCNLR 377; *Olowu v. Olowu* (1985) 3 NWLR (Pt. 13) 372; *Agbai v. Okogbue* (1991) 7 NWLR (Pt. 204) 391 referred to.] (*Pp. 321. paras. D C; 325. paras. F-G*).
6. *On Nature and efficacy of customary law as source of law* - The customary law of a people is a mirror of their accepted usage and it is no less a source of law as other sources of law. It is a set of rules of conduct applicable to persons and things, including ascension to the people's traditional stool, in a particular locality. [*Zaidan v. Mohssen* (1973) 11 SC 1; *Nsirun v. Nsirim* (1990) 3 NWLR (Pt. 138) 285; *Obi v. Obijindu* (1996) 1 NWLR (Pt. 423) 240 referred to.] (*Pp. 325-326. paras. G-A*).
7. *On Number of ruling houses in Offa under native law and custom* -

From the report in exhibit DFC2, it was very clear that the prevailing Offa native law and custom relating to the stool of Olofa of Offa recognizes only one ruling house of Anilelerin ruling house as it considers the Olugbense ruling house to have become defunct. (*P. 320. paras. D P*.) Per ONNOGHEN, J.S.C. at pages 320-321, paras. E-B:

"On the other hand, exhibit 'J', the gazette of Kwara State Government, is said to be the declaration of Offa native law and custom relating to the stool of Olofa of Offa and it recognizes two ruling houses of Olugbense and Anilelerin. It is the appellant's contention that exhibit 'J' cannot be a reflection of the prevailing native law and custom of Offa people in relation to the Olofa

of Offa stool having regard to the findings of the Sawyer Commission of Enquiry - exhibit DFC2, supra. I agree with the appellant. In the first place, exhibit 'J' is said to be based on exhibit DFC2 but exhibit DFC2 found that only one ruling house exists in Offa in relation to the stool in question in accordance with the prevailing native law and custom of the people. In the circumstance, I hold the considered slew that exhibit 'J' is inconsistent with the prevailing Offa native law and custom relating to the Olofa of Offa stool/throne and therefore does not represent the native law and custom of the people; rather it is exhibit DFC2 that represents the prevailing native law and custom of Offa people in relation to the Olofa of Offa stool. Secondly, exhibit 'J', apart from listing the two ruling houses and stating the procedure for nomination of their candidate for the consideration of the King makers, has nothing on the native law and custom of the people in the chieftaincy in question".

Per NGWUTA, J.S.C. at page 325, paras. F-G:

"As a source of the native law and custom of Offa people in relation to ascension to Offa traditional stool, exhibit 'J' should have been based on, or at least drawn from exhibit DFC2 which not only predates it but appears to x-ray the native law land custom of the people and the reasons for the extinction of the Olugbense ruling house."

8. *On Power of court to nullify chieftaincy declaration not based on customary law- of the people - Courts cannot promulgate a chieftaincy declaration or declaration of customary law, but have the competence to see whether a chieftaincy declaration, such as exhibit M' in this case, was in conformity with prevailing customary law, and where it was not; declare it invalid. The courts, therefore, have power to set aside a registered declaration that does not correctly declare the chieftaincy custom and tradition of the area concerned. In the instant case, from the evidence on record particularly exhibit DFC2, it was without doubt that exhibit 'J', the chieftaincy declaration, did not truly*

represent the customary law it professed to restate particularly in relation to the number of ruling houses for the Olofa of Offa stool/throne, and was consequently declared a nullity and set aside. [Fasade v. Babalola (2003) 11 NWLR (Pt. 830) 26; Adigun v. A.-G., Oyo Slate (1987) 1 NWLR (Pt. 53) 678; Ajakaiye v. Idehai (1994) 8 NWLR (Pt. 364) 504; Mafimisebi v. Ehuwa (2007) 2 NWLR (Pt. 1018) 385 referred to.] (Pp. 321, paras. D-G; 326, paras. A-C)

9. *On Ingredients of jurisdiction of court and effect of absence of jurisdiction -*

A court is competent when -

- (a) **it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and**
- (b) **the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and**
- (c) **The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.**

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication. [Madukolu v. Nkemdilim (1962) 2 SCNLR 341 referred to.] (P.330. paras. D-H).

10. *On Meaning of cause of action -*

The term cause of action is defined as the fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle a party to sustain an action and give him the right to seek a judicial remedy in his behalf. It means all those things necessary to give a right of action whether they are to be done by the plaintiff or a third person; every fact which is material to be proved to entitle the plaintiff to

succeed; every fact which the defendant would have a right to traverse. [Edjerome v. Ikine (2001) 18 NWLR (Pt. 745) 446 referred to,] (Pp. 297-298, paras. G-A)

11. *On Meaning of cause of action –*

For the purpose of litigation, a cause of action entails the fact or combination of facts which gives rise to a right to sue and it consists of two elements:-

- (a) the wrongful act of the defendant which gives the plaintiff his cause of complaint; and**
- (b) The resultant/consequent damage.**

It is thus constituted by the aggregate or bundle of facts which the law will recognize as giving the plaintiff a substantive right to make a claim for remedy or relief against the defendant. The existence of cause of action is an indispensable prerequisite. [Onuekwusi v. R.T.C.M.Z.C. (2011) 6 NWLR (Pt. 1243) 341 referred to.] (P. 296, paras. A-D)

Per ONNOGHEN, J.S.C. at pages 298-299, paras. F-B:

"I agree with the lower court that the cause of action of the cross respondents did not accrue in 1969/1970 when exhibit 'J' was promulgated but in 2010 when both the cause of complaint and consequent/resultant damage became crystallized. I agree with the submission of learned senior counsel for the 5th cross respondent that though exhibit 'J' gave the cross respondents a cause for complaint when it was made in 1969/1970, that complaint remained in abeyance until the "consequent damage" which occurred in 2010 when the provisions of exhibit 'J' were invoked to fill the vacancy in issue. It has to be noted that there was no need for an action to challenge exhibit 'J' as it relates to the native law and custom of Offa people in relation to the stool of Olofa of Offa as at the time the said exhibit 'J' was made and up till 2010 when the Olofa of Offa died, the incumbent Olofa of Offa was from the Anilelerin ruling house of the 5th cross respondent.

I am of the strong view that it was only after the demise of the late Olofa of Offa in 2010 and the need to fill the vacancy thereby created that the procedure

to be adopted in the filling of that vacancy became relevant and thereby the issue as to whether or not exhibit 'J', which is said to be the Chieftaincy Declaration in relation to the Olofa of Offa, is a true statement of the native law and custom of Offa people in relation to the stool of Olofa of Offa."

12. *On Nature of counter-claim -*

A counter-claim is separate and independent of the main claim and must be determined on its own merit as obtains in a cross-appeal. [Onuoha v. Okafor (1983) 2 SCNLR 244; Animashaun v. Ojojo (1990) 6 NWLR (Pt. 154) 111 referred to.] (P. 336, paras. E-F)

13. *On, Who can be defendant to a counter-claim -*

It is not the correct position of the law that a counter-claim is a cross-action against the plaintiff and not against a co-defendant. The defendants to a counter claim depend on the people that the counter claimant has a cause of action against, which may even extend to other person(s) who are not parties to the original action either as plaintiffs or defendants. Definitely, a defendant in an action can counter claim against the plaintiff anchor co-defendants depending on his cause of action and the relief he seeks. (P. 309, paras. B E)

14. *On Effect of failure of plaintiff in file defense in counter-claim -*

It is necessary for a plaintiff to file and serve a defense to a counter claim to join issues with the counter claimant. If the plaintiff fails to file a defense to properly traverse the material averment in the counter claim, then there will be no issues joined between the parties on the subject matter of the counter claim, and the allegations contained in the counter claim will be regarded as admitted.

[U . B . N P l c v. Dawodu (2003) 4 NWLR (Pt. 810) 287; Maobison Inter-Link Ltd. v U.T.C (.Nig). Plc (2013) 9 NWLR (Pt.1359)197 referred to.] [P. 3.39. paras. C-E)

15. *On Respective duties of trial and appellate courts in evaluation of evidence -*

The primary duty or function of a trial court is to evaluate the evidence placed before it before arriving at its conclusion on the matter. It is only when and where the trial court fails to evaluate or properly evaluate such evidence that an appellate court can intervene and in itself evaluate or re-evaluate such evidence. As a general rule, however, when the question of evaluation of evidence does not involve the credibility of witnesses but the complaint is against non-evaluation or improper evaluation of the evidence tendered before the court, an appellate court is in a better position, as the trial court, to do its own evaluation. [*Lav at v. Dawodu* (1972) 8 & 9 SC 83; *Fashanu v. Adekoya* (1974) 6 SC 83; *Ighodim v. Obianke* (1976, 9 & 10 SC 179; *Torti v. Ukpabi* (1984) 1 SCNLR 214 referred to.) (*P. 315, paras. C-F*)

Per ONNOGHEN, J.S.C. at pages 315-316, paras. F-B:

"Turning now to the relevant issues for consideration in the counter claim, can it be said that the trial court was right in its finding that there is no policy of rotation to the Olofa of Offa stool between Olugbense and Anilelerin ruling houses. I have gone through the record of appeal including the evidence before the court which includes the documents tendered and admitted as exhibits and have no hesitation in holding that the court was very right in coming to that conclusion. From the oral testimonies of the witnesses and exhibits DFC2 and 'J' there is no iota of evidence to support this case of rotation. The exhibits referred to above are clear and unambiguous and rotation cannot be read into them, as found and held by the learned trial Judge in passages earlier reproduced in this judgment. In fact, the above finding is, in my considered view, supported by the fact that if the exhibits intended to, and, indeed introduced rotation, the rotation would have started in 1970 when the candidate from Olugbense ruling house was deposed and the stool returned to Anilelerin ruling house. To me, it would have been the proper time to have broken the chain of succession to the throne by candidates of only the Anilelerin Ruling House."

16. *On Treatment of preliminary objection to an appeal-*

A preliminary objection raised in an appeal would first be resolved since on it is hinged the competence of the appeal and the fallout a possible lack of jurisdiction of the court to entertain the appeal. (P. 327, para. H)

17. *On Classification of ground of appeal raising question of what constitutes issue estoppels -*

A complaint in a ground of appeal as to what constitutes an issue estoppel is in the realm of legal principles or legal interpretation of terms of art and inference drawn there from and is consequently a ground of law. [N.N.P.C. v. Famfa Oil Ltd. (2012)

17 NWLR (Pt.1328) 148; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Ajuwa v. S.P.D.C.N. Ltd. (2011) 18 NWLR (Pt. 1279) 797 referred to.] (P. 291, paras. C-D)

18. *On Classification of ground of appeal complaining about failure of court to decide on issue placed before it -*

The appellant's complaint in ground 2 of the ground of appeal was that the Court of Appeal ought to have proceeded to determine the merits of the counterclaim after holding that the counter claim was not statute barred. In the circumstance, the Court of Appeal ought to have invoked the provision of section 15 of the Court of Appeal Act to resolve the issue in the counter-claim. It was bound to apply the said provision having come to the conclusion that it was not statute barred. The said ground of appeal did not raise a fresh issue which required the leave of the Supreme Court particularly as the question involved substantial points of law which needed determination to avoid a miscarriage of justice. [Adio v. State (1986) 2 NWLR (Pt. 24) 581 referred to.] (P. 292, paras. D-F)

19. *On Nature of decision of court that a claim is statute barred -*

A decision of a court of law on the issue as to whether an action is statute barred or not, is a matter of law which has nothing to do with equity. If a court holds

that an action is statute barred or not statute barred, the only issue that can arise, from such a decision is whether the decision is right in law or not. You cannot say that such a decision is right in law but wrong in equity. (P. 293, paras. C-D)

20. *On Whether ground of appeal complaining about failure of court to decide on issue placed before it could be said to have arisen from decision of the court -*

The Court of Appeal in overturning the decision of the High Court found that the counter-claim of the appellant was not statute barred contrary to the decision of the High Court, but did not proceed to determine the merits of the said counter-claim. The appellants' ground of appeal complaining about the failure of the Court of Appeal to determine the appellant's said counter-claim in the circumstances could not be said to have not emanated from the decision of the Court of Appeal. In the instant case, the complaint of the appellant before the Supreme Court in ground 2 of the grounds of appeal was simply against the failure or neglect of the lower court to so pronounce on the counter-claim. (P. 291, paras. F-H)

21. *On Raising fresh issue on appeal without leave –*

The argument on the sub-issue of the provisions of the 1963 Constitution raised a fresh issue for which leave of the Supreme Court was required, as the issue was neither raised at the High Court nor at the Court of Appeal. The argument was consequently discountenanced. Parties must contest their cases within the rules fashioned to guarantee fair play and substantial justice. (P. 300, paras. F-H)

22. *On Powers of the Court of Appeal under section 15 of the Court of Appeal Act -*

By virtue of section 15 of the Court of Appeal Act, the Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or

grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court *may* give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction. (Pp. 313-314. paras. F-C: 333-334. paras. H- D)

23. *On Duty of Court of Appeal to invoke its powers under section 15 of the Court of Appeal Act in appropriate circumstances -*

The contentions of the respondents that the applicability of section 15 of the Court of Appeal Act was not raised in the Court of Appeal and was not considered in the decision of that court was misconceived in that with the Court of Appeal holding that the counter-claim of the appellant was not statute barred, the next line of action was the activation of the appellate court's power under section 15 of the Court of Appeal Act to see that miscarriage of justice was not perpetrated and that the error made by the trial court was rectified in the interest of substantial justice. [Adio v. State (1986) 2 NWLR (Pt. 24) 581; Ucha v. Elechi (2012) 13 NWLR (Pt. 1317) 330; Ajuwon v. Adeoti (1990) 2 NWLR (Pt. 132) 271 referred to.] (P. 330. paras. A-C)

24. *On Duty of Court of Appeal to invoke its powers under section 15 of the Court of Appeal Act in appropriate circumstances –*

To underscore the necessity for the Court of Appeal not to have held back its hand in the consideration of the counter claim after finding and deciding that it was extant, valid and not statute barred, it is to be said that the right to justice of the counter-claimants thereby enured and the redress they sought ought to

have been given the due deliberation and the court decide either way in the substance of justice and ensuring that the miscarriage of justice that came out when the trial court ruled that the counter claim was statute barred was given the adequate remediation. [Beat (Nig.) Ltd. v. B. H. (Nig.) Li, (2011) 5 NWLR (Pt. 1239) 95 referred to.] (Pp. 33, 337, paras. H-B)

25. *On Duty on Court of Appeal to invoke its powers and, section 15 of the Court of Appeal Act in appropriate circumstances -*

The Court of Appeal goofed by not considering the cross-appeal of the cross-appellant. Irrespective of the decision reached in the main appeal, it has an abiding duty to consider the cross-appeal and pronounce on the propriety or otherwise of the same. The Court of Appeal erred when it failed to consider it. Such a goof precipitated by the omission to pronounce on the cross-appeal led to a breach of the appellant's right to fair hearing as enshrined in section 35(1) of the 1999 constitution. A party cannot be said to have been accorded his right to fair hearing, when his case is shut out from consideration albeit by mistake. [Best (Nig.) Ltd. v. B. H. (Nig.) Ltd. (2011) 5 NWLR (Pt. 1239) 95; Awoniyi v. Reg. Trustees, AMORC (Nig.) (2000) 10 NWLR (Pt. 676) 522; Tunbi v. Opawole (2000) 2 NWLR (Pt 644) 275 referred to.] (P. 337, paras. C-G)

26. *On Powers of the Supreme Court under section 22 of the Supreme Court Act-*

By virtue of section 22 of the Supreme Court Act, the Supreme Court is clothed with similar powers as contained in section 15 of the Court of Appeal Act, and may, from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to take or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall

have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court. (Pp. 314, paras. C-G; 334, paras. D-H)

27 On Duty on Supreme Court to invoke its powers under section 22 of the Supreme Court Act in appropriate circumstances -

Where the Court of Appeal fails to do the needful within its powers under section 15 of the Court of Appeal Act, the Supreme Court is impelled to redress the anomaly by the use of section 22 of the Supreme Court Act to give effect to the constitutional right of appeal of the appellant and determine the issues which had been competently raised before the Court of Appeal so as to avert a further miscarriage of justice. (P. 330, paras. B-D)

28 On Object of the powers conferred on the Court of Appeal and the Supreme Court –

The provisions in section 15 of the Court of Appeal Act and section 22 of the Supreme Court Act in relation to the two appellate courts are designed to satisfy the need for the courts to prevent serious miscarriage of justice and prejudice to the appellant for failure of the lower court to pronounce on his right or benefit from the decision on the matter before it. The Supreme Court, therefore, has the power to prevent the occurrence or re-occurrence and continuation of gross miscarriage of justice in this case. [Best (Nig.) Ltd. v. B.H. (Nig.) Ltd. (2011) 5 NWLR (Pt. 1239) 95; Ugwu v. State (2013) 4 NWLR (Pt. 1343) 172; Alawiye v. Ogunsanya (2013) 5 NWLR (Pt. 1348) 570; Amaechi v. INEC (2008) 11 NWLR (Pt. 1080) 227 referred to.] (Pp. 314-315 paras. H-B)

Nigerian Cases Referred to in the Judgment:

A.-G., Rivers State v. A.-G., Bavela State (2013) 5 NWLR (Pt. 1340) 123

A.I.B. v. I.D.S. Ltd. (2012) 17 NWLR (Pt. 1328) 1
Adeyeye v. State (2013) 11 NWLR (Pt. 1364) 47
Adigun v. A.-G., Oyo State (1987) 1 NWLR (Pt. 53) 678
Adio v. State (1986) 2 NWLR (Pt. 24) 581
Agbai v. Okogbue (1991) 7 NWLR (Pt. 204) 391
Agbakoba v. /NEC (2008) 18 NWLR (Pt. 1119) 489
Ajakaiye v. Idehai (1994) 8 NWLR (Pt. 364) 504
Ajuwa v. S.P.D.C.N. Ltd. (2011) 18 NWLR (Pt. 1279) 797
Ajuwon v. Adeon (1990) 2 NWLR (Pt. 132) 271
Akinyemi v. Odu'a Inv. Co. Ltd. (2012) 17 NWLR (Pt. 1329) 209

Alawiye v. Ogunsanya (2013) 5 NWLR (Pt. 1348) 570
Amaechi v. INEC (2008) 11 NWLR (Pt. 1080) 227
Animashaun v. Ojojo (1990) 6 NWLR (Pt. 154) 111
Best (Nig.) Ltd. v. B.H. (Nig.) Ltd. (2011) 5 NWLR (Pt. 1239) 95
C.C.C.T.C.S. Ltd. v. Ekpo (2008) 6 NWLR (Pt. 1083) 362
Dabpu v. Kolo (1993) 9 NWLR (Pt. 317) 254
Effiom v. Ironbar (2000) 11 NWLR (Pt. 678) 344
Ewo v. Ani (2004) 3 NWLR (Pt. 861) 610
Ezeigwe v. Nwawulu (2010) 4 NWLR (Pt. 1183) 159
F.R.I.N. v. Gold (2007) 11 NWLR (Pt. 1044) 1
Fadiora v. Gbadebo (1978) 3 SC 219
Fasade v. Babalola (2003) 11 NWLR (Pt. 830) 26
Fashanu v. Adekoya (1974) 6 SC 83
Gbadamosi v. Akinloye (2013) 15 NWLR (Pt. 1378) 455
Giwa v. Erinmilkun (1961) 1 SCNL 377
Ibrahim v. Lawal (2015) 17 NWLR (Pt. 1489) 490
Igbodim v. Obianke (1976) 9 & 10 SC 179 \
Ikin v. Edjerode (2001) 18 NWLR (Pt. 745) 446
Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423
Iyoho v. Effiong (2007) 11 NWLR (Pt. 1044) 31
J.F.S. Inv. Ltd. v. Brawal Line Ltd. (2010) 19 NWLR (Pt. 1225) 495

Kraus Thompson Org. Ltd. v. University of Calabar (2004) 9 NWLR (Pt. 879) 631
L.S.W.C. v. Sakamori Construction (Nig.) Ltd. (2011) 12 NWLR (Pt. 1262) 569
Lawal v. Dawodu (1972) 8 & 9 SC 83

Madukoht v. Nkemdilim (1962) 2 SCNLR 341
Mafimisebi v. Ehuwa (2007) 2 NWLR (Pt. 101 8) 385
Maobison Inter-Link Ltd. v. ETC (Nig.) Pic (2013) 9 NWLR (Pt. 1359) 197
Merchantile Bank (Nig.) Pic v. Nwobodo (2005) 14 NWLR (Pt. 945) 379

Mil. Admin.. Ekiti Stale v. Aladeyelu (2007) 14 NWLR (Pt. 1055) 619
Mohammed v. Oluwunmi (1993) 4 NWLR (Pt. 287) 254
Nasir v. C.S.C. Kano Stale (2010) 6 NWLR (Pt. 1190) 253
NNPC v. Famfa Oil Ltd. (2012) 17 NWLR (Pt. 1328) 148
Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285
Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718
Nwaogu v. Atuma (2013) 11 NWLR (Pt. 1364) 117
Obala of Otan-Aiyegbaju v. Adesina (1999) 2 NWLR (Pt. 590) 163
Obawyinbo v. Oshatoba (1996) 5 NWLR (Pt. 450) 53 1
Obi v. INEC (2007) 11 NWLR (Pt. 1040) 560
Obi v. Obijindu (1996) 1 NWLR (Pt. 423) 240
Odunsi v. Bamgbola (1995) 1 NWLR (Pt. 374) 641
Ogbonna v. A.-G.. I mo State (1992) 1 NWLR (Pt. 220) 647
Ojoh v. Kamalu (2005) 18 NWLR (Pt. 958) 523
Okwaranonobi v. Mbadugha (2013) 17 NWLR (Pt. 1383) 255
Olowu v. Olowu (1985) 3 NWLR (Pt. 13) 372
Onuekwusi v. R.T.C.M.Z.C. (2011) 6 NWLR (Pi. 1243) 341
Onuoha v. Okafor (1983) 2 SCNLR 244
Oragbaide v. Onitiju (1962) 1 SCNLR 70
Oyerogba v. Olaopa (1998) 13 NWLR (Pt. 583) 509
S.P.D.CN. v. Edamkue (2009) 14 NWLR (Pt. 1160) 1
Torti v. Ukpabi (1984) 1 SCNLR 214
Tunbi v. Opawole (2000) 2 NWLR (Pt. 644) 275
UBN Plc v. Dawodu (2003) 4 NWLR (Pt. 810) 287
Ucha v. Elechi (2012) 13 NWLR (Pt. 1317) 330
Ugwu v. State (2013) 4 NWLR (Pt. 1343) 172
Uwaifo v. A.-G., Bendel State (1983) 4 NCLR 1
Woherem v. Emereuwa (2004) 13 NWLR (Pt. 890) 398
Zaidan v. Mohssen (1973) 11 SC

Foreign Case Referred to in the Judgment:

Laoye v. Oyetunde (1944) AC 170

Nigerian Statutes Referred to in the Judgment:

Chiefs (Appointment and Deposition), Cap. 20, Laws of Northern Nigeria, 1963, S. 11

Constitution of the Federal Republic of Nigeria, 1963, S.78 (6)

Constitution of the Federal Republic of Nigeria, 1999 (as amended), S. 233(3) Court of Appeal Act, S. 15

Public Officers Protection Act. Cap. III, Laws of Northern Nigeria, 1963 (as applicable to Kwara State in 1969) Supreme Court Act. S. 22

Books Referred to in the Judgment:

Black's Law Dictionary with Pronunciations, 6th Ed., page 221

Iwo Itan Ofa: Rev. J. B. Olafimihan, 1948

Appeal and cross-appeal:

These were an appeal and a cross-appeal against the judgment of the Court of Appeal which reversed the decision of the High Court. The 1st- 3rd respondents also raised a preliminary objection to the appeal and cross-appealed. The Supreme Court in a unanimous decision allowed the appeal and dismissed the preliminary objection and the cross-appeal of the 1st to 3rd respondents.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: *Walter Samuel Nkanu Onnoghen, J.S.C.* (Presided and Read the Leading Judgment): *Olabode Rhodes-Vivour, J.S.C*; *Nwali Sylvester Ngwuta, J.S.C*; *Mary Ukaego Peter-Odili, J.S.C*; *Amiru Sanusi, J.S.C.*

Appeal No.: SC.890/2014

Date of Judgment: Friday, 1st July 2016

Names of Counsel: *Chief Chris R. A. Lawal-Rabana,*

SAN (with him, *Oyebanji E. Adeye, Esq.*; *Akin Akintoye II. Esq.*; *Iwalola Bello [Mrs.]; Kizito Oji, Esq.*; *Tosin S. Alawode, Esq.*;

Gbenga Oyewole, Esq.; Peter O. Abang, Esq. and Rukayat O. Ojo-Oba [Miss]) - for the Appellant/ Cross-Respondent

J. O. Baiyeshea, SAN (with him Jacob S. Fagbemi, Esq.; R. S. John, Esq.; S. Ipinlaiye, Esq.; Richard S. Baiyeshea, Esq.; Labake Belawu [Mrs.]; Olutovese Ibitoye, Esq.; Yusuf Dikko, Esq.; Kayode Odetokun. Esq.; A. S. Asonibare, Esq.: Stewart David, Esq.; Oluseyi Akintoroye, Esq.; Otele Oluwafunbi, (Miss); Elizabeth Bolanle Baiyeshea [Miss]; Lanre Mark Aluko; Betsy Stewart [Mrs.]; Deji Adeyemi, Esq. and John Samuel Opeyemi, Esq.) - for the P'to 3rd Respondents Yusuf Ali, SAN, K. K. Eleja. SAN (with them. Lawrence John, Esq.; S. A. Oke. Esq.; Alex Akoja. Esq.; N. N. Adegboye, Esq; Patricia Ikepgebu (Mrs.); K. O. Lawai. Esq.; M. A. Adelodun, Esq.; Halimah Sulaiman (Miss); A. O. Usman. Esq and Adaobi Ike [Miss]) - for the 4th to 7th Respondents Kamaldeen Ajibade, Esq. A-G Kwara State. (with him F. D. Lawal, Esq., Solicitor-General and Permanent Secretary Kwara State; PI. A. Gegele, Esq. Director of Civil Litigation. Kwara State: M. A. Oniye, Esq. Chief State Counsel; I. Zakari, Esq. State Counsel 1 and Priscilla Ejeh) - for the 8th and 9th Respondents

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: *Adzira Gana Mshelia, J.C.A. (Presided); Adamu Jauro, J.C.A.; Rita Nosakhare Pemu, J.C.A. (Read the Leading Judgment)*

Appeal No.: *CA/IL/71 A/2012*

Dale of Judgment: *Wednesday, 16th July 2014*

Names of Counsel: *Yusuf Ali, SAN; R. A. Lawal Rabana, SAN, (with them, Professor Wahab Egbewole, Akin Akintoye, K. K. Eleja, Esq., Dr. K. I. Adam. S. O. Babakebe, Esq., Jomoku Bamigboye [Mrs, Toyin Alawode, Esq., Abdulrasaq A. Daibu, Esq., T. E.*

Akintunde [Mrs.]. Oluwafunmubi Adegoke [Miss]. i. o Atorfarati, Esq.. N. N. Adegboye. A. O. Orike, Ahmad Muhammad, S. A. Yusuf [Mrs.], R. F. Mahmoud, H.A Balogun. T. Aduagba, M. A. Abduraheem. Busayo Oludaisi [Miss]) - for the Appellant John

Olusola Baiyeshea, SAN (*with him*, Toyin Oladipo, Esq. Y.A. Dikko, Esq., *Gbenga Ojo*, Esq., A.S. Asonibare, Esq., Jesuremi Alabi [Mrs.], Oluseyi Akintoroye, Esq., M. A. Zubair [Mrs.], O. A. Afolabi [Miss], Uche Ukwuoma [Miss]) - *for the 1st – 3rd Respondents*
F. D. Lawal (Mrs.), Solicitor General of Kwara State (*with her*, H.A. Gegele, Esq., Director of Civil Litigation, Ministry of Justice, Kwara State, A. A. Daibi, Esq., 'Principal State Counsel, Ministry of Justice, Kwara State and M. J. Orire, Esq., Senior State Counsel, Ministry of Justice, Kwara State) - *for the Respondent*.

High Court:

Name of the High Court: High Court of Kwara State, Offa
Name of the Judge: Akanbi, J.

Suit No.: KWS/OF/15/2010

Date of Judgment: Thursday, 19th July 2012 ;

ONNOGHEN, J.S.C. (Delivering the Leading Judgment):

This is an appeal against the judgment of the Court of Appeal, Ilorin Division in appeal No. CA/1L/71A/2012 delivered on the 16th day of July, 2014, in which the court allowed the appeal of appellant, in part, by overruling the trial court's holding that the counter claim of appellant was statute barred but failed/refused to consider other issues relating to the merit of the said counter-claim.

The facts of the case include the following:

The last Olofa of Offa, Oba Mustafa Olawore Olanipekun Ariwajoye II. died or joined his ancestors in March, 2010 thereby rendering the stool vacant. He was of the female line of the ruling house known as Anilelerin. Following the death, the kingmakers called for nomination from the Olugbense, the male ruling house, and Anilelerin the female ruling house to fill the vacancy. Appellant in this appeal emerged as the candidate of Anilelerin Ruling House, while the 2nd respondent was the candidate of Olugbense Ruling House. Appellant emerged as the winner of the contest and was presented to the 9th respondent, the Governor of Kwara State, for appointment as the new Olofa of Offa. He was so appointed and even a staff of office and crowned the Olofa of Offa.

Following the coronation of appellant, the 1st – 3rd respondents instituted suit No. KWS/OF/15/2010 in the High Court of Kwara State. Holden at Offa, for themselves and on behalf of Olugbense Ruling

House of Offa against appellant and 4th – 7th respondents who are the kingmakers of the stool of Olofa of Offa and the 8th and 9th respondents being the Attorney-General and Governor of Kwara State, respectively.

The claims of the claimants/plaintiffs in that case are as follows:

"(a) A declaration that ascension to the stool of Olofa of Offa is rotational between Olugbense (male) ruling house and Anilelerin (female) ruling house of Offa.

- (b) A declaration that Anilelerin ruling house having produced the late Oba Mustapha Olawore Olanipekun Ariwojoye *II*, who ruled for over 40 years, it is now the turn of Olugbense ruling house in law anchor equity to produce the Olofa of Offa on the basis of rotation.
- (c) A declaration that Anilelerin ruling house is precluded from producing the candidate to fill the vacancy created by the death of Oba Mustapha Olawore Olanipekun Ariwajoye *II* from Anilelerin ruling house.
- (d) A declaration that in view of the established Chieftaincy custom of Offa from 1969, ascension to the vacancy stool of Olofa of Offa is rotational between the two ruling houses of Offa viz Olugbense ruling house and Anilelerin ruling house.
- (e) A declaration that by virtue of the decision of Kwara State Government published in the Kwara State press release No. 275 of 9th July. 1969 (pursuant to the report of the Sawyer Commission of Enquiry to Olofa Chieftaincy Stool), ascension to the stool of Olofa of Offa. is rotational between the Olugbense ruling house and the Anilelerin ruling house.
- (f) A declaration that the consideration of candidates (2nd claimant and 5th defendant) from the two ruling houses - Olugbense and Anilelerin respectively at the same time by the kingmakers of Off a (1st -4th defendants) and the acceptance/recommendation of the 5th defendant by the 1st – 4th defendants as Olofa of Off a to the 7th defendant thereby is illogical, wrongful, unlawful, inequitable, unjust, invalid, null and void and of no effect what so ever.
- (g) A declaration that by virtue of the chieftaincy declarations contained in the Kwara State of Nigeria Gazette, No. II Vol. 4 of 12th March, 1970 and legal notices 3 and 4 of 1969 herein, in respect of the process of selection of a candidate for the stool of Olofa of Offa by Anilelerin ruling house and

Olugbense ruling house respectively ascension to the stool of Olofa of Offa is by rotation and not by competition between the two ruling houses.

- (h) A declaration that the recognition of the 5th defendant as Olofa of Offa by the 6th and defendants is illogical, wrongful, unlawful, unconscionable, null and void and of no effect what so ever.
 - (i) A declaration that the appointment and installation of the 5th defendant as the Olofa of Offa by the 7th defendant is wrongful, unlawful, null and void and of no effect what so ever.
 - (j) A declaration that the nomination of the 2nd claimant. Alhaji (Prince) Abdul-Rauf Adegboye Keji by the Olugbense ruling house as the Olofa of Offa is valid and he is the only candidate entitled to be recommended for approval as Olofa of Offa by the kingmakers of Offa (1st – 4th defendants) to the 7th defendant.
 - (k) A declaration that the nomination of the 2nd claimant from Olugbense ruling house as the candidate for the stool of Olofa of Offa is valid and he is entitled to be recognized by the 6th and 7th defendants.
 - (l) A declaration that the 2nd claimant from Olugbense ruling house is validly and duly nominated candidate of the stool of Olofa of Offa are entitled to be appointed and installed by the 7th defendant.
 - (m) An order nullifying the appointment and installation of the 7th defendant as the Olofa of Offa and removing him forthwith from the stool of Olofa of Offa.
 - (n) An order compelling the 1st – 4th defendants to accept the nomination of the 2nd claimant as the Olofa of Offa.
 - (o) An order of perpetual injunction restraining the 5th defendant from parading himself as the Olofa of Offa and a further order compelling the 7th defendant to install 2nd claimant as the Olofa of Offa.
 - (p) An order of perpetual injunction restraining the 5th defendant from parading himself as the Olofa of Offa."
- The 1st – 5th defendants in the suit, including the present appellant, counter claimed against the claimants as follows:

- (1) The 1st – 5th defendants repeat paragraphs 4 - 18 of the statement of defence.
- (2) That the Olugbense ruling house have beendis inherited and have gone into extinction going by the curse and the decision of Oba Olugbense their progenitor to allow only the female lineage of Anileierin to occupy the Olofa Stool.
- (3) That by reason of the fact that since the demise of Oba Olugbense it is the female lineage of Anileierin that have been occupying the Olofa Stool, the Anileierin House have become the main and the only ruling house in Offa.
- (4) Whereof the 1st – 5th defendants/counter-claimants pray as follows
 - a. A declaration that no rotational policy exist in Offa between the ruling houses in Offa on the appointment of Olofa of Offa whenever a vacancy occurs to the stool.
 - b. A declaration that the only ruling house that exists in Offa for the purpose of appointing an Olofa of Offa is the Anileierin ruling house.
 - c. A declaration that the Kwara State Government Gazette No. II. Vol. 4 of 12th March, 1970 and any other notices as it recognizes Olugbense as a ruling house in Offa be declared null and void as it is contrary to the history, custom and tradition of Offa on Offa Chieftaincy.
 - d. An order of perpetual injunction restraining the 6th and 7th defendant, from treating and or recognizing the Olugbense ruling house that *have* a right to the chieftaincy title of Olofa of Offa"

At the conclusion of the trial, the learned trial Judge dismissed the claims of the claimants and those of the counter claimants which resulted in an appeal and cross appeal to the Court of Appeal numbered as CA/IL/71/2012 and CA/IL/71^A/2012 respectively.

The Court of Appeal allowed the main appeal, CA/IL/71/2012, while the cross appeal was dismissed despite the fact that the court found that the trial court was in error in holding that the counter claim, giving rise to the cross appeal, was statute barred.

Funny enough, the judgment of the lower court in respect of appeal No. CA/IL/71/2012 generated many appeals to this court namely SC/647/2013; SC/648'2013; SC/650/2013 and SC/650A/2013. Apart from cross appeals.

The instant appeal No. SC/890/2014, is against the judgment of the lower court on the cross appeal No. CA/IL/71 A/2012 and tags along a preliminary objection and a cross appeal.

In the appellant's brief filed on 2/3/15 by the leading learned senior counsel for appellant. Chief R. A. Lawal-Rabana, SAN and adopted in

argument of the appeal on the 28th day of April. 2016, the following two issues have been formulated for the determination of the appeal:

1. Whether the learned Justices of the Court of Appeal were not in error when they struck out issues one and two raised by the appellant on the basis of the earlier decision in the sister appeal CA/IL/71/2012.
2. Whether the learned Justices of the Court of Appeal were not in error when they failed to exercise their powers under section 15 of the Court of Appeal Act to make consequential order(s) based on the evidence or. Record in support of the counter claim having held that the counter claim were not statute barred."

I have stated that the 1st - 3rd respondents in the appeal against the decision of the lower court to the effect that the counter claim of appellants is not statute barred and consequently filed a cross appellant brief on the 15th day of June, 2015 through learned senior counsel, John Olusola Baiyeshea, SAN in which the following three issues have been identified for determination to wit:

1. Whether the cause of action in this case accrued in 2010 and not 1970 and. if the cause of action accrued in 1970, whether the case of the counter claimants, 1st - 5th cross-respondents. is not statute barred. (Grounds. 2, 3, 5. 6 and 9 of the cross-appellants' grounds of appeal).
2. Whether in view of the facts and circumstance of this case, the lower court's decision that the counter-claim is not statute barred is just and equitable (Ground 4 of the cross-appellants' grounds of appeal).
3. Whether the lower court was right when it dismissed grounds 2,3,4 and 5 of the cross-appellants 'preliminary objection (Ground 1 of the cross-appellants' grounds of appeal)."

It should also be pointed out that the 1st – 3rd respondents in the main appeal raised an objection to the appeal which was argued in the 1st – 3rd respondents' brief filed on 28th April. 2015 by learned senior counsel, John O. Baiyeshea. SAN and adopted in argument at the hearing of the appeal on the 28th day of April. 2016.

The grounds of the objection are as follows:

1. That ground 2 in the notice of appeal does not emanate from the decision of the lower court.
2. That ground 2 is a new or fresh issue/ground raised for the first time in this court.
3. That no leave of this court was sought prior to the filing of the notice of appeal/grounds of appeal.
4. Ground 2 is a ground of mixed law alone.
5. Ground 1 is a ground of fact/mixed law and fan.

6. That the requisite leave of court pursuant to section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was not sought and obtained in this case before filing the grounds of appeal in this case. The two grounds of appeal require leave of the court before filing same.
7. That the court lacks jurisdiction to hear this appeal."

However and by way of an alternative, learned senior counsel formulated the following two issues for the determination of the main appeal in the said 1st - 3rd respondent's brief filed on 28/4/15:

1. Whether the learned Justices of the Court of Appeal were right when they struck out issues one and two raised by the appellant on the basis of issue estoppel.
2. Whether the learned Justices of the Court of Appeal were not in error when they failed to exercise their power under section 15 of the Court of Appeal Act to . make consequential order(s) based on the evidence on record in support of the counter claims having held that the counter claim was not statute barred?"

Having regard to the facts of this case, the issues in contention. I intend to deal with the preliminary objection first followed by issue 1 of the cross appeal as it deals with the competence of the counter-claim. It is only after a finding that the counter claim is competent or that the lower court is right in holding that it is competent, that we can properly proceed to determine the other issue(s) in contention between the parties. I therefore proceeds to . p determine the preliminary objection, the grounds of which had earlier been reproduced in this judgment.

Learned senior counsel for 1st – 3rd respondents formulated a single issue for the determination of the objection. It is as follows:

"Whether, considering the grounds of appeal in this case, this court has the jurisdiction to hear this appeal." It is the submission of learned senior counsel that ground 2 of the grounds of appeal herein is grossly incompetent as well as: the issue formulated there from in that the ground does not emanate from the decision(s) of the lower court, relying on the case of *merchantile bank of nigeria pic v. linus nwobodo* (2005) All FWLR (Pt. 281) 1640 at 1647- 1648. A-G: (2005.) 14 NWLR (Ft. j 945) 379 and *Obaioyinbo v. Oshawba* (1996) 5 NWLR (Pt. 450) 531 at 549. The reason for submitting that ground 2 of the grounds of appeal does not arise from the decision of the lower court is that it states/complains that the lower court "refused, neglected and or failed to make pronouncement ..." on the point

appealed against; that the issue of applicability of section 15 of the Court of Appeal Act was not raised in the lower court neither was it considered by the court thereby rendering the issue a new/fresh one. needing **q** leave of court to raise; that failure to obtain the prior leave of ' court to raise the issue makes the issue incompetent and robs the court of the jurisdiction to hear and determine same for which learned senior counsel cited and relied on the case of *Maditkolit v. Nkemdilim* (1962) NSCC 374 at 379; (1962) 2 SCNLR 341; that , since appellant failed to raise the issue of applicability of section 15 of the Court of Appeal Act in the lower court, appellant cannot raise it in this court under the provision of section 22 of the Supreme Court Act; that appellant also failed to obtain leave of court to tile the said ground 2 contrary to the provisions of section 233(3) of the (Constitution of the Federal Republic of Nigeria. 1999. As amended, the around being of fact or mixed law and fact.

On ground 1 of the grounds of appeal, learned senior counsel is of the view that the ground raised the issue of issue estoppel which calls for evaluation of the facts of the case viz-a-viz the decision of the lower court in the sister appeal (CA/IL/71/ 2012) as well as the facts of this case before application of the iaw. making same a ground of mixed law and fact for which leave is needed; that failure to obtain the leave renders the ground incompetent and liable to be struck out - relying on *C.C.CT.C.S. Ltd. v. ekpo* (2008) 6 NWLR (PL 1083) 362 at 407 - 409; *Akinyemi v. ODUWA INVESTMENT Co. Ltd.* (2012) 17 NWLR (Pt. 1329) 209 at 230 - 231.

Learned senior counsel finally urged the court to strike out the appeal.

In the reply brief filed on 7/4/16. Learned senior counsel for cross respondent. Chief R. A. Lawal-Rabana. SAN submitted that the objection to ground 1 of the grounds of appeal on the ground that it is incompetent, is misconceived, having regard to tire classification of grounds of appeal in the case of *NNPC v Famfa Oil Ltd.* (2012) 17 NWLR (Pt. 1328) 148 at 175 - 176; *Ajuwa v. S.P.D.C.N Ltd.* (2011) 18 NWLR (Pt. 1279) 797 at 822 – 823 *Akinyemi v. Odua Inv. Co. Ltd.* (2012) 17 NWLR (Pt. 1329) 209 at 230 - 231; that ground 1 is a ground of law requiring no leave of court as it calls for the determination of what constitutes issue estoppel.

On ground 2. learned senior counsel submitted that the contention that the. ground does not arise from the judgment on appeal is

erroneous: that the lower court, haven come to the conclusion that the counter claim was not statute barred ought to have proceeded to determine same and not doing so constitutes the complaint of appellant, that the case of *Merchantile Bank of Nigeria Plc v. Nwobodo supra*: and *Obatoyinbo v. Oshatoba {supra}* cited and relied upon by senior counsel for 1st – 3rd respondents are irrelevant; that learned senior counsel for the respondents is also in error in his submission on section 15 of the Court of Appeal Act -the fact that it was not raised in the lower court - and submitted that once the lower court came to the conclusion it reached *on* the issue of the claim not being statute barred, the application of" the section became automatic as the power is inherent on the court; that the non-application of the said section 15 of the Court of .Appeal Act is in the circumstance, not a fresh issue for which leave is required-that the issue involves substantial question of law which the court should entertain to avoid miscarriage of justice, relying on *Adio v. State* (1986) 2 NWLR (Ft. 24) 581 at 588; *Ajuwon v. Adeoti* (1990) 3 SC (Pt. 11) 76 at 87; (1990) 2 NWLR (Pt. 132) 271; *Ucha v. Elechi* (2012) 13 NWLR (Pt. 1317) 330 at 362.

Finally, learned senior counsel urged the court to overrule the objection.

I have carefully gone through the record and arguments of counsel for the contending parties on the preliminary objection. The question is whether ground 1 of the grounds of appeal is on mixed law and fact thereby requiring the leave of the court. The complaint in ground 1 of the grounds of appeal is as follows:

"The learned Justices of the Court of Appeal erred in law when they upheld the preliminary objection of the 1st - 3rd respondents on the ground of issue estoppel and struck out grounds one and two of the appellant's notice of appeal and the two issues formulated there from on basis of their earlier decision in the sister appeal CA/ IL/71/2012."

I have to point out that the complaint above is not estoppel *simpliciter* but on issue estoppel; it is not estoppel *per rem judicatam*, per conduct, per record etc but issue estoppel.

What then is issue estoppel and whether a complaint on it is of law or mixed law and fact⁷

In the case of *Fadiora v. Gbadebo* (1978) 3 SC 219 at 228, Idigbe, J.S.C. stated, inter alia, as follows:

"Now there are two kinds of estoppel by record inter partes or per rem judicatam, as it is generally known. The first is usually

referred to as cause of action estoppel and it occurs where the cause of action is merged in the judgment ... Therefore, on this principle of law (or rule of evidence) once it appears that the same cause of action was held to lie (or not to lie) in a final judgment between the same parties, or their privies, who are litigating in the same capacity (and on the same subject matter), there is an end of the matter. They are precluded from re-litigating the same cause of action. There is, however, a second kind of estoppel inter partes and this usually occurs where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties, (or their privies); in these circumstances issue estoppel arises. This is based on the principle of law that a party is not allowed to (i.e. he is precluded from) contending the contrary inapposite of any specific point which having been once distinctly put in issue, has with certainty and solemnity been determined against him."

[Italics supplied by me.]

From the above, it is clear that a complaint in a ground of appeal as to what constitutes an issue estoppel is in the realm of legal principles or legal interpretation of terms of art and inference drawn there from and consequently a ground of law. See the classification of grounds of appeal in *NNPC v. Famfa Oil Ltd. (supra): Nwadike v. Ibekwe* (1987) 12 S.C (Reprint) 12, (1987) 4 NWLR (Pt. 67) 718; *Ajuwa v. S.P.O.CM Ltd.* (2011) 18 NWLR (Pt. 1279) 797 at 822 - 823 etc.

With respect to ground 2 of the grounds of appeal, the complaint is as follows:

"The learned Justices of the Court of Appeal erred in law when they refused, neglected and or failed to make a pronouncement on the substance of the appellant's counter claim, having held that the counter claim was not statute barred, in line with the powers under section 15 of the Court of Appeal Act thereby leaving a vacuum as the prospect of the counter claim." Can it be said that the above ground of appeal does not emanate from the judgment of the lower court, The answer is obviously in the negative. It is not in dispute that the lower court agreed with the appellants that the counter-claim was not statute barred. It is also not in dispute that the lower court, haven so found,

did not proceed to determine the appeal on the merit or otherwise of the said counter claim which it has found to be extant. The complaint of appellant before this court - in ground 2 of the grounds of appeal is simply against the failure or neglect of the lower court to so pronounce on the counter-claim. Even the blind should see it as such.

It should be noted that three issues were submitted to the lower court for determination including the issue as to whether the trial court was right in holding that the counter claim was statute barred.

These issues are as follows:

1. Whether, on the state of the facts as borne out of the pleadings and evidence adduced by the parties, the findings by the trial court that there are two ruling houses in Offa, Olugbense and Anilelenu ruling houses are correct and sustainable.
2. Whether "exhibit J" established any ruling house in Offa, or has set aside the curse on Olugbense house as to constitute the latter in a ruling house under the Offa native law and custom.
3. Whether the counter claim of the 1st – 5th defendants-appellants is statute barred."

Appellant's complaint in this ground 2 is simply that the lower court ought to have proceeded to determine the counter claim in line with issues 1 and 2 after holding that the counter claim was not statute barred and that failure to do so constitutes an error in law!!

On the issue as to non-raising of application of section 15 of the Court of Appeal Act before the lower court. I agree with the submission of learned senior counsel for appellant that the lower court was bound to apply the said provision having come to the conclusion it reached on issue 3 *supra*. In any event, if the court had resolved issues 1 and 2 *supra*, the question of application of section 15 of the said Act would not have arisen.

Finally, I hold the strong view that the issue is not a fresh one which needs the leave of this court particularly as the questions involve substantial points of law which needed determination to avoid a miscarriage of justice. See *Adio v. Sum-* (1986) 2 NWLR (Pt. 24) 581 at 588.

In conclusion. I find no merit whatsoever in the preliminary objection raised by senior counsel for 1st – 3rd respondents and accordingly dismiss same.

Turning now to the issues raised in the main appeal and cross appeal, I am of the opinion that cross appellants' issues 1 and 2 which should be considered together, should come first, before the issues raised for determination in the main appeal, particularly as the said issues 1 and 2 of the cross appeal raised the question as to the existence or accrual of a cause of action in relation to the counter claim, subject matter of the appeal before the lower court. I therefore proceed to consider the said issues accordingly.

For emphasis, issues 1 and 2 of the cross appeals are as follows:

- "1. Whether the cause of action in this case accrued in 2010 and not 1970 and, if the cause of action accrued in 1970, whether the cause of the counter-claimants/ 1st – 5th cross respondents is not statute barred. (Grounds 2. 3, 5. 6 and 7 of the cross appellants' grounds of appeal).
2. Whether in view of the facts and circumstance of this case, the lower court's decision that the counter claim is not statute barred is just and equitable. [Ground 4 of the cross appellants' grounds of appeal)."

I must point out from the onset, in relation to issue 2. *supra*. that a decision of a court of law on an issue as to whether an action is statute barred or not is a matter of law which has nothing to do with equity. If a court holds that an action is statute barred or not statute barred, the only issue that can arise, from such a decision is whether the decision is right in law or not. You cannot say that such a decision is right in law but wrong in equity. It is for the above reason that I do not intend to consider the said issue 2. It is hereby discountenanced.

It is the contention of learned senior counsel for cross appellants that it is the case of the plaintiff that determines when the cause of action accrued, relying on *Woherem v. Emereuwa* (2004) All FWLR (Pt. 221) 1570 at

1581; (2004) 13 NWLR (Pt. 890) 398; that the case of the counter-claimants is based on two claims, viz;

- (a) that there is only one ruling house in Offa which is Anilelerin; and
- (b) that the gazette made in 1970 recognizing Olugbense and Anilelerin as ruling houses in Offa be set aside as same, according to them, is contrary to the native law and custom of Offa:

that from the evidence as well as pleadings, there is no doubt as to when Olugbense ruling house was recognized as a ruling house in Offa which is in 1970 vide the gazette and that the cause of action as to the existence or recognition of Olugbense ruling house accrued in 1970 not in 2010, as erroneously held by the lower court, relying on the case of *Uwaifo v.A.-G., Bendel State & Ors* (1982) vol. 13 NSCC 221 at 269-270; (1983) 4 NCLR 1 which held that the cause of action in that case arose on the date when Edict No. 10 of 1977 was promulgated and the property of appellant forfeited that exhibit 'J', the gazette, provided for a commencement date of December, 1969; that either way, the counter claim is statute barred; that counter-claimants were aware of the existence of exhibit 'J'; that exhibit 'J' was not challenged within 3 months of its enactment in 1970 and. cannot be challenged thereafter, relying on *Nasir v. Civil Service Commission, Kano State* (2010) 2 SCNJ 184 15 198, (2010) 6 NWLR (Pt. 1190) 253; *Forestry Research Institute of Nigeria v. Gold* (2007) 5 SCNJ 302 at 314. (2007) 11 NWLR (Pt. 1044) 1; section 2 of Public Officers Protection Law Cap. I11, Laws of Northern Nigeria. 1963 as applicable to Kwara State in 1969.

It is also the submission of learned senior counsel for cross appellants that the law applicable to chieftaincy matters as at 1970 is the 1963 Constitution of Nigeria which ousted the jurisdiction of the courts on chieftaincy matters, particularly section 78(6) thereof and section 11 of the Chiefs (Appointment and Deposition) Law of Northern Nigeria Cap. 20 of 1963; that by the provisions of Decree 28 of 1970 applicable to the cause of action in 1970, exhibit .J cannot be challenged by the cross respondents; that the case of *Edjerode v. Ikine* (2001) 12 SCNJ 184. reported as *ikine v. Edjerode* (2001) 18 NWLR (Pt. 745) 446 relied upon by the lower court in coming to the

conclusion that the counter claim was not statute barred is distinguishable from the facts of this case; that even a letter of appointment of a Chief by a Military Administrator has been held by this court to enjoy the protection of the Public Officers Protection Act, section 2 and can only be challenged within three months of its issuance, much less exhibit J which is a Gazette made by the Military Administration, relying on the case of *Alh. Ibrahim v. Alh. Maigida Lawal* (2015) LPELR; (2015) 17 NWLR (Pt. 1489) 490 and urged the court to resolve the issue in favour of cross appellants and dismissed the counter claim of the appellant.

On his part, learned senior counsel for cross respondents. Chief R. A. Lawal Rabana. SAN stated that exhibit 'J' was made in 1970 to have a retrospective effect from December, 1969 and that it makes provisions for the procedure to adopt in the selection of Olofa of Offa but that the late Olofa of Offa, ascended the throne in 1970 and remained on it until his death in 2010; that there was no need to put exhibit 'J' into operation until the death of the late Olofa of Offa, when the Olugbense Ruling House along with Anilelerin Ruling House were called upon to present candidates to *fill* the vacancy - in line with exhibit 'J'; that the process so initiated produced the appellant/5th cross respondent as the Olofa of Offa ; which was not accepted by the cross appellants hence the action, challenging the appointment of 5th cross respondent as the Olofa of Offa; that by way of a cross action, the 1st – 5th cross respondents challenged the provisions of exhibit 'J' on the ground that it is inconsistent with the Native Law and Custom of Offa people.

Learned senior counsel referred the court to the decision in *J.F.S. Inv. Ltd. v. Brawal Line Ltd.* (2010) 19 NWLR (Pt. 1225) 495 at 534 where this court laid down the process for determining whether an action is statute barred.

It is the submission of learned senior counsel that the cause of action of the cross respondents accrued in 2010 when the cross appellants were called upon to make nomination for the position of Olofa of Offa in accordance with exhibit 'J' via exhibit 'K' and not in 1969 or 1970 when the said exhibit 'J' came into effect.

Learned senior counsel then proceeded to give a definition of "cause of action" by quoting from the decision of this court in *Edjerode v. Ikine* (2001) 12 SCNJ 184 at 198; reported as *Ikme v. Edjerode* (2001) 18 NWLR (Pt, 745) 446 and *Onuehvusi v. R.T.CM.Z.C.* (2011) 6 NWLR (Pt. 1243) 341 at 359 - 360 and J submitted that the

approach adopted by the lower court in comma to the decision that the counter claim was not statute barred is in conformity with the requirements of the law as laid down; that the wrongful provision of exhibit 'J' merely gave the 1st - 5th cross respondents the cause of complaint leaving the second element of *p* "consequent damage" in abeyance as affirmed by the lower court at page 41 of the judgment; that it is of no moment that exhibit "J" was in existence for about 40 years and the cross respondents did not challenge it as there was no cause for it; that the fact that an action is founded on a document does not necessarily mean that the cause of action in respect thereof arose on the date of the document; that neither the date of commencement of exhibit 'J' i.e. 1969 nor its promulgation in 1970 is synonymous with The date when the cause of action in the counter claim accrued; that the case of *Uwaifo v. A-G, Bendel State (supra)*, (1983) 4 NCLR I does not apply as the Edict No. 10 of 1977 involved in the matter actually forfeited the property of the appellant therein at the date it was promulgated thereby making the cause of complaint and damage simultaneous; that the case of *Ikine v. Edjerode (supra)* is relevant to the facts of this case particularly the lead judgment of Ejiwunmi JSC constitutes the ratio decidendi in the case - see pages 199 – 200 of the report.

On the issue that exhibit 'J' cannot be challenged having regard to the provisions of the 1963 Constitution which ousted the jurisdiction of the courts, learned senior counsel submitted that the submission on the issue amounts to raising a fresh issue as the matter was neither raised at the trial court nor at the lower court and no leave of court had been obtained before raising it here.

In the alternative, learned senior counsel submitted that the counter claim does not challenge the authority of the law maker or validity of their power to make such law but the validity of the claim by exhibit 'J' that it contains the Offa Native Law and Custom, relying on *Military Administrate of Ekiti State v. Prince Benjamin Adeniyi Aladeyelu* (2007) 5 SCNJ 1 at 5; (2007) 14 NWLR (Pt. 1055) 619 and urged the court to resolve issue 1 against cross appellants.

The facts relevant to the determination of this issue are simple and straight forward and not in dispute. They are as follows:

- (a) That exhibit 'J' .a Kwara State Government Gazette was made by the government in 1970 with retrospective effect from December, 1969.
- (b) That exhibit "J" contains the Chieftaincy Declaration for the Olofa of Offa Stool.
- (c) That the said declaration contains the procedure for the selection of Olofa of Offa by the Olugbense and Anilelerin ruling houses.
- (d) That at the time the said declaration, exhibit 'J' was made, the late Olofa of Offa was on the throne until 2010 when he died.
- (e) that the first time the provisions of exhibit 'J' are to be put into operation in filling vacancy in the stool of Olofa of Offa was in 2010 as a result of the death of the said Olofa of Offa.
- (f) that following the death of the late Olofa of Offa. the Olugbense and Anilelerin ruling houses were invited by the King Makers, vide exhibit 'K', to present their respective candidates for the filling of the said vacancy in accordance with the provision of the said exhibit "J".
- (g) that the process so initiated produced the 5th cross respondent appellant in the main appeal, from the Anilelerin ruling house and 1st cross appellant from Olugbense ruling house as candidates for the stool.
- (h) That at the conclusion of the exercise, the 5th cross respondent/appellant was elected and appointed, etc. Olofa of Offa which resulted in the institution of the main suit at the High Court challenging the emergence of the 5th cross respondent and the counter claim giving rise to this cross appeal.
- (i) That the counter claim of the 1st - 5th cross respondents challenged the provisions of exhibit 'J' on the around that it is not consistent with the native law and custom of Offa people relating to the stool of Olofa of Offa.
- (j) That the trial court held that the counter claim was statute barred as exhibit 'J' had remained

unchallenged for over 40 years, which decision was overruled by the lower court resulting in the instant cross appeal.

The issue simply is when did the cause of action accrue in this case? Is it in 1969/1970 when exhibit "J" was made or said to take effect or 2010 when the late Olofa of Offa died and the need to fill the vacancy created by his demise arose. While the cross appellants contend that it arose in 1969/1970. The 1st - 5th cross respondents are of the view that their cause of action arose in 2010. Which of them is correct, is the question begging for answer.

To begin with, what is a cause of action? The term has been judicially defined in very many decisions of this court.

However, in Black's Law Dictionary with Pronunciations 6th Ed at page 221, the term is defined, inter alia, as Cause of action - "The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or slate of facts which would entitle a party to sustain action and give him right to Seek a judicial remedy in his behalf"

In the case of *Ikin v. Edjerode* (2001) 12 SCNJ 1X4 at 198; (2001) 18 NWLR (Pt. 745) 446 at 471, paras. B-C this court defined the term as follows:

"The term cause of action means all those things necessary to give a right of action whether they are to be done by the plaintiff or a third person: it means every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse."

This court has also held in the case of *Onuekwusi v. R.T.C.M.C* (2011) 6 NWLR (Pt. 1243) 341 at 359 - 360, that a cause of action consists of two elements viz (a) the wrongful act of the defendant and (b) the resultant/consequent damage. The relevant portion is herein under reproduced.

"For the purpose of litigation, a cause of action entails the fact or combination of facts which gives rise to a right to sue and it consists of two elements:

- (a) The wrongful act of the defendant which gives the plaintiff his cause of complaint; and

(b) The consequent damage.

It is thus constituted by the aggregate or bundle of facts which the law will recognize as giving the plaintiff a substantive right to make a claim for remedy or relief against the defendant. The existence of cause of action is an indispensable prerequisite."

Having regard to the established facts relevant to the issue under consideration and the applicable law as stated earlier in this judgment, can it be said that the lower court was right in holding that the cause of action of the cross respondents herein arose in 2010 following the death of the late Olofa of Offa and invitation to fill the vacancy thereby created, in accordance with the provisions of exhibit 'J'?

I agree with the lower court that the cause of action of the cross respondents did not accrue in 1969/1970 when exhibit 'J' was promulgated but in 2010 when both the cause of complaint and consequent/resultant damage became crystallized. I agree with the submission of learned senior counsel for the 5th cross respondent that though exhibit 'J' gave the cross respondents a cause for complaint when it was made in 1969/1970. That complaint remained in abeyance until the "consequent damage" which occurred in 2010 when the provisions of exhibit 'J' were invoked to fill the vacancy in issue. It has to be noted that there was no need for an action to challenge exhibit 'J' as it relates to the native law and custom of Offa people in relation to the stool of Olofa of Offa as at the time the said exhibit 'J' was made and up till 2010 when the Olofa of Offa died, the incumbent Olofa of Offa was from the Anilelerin ruling house of the 5th cross respondent.

I am of the strong view that it was only after the demise of the Olofa of Offa in 2010 and the need to fill the vacancy thereby created that the procedure to be adopted in the filling of that vacancy became relevant and thereby, the issue as to whether or not exhibit •j\which is said to be the Chieftaincy Declaration in relation to the Olofa of Offa. is a true statement of the native law and custom of Offa people in relation to the stool of Olofa of Offa.

It should be noted that the claim of the cross respondents in the counter claim earlier reproduced in this judgment has nothing to do with the authority or power of the then Military Government of Kwara State to make exhibit 'J'. The claim is simply saying that exhibit 'J' should be set aside as same does not represent the correct and true

native law and custom of Offa people in relation to the stool of Olofa of Offa. The factual situation making it necessary for the cross respondents to challenge the 6th and 7th respondents as to the existence of Olugbense ruling house in terms of exhibit 'J' arose in 2010. Following the death of the Olofa of Offa, though the dispute might have risen as far back as 1970. The application of exhibit "J" only came in 2010, not before that year.

Learned senior counsel for cross appellants has cited and relied on the case of *Uwaifo v. A-G, Bendel State* supra in support of his contention that exhibit 'J' cannot be challenged and that any action to that effect is statute barred having regard to the time the document was made. I am of the view and in agreement with the learned senior counsel for the 5th respondent that the facts of that case are not relevant to the determination of the issue under consideration particularly as Edict No. 10 of 1977 actually forfeited the property of the appellant therein at the date the Edict was promulgated which gave appellant an immediate cause of action - both the cause of complaint and resultant/consequent damage occurred simultaneously. I am also of the considered view that the counter claimants were right to wait until steps were taken by the ■ Government of Kwara State in furtherance of the provisions of exhibit 'J' before instituting their action.

In *Edjeroje v. Ikiue* supra at page 199; (2001) 18 NWLR (Pt.745) 446 at 473, paras. A-B Ejiwunmi, JSC, in the lead judgment stated as follows:

"While it is clear that the Traditional Rulers and Chiefs Edict of 1979 (Bendel State) was promulgated in 1979, the plaintiff could not have commenced any action until the appointment of the 1st appellant in April. 1985. The argument advanced for the appellant that the respondents would have commenced action against the Bendel State Executive Counsel soon after the promulgation of the Traditional Rulers and Chiefs Edict of 1979 must also be rejected."

Emphasis supplied by me.

Haven determined that the cause of action in the counter claim accrued in 2010 and not in 1969; 1970. The next sub-issue is whether the counter-claim instituted in 2010 is statute barred.

I must state hastily that it is not the case of cross appellants that the cause of action in the counterclaim arose in 2010 but rather in 1970. It is on that basis that they contend that the action was statute

barred. However, haven agreed with the lower court that the cause of action accrued in 2010, it is easy to determine whether the counter claim is statute barred since what one needs to do is to look at when the cause of action accrued and the date of filing the action vis-a-vis the relevant statute of limitation, which in this case is said, by cross appellants, to be section 2 of the Public Officers Protection Law. I agree with the lower court that judging from the date exhibit "K" was made to the date the counter claim was instituted, the counter claim was not instituted outside the 3 months required/provided for in section 2 of the Public Officers Protection Law and consequently the action is not statute barred - exhibit "K" was made on 22nd March, 2010 while the counter claim was filed on 12th July. 2010.

On the sub-issue of the provisions of the 1963 Constitution. I agree that the argument raised a fresh issue for which leave of this court is required as the issue was neither raised at the trial nor before the lower court. To that extent, the sub-issue is hereby discountenanced. Parties have to contest their cases within the rules fashioned to guarantee fair play and substantial justice. To make the conduct of cases by counsel a blank cheque would serve no useful purpose to the parties and/or the community at large as it would result in undue advantage to one party and a miscarriage of justice to the other. The goal posts are not permitted to be shifted in the course of a game of football!! Parties are consequently not allowed to be changing their case from court to court.

It is for the above reasons that I resolve issue 1 in the cross appeal against cross appellants and in favour of the 5th respondent.

Haven dealt with the above issue 1 in the cross appeal which had the potential of truncating both appeals if resolved in favour of the cross appellants, I now turn my attention to the main appeal particularly issue 1 thereof which is as follows:

"Whether the learned Justices of the Court of Appeal were not in error when they struck out issues one and two raised by the appellant on the basis of the earlier decision in the sister appeal CA/IL/71/2012".

It is the submission of learned counsel for appellant. R. A. Lawal Rabana, SAN, that the appeal of appellants haven not been withdrawn at the lower court, the court ought to have determined the issues and that the lower court was in error in jettisoning the issues raised for determination: that since the sister appeals were filed on different grounds, they ought to have been decided separately; that the lower court haven held that the two issues were competent was bound to

resolve them and failing to do so. Has resulted in a miscarriage of justice to appellant - relying on *A.I.B. v. I.D.S. Ltd.* (2012) 17 NWLR (Pt. 1328) 1 at 45; that the two issues were whether or not exhibit 'J' was made in conformity with the prevailing native law and custom; and whether or not exhibit "J" should be set aside for not being in conformity with native law and custom; that the lower court was in error in not considering and deciding the cross appeal and that the failure has impinged on the appellant's right to fair hearing, relying on *Best (Nig.) Ltd. v. B.H (Nig.) Ltd.* (2011) 15 NWLR (Pt. 1239) 95 at 122 - 123; *Tunbi v. Opawoie* (2000) 2 NWLR (Pt. 644) 275; that the issues in appeal Nos. CA/IL/71/2012 and CA/IL/71A/2012 are completely different so that a decision in one cannot be said to be a decision on the other - that CA/IL/71/2012 did not decide that exhibit 'J' was properly made or conforms with the prevailing native law and custom of Offa people; that the lower court failed in their duty to give effect to the constitutional right of appeal of appellant when they failed to determine the two issues competently raised before them thereby causing a miscarriage of justice and urged the court to resolve the issue in favour of appellant.

On his part, learned senior counsel for 1st – 3rd respondents. John Baiyeshea, SAN submitted that courts of record are bound by then-previous decisions and that the lower court was right in upholding its previous decision by holding that issues 1 and 2 of the appellants are caught by their decision in CA/IL/71A/2012 and that appellant has not appealed against the decision of the lower court that it was not appropriate for it to sit on appeal over its earlier decision in CA/IL/71/2012 and as such, the decision subsists; that by deciding that its earlier decision had answered the case of appellant, it means issues 1 and 2 of appellants had been determined by that court; that the objection of 1st – 3rd respondents on the basis of which the court decided not to decide issues 1 and 2 afresh is that the said issues 1 and 2 are caught by the doctrine of issue estoppel as same had been decided in the earlier suit between the parties; that the argument on the right of appeal of appellant is misconceived as no ground of appeal complained of it. By way of alternative, learned senior counsel submitted that appellant was not denied his right of appeal by the lower court; that the doctrine of issue estoppel is apt in the peculiar circumstances of the case in that issues 1 and 2 had been previously decided by the lower court

in appeal no. CA/IL/71/2012 ^D between the same parties; that it is not true to say that exhibit 'J' is not part of the issues determined by the lower court in the sister appeal in issues 3 and 4 of the appeal; that appellant has not shown that the parties in suit No. CA/IL/71/2012 and CA/IL/71A/2012 are not the same as well as the issues canvassed in them so as to make the principle of issue estoppel inapplicable in this case.

It is the further submission of learned senior counsel. again by way of alternative, that appellant had failed to show that the failure of the lower court to consider issues 1 and 2 in the alternative occasioned a miscarriage of justice, relying on *Ojoh v. Kamalu* (2005) 12 SCNJ 236 at 258; (2005) 18 NWLR (Pt. 958) 523; that even if the lower court had considered the said issues, their decision would not have been different on the ground that:

- (a) there is evidence that 4th – 7th respondents admitted the existence of Olugbense ruling house for the purpose of Olofa of Offa Chieftaincy Stool.
- (b) appellant and 4th – 7th respondents did not challenge the findings of the trial court that there are two ruling houses etc, etc.

Finally, learned senior counsel urged the court to resolve the issue against appellant.

It is not in dispute that two appeals arose from the judgment of the trial court in suit no. KWS/OF/15/2010 on the main suit and counter claim:

- (b) that the appeals are Nos. CA/IL/71/2012 and CA/IL/71A/2012.
- (c) that whereas No. CA/IL/71/2012 was on the main suit CA/IL/71 A/2012 was on the counter claim.
- (d) that CA/IL/71A/2012 was not made a cross appeal in CA/IL/71/2012, as it should have been.
- (e) that both appeals were not consolidated nor heard together and judgment delivered thereon, but separately and by different panels of the Court of Appeal
- (f) that the present 1st – 3th respondents, at the hearing of the appeal No. CA/IL/71A/2012 raised preliminary objection

on the grounds that issues one and two therein were caught by the principles of 'issue estoppel because the Court of Appeal had, in its judgment in No. CA/IL/71/2012 on the main appeal' claims, held that the Olofa of Offa stool is rotational thereby making the said issues 1 and 2 in the appeal CA/IL/71A/2012. On the counter claim, incompetent, and that the counter claim was statute barred and .should be stuck out.

(g) that the lower court in the judgment now on appeal duly struck out grounds 1 and 2 of the grounds of appeal together with the two issues formulated there from on the ground of their constituting issue estoppel.

At pages 1556 -1557 of Vol. 2 of the records of appeal, the lower court, per the lead judgment of my Lord. Rita N. Pemu.JCA, held inter-alia as follows:

"On issue 4 of the preliminary objection, the 1st- 5th respondents contended that this appeal is caught up by issue estoppels, because the issues raised in this appeal' have been determined in appeal no. CA/IL/71/2012. The 1st –3rd respondents urged that the appeal in-dismissed on this ground, in response, the appellants on page 6 of their amended rely brief under issue 4. on issue estoppels responded, not on issue estoppels but on estoppels per rem judicatam. See paragraph 4.04 of the appellant's amended reply brief, it should be noted that issue estoppels is quite distinct and different from estoppel per rem judicatam also known as cause of action estoppels... .. The requirements of the two are also different consequent upon foregoing; I have studied the issues raised by the appellants in this appeal. I am of the firm view that issues 1 and 2 raised by the issue estoppels have been determined in appeal no. CA/IL/71/2012. Consequent upon the foregoing; issues I and 2 raised by the appellants are hereby struck out. The appeal will now be determined on remaining issues namely issue 3. The preliminary objection succeeds in part with regard to ground 6. Indeed the preliininarv objection succeeds in part to the extent of the issue of issue estoppels “ (Italics supplied by me.)

From the above decision of the lower court, it is very clear that the issue before this court is simply whether the lower court is right m

the holding above and if not. Whether the decision occasioned a miscarriage of justice to the appellant therein.

To resolve the issue under consideration, it is important to know what we mean by the term 'issue estoppels' before proceeding to determine the sub-issue as to whether the principles are relevant to the facts of this case or whether the lower court is right in so applying the principles to this case.

In this case of *Oyerogba v. Olaopa* (1998S 13 NWLR (Pt .583) 509 at 528, paras. A-C this court per Iguh. JSC stated the law thus:

"It has been settled that an issue estoppel arises where an issue has been adjudicated on in an earlier suit by a court of competent jurisdiction and the same issue comes incidently in question in a subsequent proceeding between the same parties or their privies. See *Fadiora and Another v. gbadeho and Another* (. 1978) 3 S.C. 219. This is based on the legal principle that a party is precluded from contending the contrary or opposite of a specific point which having once been distinctly put in issue, has solemnly and with certainty been determined against him. Issue estoppel applies whether the point involved in the earlier decision is one of fact or law or one of mixed fact or law."

Continuing at page 528, paras. C-D of the report. Iguh. JSC stated thus:

"Three elements must however be established for a plea of issue estoppels to apply. These are'

- (1) The same question must have been decided in both suits.
- (2) The judicial decision relied on to create the issue estoppels must be final.
- (3) The parties to the judicial decision or their privies must be the same in both proceedings."

Emphasis supplied by me.

Applying the principles *supra*, to the facts of this case, it is without dispute that the parties in both appeal no. CA/IL/71/2012 and CA/IL/71A/2012 are the same particularly as the appeals are products of a main suit and counter claim.

The second element not disputed is the fact that the decision in appeal No. CA/IL/71/2012 is not a final determination thereby rendering the second element not satisfied or absent in the equation. This leaves us with a consideration as to whether the 1st Element requirement that the issues in the two suits must be the same, is

present herein. To determine this, we have to look at the issue calling for determination in the sister appeals.

In appeal No. CA/IL71/2012, four issues were formulated for determination viz:

1. Whether the learned trial Judge was/is right in holding that exhibit 'G' though an original copy of a public document must be certified to be admissible in evidence thereby refusing to attach any weight thereto. (Grounds 1, 2, 6 and 7)

2. Whether the learned trial Judge was is right m holding that the Newspapers, exhibit O. P. Q. R and S (which contain evidence of rotational Chieftaincy in Offa) were wrongly admitted in evidence and that the exhibits are not worthy of being accorded any weight and expunging them from the record (Grounds 3 and 8)

3. Whether there is evidence on record to show or prove that the Olofa stool is rotational between the Olugbense Ruling House and the Anilelerin Ruling House and that it was/is the turn of the claimants appellants, the Olugbense Ruling House in 2010 to present the candidate to fill the vacancy created in the stool by the death of the immediate past Olofa of Off a from the Anilelerin Ruling House. (Grounds 4,5,9. 12. 14 and 15).

4. whether the learned trial judge rightlv rejected qle notion, principle and doctrine of fairness, justice equity, and estoppels in determining the light of the appellants, the olugbense ruling house to present the candidate (2nd appellant) to fill the vacancy in the stool created by the death of the immediate past oiofa Of offa in 2010 from the rival anilelerin ruling house (ground 10, 1 1 and 13)"

On the other hand, the two issues which the lower court held to have been caught by the principles of issue estoppels as urged on it by learned senior counsel for 1st – 3RD RESPONDENTS in appeal no. ca/il/71a/2012 are as follows:

"1. whether on the state of the facts as borne out of the pleadings and evidence adduced by the parties, the findings by the trial court that there are two ruling houses in offa, olugbense and anilelerin ruling houses, are correct and sustainable.

2. whether "exhibit j" established any ruling house in offa. or has set aside the curse on olugbense in a ruling house under the offa native law and custom."

the question that follows is whether the lower court can be said to be right when it held that the issues in the two appeals, reproduced above, are the same? the answer is obviously in the negative. i agree with the submission of learned senior counsel for appellant that whereas the lower court was called upon in ca/il/71/2012 to interpret the documents presented by the 1st – 3rd respondents to determine whether or not they provide evidence of rotational policy in relation to the stool of olofa of offa. the issues in ca/11/71a/2012 were to determine whether there was any basis for the rotation policy having regard to the prevailing native law and custom of offa people regarding the said stool of olofa of offa.

in any event. i have to emphasize that the three elements required for the application of the principles of issue estoppels must be present, side by side, in the case and that the absence of any of the elements renders the principles inapplicable. in the instant case, only the requirement of the parties to the proceedings or their privies, being the same, is present while the other two are completely absent, in fact, on the requirement of finality of the determination of the issues involved by a court of competent jurisdiction, the decision of the lower court on the issues raised

before it has resulted in many appeals before this court, to wit, sc/467/2013; sc/468/2013; sc/450/2013 and sc/650a/2013. the above appeals, in fact, include a cross appeal by 1st – 3rd respondents.

it is therefore my considered view that the principles of issue estoppel do not apply to the facts of this case and that the lower court was consequently in error when it held the contrary or found to the contrary.

the consequence of the lower court finding to the contrary and consequently striking out the two issues involved is that appellants before that court, including the present appellant, were denied their right to fair hearing as their two issues remained unresolved by the court. it is obvious that the said decision has resulted in miscarriage of justice to the appellants, including the present appellant and the decision relating to the issue of issue estoppels is liable to be set aside for being erroneous in law.

in the circumstance, i resolve issue 1 in favour of appellant. on issue 2, which is:

"whether the learned justices of the court of appeal were not in error when they failed to exercise their powers under section 15 of the court of appeal act, to make consequential order(s) based on the evidence on

record in support of the counterclaims having held that the counter claims were not statute barred."

the learned senior counsel for appellant submitted that the trial judge made findings of fact on the pleadings and evidence before i the court on the counter-claim but failed to apply the findings on the ground that the counter claim was statute barred: that the stud findings of fact were not challenged before the lower court nor set aside in the judgments of the court in either ca/il/71/2012 or ca/il/71a/2012; that the material findings of fact made by the trial judge are that anilelerin ruling house, which is appellant's ruling house, had monopolized the olofa of offa throne to the exclusion of the 1st – 3rd respondents. olugbense ruling house - see page 980 - 981 of the record. learned senior counsel then referred the court to the findings of the trial court at pages 958 - 962 of the record and submitted that the said findings are supported by the pleadings of appellant and evidence led thereon; that the lower court, haven found that the counter claim was extant ought to have applied its powers under section 15 of the court of appeal act to grant the reliefs claimed in the counter-claim: that failure of the court to do so has created a vacuum and caused a miscarriage of justice relying on Ugwu v. State (2013) 4 NWLR (Pt. 1343) 172 at 187 -188; Ezeigwe v. Nwawulu (2010) 4 NWLR (Pt. 1183) 159.

It is the further submission of senior counsel that this court should invoke its powers under section 22 of the Supreme Court Act to redress the miscarriage of justice by making pronouncement on the counter claim, relying on Alawiye v. Ogunsanya (2013) 5 NWLR (Pt. 1348) 570 at 608 - 610; Amaechi v. INEC (2008) 11 NWLR (Pt. 1080) 227; Agbakoba v. INEC (2008) 18 NWLR (Pt. 1119) 489; Obi v. INEC (2007) 11 NWLR (Pt. 1046) 560 and Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423.

Referring to relief Nos. (b). (c) and (d) of the counter chum, learned senior counsel stated that they were directed at the 8th and 9th respondents, not 1st – 3rd respondents though the relict's may impact on them but that the said 8th and 9th respondents did not respond to the said reliefs as they filed no defence to the counter claim neither did they contest the appeal at the lower court, that the said respondents are deemed to have conceded the counter claim and that the court ought to have acted on their admission, relying on Maobison inter- Link Ltd. V. UTC (Nig) Plc (2013 9 NWLR Pt. 1359) 197 at 209; CRN Plc v. Dawodu (2003) 4 NWLR (Pt. 810) 287 at 300.

Finally learned senior counsel urged the court to resolve the issue in favour of appellant and allow the appeal and grant all the reliefs in the counter-claim.

On his part, learned senior counsel for the 1st - 3rd respondents submitted that in view of the lower court upholding its earlier decision in CA/IL/71/2012. there was no consequential order to be granted in the circumstance: that the court cannot, under the guise of consequential order overrule its earlier decision: that section 15 of the Court of Appeal Act was therefore inapplicable to the facts and circumstances of this case as well as section 22 of the Supreme Court Act; that there was no issue of applicability of section 15 of the Court of Appeal Act before the lower court and no decision of that court on it; that there is no material evidence before the court to support the counter claim; that exhibit DFC2 does not support the case of appellant as found by the trial court at page 1277 of the record; that whatever was in exhibit DFC2 has been overtaken by exhibit 'J' in which two ruling houses were recognized by the

kwara State Government more than 40 years ago; that exhibit 'J' is the decision of government on the number of ruling houses and the rotation policy, not exhibit DFC2, which is a report of enquiry.

In respect of the non-filing of a defence to the counter claim by the 7th – 8th respondents, learned senior counsel submitted that declaratory reliefs are not granted as a matter of course, relying on *A-G., Rivers State v. A-G., Bayelsa State* (2013) All FWIR (Pt. 699) 1087. (2013) 5 NWLR (Pt. 1340) 123: that appellant failed to prove his case and cannot rely on the weakness of the defence.

Learned senior counsel further submitted that "Besides, it is trite law that a counter-claim is a cross action against the plaintiff and not against a co-defendant. Therefore, under the rules of court applicable in this case, the 7th and 8th respondents are not by rules expected to file any defence and we urge Your Lordships to so hold. I must state at once that the above submission is not the true position of the law because the contrary is correct. The defendants is a counter claim depend on the people that the counter claimant has a cause(s) of action against, which may even extend to other person(s) who is are not parries to the original action either as plaintiffs or defendants. Definitely a defendant in an action can counter claim against the plaintiff anchor co-defendants depending on his cause of action and the relief(s) he seeks.

Finally, learned senior counsel urged the court to resolve the issue against appellant and dismiss the appeal.

I will start the consideration of this issue by reproducing, once again, the reliefs claimed in the counter claim. These are as follows:

- (1) A declaration that no rotational policy exists in Offa between the ruling houses in Offa on the appointment of Olofa of Offa whenever a vacancy occurs to the stool.
- (2) A declaration that the ruling house that exists in Offa for the purposes of appointing an Olofa of Offa is the Anilelerin Ruling House
- (3) A declaration that the Kwara State Government Gazette No. 11 Vol. 4 of 12th March, 1970 and any other Notices as it recognizes Olugbense as a ruling house in Offa be declared null and void as it is contrary to the history, custom and tradition of Offa on Offa Chieftaincy.
- (4) An order of perpetual injunction restraining the 6th and 7th defendants from treating and or recognizing the Olugbense Ruling House as a ruling house that have right to the Chieftaincy title of Olofa of Offa."

From the pleadings and evidence on record, the case of the counter claimants is that the Olugbense Ruling House has been disinherited of the right to occupy the Olofa of Offa throne following a curse and the decision of late Oba Olugbense - their progenitor - and enthroning the female line of Anilelerin Ruling House; that since the demise of the said Oba Olugbense, it has been only the female line of Anilelerin Ruling House that has been occupying the Olofa of Offa throne; that the list of past Olofa of Offa supports the contention of the counter claimants including some of the documents tendered by 1st - 3rd respondents; that the above is the prevailing native law and custom of Offa people as it relates to the Olofa of Offa stool/throne; that there is no policy of rotation of appointment of Olofa of Offa between Olugbense and Anilelerin Ruling House of Offa in relation to the said chieftaincy; that the ruling house of Anilelerin is extinct as evidenced in exhibit DFC2 and the list of past Olofa of Offa up to the immediate past Olofa of Offa who joined his ancestors in 2010.

It is also the case of the counter claimants that in view of the prevailing native law and custom of Offa people relating to the Olofa of Offa stool exhibit 'J', which recognizes Olugbense

Ruling Houses as an extant ruling house, does not reflect the true position of the prevailing native law and custom of the people and should be set aside.

On the other hand, the case of the 1st - 3rd respondents by way of defence to the counter claim include the averment that the counter claim is statute barred and caught by estoppel on the ground that the 4th - 7th respondents, as Kingmakers, wrote to them as ruling house, inviting them for the selection of Olofa of Offa process; that there are two ruling houses in Offa in relation to the Olofa of Offa Stool and that the Government of Kwara State decided on rotation of ascension to the stool of Olofa of Offa as evidenced in the relevant exhibits, including exhibit 'J'.

What did the trial court say on the counter claim? At pages 980 - 982 of the record, the court stated as follows; inter alia: "On the 1st to 5th defendants' counter claim. The claimants' counsel urged me to dismiss the counter claim as it is statute barred. On exhibit 'J' made since 1970 as it is late to do so. I have already pronounced on the two ruling houses the defendant cannot pick and choose which of the documents to follow. Both the one favourable and unfavourable must be looked into, to that extent; I agree with the claimants' counsel on recognition of two ruling houses as declared in 1970.

Exhibit 'J' declaration of the defendants cannot be heard to say that they will continue to monopolize till kingdom come that only their ruling house exists, it is not done, it is mere rhetoric and absolutely unjustifiable and so declaration number 2, 3 and 4 of the 1st to 4th defendants does not hold water, it cannot stand. No. 2, 3 and 4 declaration do not stand. 2, 3 and 4 cannot stand in the right (sic) of overwhelming evidence given by the claimants in support of recognition of the two ruling houses ...

Although I agree that cause of action on limitation is calculated from the period the cause of action accrues. Besides, exhibit 'J' was not challenged (several) 40 years ago. See *Alhaji Bello Nasir v. Civil Service Commission, Kano State* (2010) 2 SCNJ 164 at 189; (2010) 6 NWLR (Pt. 1190) 253 rightly and appositely cited by the claimants' counsel. See Public Officer Protection Law Cap. 111, Laws of Northern Nigeria 1965.

The counter claim of the defendant cannot stand to that extent of being statute barred. Accordingly I dismissed the counter claim of the 1st to 5th defendant.' On the question as to

whether ascension to the stool of Olofa of Offa is on rotation between the two ruling houses, the learned trial Judge, at pages 968, 969, 970, 971 etc. made the following findings, inter alia:

"My closest scrutiny and examination of the Sawyer's report (exhibit DFC2) in corroboration revealed with due respect to the submission of the erudite silk Mr. John Bayeshea and the evidence of PW2 and Saka Keji PW3 and Hon. Shittu PW2. Showed correctly that there was no rotation even exhibit DFC2 Sawyer Commission which PW3 said is a very important document did not say anything about rotation instead it talked about the ruling houses, the list of Olofa and the ruling houses historical occupation of the ruling house before the curse theory and the successful occupation of the female ruling house in succession. The Sawyer's finding did not say anything about rotation which the two witnesses and others agreed. It was brutally silent on rotation from the exhibit DFC2 tendered at pages 28 - 29, 35 - 36 and other pages "

To cap it all. exhibit 'J' which is the Gazette which came up after the decision of Sawyer Commission only set out procedures guidelines for the selection of (sic) declaration by traditional kingmakers ... the gazette of 12th March. 1970. Exhibit 'J', is the declaration of Offa native law and custom relating to the selection for each of the houses. Anilelerin and Olugbense separate declarations made for them. Again exhibit 'J' the gazette of March, 1970 was ominously silent on rotation..... In fact, the tables in exhibit 'A' and 'B' showed that from the list in both Olugbense male house, the first existing ruling house before the so called curse and disinheritance of the male, there had been no rotation among the ruling houses and the takeover or total annihilation or occupation by the female house after the curse theory also showed no rotation in the list and tables provided. See evidence to PW1 to PW3 and appendix 1 list of Olofas in succession pages 108 - 109...

Having considered these extant laws in relation to the pieces of evidence and averments as contained in the statement of (sic) oath of PW1 to PW4 and DW 1 to DW5 there is no where it is stated, apart from exhibit 'A' which talked about rotation, all other exhibits and the evidence did not already establish rotation. What then is the business of the court to imply or infer or read into the document what is not contained in it ..." (Italics supplied by me.)

On the issue as to whether there are one or two ruling houses... the trial Judge at pages 922 - 923 made the following findings inter alia:

"With all these there is no doubt that from the evidence of both parties, claimant and defendant and the statement of claim and statement of defence there exists two ruling houses in Off a. Olughenoe and Anilelerin ruling houses, what is admitted is taken 10 proved...

Even exhibit DFC2 and exhibit 'IF page 100 respectively lent credence to the above established and undisputed fact that there are two ruling houses in Offa, namely Anilelerin and Olugbense. What is in (sic) challenged and uncontradicted is taken as proved..."

[Emphasis supplied by me]

As stated earlier. In this judgment, the lower court did not consider the claims of appellants in the counter claim after coming to the conclusion that the said counter claim was not statute barred. Part of the reason that advised the non-consideration of the issues raised in the counter claim may be the earlier decision of that court on the preliminary objections of the 1st - 3rd respondents' senior counsel, that the claims are caught by the principles of issue estoppel having regard to the issues already determined by the court in appeal No. CA/IL/71/2012 which decision holding I had earlier, in this judgment, found not to be well founded in law and consequently set aside. In any event, whatever the reason for the non-consideration of the merits or otherwise of the counter claim, the fact remains that it amounts to a breach of the right of fair hearing of the appellants before the lower court to have their case determined. Secondly, the non-determination of the counter claim has resulted in a serious miscarriage of justice to the appellants for which this court has the duty to intervene.

I had, while considering the preliminary objection relating to applicability of section 15 the Court of Appeal Act, held that the provision is relevant having regard to the finding/holding by the lower court that the counter claim is extant - not statute barred. The said section 15 provides thus:

"... The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record

of appeal, and may direct the court below to inquire into and certify its findings on and question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings have been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or, may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be re heard by a court of competent jurisdiction,"

On the other hand, this court by the provisions of section 22 of the Supreme Court Act is clothed with similar powers as contained in section 15 of the Court of Appeal Act, *supra*. It enacts as follows;

"...The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to take or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

The above provisions in relation to the two appellate courts are designed to satisfy the need for the courts to prevent serious miscarriage of justice and prejudice to the appellant for failure of the lower court(s) to pronounce on his/their right or benefit

the decision on the matter before it/them. This court, therefore, has the power to prevent the occurrence or re-occurrence and continuation of gross miscarriage of justice in this case; see *Best (Nig.) Ltd. v. B.H. (Nig.) Ltd.* (2011) 5 NWLR (Pt. 1239) 95; *Ugwu v. The State* (2013) 4 NWLR (Pt. 1343) 172; *Alawiye v. Ogunsanya* (2013) 5 NWLR (Pt. 1348) 570 at 608 - 610; *Amaechi v. INEC* (2008) 11 NWLR (Pt. 1080) 227 etc, etc.

As stated earlier in the judgment, the trial Judge made some findings in relation to the counter claim even though it finally dismissed same on the grounds that the counter claim was statute barred, which finding was duly set aside by the lower court. The lower court, however, failed and or neglected to consider the evidence on record relating to the counter claim, which it ought to have done.

It is settled law that it is the primary duty/function of the trial court to evaluate evidence placed before it, before arriving at the conclusion it reached in the matter. It is only when and where the Judge fails to evaluate or properly evaluate such evidence that a Court of Appeal can intervene and in itself evaluate or re-evaluate such evidence. As a general rule, however, when the question of evaluation of evidence does not involve the credibility of witnesses but the complaint is against non evaluation or improper evaluation of the evidence tendered before the court, an appellate court is in a better position, as the trial court, to do its own evaluation - see *Lawal v. Dawodu* (1972) 8 & 9 SC 83 at 114 -117; *Fashanu v. Adekoya* (1974) 6 SC 83 at 91; *Ighodim v. Obianke* (1976) 9 &10 SC 179; *Torti v. Ukpabi* (1984) 1 SCNLR 214, (1984) 1 SC 370 at 392 - 393 etc, etc.

Turning now to the relevant issues for consideration in the counter claim, can it be said that the trial court was right in its finding that there is no policy of rotation to the Olofa of Offa stool between Olugbense and Anilelerin ruling houses. I have gone through the record of appeal including the evidence before the court which includes the documents tendered and admitted as exhibits and have no hesitation in holding that the court was very right in coming to that conclusion. From the oral testimonies of the witnesses and exhibits DFC2 and 'J' there is no iota of evidence to support this case of rotation. The exhibits referred to above are clear and unambiguous and rotation cannot

be read into them, as found and held by the learned trial Judge in passages earlier reproduced in this judgment. In fact, the above finding is, in my considered view supported by the fact that if the exhibits intended to, and, indeed introduced rotation, the rotation would have started in 1970 when the candidate from Olugbense ruling house was deposed and the stool returned to Anilelerin ruling house. To me, it would have been the proper time to have broken the chain of succession to the throne by candidates of only the Anilelerin Ruling House.

The above issue is related to the sub-issue as to whether there are two ruling houses of Olugbense and Anilelerin in Offa as found by the trial Judge. It is my view that the above sub-issue is also related to the issue as to whether exhibit 'J' is in accordance with the prevailing Offa native law and custom relating to the Olofa of Offa stool. To determine the issues, we have to look at pages 24 - 27 and 35 - 36 of exhibit DFC2. The report of the Sawyer Commission of Enquiry into the Traditional Titles of Olofa and Olosi Chieftaincies, hereinafter reproduced, inter alia:

"Term 3: To establish the number of ruling houses in Offa and the general concept the Offa masses now held of each of the houses.

Terms 3, 4, and 5 are very much related according to the findings of the Commissioner. Number of ruling Houses.

From the evidence before the Commission there is actually one ruling house accepted by the masses of Offa people - Anilelerin ruling house. One of the cause of the present unrest in the town is the attempt to re-establish a second ruling house - the Olugbense House. The struggle for the re-establishment of this second house seems to have been intensified since 1937 when the father of Mustafa Keji - Abubakar Keji contested the stool against Wuraola Isioye and failed. To understand the struggle one has to go into the history of the Offa.

From Olofagangan - the founder of Offa - who came from Oyo through Ife to Olugbense - the eighth Olofa, the Olofa was selected from the male descendants. There was therefore only one ruling house. Anyone who was a male descendant could be selected by the princes provided his father was no longer alive and provided that his character, deportment, etc, were most suited for the high post.

After the fire incident in which the male children of Olugbense abandoned the old man to die in the fire but the son of his daughter at Ajase-ipo saved the old man's life, Olugbense cursed all his male children and their descendants forever. By the curse, Olugbense disinherited his male line of the stool of Olofa forever and ever. He also blessed the daughter to the effect that her descendants would forever be the Olofa. This was how the new line of Olofa from Bamgbola Aremu (the 9th Olofa) came into existence. Wuraola Isioye - is a direct descendant of this line - Anilelerin: whereas Mustafa Keji comes from the male line of Olugbense.

Olugbense house tried to explain the comma in of Bamgbola Aremu - the son of the daughter of Olugbense by saying that Olugbense had 300 sons struggling for the stool of Olofa and when they could not agree among themselves to present the candidate, the Alafin appointed Bamgbola Aremu. For many reasons this story of 300 children is not acceptable to the Commission. The 'curse story' is by far plausible from all evidence before the Commission.

(a) Rev. J. B. Olafimihan's book *Two Itan Ofa* relates that story of the curse, from the evidences before the Commission, Rev. Olafimihan started collecting his story in 1923 and published the book in 1948, long before the present struggle. It was also after the 1937 struggle, so that if the story was being made up to support one house the house would have challenged the truth of the story. Up till the time of the setting up of the Commission, nobody challenged the book though it has been used in the neighboring villages.

Furthermore, Rev. Olafimihan listed the old people consulted and from the evidence before the commission Olafimihan could not have consulted a better set of people.

(b) Hermon Hodge, the Ilorin Resident, who wrote his Gazetteer of Ilorin Province in 1926 did not include Arokan, Otakogbaiye in his list of Olofas. The present Emir of Ilorin told the Commission the story of the 'curse' which he collected between 1952 and 1954.

(c) The story of the 300 children was supposed to have been collected between 1951 and 1952 by a number of the Olugbense house but there was no evidence of any challenge of Olafimihan's story up till now and the story teller could not give the Commission the source of his story.

(d) There were seven Olofas directly after Olugbense (from about 1789 - 1888) who came from the female line - Anilelerin House. There was nobody from the male line throughout that period.

There have been fifteen (15) Olofas since that line all except two coming from the female line - Anilelerin. The first of the male line was Arokan Otakogbaiye who apparently posed as the Olofa when Adegboye with most of his chiefs and people fled to Ido Oshun because of the long siege of Ilorin. When Adegboye was invited back to Offa by the Emir of Ilorin and Governor Carter, Otakogbaiye had to give way to Adegboye. It is pertinent to state here that recognition should be given to the Yoruba tradition that you do not install a new Oba unless the former one is dead. An Oba could be exiled if the people couldn't tolerate him anymore but no new one is installed until the exiled one is dead. The second Olofa - if we may call him so - from the male line is Mustafa Keji who was installed by Ilorin N. A. first as District Head and subsequently referred to as 'Olofa'. This again was when the Olofa Wuraola Isioye - was in exile.

(e) If two houses have been accepted by Offa people there would have been a system of rotation of the Olofa between the houses. Or, more candidates from the Olugbense house should have been successful. It is unthinkable that Anilelerin House has so many men of good character - worthy to be an Olofa while Olugbense house has so few and in fact that the Olofaship of the two should be so doubtful.",

(f) It is clear from the evidence before the Commission that Offa people in general still believe in and fear the curse and so are not ready to brush it aside. One of the aspects of the curse was that if anyone from the male descendants should ever pose as the Olofa there

would be no peace in Offa until such a one was removed. This is supported by the unrest that ensued during the two reigns. A witness from Mustafa Ken's camp actually told the Commission that there had been no rest since Keji became the Olofa.

WHAT IS IN A CURSE?

The Commission believes that a curse is only valid:

(a) the people concerned believe it and or the prophesized evils etc. are really being fulfilled when the conditions are not observed. The people concerned decided not to honour the terms then the curse may be said to be no longer valid. There are examples of such curses in the history of Yoruba people. An outstanding one is the curse that Owu would never be inhabited again. For sometime anybody who tried to settle there was reminded, oi the curse and those who paid no heed died. But noun Owu is a flourishing town because the majority of the people decided to brush aside the curse.

As long as Offa people still believe in the curse, the Commission believes that it would be unwise to ignore it.

The Commission has therefore, come to the conclusion that there has always been one ruling house acceptable to the people of Offa. Before the curse it was the male line of Olofagangan; but since the death of Ojugbense. it has been the Anilelerin family, because the line changed with the curse. There also has been a system of selecting the Olofa and it is believed that anyone not selected according to this tradition could not be regarded as Olofa. This is elaborated in term 4.

Term III. To establish the number of ruling houses in Offa and the general concept - the Offa masses now hold of each of the house:

ANSWER

Historically, there was only one ruling house from the Olofagangan. the founder of Offa. The second ruling house which is indeed a branch of the descendants of Olofagangan was established after the death of Olugbense as the female line. Since the death of Olugbense, the female line had successively occupied the stool of the Olofa except in two doubtful cases from the male line. The Commission is of the opinion that the male line is defunct thereby leaving only one ruling house namely the Omo-Anilelerin ruling house."

(Italics supplied by me.)

From the above report, it is very clear that the prevailing Offa native law and custom relating to the stool of Olofa of Offa recognizes only one ruling house of Anilelerin ruling house as it considers the Olugbense ruling house to have become defunct.

On the other hand, exhibit 'J', the gazette of Kwara State Government, is said to be the declaration of Offa native law and customs relating to the stool of Olofa of Offa and it recognizes two ruling houses of Olugbense and Anilelerin. It is the appellant's contention that exhibit 'J' cannot be a reflection of the prevailing native law and custom of Offa people in relation to the Olofa of Offa stool having regard to the findings of the Sawyer Commission of Enquiry - exhibit DFC2, supra. I agree with the appellant. In G the first place, exhibit 'J' is said to be based on exhibit DFC2 but exhibit DFC2 found that only one ruling house exists in Offa in relation to the stool in question, in accordance with the prevailing native law and custom of the people. In the circumstance. I hold the considered view that exhibit 'J' is inconsistent with the prevailing H Offa native law and custom relating to the Olofa of Offa stool throne and therefore does not represent the native law and custom of the people; rather it is exhibit DFC2.that represents the prevailing Native law and custom of Offa people in relation to the Olofa of Offa stool.

Secondly, exhibit 'J', apart from listing the two ruling houses and stating the procedure for nomination of their candidate for the consideration of the King makers, has nothing on the native law grid custom of the people on the chieftaincy in question.

It is settled law that customary law is unwritten and is a question of fact to be proved by evidence except it is of such notoriety and has been regularly followed by the court that judicial notice would be taken of it without evidence required in proof thereof - see *giwa v. Erimilokun* (1961) 1 SCNLR 377. However, where the customary law and tradition of the relevant people is reduced into writing, it is known as chieftaincy declaration and it regulates the nomination and selection of a candidate to fill a vacancy to avoid uncertainty - see *Olowu v. Olowu* (1985) 3 NWLR (Pt. 13) 372; *Agbai v. Okogbue* (1991) 7 NWLR (Pt. 204) 391.

It is also settled law that the courts cannot promulgate a chieftaincy declaration or declaration of customary law. but have the competence to see whether a chieftaincy declaration, such as exhibit "J" in this case, is in conformity with prevailing customary law. and

where it is not: declare it invalid. The courts, therefore, have power to set aside a registered declaration that does not correctly declare the chieftaincy custom and tradition of the area concerned, see *Fasade v. Babalola* (2003) 11 NWLR (Pt. 830) 26; *Adigun v. A.-G., Oyo State* (1987) 1 NWLR (Pt. 53) 678; *Ajakaiye v. Idehai* (1994) 8 NWLR (Pt. 364) 504; *Mafimisebi v. Ehuwa* (2007) 2 NWLR (Pt. 1018) 385 at 412.

From the evidence on record, particularly exhibit DFC2 supra, it is without doubt that exhibit "J". the chieftaincy declaration, does not truly represent the customary law it professes to restate particularly in relation to the number of ruling houses for the Olofa of Offa stool/throne, and is consequently liable to be so declared and set aside.

In the circumstances and having regard to the evidence on record and the applicable law. I resolve issue 2 in the appeal in favour of appellant.

On issue 3 in the cross appeal which is:

"Whether the lower court was right when it dismissed grounds 2,3,4 and 5 of the cross appellant's preliminary objection."

Learned senior counsel for the cross appellants submitted that the lower court was wrong when it dismissed grounds 2, 3, 4 and 5 of the cross appellant's preliminary objection. The reason for so submitting is that the Kwara State Government, being the maker of exhibit 'J' which the cross- respondent seeks to set aside was not made a party to the counter claim; the counter claim is incompetent and ought to be struck out on the authority of *otan-aiyegbaju v. adesina* (1999) 2 NWLR (Pt. 590) 163 at 180; that the 6th and 7th cross respondents were not joined in the trial court in respect of the counter claim so the appeal as presently constituted with their names, is incompetent and should be struck out.

On his part, learned senior counsel for the 5th cross respondent submitted that the submissions of his learned friend are misconceived. Learned senior counsel then referred to the rebels claimed in the counter claim and earlier reproduced in this judgment and stated that relief 'C and 'D' thereof specifically targeted the 6th and 7th respondents at the trial; that the 6th and 7th defendants were not only named but necessary parties to the counter claim and that to that extent, the case of *Obala v. Adesina* (supra) does not apply to the facts of the case as the Oyo State Government and Ila Local Government were not

parties in that suit, neither did the counter claim so name them, contrary to the facts of this case and urged the court to resolve the issue against cross appellants.

Without wasting the precious time of this court, it is clear that the 6th and 7th cross respondents had been parties to the suit right from inception as evidenced in pages 1 to 4 of vol. 1 of the record of appeal - being the writ of summons issued or caused to be issued by the cross appellant. The 6th and 7th cross respondents were named as defendants to the action and had remained so throughout the proceedings including the counter claim and appeals arising therefrom, it is therefore my considered view that the issue under consideration has no merit whatsoever and is accordingly resolved against the cross appellant.

I need to comment on the parties herein and the pleadings and briefs filed.

In respect of the counter-claim which gave rise to appeal No. CA/IL/71 A/2012 at the lower court, the 1st – 5th defendants were also the appellants in the said appeal, and they filed their pleadings as well as appellants' brief.

On the other hand, the 6th and 7th defendants who were also the 4th and 5th respondents in CA/IL/71A/2012 at the lower court neither filed a defence to the counter-claim nor a respondents' brief in the appeal; that at the lower court, the current appellant was the 5th appellant while he is the sole appellant in this appeal No. SC/890/2014 arising from the decision of the lower court; that the 1st – 4th appellants in CA IL/71A/2012 are now the 4th- 7th respondents' in appeal No. SC/890/2014 and have filed no respondents' brief herein.

It should be noted also that the 8th and 9th respondents herein haven't filed a respondents' brief nor any process to contest the appeal, have nothing to urge on the court in respect of the merit of the appeal, and can consequently be deemed to have conceded the appeal.

In conclusion, I find merit in the main appeal No. SC/890/2014 and accordingly allow same and set aside the decision/judgment of the lower court in appeal No. CA/IL/71A/2012 as it relates only to the non-consideration of the issues raised in the counter claim for determination and in

its place find and hold that judgment be and is hereby entered for the counter claimants in the following terms:

1. it is hereby declared that no rotational police exists in Offa in relation to the appointment of Olofa of Offa whenever a vacancy occurs to the stool/throne.
2. It is hereby declared that on the prevailing native law and custom of Offa people, the only ruling house that exists for the purpose of appointing an Olofa of Offa is the Anilelerin ruling house.
3. It is further declared that the Kwara State Government Gazette No. 11 vol.4 of 12th March. 1970 and any other notices as it recognizes Olugbense as a ruling house in Offa in relation to the Olofa of Offa stool/throne is null and void as same is contrary to the history, custom and tradition of Offa people in relation to the stool.
4. It is ordered that the 6th and 7th defendants to the counter claim be and are hereby restrained perpetually from treating and/or recognizing the Olugbense Ruling House as a ruling house that has a right to the chieftaincy title or stool/throne of Olofa of Offa.

In respect of the cross appeal, it is clear and I hereby hold that the issues relevant for the determination of same have been considered and resolved against the cross appellants and having regard to the fact that the main appeal has just been allowed by this court, the cross appeal is dismissed for lack of merit.

The customs and traditions of the people being dynamic is subject to changes depending on the practices of the people concerned at the particular time, it is hoped that in due course Offa people, particularly the ruling houses will see need and reason, to effect the necessary changes to enable Olugbense descendant ascend the stool once again. The parties are encouraged to talk things over and find a peaceful solution to the problem and the Kwara State Government accordingly.

I make no order to costs as parties are to bear their costs Main appeal allowed and cross appeal dismissed

RHODKS-VIVOUR, J.S.C.: I have had the advantage of a preview of the leading judgment of my learned brother. Onnoghen. JSC just read.

I am in agreement with his lordship that the main appeal be allowed and the cross appeal dismissed.

NGWUTA, J.S.C.: I read in draft, the lead judgment delivered by my learned brother Onnoghen, JSC. His Lordship conclusively settled the various legal and factual issues in the main appeal as well as the cross-appeal.

I entirely agree with the reasoning leading to the main appeal being allowed and the cross-appeal being dismissed.

I will like to say a word on whether or not there is a policy of rotation to the stool of Olofa of Offa between Olugbense and Anilelerin Ruling Houses; an issue raised in the counterclaim. The answer to the above poser hinges on exhibits DFC2 and J.

Exhibit DFC2 is the report of the Sawyer Commission of Enquiry into the Traditional Titles of Olofa and Olosi Chieftaincies. On the other hand, exhibit J is the Kwara State Government gazette declaring the Offa Native Law and Customs relating to Olofa of Offa traditional stool. Term 3 of the terms of reference of the Sawyer Commission is hereunder reproduced:

"Term 3: To establish the numbers of ruling houses in Offa and the general concept the Offa masses now held of each of the houses."

On the numbers of ruling houses, the Commission found inter alia that:

"from the evidence before the Commission there is actually one ruling house accepted by the masses of Offa people - Anilelerin ruling house. One of the cause (sic) of the present unrest in the town is the attempt to re-establish a second ruling house - the Olugbense House ..."

The Commission found that the struggle to re-establish the Olugbense House "was intensified since 1937 when the father of Murtafa Keji, Abubakar Keji, contested the Offa stool against Wuraola Isioye and failed". This means that there was a second ruling house - the Olugbense House but the same became extinct before 1937.

It would appear that much earlier than 1937, the Offa had only one ruling house - Anilelerin ruling house, the second one - Olugbense house having gone extinct prior to 1937. The commission relied on oral evidence as well as Rev. J. B. Olatimihan's book "Iwe Itan Ofa" in its finding on the extinction of the Olugbense ruling house. The materials in the book date back to 1923.

Exhibit J is the Kwara State Government Gazette No. 11 Vol. 4 of 12th March 1970. Contrary to exhibit DEC2 (the Sawyer Commission

Report) which predates it. exhibit J recognizes two ruling houses - Anilelerin and Olugbense ruling houses. Though it declared the native law and custom for selection of candidates for each ruling house, it fell short of making a declaration on relation between the two ruling houses it recognized.

As a source of the native law and custom of Offa people in relation to ascension to Offa traditional stool, exhibit 'J' should have been based on, or at least drawn from exhibit DEC2 which not only predates it but appears to x-ray the native law and custom of the people and the reasons for the extinction of the Olugbense ruling house.

The customary law of a people is a minor of their accepted usage and it is no less a source of law as other sources of law. See *Laoye v. Oyetunde* (1944) AC 170; *Zaidan v. Mohssen* (1973) 11 SC 1 at 21; *Nsirim v. Nsirim* (2009) 94 LRCN 177 at 188; (1990) 3 NWLR (Pt. 138) 285. It is a set of rules of conduct applicable to persons and things, including ascension to the people's traditional stool, in a particular locality. See *Obi v. Obijindu* (1996) 1 NWLR (Pt. 423) 240; *nsirim v. Nsirim* (supra). Customary law is issue of fact to be established by evidence.

Is exhibit J a codification of the practices of the Offa people? There is no evidence to that effect. On the contrary, exhibit DEC2 is based on oral and documentary evidence of the people as well as scholarly work on the stool of Offa.

In my view, exhibit DEC2 is preferable to exhibit J as to whether there is a policy of rotation to the stool of Offa. There being only one ruling house. Anilelerin House, there can be no policy of rotation.

For the above and the more comprehensive reasoning settling the intricate issues in the appeal in the lead judgment, I also allow the main appeal and dismiss the cross-appeal for lack of merit.

Main appeal allowed.

Cross-appeal dismissed.

PETER-ODILI, J.S.C.: I am in total agreement with the judgment just delivered by my learned brother. W.S.N. Onnoghen, JSC and in support of the reasonings. I shall make some comments.

This is an appeal against the decision of the Court of Appeal, Ilorin Division which judgment was delivered on the

16/7/14. Part of the decision complained of is that part striking out the appellant's issues 1 and 2 and the failure of the court to make consequential order. This appeal stems from the appellant's counter-claim at the trial court.

The full facts leading to this appeal are well adumbrated in the lead judgment and no useful purpose would be served repeating them. I would however state that the 1st - 3rd respondents cross-appealed.

On the 11th day of April, 2016 date of hearing. R.A. Lawal-Rabana.SAN for the appellant adopted his brief of argument filed on the 2/3/2015 and in it raised two issues for determination which are as follows;

Issue One:

Whether the learned Justices of the Court of Appeal were not in error when they struck out issues 1 and 2 raised by the appellant of the basis of the earlier decision in the sister appeal CA/IL/71/2012.

The above issue is distilled from ground 1 of the notice of appeal; to wit:

1. The learned Justices of the Court of Appeal erred in law when they upheld the preliminary objection of the 1st - 3rd respondents on the ground of issue estoppels and struck out grounds 1 and 2 of the appellant's notice of appeal and the two issues formulated therefrom on the basis of their earlier decision in the sister appeal CA/IL/71/2012.

Issue Two:

Whether the learned Justice of the Court of Appeal were not in error when they failed to exercise their powers under section 15 of the Court of Appeal Act to make consequential order(s) based on the evidence on record in support of the counter claims having held that the counter claim were not statute barred.

The above issue is distilled from ground 2 of the notice of appeal to wit:

2. The learned Justices of the court of appeal erred in law when they refused, neglected and or failed to make a pronouncement on the substances of the appellant's counter-claim, having held that the counter-claim was not statute barred. In line with their powers

under section 15 of the Court of Appeal Act, thereby leaving a vacuum as the prospect of the counterclaim.

Learned senior counsel for the 1st – 3rd respondents. John Olusola Bayeshea SAN adopted their brief of argument filed on 28/4/15 and crafted two issues for determination in the event their preliminary objection argued in this brief of argument was not upheld. The two issues so formulated are thus:

1. Whether the learned Justices of the Court of Appeal were right then they struck out issues one and two raised by the appellant on the basis of issue estoppel.
2. Whether the learned Justices of the Court of Appeal were not in error when they failed to exercise their power under section 15 of the Court of Appeal Act to make consequential order(s) based on the evidence on record in support of the counter claims having held that the counter claim was not statute barred?

It needs no saying that the preliminary objection raised by the 1st - 3rd respondents would be first tackled since on it is hinged the competence of the appeal and the fallout the possible lack of jurisdiction of this court to entertain the appeal.

Preliminary Objection

TAKE NOTICE that the 1st - 3rd respondent shall at hearing of this appeal raise preliminary objection to the competence of this appeal on the following grounds

1. That around 2 in the notice of appeal does not emanate from the decisions of the lower court.
2. That around 2 is a new or fresh issue/ground raised for the first time in this court.
3. That no leave of this court was sought prior to the filing of the notice of appeal/grounds of appeal.
4. Grounds 2 is a ground of mixed law and/ground of fact alone.
5. Ground 1 is a ground of fact/mixed law and fact.
6. That the requisite leave of court pursuant to section 213(3) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) was not sought and obtained; this case before filing the grounds of appeal in this case. The two grounds of appeal require leave of the court before filing same.
7. That this court lacks jurisdiction to hear this appeal.

Learned counsel for the objector formulated a single issue on

the preliminary objection which is thus:

Whether considering the grounds of appeal in this case, this court has the jurisdiction to hear this appeal. Canvassing the position of the objector, learned counsel contended that ground 2 of the appeal is grossly incompetent, so also the issue formulated thereon as the ground of appeal did not emanate from the decision of the lower court. That the ground 2 of appellant's notice of appeal is grossly incompetent in that the issue of applicability of section 15 of the Court of Appeal Act was not raised in the lower court and same was not considered at all in the court below and therefore a new or fresh issue and so leave of court must be first sought and obtained before such an issue can be raised. He cited *Madukoh, v. Nkemdilim* (1962) NSCC 374 (Pt 379); 1962) 2 SCNLR 341. That it follows that since there is no decision of the lower court on section 19 of the Court of Appeal Act and as such section 22 of the Supreme Court Act is most incongruous in the peculiar circumstances of this case. He referred to the case of *LS.W.C. v. Sakamori Construction (Nig.) Ltd.* (2012) All FWLR (Pt.632) 174 at 1770 -1771; (2011) 12 NWLR (Pt. 1262) 569.

That an appeal is not a new case but the continuation of an existing case which is the subject of the appeal and an appellant cannot be allowed to set up a case different from that which was canvassed at the lower court.

In respect to ground 1, learned counsel said the issue of estoppels raised in the ground calls for the evaluation of the facts of the case vis-a-vis the decision of the court below and the facts of this case before the application of the law and therefore a ground of mixed law and facts and so the need for leave first sought and obtained; He cited *Akinyemi u. Odu'a Investment Co. Ltd.* (2012) 17 NWLR (Pt. 1329) 209 at 230 - 23; *C.C.CJ.CS. Ltd. v. Ekpo* (2008) 6 NWLR (Pt. 1083) 362 at 407 - 409. Reply thereto by Lawal-Rabana, SAN

That the objection to ground 1 of the grounds of appeal on the ground that it is incompetent is misconceived having regard to the classification of grounds of appeal in the case of *NNPC v. famfa Oil Ltd.* (2012) 17 NWLR (Pt. 1328) 148 at 175 - 176 etc.

In respect to ground 2, learned Senior Advocate stated that the ground does not arise from the judgment on appeal is erroneous that the court below having come to the conclusion

that the counter claim was not statute barred ought to have proceeded to determine the same and not so doing constituted the complaint of the appellant. That the Court of Appeal having reached its decision that the claim was not statute barred, the application of section 15 of the Court of Appeal Act was the next thing and so it was not a fresh issue for which leave is a necessity as it involved a substantial question of law which the court could entertain to sustain substantial justice and avoid miscarriage of justice. He cited *Adio v. State* (1986) 2 NWLR (Pt. 24) 581 at 588; *Ajuwon v. Adeoti* (1990) 3 SC (Pt. 11) 76 at 87; (1990) 2 NWLR (Pt. 132) 271; *Ucha v. Elechi* (2012) 13 NWLR (Pt. 1317) 330 at 362.

The submission of the objector of incompetence in regard to ground 2 is self defeating and that ground 2 states thus; "The learned Justices of Court of Appeal erred in law when they refused, neglected and or failed to make a pronouncement on the substance of the appellant's counter claim, having held that the counter claim was not statute barred in line with their powers under section 15 of the Court of Appeal Act, (hereby leaving a vacuum as the prospect of the counter claim." The objector contends that the applicability of section 15 of the Court of Appeal Act was not raised in the court below and was not considered in the decision. That this court would therefore have the competence to do what the Court of Appeal ought to have done.

I am at one with the contentions of the learned counsel for the appellant that the objection is misconceived in that with the court below holding that the counter-claim was not statute barred, the next line of action was the activation of the appellate court's power under section 15 of the Court of Appeal Act to see to ensuring that miscarriage of the justice was not permitted and the error made by the trial court, as in this case, had to be rectified in the interest of substantial justice. See *ADIO V. STATE* (1986) 2 WVLR (Pt. 24) 581 at 588; *Ucha v. ELECHI* (2012) 13 WVLR (Pt. 1317) 330 at 362; *AJUWON V. ADEOTI* (1990; 3 SC (Pt. 11) 76 at 87; (1990) 2 WVLR (Pt. 132) 271.

This preliminary objection clearly is misconceived and based on the objector's founding same on mere classifications of grounds of appeal, whether of law or mixed law and facts are insufficient to vitiate an appeal that is otherwise valid and within what is required to cloth a court, trial or appellate with jurisdiction, as well set out in the

case of: MADUKOLU V. NKEMDILIM (1962) NSCC 374 at 379; (1962) 2 SCNLR 341.

Before discuss of those portions of the record. I shall make some observations on jurisdiction and the competence of court. Put briefly, a court is competent when -

1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another: and
2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
3. The case comes before the court initiated by due process of law. and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nudity however well conducted and decided; the defect is extrinsic to the adjudication.

Clearly this appeal is valid and the grounds need no leave to be sought and obtained first before the competence of the appeal can be assured. Therefore, the preliminary objection lacking merit is dismissed.

MAIN APPEAL

The issues as identified by the 1st - 3rd respondents seem to me easier to utilise thought they are in content the same as those crafted ; by the appellant and so I shall use those of 1st - 3rd respondents.

ISSUES I & 2

Whether the learned Justices of the Court of Appeal were right when they struck out issues I and 2 raised by the appellant on the basis of issue estoppel.

Whether the learned Justices of the Court of Appeal were not in error when they failed to exercise their power under section 15 of the Court of Appeal Act to make consequential order (s) based on the evidence on record in support of the counter-claims having held that the counter claim was not statute barred.

Lawal-Rabana. SAN of counsel for the appellant submitted that the lead judgment of the Court of Appeal did not give any reason for striking out the two grounds and issues complained of but merely drew a dichotomy between issue estoppels and estoppel per REM

JUDICATAM without any explanation of how this dichotomy affected the issues before that court. That this decision had occasioned a miscarriage of justice and impaired the constitutional RIGHT OF APPEAL of the appellant which is sacred. He cited MOHAMMED V. OLAWUNMI (1993) 4 NWLR (Pt. 287) 254 at 279 etc.

That the consequences of the inconsistencies of the Court of , Appeal on the position on the two appeals i.e. CA/I/71/2012 and CA/IL/71A/2012 should not be meted on the appellant who honestly believed that the Court of Appeal's position that since the two appeals were filed on different grounds, they should be determined separately, only for that court to refuse to determine the appellant's appeals based on the judgment in the 1st- 3rd respondent's appeal. That the process of court ought not to be used as a mercenary of fraud or deceit. He relied on Gbadamosi v. AKINLOYE (2013) 15 NWLR (Pt. 1378) 455 at 478.

Learned counsel for the appellant contended that the Court of Appeal was bound to consider the material and important issues in controversy before them that is whether or not exhibit J was H J made in conformity with the prevailing Native Law and Custom. and whether or not exhibit J should be set aside having not been made in conformity with the prevailing Native Law and Custom. That the court below after acknowledging the fact that a counter claim independent of the main claims must be determined on its own merit and that this is the same for the cross-appeal. He cited A.I.B. v. I.D.S. Ltd. (2012) 17 NWLR (Pt.1328) 1 at 45; Ewo , Ani (2004) 3 NWLR (Pt. 861) 610 at 631. That the. court below having explained the law rightly failed to apply the law to the circumstances before them. He referred to Best (Nig.) Ltd. v. H. (Nig.) Ltd. (2011) 15 NWLR (Pt. 1239) 95 at 122-123; Tunbi, v.Opawole (2000) 2 NWLR (Pt. 644) 275.

The learned senior advocate for the appellant submitted that the trial court found as a fact that the Anilelerin Ruling House-had monopolized the Olofa of Offa throne to the exclusion of the Olugbense Ruling House since the demise of Oba Olugbense in 1789 but apparently frustrated by what he considered unfair monopoly and sought refuge in exhibit J to restore their eligibility to the throne though not by rotation. That the finding of fact becomes binding since it was not appealed against, let alone set aside by the court of Appeal. He cited Adeyeye v. The State (2013) 11 NWLR (Pt. 1364) 47 at 84; Okwaranonobi v. Mbadugha (2013) 17 NWLR (Pt. 1383) 255 at 273; Nwaogu v. Atuma (2013) 11 NWLR (Pt.1364)117 at 158 - 159.

Contending for the appellant, learned senior counsel stated that the court below merely found that the counter claims were not statute barred but did not make any consequential orders, even though all the materials to empower them to make such orders were on Record before them. He said the court below ought to have exercised the powers under section 15 of the Court of Appeal Act and so with that failure this court should utilize its powers under section 22 of the Supreme Court Act. He cited *Ugwu v. State* (2013) 4NWLR(Pt. 1343) 172 at 187 and 188; *Ezeigwe v. Nwawulu* (2010) 4 NWLR (Pt. 1183) 159; *Alawiye v. Ogunsanya* (2013) 5 NWLR (Pt. 1348) 570 at 608 - 610; *Aghakoba v. INEC* (2008) 18 NWLR (Pt. 1119)489.

Lawal-Rabana, SAN submitted that 8th and 9th respondents did not file a defence to the counter claim nor contest the same at the trial court or court below and so it should be taken that they conceded and admitted the counterclaims and so both courts below were found to act upon the admission. He cited *Maobison inter-Link Ltd. v. U.T.C. (Nig.) Plc* (2013) 9 NWLR (Pt.1359) 197 at 209; *UBN Plc v. Dawodu* (2003) 4 NWLR (Pt. 810) 287 at 300.

For the 1st - 3rd respondents. John Olusola Baiyeshea, SAN and the 4th – 7th respondents who were co-appellants at the lower court have not appealed against the above decisions of the lower court which is to stand by their earlier decision in CA/IL/71/2012 and that the decision of the Court of Appeal still subsists and binding on all and sundry in this case and the Supreme Court has no vires to disturb the findings of the lower court, same having not been appealed against. He cited *S.P.D.C.N. v. Edamkue* (2009) 14 NWLR (Pt. 1160) 1 at 27 etc. That the appeal of the appellant herein is an exercise in futility in that the decision of the trial court still stands and holding otherwise would amount to an academic exercise which is left for the academia and not the court. He referred to *Iyoho v. E.P.E. Effiong Esq. & Anor.* (2007) 4 SCNJ 414 at 429-430; (2007) 11 NWLR (Pt. 1044) 31.

Learned senior counsel for the respondents contended that this is not the circumstance contemplated under section 15 of the Court of Appeal Act and section 22 of the Supreme Court Act, wherein the lower court and the Supreme Court are empowered to invoke the powers of the trial court. That none of the parties before the court addressed the lower court on the propriety or otherwise of the invocation of section 15 of the Court of Appeal Act and doing so will run contrary to the provision of section 3b of the 1999 Constitution as all parties must be heard. He cited *Kraus thompson Org. Ltd. v.*

University of Calabar (2004) All FWLR (Pt. 209) 11-18 at 1165; (2004) 9 NWLR (Pt. 879) 631.

In a nutshell, the appellants contend that it is within the powers of this court to do that which the lower court failed to do pursuant to their statutory powers and the exercise of this power will cure the vacuum and miscarriage of justice caused by the lower court. That to apply section 22 of the Supreme Court to reconsider ground. 1 and 2 and issues 1 and 2 struck out by the lower court and review (the evidence and submissions in support, of the counter-claims).

Respondent counters by stating that the appellant failed to show any miscarriage of justice done in this case by the lower court justifying the application of the either section 15 of the Court of Appeal Act section 22 of the Supreme Court Act and in the end for the appeal to be dismissed.

For a clearer view, I shall recast the provision of section 15 of the Court of Appeal Act hereunder:

Section 15 Court of Appeal Act provide thus -

"The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal .and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction."

The provisions of the Supreme Court Act, section 22 which is called to be applied herein stated thus:

"The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the

appeal, and may amend any defect or error in the record of appeal, and direct the court below to inquire into and certify its finding on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

The learned trial Judge had this to say on the counter claim as follows:

"On the 1st to 5th defendants' counter-claim. The claimants' counsel urged me to dismiss the counter claim as it is statute barred. On exhibit "J" made since 1970 as is it late to do so. I have already pronounced on the two ruling houses the defendant cannot pick and choose which of the documents to follow. Both the one favourable and unfavourable must be looked into. To that extent. I agree with the claimants counsel on recognition of two ruling houses as declared in 1970.

Exhibit "J" declaration the defendants cannot be heard to say that they will continue to monopolize till kingdom come that only their ruling house exists, it is not done, it is mere rhetoric and absolutely unjustifiable and so declaration number 2. 3 and 4 of the 1st to 4th defendants does not hold water, it cannot stand. Nos. 2, 3, and 4 declaration do not stand. 2. 3. and 4 cannot stand in light of overwhelming evidence given by the claimants' in support of recognition of the two ruling houses."

"Although I agree that cause of action on limitation is calculated from the period, the cause of action accrues. Besides, exhibit J was not challenged (several) 40 years ago. See Alhaji Bello Nasir v. Civil Service Commission, Kano State (2010) 2 SCNJ 164 at 189: (2010) 6 NWLR (Pt. 1190) 253 rightly and appositely cited by the claimants counsel. See Public Officers Protection Law, Cap. 111. Laws of Northern Nigeria 1965.

The counter claim of the defendants cannot stand to that extent of being statute barred. Accordingly. I dismissed the counter claim of the 1st , 5th defendants."

On appeal, the court below took a different channel and stated see pages 1586 - 1587 of the record:

"This appeal No. CA/IL/71 A/2012 which was filed along with CA/IL/71/2012, was not taken together. Though, there was an application to consolidate same, that prayer was never granted, hence the reason why this present appeal is heard by a different panel.

A counter-claim is essentially an independent action. It does not have to relate to plaintiff's claim or arise out of the same transaction. See *Effiom v. Ironbar* (2000) 11 NWLR (Pt. 678) 344 at 347. Most undoubtedly a counter-claim, by the very distinctive nature thereof, is not merely a defence to the claim of the plaintiff, but rather it is substantially a cross-action. See *Oragbaide v. Onitiju* (1962) 1 All NLR 32 at 36; (1992) 1 SCNLR 70. The practice of counter-claim after a suit had been instituted against a defendant is governed by the same reason that informs the practice of consolidation of suits. A counter-claim is to all intents and purposes a distinct and independent action although the defendant may for the sake of convenience and speed incorporate it in the statement of defence thereof. See *Ogbonna v. A.-G., Imo State* (1992) 1 NWLR (Pt. 220) 647 at 675; *Odunsi v. Bamgbala* (1995) 5 SCNJ 276 at 286; (1995) 1 NWLR (Pt. 374) 641 and *Dabpu v. Kolo* (1993) 12 SCNJ 1 ; (1993) 9 NWLR (Pt. 317) 254."

The Court of Appeal arriving at the decision that the Counter claim was not statute barred left it at that without utilizing its powers under section 15 of the Court of Appeal Act to make findings on the counter claim whether established or not and also failed to make any consequential orders thereto having found that the counter claim was extant, a situation well borne out by the record. This is so in view of the fact that a counter claim is separate and independent of the main claims and must be determined on its own merit as obtains in a cross-appeal. See *Onuoha v. Okafor* (1983) 8 SC 52. (1983) 2 SCNLR 244; *Animashaun v. Ojojo* (1990) 6 NWLR (Pt. 154) 111.

Indeed, the matter of the applicability of section 15 of the Court of Appeal Act became all the more poignant in the crucial and fundamental issue of whether or not exhibit J was made in conformity with the prevailing native law and custom of the Offa people and if not, then whether there was no need to set it aside. Of emphasis is the fact that exhibit J is the Kwara State Government Gazette of 1970 which recognized the Olugbense House as a Ruling House while exhibit DFC2, the Report of Sawyer's Commission of Enquiry which showed the extinction of the Olugbense right to rule in view of the enduring right of the female line of Anilelerin House.

To underscore the necessity for the Court of Appeal not to have held back its hand in the consideration of the counter claim after finding and deciding that it was extant, valid and not statute barred, it is to be said that the right to justice of the counter-claimants thereby enured and the redress they sought ought to have been given the due deliberation and the court decide either way in the substance of justice and the ensuring that the miscarriage of justice that came out when the trial court ruled that the counter claim was statute barred was given the adequate remediation. I am strengthened in this view having followed in the footsteps of the case of: *Best (Nig.) Ltd. v. B. H. (Nig.) Ltd.* (2011) 5 NWLR (Pt. 1239) 95 at 122-123. A - C, where this court held:

“ I should state it right away that the court below goofed by not considering the cross-appeal of the cross appellant. Irrespective of the decision reached in the main appeal, the court below had an abiding duty to consider the cross-appeal and pronounce on the propriety or otherwise of the same. The court below erred when it failed to consider arguments urged upon it in respect of the cross-appellant's appeal. See *AMORC v. Awoniyi* (supra). Such a goof as precipitated by the omission to pronounce on the cross-appeal, led to a breach of the appellant's right to fair hearing as enshrined in section 35(1) of the 1999 Constitution. See *Tunbi v. Opawole* (supra) at 288. paras. G-H where Ayoola, JSC pronounced as follows:

"When such argument has been presented and submissions made, the tribunal should not come to a decision without consideration of the arguments and submissions. A party cannot be said to have been given his right of fair hearing, when his arguments have been shut out from consideration albeit by mistake." In short, it must be stated in clear terms that the oversight of the court below in not considering the cross-appeal is improper and prejudicial to the cross-appellant....

The sum of N75, 000.00 which was awarded by the trial court based on an unenforceable contract naturally collapsed. It must be wiped out vide the full powers of this court vide section 22 of the Supreme Court Act. It is the duty of the Court of Appeal to consider issues properly raised in the grounds of appeal before it. Where this had not been done, as herein, this court can, notwithstanding the fact that the court below has not made any pronouncement, consider the ground of law or facts so raised. Refer to *Ukwunnenyi v. The State* (1989) 4 NWLR (Pt. 114) 131 at 141".

In line with the foregoing, the Court of Appeal having failed to do the needful within its powers under section 15 of the Court of Appeal Act, this court is impelled to redress the anomaly by the use of section 22 of the Supreme Court Act to give effect to the constitutional right of appeal of the counter-claimants/appellants and determine the two issues which had been competently raised before the court below so as to avert a further miscarriage of justice. To be noted is that the counter claim had been heard on the merit by the trial court which made some findings of fact to the effect that the Anilelerin House had monopolized the Olofa of Offa Throne to the exclusion of the 1st – 3rd respondents Olugbense Family. That court of first instance however after that findings ruled that the counter claim was statute barred and so nothing came out of it.

The Sawyer Commission of Enquiry report, exhibit DFC2. The salient part thereof being the conclusion wherein that panel slated thus:

"Historically, there was only one ruling house from the Olofagangan the founder of Offa. The second ruling house which is ended a branch of the descendant of Olofagangan was established after the death of Olugbense as the female line, since the death of Olugbense the female line had successively occupied the stool of the Olofa except in two doubtful cases from the male line. The conclusion is of the opinion that the male line is defunct thereby leaving only one ruling house namely, the Omo Anilelerin ruling house. At the end, the commission member signed.

Signed Mr. O. O. Sawyer Chairman

Signed Mr. A. B. Osheidu Member

Signed Mr. David Balogun Member/Secretary"

The said courier claim of the appellants is recast below as follows:

- (a) A declaration that the only Ruling House that exists in Offa for the purposes of appointing an Olofa of Offa is the Anilelerin Ruling House.
- (b) A declaration that the Kwara State Government Gazette No. II Vol. 4 of 12th March 1970 and any other Notices as it recognizes Olugbense as a Ruling House in Offa be

declared null and void as it is contrary to the History, custom and tradition of Offa on Offa Chieftaincy.

- (c) An order of perpetual injunction restraining the 6th and 7th defendants from treating and or recognizing the Olugbense Ruling House as a Ruling House that have a right to the chieftaincy title of Olofa of Offa.

A situation that needs be mentioned is the fact that there was no defence to this counter claim and this court had stated in such a circumstance as follows in the case of Maobison Inter-Link Ltd. v U.T.C (Nig.) Plc (2013) 9 NWLR (Pt. 1359) 197 at 209, C- F:

"It is necessary for a plaintiff to file and serve defense to a counter claim to join issues with the counter claimant, if the plaintiff fails to file a defence to properly traverse the material averment in the counter claim, then there will be no issues joined between the parties on the subject matter of the counter claim, and the allegations contained in the counter claim will be regarded as admitted." See also UBN Plc v.

Dawodu (2003) 4 NWLR (Pt. 810) 287 at 300, C.

In the final analysis, the counter claim having been made against the 8th – 9th respondents that is, the Attorney General and the Governor of Kwara State respectively who filed no defence thereto and therefore are taken to have admitted the counter claim leaving this court no option than to grant the said claims within its powers under section 22, Supreme Court Act, the court below having failed to use its powers pursuant to section 15 of the Court of Appeal Act. Therefore, I have no difficulty in setting aside exhibit 'J' as inapplicable to the case in hand as the matter of rotation between the two families of Olugbense and Anilelerin Houses had no supporting base being averse, to the extant custom of Offa people in the face of the valid native law and custom as found in the Report of Sawyer Commission of Enquiry. The full effect being a grant of all the reliefs in the counter claim of the appellant having been proved by credible evidence.

From the foregoing and the better articulated lead judgment. I allow the appeal and abide by the consequential orders made.
Cross-Appeal

This cross-appeal is anchored on the fact that the Court of Appeal overturned the decision of the trial court and held that the counter claim is not statute barred and that the cause of action arose in 2010. That the decision of the Court of Appeal is erroneous and occasioned a serious miscarriage of justice and so this court is called upon in this cross-appeal to correct the grave errors committed by the lower court in respect of the counter claim.

The cross-appeal formulated three issues for determination of this cross-appeal which are as follows:

1. Whether the cause of action in this case accrued in 2010 and not 1970 and, if the cause of action accrued in 1970, whether the case of the counter claimant/1st – 5th cross-respondents is not statute barred. (Grounds 2, 3, 5, 6, 7 of the cross-appellants' grounds of appeal).
2. Whether in view of the facts and circumstance of this case. (the lower court's decision that the counter-claim is not statute barred is just and equitable. (Ground 4 of the cross-appellant's grounds of appeal).
3. Whether the lower court was right in dismissing grounds 2, 3, 4 and 5 of the cross-appellant's preliminary objection. (Ground 1 of the cross-appellants 'grounds of appeal).

For the cross-appellant is contended by the learned senior counsel that the time a cause of action accrues is determined from the case of the plaintiff or the counterclaim as in this case and so it is the averments in the counter claim that must be considered and nothing else. He cited *Woherem v. Emereuwa* (2004) All FWLR (Pt.221)1570 at 1581; (2004)13 NWLR (Pt. 890) 398.

That the cause of action of the 1st- 5th cross respondents' case accrued in 1970 and not in 2010 which case is statute barred.

This cross-appeal had been in my humble view overtaken by the events of the main appeal and I dismiss it as it is an academic exercise. I abide by the consequential orders made.

SANUSI, J.S.C.: I had the advantage of perusing before now the judgment delivered by my learned brother. W. S. N. Onnoghen.

JSC. His lordship had ably and painstakingly dealt with all the salient issues raised in this appeal before arriving at the conclusion that this appeal is meritorious and deserves to be allowed while the cross-appeal is devoid of merit and should be dismissed. I agree entirely with the reasoning and conclusion arrived at in the leading judgment and adopt them as mine. I also allow the appeal and dismiss the cross appeal accordingly.

Appeal allowed.

Cross-appeal dismissed