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THE SYNERGY BETWEEN CUSTOMARY LAW ARBITRATION AND THE RULE OF OKOJO 11 v. BONSIE (1957) 1 WLR 1223 IN RESOLVING CONFLICTS

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Abstract

Customary Law Arbitration is one of the sources of arbitration law in Nigeria but is not regulated by the Arbitration and Conciliation Act of Nigeria, 2010, which concerns written agreements to arbitrate. This type of arbitration is still popular among the people in the villages and recognised by the courts. Customary Law Arbitration is an arbitration of dispute founded on voluntary submission of parties to the decision of the arbitrators who are either chiefs or elders of their communities on the agreement to be bound by such decision.[1]

Customary Law Arbitration is on African law jurisprudence and Common Law Arbitration is on English Law jurisprudence where proceedings and decisions are not normally recorded in writing.

Arbitration is consensual and basically attained by the parties on agreeing to surrender their differences to an umpire/arbitrator who would adjudicate and resolve the differences in a judicial manner in a way other than a court of competent jurisdiction. Arbitration is succinctly said to be the reference of a dispute or difference between two or more parties to be adjudicated in a judicial manner by person or persons other than a court of competent jurisdiction. Native Customary Law remains an important source of law in Nigeria. It governs mainly the matters of personal status except in the case of propositus who has elected the received English Law. Customs could be crucial in determining litigant's case or title to a disputed land, interest in chieftaincies, and other traditional titles.

Key Words: SYNERGY, CUSTOM, LAW, ARBITRATION, CONFLICT

1.0 Introduction

Arbitration is consensual and basically attained by the parties on agreeing to surrender their differences to an umpire/arbitrator who would adjudicate and resolve the differences in a judicial manner in a way other than a court of competent jurisdiction. Arbitration is succinctly said to be the reference of a dispute or difference between two or more parties to be adjudicated in a judicial manner by person or persons other than a court of competent jurisdiction. In Arbitration, there are many types of arbitration such as Customary Law Arbitration and Common Law Arbitration that are similar in type, with ;ittle differences. Custom is the culture, belief, arts, way of life and social organization of a particular country or group of people. It is also music, literature, thought as a group[2]. The social organization of a particular country or group of people is regulated by certain rules or regulations. In all human interactions, there must be conflicts associated with it and these differences are best settled or resolved through arbitration in a judicial manner which affords peace to the society. The resolution of these differences between the parties could be achieved by these parties agreeing and consenting to and submitting to arbitration before the elders and the chiefs of the town or village. The rights and the duties of parties to a customary marriage could be hinged upon the custom of both or either of the couple, One of the ways to establishing the existence of a rule of native custom is through witnesses who would narrate oral tradition passed on to them by their forefathers[3]. There is an exception

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[1] .Agu v. Ikewibe [1991] 3 NWL (Pt.180) 383 - 402

[2] Oxfords Advanced Learner's Dictionary, International Student's Edition, (Oxford University Press,8dn 2010) 157

[3] . Evidence Act of 2011 as amended section 19

against the rule of **hearsay** in the Nigerian Evidence Act[4], which is traditional history where opinions of the Chiefs, elders and other persons of authority on custom is relevant and admissible by the trial court. It means, that the court would admit the evidence based on these grounds as being substantive and procedural. The oral tradition which is beyond the living memory of the witness may be rendered. They are to prove the title to a disputed land[5], also to establish genealogy or pedigree[6]. Relevancy is considered when treating facts in issue as a matter of procedure and of proof on native customary law, which is a relevant fact[7] in issue.

1.01 THE Rule in OKOJO 11 v. BONSIE (1957) 1 WLR 1223

The rule in ***Kojo 11 v. Bonsie*[8]** is to the effect that where the there are two competing traditional histories with respect to the title to land, Chieftaincy, genealogy or pedigree[9] in dispute and the two parties are equally credible, the court will rely on the acts of recent possession within the living memory on the part of the parties as a test of which of the stories is more probable. The case under discussion involved a dispute over a title of to a certain land in the Kumasi district of Ashanti; traditional evidence was given by each party to support its claim that the land in dispute had been awarded to his ancestors as a reward for the part played by him in a war. The Supreme Court of the then Gold Coast (Land Court), affirmed by the West African Court of Appeal, reversed the decision of Asantehene's A Court and upheld the decision of the lower Asantehene's B Court in favour of the defendants on the ground, *inter alia,* that it was a decision of fact depending on the demeanour of the witness and almost inviolable on that account.

The case went further, on appeal to the Judicial Committee of the Privy Council, the decision of Ghanaian Supreme Court and the West African Court of Appeal was upheld. Nevertheless Lord Denning as he then stated that the rational and position of their Lordships at the appeal court levels, where he observed that

> "Their Lordships noticed that the judges in the Appeal Court who were in favour of upholding the decision of the Asanetene's B Court, did so on two grounds; first, that it was a decision of fact depending on demeanour of the witness and almost inviolable on that account … so far as the first ground was concerned, their Lordships do not think it was correct approach to the case. Their Lordships noticed that there was no dispute as to the primary fact, that is, the facts which witnesses actually observed with their own eyes or knew of their own knowledge in their own life time. The dispute was all as to traditional history which had been handed by the word of mouth from their forefathers. In this regard it must be recognised that in course of transmission from generation to generation, mistakes may occur without any dishonest motives whatsoever. Witness of the utmost veracity may speak honestly but erroneously as to what took place a hundred years or more ago. Where there is a conflict of traditional history one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeking which of the competing histories is the more probable.[10]"

However, Customary Law Arbitration is one of the sources of arbitration law in Nigeria but is not regulated by the Arbitration and Conciliation Act of Nigeria, 2010, which concerns written agreements to arbitrate. This type of arbitration is still popular among the people in the villages and recognised by the courts. Customary Law Arbitration is an arbitration of dispute founded

[4] . Evidence Act of 2011 as amended section. 37 (2) –

[5] ibid Evidence Act cap 112 LFN 1990 *s.45* see the case of Idundun & Ors v. Okumagba [1976] 1-10 SC. 227 251

[6] ibid Evidence Act of 2011 as amended Section 44(2)

[7]. Evidence Act, of 2011 as amended Sections .4, 7(a) – (e) 19

[8] . [1957] 1 WLR. 1223

[9]. *Ibid, Evidence Act s3 (i)(c) & (2)*

[10]. *(1957] 1 WLR p. 1223*

on voluntary submission of parties to the decision of the arbitrators who are either chiefs or elders of their communities and the agreement to be bound by such decision[11].
However, the subject matter of this case was a track of a forest land which both parties claimed to form part of a larger parcel of land given to them by the Bantamehene for their alleged respective roles in a certain Abrimoro war, some 200 years back. The Plaintiff's witnesses narrated traditional history to the effect that the 1st defendant caretaker of the Land was let into possession of the land through one kwabena Tenteng to whom the ancestors pledged the land only some 80 years ago. But the defendants narrated traditional history to the effect that the larger parcel of the land from Bonkwaso to the Supong River was given to the Odikro and his ancestors on whose behalf the 1st defendant caretaker and his ancestors had been collecting tributes, part of which was usually paid over to the Bantamehene. The Court found that, that was the position at the time of action and for sometimes past within the living memory. In applying the rule formulated in that case to the dispute, their Lordships, after reviewing the evidence relied on two events within living memory, which strengthened the case of the defendants and weakened that of the plaintiff. Firstly, not only have the defendants enjoyed the profits of the land without interruption for 80 years, four generations have passed during which no suggestion had been made that it was the subject of a pledge, as would have been expected of the Plaintiff's ancestors if his claim were true. Secondly, the Odikro had in 1919 in action of trespass to his land next to the Supong stream, a fact within the living memory which supports the defendant's traditional history to the effect that he did get the land as far forward as the Supong and weakened the Plaintiff's account that the defendant played no role in the Abrimoro war and was never compensated with any land gift.

1.02 Conflict as a Social Phenomenon

Sociologically, conflict is a phenomenon that is embedded in social, political, economical and psychological behaviours of man and cannot be totally eradicated from humans, rather it could be resolved, pacified, pampered or shelved in a given time and space for peace to reign. Therefore conflict could be defined as a situation in which people, group or countries are involved in a serious disagreement or arguments, a conflict between two cultures[12]. This work shall centre majorly on the disputes that are common within and between individuals, local persons and their localities and between the nationals of the same nation state. These disputes may arise from economical transactions, social events and contracts, marriages, land disputes and/or religious differences. These differences could be resolved by settlement through arbitration by the parties to such dispute resolving and consenting to surrender these differences to an umpire of their choice, who would be bound to render a binding award in a judicial manner as in the Courts of Law of the land. Our discussion on this kind of arbitration shall be under the auspices of Customary Law Arbitration and on the principle that such differences shall be one that could be settled under rule of **accord and satisfaction,** not criminal cases which could not be surrendered to an arbitral panel for adjudication as it is not within the jurisdiction of any Arbitral Panel.

2.0 Customary Law Arbitration

Customary Law Arbitration is on African law jurisprudence and Common Law Arbitration is on English Law jurisprudence where proceedings and decisions are not normally recorded in writing, even though they are recorded, they are still within the purview of customary law arbitration and Common law arbitration.
Customary Law Arbitration is one of the sources of arbitration law in Nigeria but is not regulated by the Arbitration and Conciliation Act of Nigeria, 2010, which concerns written agreements to arbitrate. This type of arbitration is still popular among the people in the villages and recognised by the courts. Customary Law Arbitration is an arbitration of dispute founded on voluntary submission of parties to the decision of the

[11] Agu v. Ikewibe (1991) 3 NWLR (pt. 180) 383 at p.407.
[12] Ibid 304

arbitrators who are either chiefs or elders of their communities and the agreement to be bound by such decision[13].

In ***Onyenge v. Ebere***[14] - the Supreme Court of Nigeria held that oath taking is a valid process under customary law for establishing the truth of a matter. In the case of ***Assampong v. Kweku Amaku & Ors***[15] - West African Court of Appeal held that where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held, which is in all fours with native law and custom and decision given, it is binding on the parties and the supreme court will enforce it. The supreme Court of Nigeria in the case of ***Duruka Eke & Ors v. Udeozor Okwaranyia Ors***[16] **-** enunciated four grounds and ingredients to be proved for a valid customary law arbitration namely:-

(i) Voluntary submission of the dispute to arbitration by the parties.

(ii) Agreement by the parties before hand to be bound by the decision or award of the arbitrator or arbitrators.

(iii) Constitution of the arbitral panel of a decision of the community.

(iv) Pronouncement by the arbitral panel of a decision or an award, which is final and unconditional.

In the case of ***Agu v. Ikewibe***[17] and ***Ohiaeri v. Akabueze***[18] - Supreme Court of Nigeria added two grounds or ingredients within which a valid customary law arbitration could be proved, namely :-

(v) That none of the parties would withdraw from the arbitration midstream and;

(vi) That none of the parties rejected the award immediately it was made.

From this judgment of the Supreme Court of Nigeria, it is clear that the validity of customary law arbitration could not be questioned and any award rendered under it, is valid. Where all the ingredients enunciated above are evident in the course of the arbitration and there are no other irregularities, procedurally or otherwise, the parties will be bound by the award rendered by the said customary law arbitral panel and none will be allowed to repudiate same because it does not favour it.

However, it shall be more emphatic to state, that the true and probable position of law is that a party to a arbitration agreement under customary law, cannot withdraw midstream and such were the decisions of the West African Court of Appeal, Federal Supreme Court and the High Courts, that a party to customary court law arbitration is not free to withdraw or reject the award where it does not favour him.

Once a party to arbitration proceedings under customary law, who relied on the same, pleads that the dispute was the subject of arbitration in accordance with customary law and that there was an award in his favour and that the party relies on the award to raise *estoppel* against the other party. It is enough and adequate, as it is so raised, the said party shall at the trial of the suit lead evidence to show that there was a valid arbitration by proving the existence of the necessary ingredients if need be[19]. Whether customary law arbitration award will operate as *estoppel per rem judicatam* or will sustain an issue *estoppel* will depend on the satisfactory evidence adduced by the applicant, whose duty it is to prove the necessary ingredients and where the award qualifies to operate as *estoppel per rem judicatam or issue estoppel*, the said party will be entitled to the plea[20].

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[13] Agu v. Ikewibe [1991] 3 NWLR (pt. 180) 383 at p.407

[14] [2004] 13 NWLR (pt.889) 20.24

[15] [1932] 1 WACA 192 221 per Deane C.J.

[16] [2001] 4 S.N.C.J 300

[17] [1991] 3 NWLR (pt. 180) 385 .407

[18] [2004]13 NWLR (pt. 889) 20 24 ratio 2

[19] Okere v, Nwoke [1991] 8 NWLR (Pt 209) 317

[20] Greg Nwakoby, '*The Law and Practice of Commercial Arbitration in Nigeria' Enugu:(The Iyke Ventures Production 2004).12*

2.01 Common Law Arbitration:

Common Law Arbitration is one of the sources of the Law of Arbitration in Nigeria as a received laws and its award is enforceable only by action at law. It has a similar characteristic with customary law arbitration. It arises from oral agreement between parties in respect of existing disputes but instead of Native law and custom, the English Common Law, applicable in Nigeria governs it, under received English law. Therefore a written agreement to arbitrate is exclusively governed by statute, while oral agreement are entirely regulated by the common law and continued to be known as submissions. An oral agreement to arbitrate remains so and must be treated as such, even if the award is in writing, or in deed under a seal[21].

Both Customary Law Arbitration and Common Law arbitration have similar characteristics, it may at times be necessary to decide whether a particular arbitration is customary or common law arbitration. It is expected that the courts would most probably have recourse to the rules which have been statutorily worked out to resolve internal conflicts between customary law arbitration and non - customary law arbitration that is English Law. The conflict would be resolved in favour of either of the two laws depending on the nationalities and the status of the parties, the nature and subject matter of the transaction (is the transaction known to customary law) the express or implied agreement of the parties, location and the place of entering into the contract[22].

2.02 Customary Law Arbitration and **Common Law Arbitration** proceedings and decisions are not normally recorded in writing. Oral arbitration is predominant to the African Natives in their common believe in the oath taking in resolving all kinds of disputes and differences amongst the parties in the absence of written or unwritten documents. The resulting arbitral award by the arbitrator or arbitrators are recognized and enforced by the courts as par with the judgment of the court, when all necessary ingredients are proved. Arbitration is the reference of a dispute or difference between two or more parties to be adjudicated in a judicial manner by person or persons other than a court of competent jurisdiction. In ***Ofomata v. Anoka***[18] - Arbitration was defined as the determination of dispute by the decision of persons called arbitrators, chosen or appointed in a recognized manner and agreed upon by the disputants. Arbitration on the other hand can be described as a consensual method of resolving dispute by two or more parties in a contract agreeing that, in the event of any dispute or difference, they will resort to one person or persons to consider the issue and make a decision either way[19].

Therefore, in all kinds of arbitration be it oral arbitration (customary and non - customary arbitration or statutory arbitration) the rule stands to be and mean, that parties involved must have an agreement to arbitrate and a clause for submission to arbitration, if orally made, it shall be proved in evidence and if in a written form by the parties to the arbitration, it shall be relied upon by the party in the cause of trial as a form of *estoppel.*

The Igbo's before time and before the advent of white man had embraced Justice as ordered by God in the Bible, which had a wonderful significant effect and binding on the people and affording permanent peace on them. These elders and chiefs do take oath of office by vaccinating their tongues to speak the truth always, which is known and called *"Isa Ile"* sometimes oath taking is adopted as a form of arbitration due to the common belief that if any one goes contrary or against the agreement upon the oath shall face a dare/terrible consequence of his/her action. This believe looks fetish to the English people but works for the Africans, see the case of ***Onyenge v. Ebere supra*** - where the Supreme Court of Nigeria held that oath taking is a valid process under customary law for establishing the truth of a matter. Arbitration had existed in much earlier times without records, as Africans do not believe in writing but their oral tradition which gave rise to the claim by the English people as being the source of arbitration.

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[21] Talbot v. Earl of Shrewsbury [1873] LR 16 EQ 26

[22] Greg Nwakoby, '*The Law and Practice of Commercial Arbitration in Nigeria' (ENUGU;The Iyke Ventures Production, , 2004).18*

[18] [1974] 4 ECSLR 251.253

[19] Bayo Ojo,' Lawyers in Arbitration paper delivered at NBA Annual Conference' (Abuja - Nigeria: 2000)

For example in Ogidi - Idemili North Local Government Area of Anambra State of Nigeria, the town of Chinua Achebe - the author of the "Things Fall Apart, the Customary Law Arbitration and Adjudication of the disputes were the duties of the Chiefs and Elders applying the age long culture and folklores to settle and resolve disputes in the way and style of their people as it is known to them.

Ogidi in those days was governed by the Ezeobodo, Elders, Chiefs, and the Age Grades Groups. It was their sole duty to settle dispute amongst sub - villagers by resolving conflicts between subjects by arbitration processes. With the advent of Igwe Okaa Kwochaka Amobi in 1904, the duties of Ezeobodo did not cease or stop, only that they performed the task with the approval and consent of the Igwe[23]. The Igbo society is an egalitarian/republican in nature. There was nothing like an overall crowned leader. The whole village meet at the village square to discuss and deliberate on disputes and matters affecting them and thereafter render an award, which settles the dispute.

3.0 The Synergy between Customary Law Arbitration and the Rule of *KOJO 11 V. BONSIE (1957) 1 WLR 1223(1957) 1 WLR 1223*

Synergy is a benefit resulting from combing different groups, people, objects or processes to the advantage of the society.

Customary Law Arbitration is on African Law Jurisprudence and it's been on existence before the arrival of the white man and the missionaries in Africa. Arbitration started with the black people or the African nation, who then were unable to keep written documents and or recorded history.

The Customary Law Arbitration is by the elders and the Chiefs who are the custodian of the native law and custom and the traditional history of their people and their communities. They settle the disputes between their people at the village square, as the parties agree to be bound by the decision of these chiefs and elders. See the case of ***Assampong v. Kweku Amaku & ors, supra[24]*** **-** WACA held that where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held, which is in all fours with native law and custom and decision given is binding on the parties and the Supreme Court will enforce it. See the case of ***Duruka Eke & Ors v. Udeozor Okwaranyia Ors[25]*** **-** enunciated four grounds and ingredients to be proved for a valid customary law arbitration namely:-

(i) Voluntary submission of the dispute to arbitration by the parties.

(ii) Agreement by the parties before hand to be bound by the decision or award of the arbitrator or arbitrators.

(iii) Constitution of the arbitral panel of a decision of the community.

(iv) Pronouncement by the arbitral panel of a decision or an award, which is final and unconditional.

In the case of ***Agu v. Ikewibe[26]*** and ***Ohiaeri v. Akabueze[27]*** **-** Supreme Court of Nigeria added two grounds or ingredients within which a valid customary law arbitration could be proved, namely :-

(v) That none of the parties would withdraw from the arbitration midstream and;

(vi) That none of the parties rejected the award immediately it was made.

In the rule of ***Kojo 11 v. Bonsie supra[28],*** the case was centred on traditional history of the parties and the court relied on the recent custom known and which is within the living memory. This traditional history was

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[23] Obi Chukwugozie Remigius, 'Ana Ogidi - The History of Ogidi' (,Ogunike - Anambra State: Newspapers & Co. Publications. Amala House St Monica's Road,Ogunike - Anambra State 1st ed, 1996).77

[24] [1932] 1 WACA 192. 221 per Deane CJ.

[25] [2001] 4 S.N.C.J 300

[26] *[1991] 3 NWLR (Pt. 180) 385 407*

[27] *[2004] 13 NWLR (Pt. 889) 20 24 ratio 2*.

[28]. [*1957] 1 WLR 1223(1957) 1 WLR 122*

handed down by the ancestors, elders and the Chiefs of the communities so concerned of many generations. The Court relied upon the defendant's traditional history that was in all fours within the living memory as being the probable evidence of the custom of the people based on their law and custom.

It is known that customary law award in all ramification must be ventilated and verified by the court to know the truism and whether it was conducted in a judicial manner, by observing all the tenets of natural justice; like ***Nemo Judex in causa sua***- as to meaning that no person shall be a judge in his own case, the rule of ***audi alteram partem*** – as to the meaning that both parties and witnesses were given equal hearing and chances to adduce and advance their case before the arbitral panel, all cumulating into fair hearing of the case before the arbitrators.

The rule of Kojo 11 v. Bonsie supra as it is related to Chieftaincy matters and the Land Cases and/or disputes

The Rule as it relates to Chieftaincy Matters

The rule relating to traditional history shall apply where two parties to Chieftaincy or land cases/dispute plead traditional history and led evidence in accordance with their pleadings at the trial. Hence there are two competing traditional histories on the same subject matter between the plaintiff and the defendant[29]. When the parties gave evidence on the same subject matter, there must be conflict. It is now a duty of the arbitral panel/ court to find out a way round these conflicting traditional histories, hence the rule of ***KOJO 11 V. BONSIE*** supra was devised to solve the problem.

The Court of Appeal Court and the Supreme Court applied the said rule in this case, the court of first instance did not address the issue of the propriety of its' extension to Chieftaincy disputes. This issue was taken up by the Court of Appeal in the more recent case of ***Ajagunbade 111 v. Laniyi***[30] - the facts were that the respondents sued the appellants at the High Court of Ogbomosho seeking a declaration that the installation of the second appellant as Chief Alapa of Ogbomosho was *ultra vires*, illegal and of no effect, and an injunction restraining the 2nd appellant from further parading himself as Chief Alapa. The respondents backed up their claim with traditional history of the line of succession to Chieftaincy. The appellants too relied on traditional history of their ancestors to establish heir claim. In other words, the contestants each gave historical account of their entitlement to the Chieftaincy. The trial Court found that there was a conflict in the traditional history adduced by the parties in the chieftaincy suit, therefore proceeded to apply the rule in ***kojo II v. Bonsie*** by having recourse to facts in recent years to determine which of the version is more probable. On appeal the appellants attacked the application of ***Kojo II v. Bonsie*** on the ground that the principle is only applicable in land cases.

In dismissing the appellants' argument and upholding the trial judge's position, the Court of Appeal held that the rule in ***Kojo II v Bonsie*** whuch states that in resolving conflict in the traditional histories relied upon by contending parties in an action, evidence of facts in recent years can be used to test which version of the story is more probable, is applicable generally to situations where the parties rely on inconclusive traditional history and is not limited to land cases.[31]. In the words of Onalaja J.C.A who delivered the leading judgment, he stated as follows: "that my understanding is that law is a social engineer within principles laid down to guide the Court in its application of the *ratio decidendi* in a case as guide to apply the principle to facts and circumstances of each case. The emphasis was on traditional history which is not limited to strict and straight jacket of land cases. Traditional history play important and significant role in succession cases, customary law, which is the law to be applicable, must not be contrary or repugnant to natural justice equity and good conscience. Law being a social engineer is not static but grows and develops as society develops, so "I am in agreement with the learned trial judge that ***Kojo II v. Bonsie*** is applicable generally to situation where the parties rely on inconclusive traditional history and not limited to land cases alone but to cases in which there is conflict in the traditional history relied upon by the parties."

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[29] . *Eze v Atasie [2000] 3 WRN 76 82 per Adamu JCA 138 – 139, see also Justice Uwaifo JSC*

[30]. [1999] 13 NWLR (Pt 633) 92

[31] Supra 109-110

In the concurring words of **Olanrewaju J.C.A,** he stated that I share the view of my learned brother that the principle in the Privy Council's decision in ***Kojo II v Bonsie*** (1957) 1 WLR 1223, 1226, has over the years been assimilated as part of our law in land matters which posits that, in resolving conflict in the traditional histories relied upon by contending parties in an action, evidence of facts in recent years can be used to test which version of the story is more probable…

The application of that principle to chieftaincy matters is an important plank of the appellant's case in this appeal who contended that the principle is limited to land matters and that its application by the learned trial judge to the present case resolves the question of the traditional history of which family between the parties is entitled to the vacant stool of Alapa of Ogbomosho is erroneous.

I cannot find a direct authority on the matter nor could the learned trial judge find any part from two decisions of his court copies of which are not available to us. Thus, there is no precedence to guide this court on what appears to be a grey area of the law and recourse has had to be analytical deduction. With the lacuna which stared this Court in the face over a point in which a decision must be taken, I find particularly innovative and refreshing the extension, by the leading judgment of the principle in ***Kojo II v Bonsie*****, supra,** "to kindred other cases" in which there is conflict in the traditional history relied upon by the parties, in this particular case to chieftaincy matters.[32]

The Supreme Court in the case of ***Olanrewaju v. Gov. of Oyo State***[33], where the Apex court clearly and positively applied the rule of ***kojo II v. Bonsie,*** supra, and consequently disturbed a perverse finding of fact by a trial court in a Chieftaincy case. The Court of Appeal and the Supreme Court had applied the rule in the earlier case without addressing the question of the propriety on the application of Chieftaincy disputes because that issue was not raised by counsel to the plaintiff who lost in both courts and had a favorable trial court judgment reversed. The fact that the rule was in fact applied to reverse a decision of the trial court forecloses any suggestion that the two apex courts did not advert their minds to the propriety of its application to Chieftaincies and other disputes.

The Court of Appeal equally applied in ***Kojo II v Bonsie.supra in the*** case of ***Daramola v. Attorney General of Ondo State***[34] ***r***e-emphasized the application of the principle in ***kojo II v. Bonsie supra,*** to chieftaincy matter. The trial Court had stated that the conflict in the traditional evidence of both parties was irreconcilable and had simply adopted the position of the head of the **Arojojoye** ruling house. The Court of Appeal however held that the conflict is not irreconcilable and that this approach was an abdication, on the trial judge's part, on his constitutional duty to determine the dispute. In the words of Onnogben JCA who delivered the leading judgment (and with whom **Okunola** and **Amaizu J.C.A** concurred):

The Court therefore found the following facts supportive of the plaintiff/ Appellants version and consequently reversed the trial court decision:

(1) The fact that both parties agree that Eiyebiokin who the plaintiff claimed to be the father of their progenitor was an Ajero, whereas the defendant who contended that their progenitor was not his first son did not name who Eiyebiokin's first son was the Plaintiff were also able to explain away the fact that their progenitor never became Ajero by showing that before the Morgan Commission, the first sons were not allowed to ascend the throne.

(2) The Plaintiff memberships of an Ajero ruling house was held out by some recent events, such as the fact that:
   - Several princely titles were held by descendants of their progenitor, which the defendants admitted.
   - The plaintiff's Akata family members held farmlands within royal land exclusively reserved for members of the ruling houses of Ajero.

3.02 The Rule as it relates to Land Matters

[32] . Supra 115

[33] [1999] 13 NWLR (Pt .633) 92

[34] [2000] WRN 120

The rule of ***Kojo II v. Bonsie***, supra, also relates to land matters in resolving the conflict of traditional history - In the case of Adeosun v. Jibesin[35] the court summarized the conditions upon which the above rule would apply to conflicts in traditional history pleaded/evidenced in land matters as follows:

- There must exist two stories of traditional history one by each party which are themselves credible or plausible, but are in conflict with the other so that the court is unable realistically and justifiably to prefer one to the other.
- In that case, either of two stories may rightly be regarded as likely to be true or that they are probable.
- It follows that none of the stories in that situation is arbitrarily rejected but each one is tested against recent act of possession and ownership to determine which of the two stories are more probable.

Justice Adamu in his judgment and in analyzing the rule in ***Kojo II v. Bonsie*** also stated that, both parties pleaded traditional history. The evidence adduced in proof thereof show that their root of title was sharply different as they claimed, under two different ancestors or original owners of the land. In such circumstances, it can be said that the traditional histories of the parties being conflicting were consequently inconclusive. Thus there was doubt as to which of the versions was more probable than the other. This is where the rule in ***Kojo II v. Bonsie*** (1957) I WLR 1223 comes into play and the trial judge will be required to apply it in order to resolve the conflict in the traditional histories adduced, to refer to evidence of acts of possession or ownership in recent years by the parties in choosing which of the versions is more probable and should consequently be accepted.[36]

It was also held that where the trial court properly applied the rule in resolving the conflict his failure to specifically mention that he was relying on the principle will not affect the validity of his decision on appeal.[37]

Also, the mere fact that the trial judge said he disbelieved the evidence of one party and believed the evidence of the other party is not sufficient to conclude that he did not have regard to the requirement of testing the traditional histories against acts of recent possession. Where, in spite of the usage of such phrases as "I believe the witness" or I found the witness to be a witness of the truth" in describing the evidence of one party, the trial judge actually evaluated both traditional histories and tested them against recent acts of possession, a finding in favour of that party will not, on appeal, be overruled on the account that the judge relied on witnesses' demeanour.

In **Obioha *v Duru*,[38]** the appellants had appealed against the decision of the trial Court which accepted the respondents traditional evidence in proof of title to the disputed land on the ground that the trial judge did not test the competing traditional evidence against recent acts and events as is required by the rule in ***Kojo II v. Bonsie, supra.*** The counsel to the appellants referred to several passages in the trial Court judgment where the Court had said

- "I must say the 1st Plaintiff impressed me as a witness of truth"
- "I believe the evidence that the defendants and their wives cultivate the land by authority of the Plaintiffs"
- "I disbelieve this evidence" (the evidence being that of the defendants/appellants) "I believe the plaintiffs". e.t.c.

The appellant appealed against the decision of the Court of Appeal upholding the judgment of the trial court on grounds ***inter-alia*** that the Court of Appeal was wrong in affirming the judgment of the trial court when the trial judge did not properly direct himself on the proper approach to be adopted in law where there are conflicts in traditional evidence adduced by the parties.

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[35] [2001] 14 W.R.N 106.(C.A)

[36] *Eze v Atasie [2000] 9W.R.N 76.82.*per Adamu J.C.A.138-139 see also Uwaifo J.S.C

[37] *Adesoun v Jibesin,[supra] per, Adamu J C A at 306-307.*

[38] [1994] 8 NWLR (Pt.365) 631.

In rejecting appellant counsel's submissions and affirming the decision of the Court of Appeal, the Supreme Court after reviewing the evidence and the judgment of the trial court, found that the decision of the trial court was actually based on several contradictions in the evidence of defendant's witnesses as reviewed by the trial judge which strengthened the case of the plaintiff. The Learned trial judge after highlighting these inconsistencies, most of which relate to recent acts of possession which did not support the defendant's traditional evidence said: "Having given very anxious considerations to the evidence on both sides, I found the evidence of traditional history by Plaintiffs more probable. It is straight forward and indeed more convincing and I have no difficulty in believing the Plaintiffs."In affirming the judgment of the trial court the learned justices of the Court of Appeal had held that

> "The learned trial judge carefully evaluated the evidence led, made deductions there from and gave reasons for such deductions. *He did not solely depend on the demeanour of the witnesses to arrive at his conclusion*. There is nothing however inherently wrong with the use of such expressions as believe this" or "I believe that", or I watched his demeanour and impressed me as a witness of truth" where it can be shown, as in this case, that the learned trial judge actually evaluated the evidence of the witnesses who testified before him".

Justice Onu, who delivered the leading judgment of the Supreme Court therefore held that, "the learned trial judge, in my view appreciated the nature of the traditional evidence, had carefully evaluated it, made deductions thereof (Sic) and gave reasons or arriving at the conclusions he did, he cannot in my view be faulted"[39] For the rule to apply, the evidence adduced by the two parties to a dispute must be plausible. If there is internal or intrinsic conflict in either or both, the principle will not arise and the Judge will be entitled to treat the evidence in the ordinary way and reject one or both histories as the case may be.[40] The role of the judge in this situation therefore is to place the competing histories on the usual imaginary scale and determine whether the balance tilts towards one side or the other. Where the court finds the story of one side more satisfactory, or that it reveals a settled ancestral devolution of the land in dispute, a trial court will accept it and there would be no recourse to the rule in ***Kojo II v Bonsie.***

However, a judge must be careful when applying the rule ***Kojo II v Bonsie.*** The rule must be followed strictly as laid down and the judge is not allowed to resort to comparison of traditional histories of the parties in dispute in order to determine which is more plausible.

In the case of Ejebu v Okoko,[41] the trial judge in attempting to lay a proper test to see which of the two traditional histories in the case is more probable proceeded to compare the version of the respondents' evidence with the version of the appellant's. In the course of his comparison, he speculated on what ought to be the history of the root of title of the appellants without confining himself to the history as pleaded based on this comparison, he held, that

> "On comparison of the two competing histories of the parties, I am inclined to prefer the claim of the plaintiff that they were the earlier settlers of the land in dispute. The plaintiffs' evidence of traditional history appears to me stronger than that of the defendant because of the reasons which I highlighted in the preceding paragraphs above"[42].

The Court of Appeal held that the learned trial judge had departed from all well-known principles and decided cases of the Supreme Court by adopting a rather inappropriate method to test the competing version of traditional history or evidence to ascertain which was more probable than the other. The Court then went further to restate the rule in ***Kojo II v Bonsie*** that[43]. "The best way to test the traditional history is by reference to acts in recent years as established by evidence and seeing which of the two competing histories is more probable.

It is known that customary law is still prominent in Nigeria as a country in such areas of law of personal status as succession, marriage, and legitimacy, etc. The Court of Appeal and the Supreme Court of Nigeria

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[39] Supra at 60-61

[40] See Biariko v Edeh – Ogwuike (2001) 20 WRN 1at 27-28, per Uwaifo

[41] [2001)] 44 WRN.141

[42] Per Nsofor J.C.A 154-155

[43] [2000] 21 W.R.N 41

accepted the rule of ***Kojo 11 v. Bonsie, supra*** and extended its application to other cases, where the unresolved conflict of traditional history evidence is acceptable.

4.0 CONCLUSION AND RECOMMENDATION

Customary Law Arbitration primarily borders on native law and custom of the local people and their ways of life. The elders and the Chiefs used to take oath of office to be of good behaviour and not to tell lies and to refuse kick back, at any time and especially when in arbitral tribunal and arbitrating for the good and piece of the land. These elders could decree oath taking on the parties before them while rendering an award, in other to resolve a dispute. The age long traditional history could be ventilated and stated in their evidence before the Chiefs and the Elders. They could resolve any dispute when traditional history is given in evidence, in line with the rule in the case of ***Kojo 11 v. Bonsie, supra,*** through and in line with the said case by resolving the conflict by evidence of most recent event known in the living memory. I recommend that this well known rule be further received and accommodated in our Customary Law jurisprudence.

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