

Customary Court of Appeal in Nigeria: Focus on the Jurisdiction

By

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Introduction

Section 245 (1) of the Constitution of the Federal Republic of Nigeria, 1979 hereinafter referred to as Constitution provides:

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

Some States have availed themselves of the advantages of the above provision to establish the court in their States. Such States are Plateau, Edo, Delta, Imo and Abia. It has also been established at the Federal Capital Territory (F.C.T) Abuja. Arrangements for the establishment of the court in some other States of the Federation have reached advanced stages

The Customary Court of Appeal has been classified by section 6 (3) of the Constitution as one of six superior courts of record in Nigeria. Others are the Supreme Court, Court of Appeal, Federal High Court, High Court of a State and Sharia Court of Appeal of a State.

Jurisdiction

The jurisdiction of the Customary Court of Appeal has been spelt out in section 247 (1) of the Constitution. It provides:

“A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.”

The actual interpretations of the above provisions have continued to receive the attention of the Supreme Court, the apex court in Nigeria.

The first attempt was not an interpretation of the provision of section 247 (1) but an interpretation of the provisions of section 224 (1) of the Constitution which deal with appeal from the Customary Court of Appeal to the Court of Appeal. This was in the case of *Bahang Golok v. Mamhok Diyalpwan*.¹ In this case, the appellant appealed to the Court of Appeal on a decision of the Plateau State Customary Court of Appeal and filed four grounds of appeal. The respondent at the Court of Appeal filed a notice of preliminary objection challenging the jurisdiction of the Court of Appeal to hear the appeal pursuant to section 224 (1) of the Constitution, which provides as follows:

“An appeal shall lie from the decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly.”

The Court of Appeal ruled that grounds 1 and 2 raised purely questions of fact and not customary law and were, therefore, incompetent and proceeded to strike them out. On further appeal to the Supreme Court, it was held that:

“By the provisions of section 224 (1) of the 1979 Constitution, there is only one right of appeal to the Court of Appeal from the decision of a State Customary Court of Appeal and that right is in respect of a complaint or ground of appeal which raises a question of customary law alone. That section does not accommodate any complaint or ground of appeal, which does not raise a question of customary law.”

Although sections 224 (1) and 247 (1) of the 1979 Constitution were not couched in like manner, the question that agitated the minds of some jurists after the decision in *Golok's case (supra)* was whether the same interpretation could be

1. (1990) 3 NWLR (Pt. 139) P.411

given to both provisions. In other words whether a complaint or ground of appeal from the Customary Court (in Edo State for example) must raise a question of customary law in order to make such a complaint or ground of appeal maintainable, cognizable or competent in the Customary Court of Appeal.

The Edo State Customary Court of Appeal attempted to resolve this problem in the case of *Osaretin Aimuaemwosa v. Madam Edowave Joshua* reported in Volume 1 of the Customary Court of Appeal Law Reports cited as *I.C.C.A.L.R. 184*. The court was of the view that the pronouncement of the Supreme Court in *Golok's case (supra)* in respect of section 224(1) of the Constitution could not be extended to the provisions of section 247 (1) of the Constitution. This was posited on the fact that appeal from the Customary Courts to the Customary of Appeals was not one tier but two tiers i.e. appeals as of right and with leave. The court held *inter alia* at page 190 of the report as follows: “In order to determine whether or not the jurisdiction of this court is ousted, the following should be considered:

- (a) Whether the action is civil:
- (b) Whether it involves questions of customary law i.e. whether the matter involves a land, matrimonial causes or matters, causes or matters under customary law, guardianship and custody of children under customary law, inheritance upon intestacy under customary law and grant of power to administer the estate on an intestacy under customary law...

The Court went further to state that:

“If the above criteria are present in the action before the trial court, any *issue arising therefrom* on appeal to this court can be entertained without undue emphasis on how the grounds of appeal are formulated.”

By the above pronouncements, the Edo State Customary Court of Appeal, in my humbly opinion, was of the view that the determining factor as to whether or not it had jurisdiction to entertain any appeal brought before it was whether or not the

claim brought before the trial Customary Court raised any issue involving questions of customary law.

In trying to determine this, the Customary Court of Appeal in my opinion is enjoined to look at what the parties were fighting for, the reliefs they sought to obtain at the end of it and the matters on which issues were joined. These points were highlighted by the Supreme Court in the case of *Ben Ikpang & Others v. Chief Sam Edoho*².

This approach appears to have now been aborted by the Supreme Court in the case of *Ahmadu Usman v. Sidi Umaru*.³ This is another case, which also proceeded from the Plateau State High Court to the Court of Appeal and thenceforth to the Supreme Court. The Supreme Court, among others, considered the provisions of section 236, 242 (1) & (2), 245 (1) & (2) and 247 (1) & (2) of the Constitution. These sections deal with the High Court, the Sharia Court of Appeal and the Customary Court of Appeal. Delivering the lead judgment, Ogundare J.S.C. said *inter alia* at page 397 as follows:

“The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by section 242, and 247 conferring jurisdictions on the other two courts in respect of their areas of specialty. The Area Court possesses jurisdiction to administer customary law (including Islamic Law) generally. It is from this court that appeals go to any of the three superior courts, that is, High Court, Sharia Court of Appeal and Customary Court of Appeal. In my humble view, the superior court to which the appeal goes would be determined by the nature of the questions raised by the appeal. If the appeal raises issues of general law, it goes to the High Court. But if it raises questions of Islamic personal Law, it goes to the Sharia Court of Appeal. And if it raises questions involving customary law, the appeal goes to the Customary Court, of Appeal. To decide otherwise, hardly will any appeal ever go to the High Court from the Area Court as the latter court is enjoined to administer invariably only native law and custom simpliciter or Islamic law ...

2. (1978) 6-7 SC. 221

3. (1992) 7 NWLR (Pt 254) p.377

I can hardly, however visualize a case where any two of these three courts will have concurrent jurisdiction to entertain an appeal.”

From the foregoing, it becomes clear that what determines whether or not an appeal is competent before the Customary Court of Appeal is the issue(s) raised in the grounds of appeal and not the subject matter contained in the claim at the trial Customary or Area Court.

Consequential Problems

It is the humble view of the writer that the consequences of the decisions in *Usman* and *Golok's* cases (*supra*) are bound to be far-reaching on the Customary Courts of Appeal and the Sharia Courts of Appeal in Nigeria. For the purposes of this paper, attention will be focussed on the Customary Courts of Appeal.

In *Golok's* case (*supra*), the Supreme Court decided, among others, that the omnibus ground of appeal deals purely with facts and has no connection with customary law and, therefore, incompetent in the Customary Court of Appeal although the claim before the trial Area Court was substantially founded on customary law.

With this decision, the Customary Courts of Appeal are bound to be inundated with motions challenging their jurisdiction to hear virtually all appeals even when the subject matters at the trial court were purely civil proceedings involving questions of customary law.

In the case of *Thomas Borbokhai Edehe v. Braiham Igiadegho*,⁴ the appellant brought an action against the respondent in a Customary Court in Etsako area of Edo State claiming damages against the respondent for being called a slave contrary to the customary law of Ayogwiri people. The trial court dismissed the claim. The appellant appealed to the Edo State Customary Court of Appeal and filed only the omnibus ground of appeal as follows:

4. Reported in I.C.C.A.L.R. 64.

“That the decision of the court is against the weight of evidence.”

The Counsel for the appellant subsequently brought a motion for leave to file and argue additional grounds of appeal. Counsel for the respondent objected and submitted that the omnibus ground of appeal was incompetent and therefore not arguable in the Customary Court of Appeal. That being so, he submitted that there was nothing to add to.

Counsel for the appellant at page 66 of the Law Report submitted that the Customary Court of Appeal must look at the claim as filed before the trial court together with the evidence adduced in order to know whether or not it was proper to call an Ayogwiri man a slave under the Ayogwiri customary law. But the Court relying on the decision in *Golok's case (supra)* upheld the objection of the Counsel for the respondent and struck out the omnibus ground. Having done so, the court further held at page 68 relying on the case of *Akanbi Enitan v. The State*⁵ that:

“The motion filed by the appellant for leave to file and argue proposed additional grounds of appeal can no longer be entertained as there is really nothing to add to.”

The court eventually struck out the entire appeal notwithstanding the fact that the proposed additional grounds of appeal raised issues involving questions of customary law.

It is common knowledge that lawyers and litigants file omnibus ground of appeal at the trial courts early enough in order to initiate an appeal within the statutory period. Most of the Customary and Area Courts do not produce copies of judgements until much later and that is usually when the parties decide on what additional grounds of appeal to file at the appeal court.

One of the consequences of the foregoing is that cases founded on purely customary law with some additional grounds of appeal raising questions of

5. (1986) 3 NWLR (. 604 at 609)

customary law more often cannot be argued before Customary Courts of Appeal established for that purpose. The question is whether this was the intention of the legislators in section 247 (1) of the 1979 Constitution.

Earlier on, reference was made to the decision of the Supreme Court Usman's case (*supra*) where it was decided among others that what determines whether or not an appeal is competent before the Customary Court of Appeal is the issue(s) raised in the grounds of appeal and not the issues raised in the claim at the trial court.

It is the humble view of the writer that this is fraught with its problems. Suppose a decision in a case based on purely customary law was appealed against from the Customary or Area Court to the Customary Court of Appeal with five grounds of appeal—two raising questions of customary law and three raising questions of general law. Following the decision in *Usman's* case, the Customary Court of Appeal should strike out the three grounds raising questions of general law. Assuming the grounds struck out are the potent grounds and two grounds argued fail for want of merit then the appellant would have suffered incalculable injustice because he cannot go to another court with competent jurisdiction to relitigate the three potent grounds already struck out. Again, one would wonder whether the result has satisfied the intention of the legislators in promulgating section 247 (1) of the Constitution.

At page 397 of *Usman's* case (*supra*), the Supreme Court held, among others that:

“The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by section 242 and 247 conferring jurisdiction on the other two courts in respect of their areas of specialty.”

At page 398 the learned Justice, delivering the lead judgment, said:

“I can hardly, however, visualize a case when any two of these courts will have concurrent jurisdiction to entertain an appeal.

At page 401 of the same case, Bello, C.J.N. pronounced as follows:

“Firstly, it should be appreciated that the Constitution envisages division of appellate jurisdiction on state matters between the High Court, Sharia Court of Appeal and Customary Court of Appeal in States where the three Courts have been established”

The learned Chief Justice went further on the same page and said:

“In my view, the provisions of the Constitution relating to the divisions of appellate judicial powers between the three courts are clear and one court has no concurrent jurisdiction with one or the other.”

In other words, the Supreme Court has said that grounds of appeal from Customary or Area Courts which raise, for example, question of customary law cannot be entertained in the High Court or Sharia Court of Appeal in a State that has established the Customary Court of Appeal.

This again, it is humbly submitted, has to be reconciled with an earlier decision of the Supreme Court in the case of *Alhaji Umaru Abba Tukur v. Government of Gongola State*,⁶ where it said:

“If there is a court with jurisdiction to determine all the issues raised in a matter including the principal issue, it is improper to approach a court that is competent to determine only some of the issues.

The incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and judgment as *there is no room for half judgment* in any matter brought before the Court.”

In other words, as regards the Customary Court of Appeal, because that is what this paper is focussing on, the court should not entertain any ground of appeal if it

6. (1989) 4 NWLR (Pt 117)p. 517 at 549

is not competent to entertain all grounds filed and brought before it because if it does so the court would be giving room to “half judgment.” Also the judgment of the court may be declared a nullity by a superior court especially if the Customary Court of Appeal strikes out the more potent grounds and proceeds to entertain the less potent grounds that raise question of customary law.

The result of this it is submitted, is that unless something serious is done to remedy the devastating consequences of the restrictive interpretations given to section 247 (1) of the Constitution, the intention and purposes of the establishment of the Customary Courts of Appeal nationwide may be completely defeated.

In a State where the High Court and Customary Court of Appeal co-exist and an appeal is filed from a Customary or an Area Court with grounds which raise issues of general law and customary law, it follows from the decision in *Usman’s case (supra)* that the grounds raising issues of general law should go to the High Court and those raising issues of customary law should go to the Customary Court of Appeal. This, in my view, would create a legal dilemma for the appellant because he would not know where to go from there as it would be an abuse of courts’ process to pursue the grounds simultaneously in both the High Court and Customary Court of Appeal. It would also create a legal impasse for the legal system in that State as there would be no court in that State with jurisdiction to entertain all the issues raised in the appeal because as earlier decided neither of the two courts where they co-exist should have concurrent jurisdiction.

The Way Forward

The Chief Justice of Nigeria, Hon. Justice Mohammed Bello was quoted to have severely criticized the decision of the Supreme Court in *Usman’s case (supra)* on the ground that section 247 (1) of the Constitution was too restrictive interpretation with regard to the omnibus ground of appeal as not raising any question of customary law.

The point was said to have been canvassed by Hon. Justice I.O. Aluyi (P.C.C.A.) Edo State (as he then was) at the Judicial Lectures for Senior Judges under the auspices of the National Judicial Institute, held at Sokoto from 24th through 28th of October, 1994. The learned Chief Justice was said to have expressed the view that when a judgment of a Customary Court is said to be against the weight of evidence, all that is querying is the weight of evidence of custom adduced in support of the customary law claim set out to be proved. This was also said to be the consensus of the Judges at the seminar. If one would not be adjudged to have breached protocol, the writer would plead to be allowed to say that the view of the learned Chief Justice of Nigeria gladdens the heart of the practitioners of customary law before Customary Courts of Appeal.

This country practices the sacred principle of *stare decisis* by which precedents are authoritative and binding. Consequently, the interpretations of the Supreme Court are authoritative and binding on all courts in Nigeria. The supreme position of the Supreme Court is unquestionable. The decision of the Supreme Court as far as a matter is concerned is final for all ages. It is final in the sense of real finality. It is final for ever. Only a legislation *ad hominem* can alter it. These were the views expressed by Kayode Eso J.S.C. (as he then was) in the case of *Architect Registration Council of Nigeria (No.4) in Re: O.C. Majoroh v. Prof. M.A. Fassassi*.⁷

However, it is trite that the Supreme Court, if it deems it absolutely necessary and legally expedient can overrule its previous decision. This is why it is hoped that it will take a second look at the interpretation it gave section 247 (1) at the earliest opportunity.

7. (1987) 3 N.W.L.R. (Pt. 59) p. 42 at 46r. 7

There are different rules guiding court's interpretation of statutes. One of them is "Interpretation in the light of Policy." Glanville Williams, in his book titled Learning the law eleventh editions at page 99 said *inter alia*.

"Others, however, think it is proper to speak of the intention of Parliament, in the sense of "the meaning, which Parliament must have intended the words to convey. "In case of doubt, the court has to guess what meaning Parliament would have picked on if it had thought of the point."

The "mischief" rule according to the same author at page 101 said the court should look at:

"the legal position before the Act, and the mischief that the statute was intended to remedy: the Act is then to be construed in such a way as to suppress the mischief and advance the remedy."

It is my humble view that the mischief that existed before the promulgation of section 247 (1) of the Constitution is that our customary law was derided and subdued with the colonization of the country by foreigners who imposed the English common law on the country. When Customary and Area Courts were introduced to protect the customary law, appeals from those courts lay to the High Courts which were manned by men learned in common law with the result that the congestion in the High Court made the Judges to pay very little attention to appeals from Customary Courts. This mischief was, therefore, to be remedied by providing Customary and Area Courts with their own Appellate Courts i.e. the Customary Court of Appeal to cater exclusively for customary law claims. However, with the interpretations given to section 247 (1) of the Constitution, about eighty per cent (80%) of appeals from Customary Courts in respect of customary law claims still do not go to the Customary Courts of Appeal. Consequently, the mischief that led to the establishment of the Customary Courts of Appeals still persists. It is my humble view that the Supreme Court should suppress the mischief and advance the remedy.

It is common knowledge that some Customary Courts are manned by lay men. Appeals against the cases decided by such courts are supposed to lie before the Customary Courts of Appeal which by the provisions of sections 285 and 267 of the 1995 draft Constitution of the Federal Republic of Nigeria, should be composed of a panel of at least three Judges who should be legal practitioners in Nigeria and have been so qualified for a period of not less than 12 years and have considerable knowledge and experience in the practice of customary law. This is the present composition of the Customary Court of Appeal in some States like Edo and Delta. Surprisingly, this court composed of highly qualified panel of Judges have been adjudged incompetent to hear appeals from Customary and Area Courts that have tried claims based on customary law on the technical reason that the grounds of appeal do not *ex facie* raise questions of customary law.

A Customary Court of Appeal has no original jurisdiction. Its jurisdiction is only appellate. Its appellate jurisdiction does not extend to appeals from Magistrates Courts. The appeals must come from no other courts than Customary or Area Courts. Not every appeal from Customary Courts can be entertained by it. The appeal must emanate from a claim based on customary law. Not only that, if the claim is based on customary law, the appeal arising there from must raise questions of customary law otherwise the jurisdiction of the Customary Court of Appeal is ousted. One can, therefore, see the extent to which the very restrictive interpretation of section 247 (1) of the Constitution has placed the Customary Court of Appeal.

Recommended Panacea

In order to satisfy what I believe is the intendment of the legislators, in order not to frustrate genuine appeals, and in order to remove a possible legal impasse in the legal system, it is humbly submitted that the Supreme Court should, at the very earliest opportunity, *give a more liberal and less restrictive interpretation to the provisions of section 247 (1) of the Constitution with the aim*

of allowing the Customary Courts of Appeal entertain all issues arising from appeals on claims based on customary law without undue emphasis on how the grounds of appeal are formulated.

This approach would NOT, in my considered opinion, noticeably whittle down the already high volume of inflow of cases to the High Court. The High Court exercises original jurisdiction in both civil and criminal matters. Civil and criminal appeals flow to it from Magistrates' Courts. In addition, criminal and civil appeals also flow to it from Customary and Area Courts on issues of general law.

This approach, I believe would shut the present "floodgate" of preliminary objections usually made by Counsel for the respondents to the jurisdiction of the Customary Courts of Appeal, which objections now appear to be overwhelming the courts. The shutting of the "floodgate" of objections would enable the Customary Courts of Appeal to settle down once more to its constitutional duties.

******HON. JUSTICE J.O.OLUBOR is now the President of the Customary Court of Appeal, Edo State of Nigeria. This paper was presented at the ALL NIGERIA JUDGES' CONFERENCE, 1995, held at Kano, Nigeria.***