

**JUDICIAL APPROACHES TO THE
ADMISSIBILITY OF EVIDENCE AND THE
EMERGING PRINCIPLES: RECONCILING THE
SUPREME COURT’S DECISION IN THE CASES
OF BENJAMIN V. KALIO (2018) AND
ABDULLAHI V. ADETUTU (2019).**

**A paper presented at the workshop organized by the
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“Relevance and Admissibility of Electronically
Generated Evidence and other Emerging Trends in
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BY

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1.0. INTRODUCTION.

The theme of this workshop organized by the Edo State Ministry of Justice in collaboration with AGA/AFRICA/PUNUKA ATTORNEYS and SOLICITORS is on the “*Relevance and Admissibility of Electronically Generated Evidence and other Emerging Trends in the Admissibility of Documents*” and my presentation is titled: **JUDICIAL APPROACHES TO THE ADMISSIBILITY OF EVIDENCE AND THE EMERGING PRINCIPLES: RECONCILING THE SUPREME COURT’S DECISION IN THE CASES OF BENJAMIN V. KALIO (2018) AND ABDULLAHI V. ADETUTU (2019).**

Thus, the two decisions under consideration are the Supreme Court’s judgments in the cases of *Benjamin v. Kalio (2018)* and *Abdullahi v. Adetutu (2019)* on the admissibility of an unregistered registrable instrument to prove title to land.

The two decisions have been the subject of much debate since the later judgment was delivered by the Apex court. The controversy is whether the later decision has effectively overruled the former decision, thus reinstating the age long position to the effect that an unregistered registrable instrument is not admissible in evidence to prove title to land in Nigeria.

In this presentation, I will articulate my views in my attempt to reconcile the seemingly conflicting decisions.

2.0. RELEVANCE AND ADMISSIBILITY

In Nigeria, the relevance and admissibility of evidence play a crucial role in legal proceedings. A cardinal principle under Nigerian law of evidence is that evidence must be relevant to the facts in issue or any other relevant fact.

Relevance refers to the connection between the evidence and the matter being decided by the court. Evidence is considered relevant if it has a logical bearing on the case. On the other hand, Admissibility pertains to whether the evidence is allowed to be presented in court.

Incidentally, the Nigerian *Evidence Act, 2011* does not provide a definite meaning of the terms 'Relevancy' and 'Admissibility'. The word 'Relevancy' derives from the adjective 'Relevant'. Relevancy refers to the fact, quality or state of being relevant, related or pertinent to the issue at hand. Relevant evidence is therefore evidence which tends to prove or disprove a matter in issue. Relevant evidence is both probative and material, and is admissible unless excluded by a specific statute or rule.

Conversely, admissible evidence is evidence that is relevant and is of such a character that the court should receive it. Admissibility is the quality or state of being allowed to be entered into evidence in a hearing, trial or other proceeding. The Law of Evidence is dependent on admissibility and relevancy of evidence or facts. The basic principle of law governing admissibility of evidence in a judicial proceeding is that a piece of evidence is admissible if it is relevant. So, it is only evidence of relevant facts which is admissible in evidence. Therefore, admissibility is dependent on relevancy. In other words, for a piece of evidence to be admissible, it must be relevant. But, this is not necessarily vice versa, since a piece of evidence could be relevant without being admissible. In the case of *Nwabuoku v Onwordi (2006) All FWLR (Pt. 331) 1236 at 1251*, the Supreme Court emphasised that the admissibility of evidence is based generally on relevancy, as a fact in issue is admissible if it is relevant to the matter before the court.

2.1. RELATIONSHIP BETWEEN RELEVANCY AND ADMISSIBILITY

In the English case of *DPP v. Kilbourne (1973) AC 729*, the English Court of Appeal, per *Lord Simon* opined that —the terms relevancy and admissibility are frequently and in many circumstances legitimately used interchangeably but that it makes for clarity if they are kept separate, since some relevant evidence may be inadmissible.

Indeed, the relationship between the two concepts may be noted as follows:

(i)When it is said that a piece of evidence is admissible, what is meant is that the evidence is relevant and is one which can be admitted in a judicial proceeding because it does not offend any exclusionary rule. A fact which is ordinarily admissible may become inadmissible because a statute declared it inadmissible or the fact is too remote to be material;

(ii) Admissibility is a matter of law; relevancy is usually, though not invariably, a matter of logic and common sense. But, note that relevancy follows the provision of the law. Thus, facts that are declared to be commonsensically relevant are so by the application of the law. However, a fact which is commonsensically not relevant can be declared relevant by the provisions of the law.

(iii) Whereas all irrelevant facts are inadmissible; not all relevant facts are admissible because of the above highlighted exclusionary rule.¹

2.2. DOCUMENTARY EVIDENCE

Documentary evidence forms part of the entire gamut of the Law of Evidence. *Section 88 of the Evidence Act, 2011* provides that “*documents shall be proved by primary evidence except in the cases mentioned in this Act*”.

Documentary evidence is one of the recognised modes of proof. Documentary evidence is of such tremendous importance in Court proceedings that it is now settled law that documentary evidence serves as a hanger to test the veracity of oral evidence. Consequently, when documentary evidence supports oral testimony, that testimony becomes more credible. See: *Kotun V Olasawere (2010) 1 NWLR (pt. 1175) 411 and Odunlami V Nigerian Navy (2013) 12 NWLR (Pt. 1367) 20*.

Generally, the rule that governs the admissibility of any document is the test of the relevance of such document. It is the pleading of the parties that streamlines the relevant issues/facts between the parties. Thus it is required that for any document to be admissible in the Court the said document must have been duly pleaded or facts in support of the document must have been pleaded by the party relying on same.

In the Nigerian case of *Dr. Torti vs Ukpabi*² the Court held that even if the document is not produced from proper custody, it is admissible once it is relevant. That lack of proper custody may only affect the weight the Court will attach to the document when evaluating it and no more.

¹ See: Relevance and Admissibility of Facts Under Nigerian Law of Evidence: <https://legalempereors.blogspot.com/2016/02/relevancy-and-admissibility-of-facts.html>

² (1984) 1SCNLR 214

Notwithstanding the importance of documentary evidence, there are some peculiar challenges surrounding the admissibility of documentary evidence in legal proceedings. As we will discover in the course of this presentation, in some cases, the conflicting decisions of the superior Courts have worsened the situation.

I will proceed by referring to some salient provisions of the Constitution.

Under the *Constitution of the Federal Republic of Nigeria 1999, as amended*, the subject of Evidence is listed as *Item 23 of the Exclusive Legislative List in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999, as amended*. The Courts have expounded on the implications of this constitutional arrangement in several decided cases. In the case of *CHIJOKE AHUKANNA EMMANUEL v. FEDERAL REPUBLIC OF NIGERIA (2018) LPELR-50844(CA)*, the Court of Appeal stated thus: *"Every trained lawyer knows that Nigeria operates a federal system and going by clear constitutional provisions, even on items where both State and Federal legislatures have concurrent power. Federal Acts take precedence over State Laws. So the trial Court cannot for patriotism and loyalty to the State disregard Federal legislations and proceed to apply State laws.*

The 2nd Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) list Evidence under the Exclusive Legislative list which therefore excludes the States from making laws on Evidence. So when and if any State within the Federal Republic of Nigeria makes any law on Evidence contrary to the Evidence Act, such law will be unconstitutional and therefore inapplicable."

Again in the recent case of *ENGR. ALBERT EJIRO vs. ANDREW DIO OCHAI & ORS (2021) LPELR-54190(CA)* the Court of Appeal emphasised the position thus: *"State Law cannot determine what should qualify to be tendered in evidence, the subject of evidence being a Federal item on the Exclusive Legislative list. The state cannot legislate on it."*

3.0. LAND INSTRUMENT REGISTRATION LAWS.

Land matters form the bulk of cases dealt with in civil suits, thus most evidence adduced in a typical civil court are in respect of real property. States in

Nigeria in recognition of the importance of real property have enacted statutes to protect the interest of citizens with regard to landed property. Among such statutes are the Land Instrument Registration Laws of the various states of the Federation. These statutes provide for registration of Land Instruments and the admissibility of such instruments as evidence in proceedings relating to land.

Registration is the act of making a formal entry into a register. It is regarded as a safe way to record transactions on land and an easy means of investigating title to land.³

For example, in Lagos State, *Section 2 of the Lagos State Lands Registration Law (LLRL) 2015* provides that “*every document of interest or title to land in Lagos State shall be registered in accordance with the provisions of this law.*”

Furthermore, *Section 30* of the Lagos Law goes further to stipulate on the effect of non-registration under the Law thus: “*no registrable instrument shall be pleaded or given in evidence in any court as affecting land in the State unless it has been duly registered*”.

Over the years in Nigeria, the courts in several cases have upheld the provisions of these land instrument registration laws and have consistently held that an unregistered registrable instrument is inadmissible in evidence to prove title to land. The courts have also stated that although such unregistered registrable instrument are inadmissible to prove title to land, they are however admissible for the purpose of proving the existence of a transaction of payment of money. See the following cases: *Ojugbele v. Olasoji (1982) 4 SC 31; Akintolav. Solano (1986) 2 NWLR (Pt. 24) 598, (1986) 4 SC 141, (1986) All NLR 395; Edokpolo v. Ohenhen (1994) 7 NWLR (Pt. 358) 511, (1994) 7 SCNJ 500 [referred to] P. 17, paras. A-B; Anyabunsi v. Ugwunze (1995) 6 NWLR (Pt. 401) 225.*

4.0. THE CASE OF BENJAMIN V. KALIO (2018)

The landmark decision of the Supreme Court of Nigeria in the case of *Benjamin v Kalio (2018) 15 NWLR (PT. 1641) 38* marked a watershed in the jurisprudence of the admissibility of land instruments in suits relating to land. The

³ Registration of titles and instruments, PPL 324 Project, Group 8, University of Lagos.

succinct facts of the case were that the Plaintiffs instituted an action on behalf of the members of the Gobo family of Abuloma Town of Rivers State against the Defendants who were representing the beneficiaries of the estate of Rev. G.B. Kalio. At the trial Court, in proof of their case, the Plaintiffs tendered a Deed of Conveyance which was admitted as Exhibit L. After hearing evidence on both sides, the learned trial Court dismissed the Claims of the Plaintiffs and granted the Counter-Claims of the Defendants.

The suit eventually came before the Supreme Court on appeal.

At the Supreme Court, one of the issues for determination was whether the Deed of Conveyance (Exhibit L) tendered by the Respondents at the trial court was inadmissible to prove title in line with the provisions of *Section 20 of the Land Instruments (Preparation and Registration) Law, Cap. 74 of the Laws of Rivers State* which provides that “*No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered.*”

In deciding this issue, the Supreme Court (sitting as a full panel of 7 justices) considered the argument of the learned counsel for the appellants who referred to *Section 20 of the Land Instruments (Preparation and Registration) Law of Rivers State*, as well as a long line of existing authorities which all supported the principle that an unregistered registrable instrument is inadmissible to prove title. However the Apex Court took a decision that was at variance with the well-established position of the law at the time. The Court held that a piece of evidence rendered admissible by the *Evidence Act* cannot be rendered inadmissible by the provisions of the *Land Instrument Registration Law of Rivers State*. According to the Apex Court, admissibility of evidence is governed by the Evidence Act and not the *Land Instruments Registration Law*. The Court’s reasoning was that prior to the promulgation of the **1979 Constitution**, the topic of evidence was not on the Exclusive Legislative List. This however changed with the promulgation of the **1979 Constitution** as under the **1979 Constitution**, Evidence was brought into the Exclusive Legislative List as **item 23**. This has remained so since then and currently it is **item 23 of the Exclusive Legislative List in Part 1 of the Second Schedule of the 1999 Constitution**. Thus any law made by a State House of Assembly on the admissibility of evidence is void to the extent of its inconsistency with the provisions of the Constitution. The Supreme Court viewed the intent of

the law enacted by the Rivers state House of Assembly as “*an act of legislative trespass into the exclusive terrain of the National Assembly prescribed by the Constitutions, since 1979.*”⁴

Eko JSC (as he then was) who delivered the lead judgment had this to say,

“In my firm view, the argument of the appellant that Section 20 of the Land Instruments (Registration and Preparation) Law, Cap. 74 of the Laws of Rivers State has rendered Exhibit L, a land instrument, unpleadable and inadmissible in the proceedings at the trial court go to naught. It does not fly in view of the current and prevailing state of constitutional law. Admissibility of Evidence is governed by the Evidence Act; not the Rivers State Land Instrument (Preparation and Registration Law, Cap.74. In my judgement, a piece of evidence pleadable and admissible in evidence by dint of the Evidence Act cannot be rendered unpleadable and inadmissible in evidence by a law enacted by a State House of Assembly under the prevailing Constitutional dispensation. ”

Thus the Supreme Court by a unanimous decision dismissed the appeal. Majority of lawyers and legal scholars rejoiced at the pronouncement of the Supreme Court. Many praised the reasoning of the court as revolutionary and the best thing that has ever happened to proof of title to land in Nigeria for over a century.⁵

On the admissibility of registrable land instruments, the case of *Benjamin vs. Kalio* established two major principles of law:

- a. When an unregistered registrable land instrument is tendered to prove title to land, such instrument would be admissible because such instrument is admissible under the Evidence Act as the State Law mandating its registration is void to the extent of its inconsistency with the Constitution; and

⁴ Per Eko JSC, *Benjamin v Kalio* (2018) 15 NWLR (PT. 1641) 38.

⁵Gbenga Bello, *Admissibility of Unregistered Title Documents in Nigeria: A Paradigm Shift Towards Justice* (2019),

This Day Newspaper, quoted in M.I Okeke, *THE DECISION IN BENJAMIN v. KALIO: AN EPITOME OF SOUND CONSTITUTIONAL JURISPRUDENCE.*

- b. When an unregistered registrable land instrument is only tendered to prove the existence of a transaction or payment of money, it would be admissible even though registered or otherwise.

For proper emphasis, it must be noted that before the Supreme Court's decision in the case of *Benjamin vs. Kalio*, the position of the law was:

- a. An unregistered registrable land instrument is not admissible **to prove title to land** because the States Land Instrument Registration Laws make it mandatory for such instruments to be registered; and
- b. An unregistered registrable land instrument can be admitted but **only** for purposes of proving the existence of a transaction or payment of money.
- c. Thus the case of *Benjamin v. Kalio*⁶ only tampered with the part of the law as regards admissibility to prove title to land.

Thus after the landmark decision in the case of *Benjamin vs. Kalio*, for a time, the law as regards admissibility of evidence was that since evidence was a matter that could only be regulated by an Act enacted by the National Assembly, the admissibility of land instrument was to be regulated by the provisions of the *Evidence Act 2011* alone and not by any statute enacted by any State House of Assembly. Thus, the courts were not expected to reject any piece of evidence on the basis of a state law governing the admissibility of evidence.

From my personal experience on the Bench, the case of *Benjamin vs. Kalio* came to the judicial landscape as *a breath fresh air* to save litigants from the suffocating effect of the stringent measures on admissibility of land instruments imposed by the provisions of the Land Instrument Registration Laws of the various states of the Federation.

The effect of that revolutionary decision was that the burden of proof of title to land was seriously lightened because it is common knowledge that majority of owners of land hardly ever proceed to register their title documents after bona fide purchase of land. The apathy of land owners in this regard is mostly as a result of the cumbersome and expensive process of registration of title obtainable in states across the Federation. It is common knowledge that as a result of the dwindling revenue accruing to the States from the monthly allocation from the Federation Account, most States have intensified their efforts to generate huge internal

⁶ Supra.

revenue. The internally generated revenue (IGR) drive of most states target landed property and the registration of Land Instruments is a major source of IGR.

Thus with the huge burden imposed on property owners by the process of registration, many land owners are prepared to take the risk of non-registration with the hope that they will not be engaged in any litigation in the Court that will warrant the production of registered land instruments.

Personally, I found the decision in *Benjamin vs. Kalio* as quite salutary and a step in the right direction because I have always believed that there is something quite unjust about a piece of legislation that can effectively invalidate an otherwise valid title document merely on the ground of the non-registration of the title document. I regard such a statute as quite drastic and draconian.

However, the respite provided by the case of *Benjamin vs. Kalio* was quite short lived. Quite paradoxically, while we were still basking in the euphoria of that respite, barely a year after that judgment, the Supreme Court delivered its judgment in the case of *ABDULLAHI & ORS V. ADETUTU (2019) LPELR-47384(SC)*. The judgment in this latter case appeared to be a *judicial tsunami*.

5.0. THE CASE OF ABDULLAHI V. ADETUTU (2019)

The decision of the Supreme Court in the case of *Abdullahi vs. Adetutu* appears to many to be a reversal of its decision taken in *Benjamin v. Kalio*. The facts of the case are as follows: The Plaintiffs at the High Court of Lagos State instituted a suit against the Defendants claiming *inter alia*, a declaration that the Plaintiffs are entitled to the Statutory Right of Occupancy in respect of a land situate at Onipetesi, Idimango, Agege, Lagos. At the High Court, judgment was delivered in favour of the Defendants.

Dissatisfied with the decision of the trial Court, the Plaintiffs appealed to the Court of Appeal which allowed the appeal in part and they further appealed to the Supreme Court.

One of the issues raised by the parties on Appeal before the Supreme Court was on the admissibility of Exhibit D8, the Appellants' document of title. The said document of title was a registrable instrument under the provision of *Section 15 of the Land Instruments Registration Law of Lagos State*, and the same section provides that a failure to register such a document renders it inadmissible in

evidence. The document of title in this case was not registered and so the trial Court held it inadmissible; a decision which was upheld by the Court of Appeal.

At the Supreme Court the court had to consider the issue, “*Whether the lower court erred when it agreed with the trial court that the appellant’s document of title, exhibit D8, was inadmissible?*” In resolving this issue the court reasoned that the admissibility or inadmissibility of an unregistered registrable instrument depends on the purpose for which it is being sought to be admitted. In the words of **Hon. Justice Chima Centus Nweze, J.S.C.**,

“Put differently, a document, registrable under the Land Instruments Registration Law, may be admitted in evidence without registration, if it is tendered, not as an instrument affecting land but only to establish evidence of a transaction between the parties... In effect, when a court is determining whether or not to admit or reject an unregistered registrable instrument, it has to consider the purpose and the use to which it is being put, Ole v. Ekede[1991] 4 NWLR (pt. 187) 569. In the vocabulary of pleadings, the pleader has a duty to show that the document was pleaded as an acknowledgement of payment and not as an instrument of title...”

Thus, the summary of the court’s decision was that a document may be admitted in evidence without registration if it is tendered as evidence in proof of the existence of a transaction between parties. However, if same is tendered in proof of title to land or an interest in land, such a document would not be admissible in evidence for that purpose.

In effect the decision of the Apex Court is that the purpose or use for which a document is tendered is the determinant factor in the admissibility or otherwise of an unregistered registrable instrument. The cases relied on by the court in coming to its decision were cases prior to 2018 when ***Benjamin v. Kalio*** was decided.⁷

⁷ Akintola v Solano [1986] 2 NWLR (Pt. 24) 598; Registered Trustees of Muslim Mission Hospital Committee v Adeagbo [1992] 2 NWLR (Pt 226) 690; Oredola Okeya Trading Co. v. Attorney-General, Kwara State [1992] 7 NWLR (Pt 254) 412; Co-operative Bank Ltd v Lawal [2007] 1 NWLR (Pt. 1015); Gbinijie v Odji [2011] 4 NWLR (Pt. 1236) 103

Another issue before the court was in respect of the discrepancy as to the dates in exhibit D8 which was dated 1969 but the survey plan attached to it was drawn in the same year 1969 but dated and signed seventeen years later in 1986. The court held that this discrepancy had also rendered Exhibit D8 ineffective.

6.0. THE CONFOUNDING EFFECT OF THE SUPREME COURT'S DECISION IN ABDULLAHI V. ADETUTU (2019).

The decision of the Supreme Court in the case of *Abdullahi v. Adetutu* sent shock waves across the judicial landscape. From this present decision, it appears that contrary to the decision of the Apex Court in the land mark case of *Benjamin v. Kalio*, the position of the law has reverted back to the old authorities which were clearly upturned by the decision in *Benjamin vs. Kalio*. To wit that:

- a. An unregistered registrable land instrument is not admissible **to prove title to land** because the States Land Instrument Registration Laws make it mandatory for such instruments to be registered; and
- b. An unregistered registrable land instrument can be admitted but **only** for purpose of proving existence of a transaction or payment of money.

The decision in the case of *Abdullahi vs. Adetutu* has generated a lot of controversy among legal scholars and has been the subject of much debate over the years.

Some scholars are of the firm view that the decision in *Benjamin v. Kalio* has not been overruled by the Supreme Court's decision in *Abdullahi v. Adetutu*.

One of the arguments put forward is that the facts of the case, culminating in the decision in *Benjamin v. Kalio* are different from that of *Abdullahi v. Adetutu*. According to them, both cases are not *impari materia*. They maintain that in the *Abdullahi case*, the question of the validity of the law vis-à-vis the provisions of the Constitution and the Evidence Act did not arise, whereas that was the issue in the *Benjamin case*.

Furthermore, some have argued that the Apex Court in the *Benjamin v. Kalio* case was a Full Court constituted with 7 Justices while in the *Abdullahi v. Adetutu* case, there were only 5 Justices. Their argument is that in order to overrule itself the Supreme Court Panel must be a Full Court constituted with 7 Justices.

Another argument put forward is that no mention was made of the case of *Benjamin v. Kalio* in the later case of *Abdullahi v. Adetutu*. According to this school of thought, if the Apex Court was mindful of overruling the decision in the case of *Benjamin vs. Kalio*, that case would have been specifically mentioned in the *Abdullahi case*.⁸

Again some scholars have contended that in our jurisprudence, the Constitution is supreme and a judicial precedent cannot overrule the clear provisions of the Constitution.⁹

However, some erudite legal scholars have strongly contended that the *Abdullahi vs. Adetutu* case clearly overruled the case of *Benjamin vs. Kalio*. Some of the pundits of this school of thought are of the view that although the question of the validity of the law vis-à-vis the provisions of the Constitution and the Evidence Act did not arise in the case of *Abdullahi v. Adetutu*, the facts leading up to the Supreme Court's decision in the latter case are quite similar particularly as it relates to the admissibility of land instruments. They also observe that it is pertinent to note that the provisions of *Section 20 of the Land Instruments (Preparation and Registration) Law of Rivers State* which formed the basis of the Court's decision in the earlier case are *ipsissima verba* with the provisions of *Section 15 of the Land Instruments Registration Law of Lagos State* which was the bone of contention in the latter case.¹⁰

⁸ [CASE REVIEW: Whether The Decision In IBRAHIM V. ADETUTU \(2019\) Has Dislodged The Principle In BENJAMIN V. KAILO \(2017\) On Admissibility Of Unregistered Registrable Land Instruments In Nigeria By Festus Agbo And Sylvester Udemezue - TheNigeriaLawyer](#)

⁹ See, Sec 1(1) CFRN 1999 (as amended). M.I Okeke, The Decision in Benjamin v. Kalio: An Epitome of Sound Constitutional Jurisprudence.

¹⁰ K.D. Olali, A.C.Nwosu; Benjamin v. Kalio, Abdullahi v. Adetutu. What is the way?

Furthermore, the members of this school of thought maintain that in *Benjamin Kalio's case*, the Apex Court stated that whether tendered to prove title or to prove existence of a transaction or payment of money, an unregistered registrable land instrument is admissible, if pleaded. However, in the *Abdullahi v. Adetutu* case, the Court stated that the admissibility or otherwise of an unregistered registrable instrument depends on the purpose for which it is being tendered. That if it is tendered in order to prove title it is inadmissible but if it is tendered to prove the existence of a transaction or payment of money it is admissible. According to them, what the Court did in *Abdullahi v. Adetutu* case was to reinstate the position prior to the case of *Benjamin v. Kalio* that an unregistered registrable land document is *inadmissible in evidence* to prove title to land.¹¹

On the issue of the composition of the Supreme Court in the two cases, *Section 234 of the Constitution of the Federal Republic of Nigeria 1999, as amended* is quite relevant. The section provides as follows:

“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any Law, the Supreme Court shall be duly constituted if it consists of not less than five justices of the Supreme Court: Provided that where the Supreme Court is sitting to consider an appeal brought under 233(2)(b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 232 of this Constitution, the Court shall be constituted by seven Justices.”

Furthermore, *Section 233 (2) (b) of the 1999 Constitution* provides that *“an appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in cases involving decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution”*.

It is pertinent to point out that the case of *Benjamin v. Kalio (2018)* involved questions as to the interpretation or application of the Constitution (to wit: the implication of Evidence being an item under the Exclusive Legislative List and the constitutional validity of a State Legislation on evidence). Hence the composition of a Full Panel of 7 Justices. However, in the case of *Abdullahi vs. Adetutu*, there

¹¹ See: Sylvester Udemezue Esq. in CASE REVIEW: Whether The Decision In IBRAHIM V. ADETUTU (2019) Has Dislodged The Principle In BENJAMIN V. KAILO (2017) On Admissibility Of Unregistered Registrable Land Instruments In Nigeria By Festus Agbo And Sylvester Udemezue - TheNigeriaLawyer

was no *question as to the interpretation or application of the constitution*. The issue was simply on the admissibility of an unregistered land instrument.

It is pertinent to note that there is no provision in the *1999 Constitution* or under the *Supreme Court Rules* that makes it mandatory for a Full Court to be composed before the Supreme Court can overrule itself. The relevant provision of the *Supreme Court Rules* in this regard is *Order 6, Rule 5(4)* which simply provides as follows:

“(4) If the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the brief, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons.”

The position of the law is that where two Judgments of the Supreme Court are clearly contradictory, the later in time must be taken to have impliedly overruled the earlier case once the facts of the two cases are not totally different from one another, yet the decisions are inconsistent.¹² The later in time must therefore be chosen over the earlier. See, *Opene v. National Judicial Council (2011) LPELR-CA/A/324/07* where the Court of Appeal stated,

*“it is trite that when this court is faced with two conflicting decisions of the Supreme court on an issue, it is bound to follow the latest. This is so because the Supreme Court has an inherent power to overrule itself. If the latest decision is in conflict with the earlier one, it follows that the latest decision has overruled the earlier one.”*¹³

Thus although no mention was made by the Supreme Court of the decision in *Benjamin v. Kalio (2018)*, It can be inferred that the decision in *Abdullahi v. Adetutu (2019)* has impliedly overruled the decision in *Benjamin v. Kalio*.

However, the issue remains a moot point which is still subject to academic debates as to whether a judicial precedent can overrule the clear provisions of the

¹² Halima Abiola, The Effect of a Registrable Land Instrument that is Not Registered. (February 15, 2022).

¹³ Per, Hon. Justice Paul Adamu Galinje, JCA. See also, Alhaji M. C. Dahiru & 1 Or v. Alhaji Kamale (2005) 9 NWLR (PT.929) 8; Mujakperruo v. Ajobena (2014) LPELR-23264 (CA)

Constitution. I make bold to state that it is quite clear from the express provisions of *Item 23 of the Exclusive Legislative List in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999, as amended* that the matter of evidence is solely reserved for the National Assembly to legislate upon. I am of the view that a law made by a State House of Assembly on the admissibility or otherwise of any piece of evidence would rightly be regarded as *ultra vires* the powers of the State Legislature and as aptly stated by the Apex Court in the earlier case of *Benjamin vs. Kalio*, is tantamount to “*an act of legislative trespass into the exclusive terrain of the National Assembly prescribed by the Constitution.*”¹⁴

In my humble opinion, the decision of the Apex Court in *Benjamin v. Kalio* upheld the supremacy of the Constitution as enshrined in *Section 1 of the Constitution of the Federal Republic of Nigeria 1999, as amended*. The decision is therefore laudable as “*good law*”. I think the decision in the case of *Abdullahi v. Adetutu (2019)* was given by the Apex Court without adverting its mind to the Constitutional implications. Of course, the case was determined based on the simple issue that was formulated at the hearing of the appeal, to wit: *the admissibility of an unregistered legal instrument*. The issue of *the constitutional validity of the State Legislation* was never canvassed before the Apex Court in the latter case.

More fundamental is the fact that quite curiously, the land mark case of *Benjamin vs. Kalio* was never considered or mentioned in the determination of the *Abdullahi case*. I am of the view that the decision of the Apex Court may have been different or more definitive if the previous decision was considered. To the extent that the *Abdullahi case* has re-introduced the rigid regime of non-registration resulting in inadmissibility of the title document, I think it has taken the law on admissibility of evidence in land matters a step backwards.

7.0. CONCLUSION.

The conflict between the pronouncements of the Supreme Court in *Benjamin v. Kalio (2018)* and *Abdullahi v. Adetutu (2019)* has been the subject of much legal debate. However it is clear from the express pronouncements of the Supreme Court that the decision taken in *Benjamin v. Kalio* as it relates to the

¹⁴ Benjamin v Kalio (2018) 15 NWLR (PT. 1641) 38

admissibility of land instruments to prove title has been impliedly overruled. Thus, it is my humble opinion that the current position of the law relating to pleadings and the admissibility of unregistered registrable land instruments in Nigeria, is the decision in the case of *Abdullahi v. Adetutu (2019)*.

This present decision must be taken as binding on all Courts in Nigeria based on the sacrosanct doctrine of *stare decisis* (judicial precedent). In the very recent case of *Hon. Attorney General Abia State & Ors. v. Attorney General Federation (2022) LPELR-57010 (SC)*, the Apex Court emphasised the significance of the doctrine when they expounded as follows:

“...the place of precedent, the doctrine of stare decisis, in adjudication is an eminent one. The question whether or not the decisions of this Court bind subordinate and indeed the Court itself is no longer open to argument. The doctrine directs that once a point of law has earlier been pronounced upon by a Court of competent jurisdiction, the Court and those subordinate to it are bound by such pronouncement on the very principle in a subsequent case.”

However there still remains a dichotomy between the present view of the Apex Court and the clear provisions of the *Constitution of the Federal Republic of Nigeria, 1999 as amended* on this subject of the validity of State Legislations on evidence. It is my fervent hope that in the nearest future a case with similar facts will come before the Apex Court to enable them make a more definite pronouncement on the Constitutional validity of the Land Instrument Registration Laws of the States on the admissibility of unregistered Legal Instruments. Until such a definite decision is made, the debate on this subject may be unending.