

CUSTOMARY ARBITRATION AS A DISPUTE RESOLUTION MECHANISM AND ITS OPERATIONAL FRAMEWORK AS ESTOPPEL PER REM JUDICATAM

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I. INTRODUCTION

Arbitration as a dispute resolution mechanism has a chequered history. It has always been a more economical and friendly method of resolving disputes both in traditional and modern settings and it was after the advent of colonialism that statutory arbitration was evolved wherein certain provisions of the statutes started regulating arbitration. But before then, disputes arising out of land matters, marriage, dissolution of marriage and other kinds of disputes were regulated, administered and settled by elders, chiefs and traditional rulers in a particular community.

The convenience, simplicity and informality associated with settlement of disputes in customary or traditional ways fortifies the recognition of customary arbitration, so much so that our case law is now laced with decisions on customary arbitration, being a viable alternative dispute resolution mechanism. However, because customary arbitration is not a court of law the issue of the bindingness of its decision as estoppel per rem judicatam has really engineered the attempt to embark on this piece of work

II. NATURE AND SCOPE OF CUSTOMARY ARBITRATION

Arbitration, generally speaking, is a key player in alternative dispute resolution other than court of law and has been so recognized both

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nationally and internationally so much so that its efficacy and effectiveness cannot be over-emphasized. Karibi Whyte JSC in *Agu v Ikewibe*¹ explained the nature of customary arbitration thus:

It is well accepted that one of the many African Customary models of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to that point...

His Lordship goes further to say:

What then is a customary arbitration? I venture to regard customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the Arbitration who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable²

The learned erudite Justice maintained virtually the above quoted view in the case of *Oniaeri v Akabeze*.³ This position has equally been confirmed recently by the Supreme Court in *Eke v Okwaranyia*⁴ per Uwaifo, JSC delivering the leading Judgment.

The above vividly represents the nature and scope of customary arbitration. Customary Arbitration therefore is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability and

1. (1991) 3 NWLR (Pt 180) 358, 407

2. *Agu v Ikewibe* (1991) 3 NWLR (Pt 180) 385

3. (1992) 2 NWLR (Pt 221) 1 at 28

4. (2001) 4 SC (Pt II) 71 at 89

Ariyoosu D. A.

social equilibrium to the people and their immediate society or environment.

It has equally been held that customary arbitration is only a convenience forum for settlement of native disputes and cannot be raised to the status of a court of law.⁵

III. ESSENTIAL INGREDIENTS OF CUSTOMARY ARBITRATION

A decision by a court of competent jurisdiction is binding on the parties to it so also is a decision of a customary arbitration so long as the ingredients constituting preconditions for its bindingness are met or complied with. For there to be a valid customary arbitration, the following ingredients must be proved:

- (a) That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
- (b) That it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding;
- (c) That the said arbitration was in accordance with the custom of the parties or their trade or business;
- (d) That the arbitrator(s) reached a decision and published their award; and
- (e) That the decision or award was accepted at the time it was made.⁶

It should be noted that unless the above-mentioned conditions are fulfilled, the arbitration award would be unenforceable. Thus, the Supreme Court, per Uwaifo JSC delivering the leading Judgment in *Eke v Okwaranyia* held as follows:

5. See the dictum of Tobi JSC in *Ufomba v. Ahuchaogu* (2003) 4 SC (Pt II) 65 at 90

6. See the following Supreme Court cases: *Eke v Okwaranyia* (2001) supra at 87-88; *Okereke v. Nwankwo* (2003) supra at 21-22; *Odonigbi v. Ovelcke* (2001) 2SC 184 at 203-204

I think anything short of these conditions will make any customary arbitration award risky to enforce. In fact it is better to say that unless the conditions are fulfilled, the arbitration award is unenforceable.

Put succinctly, Akpata, JSC, in *Ohiaeri v Akabeze*⁷ in his leading judgment proffered a rationalization for the need to be circumspect about customary arbitration when he said that it is essential before applying the decision of a customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted to the arbitration, consciously indicated their willingness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award.

At this juncture, it is pertinent to state as a general principle that the onus is on the party who alleges that the transaction leading to a dispute is a case of customary arbitration and must prove all the ingredients of customary arbitration, hence the aphorism "he who asserts must prove" is readily applicable.

The crucial issue now is whether the above ingredients of customary arbitration must not only be proved by the party relying on it but also must be pleaded? In *Eke v Okwaranyia*⁸ the Supreme Court held, per Uwaiso JSC, that the ingredients for a valid customary arbitration "must be pleaded and proved".

The same Supreme Court in *Ohiaeri v Akabeze*⁹ per Akpata, JSC had earlier held that:

Where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he (will rely on it, it) will not be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estoppel by customary arbitration.

7. (2001) *Supra* @ 88

8. *Supra* @ 24

It is observed that the Supreme Court in *Eke v Okwaranyia*⁹ cited and relied on its decisions in *Agu v Ikewibe*¹⁰ and *Ohiaeri v Akabeze*¹¹ to arrive at its conclusion that for there to be a valid customary arbitration, the five ingredients must be pleaded and proved. However, it is submitted that the decision relied upon in *Agu v Ikewibe* is a dissenting judgment delivered by Nnamaka Agu JSC, where the learned Justice held that before a party in a case in the High Court can defeat the right of his adversary to have his case adjudged upon by the courts on the ground that there has been a previous binding arbitration which raise an estoppel between them the ingredients of a binding customary arbitration must be pleaded and established. The opinion of the majority as expressed in the leading judgment delivered by Karibi Whyte JSC that prevailed was not that the ingredients must be pleaded but that such ingredients should be established by evidence. It was the view expressed in the majority judgment in *Agu v Ikewibe* that was expressly put by Akpata JSC in *Ohiaeri v Akabeze*.

Recently, the same Supreme Court had another occasion to consider and review the cases of *Agu v Ikewibe* and *Ohiaeri v Akabeze* in *Egesimba v Onuzurike* and it tilts in favour of the position that the ingredients of customary arbitration need not be pleaded but that such ingredients should be established by evidence.

In the first instance, it seems there are two conflicting decisions of the Supreme Court on whether the ingredients of customary arbitration must be pleaded or not. The position of the law on conflicting decisions of the Supreme Court is far clear. Where there appears to be a conflict in two previous decisions of the Supreme Court on the same point or issue, the Court of Appeal is bound by the latter decision and must follow and apply it.¹² Regarding the issue before hand, the decision in *Egesimba v Onuzurike* which affirms the decision in *Ohiaeri v Akabeze* will prevail over the decision in *Eke v Okwaranyia*.¹⁶

9. (2001) *supra* @ 87

10. (1992) *supra* @ 153-154

11. (2001) *supra*

12. (1991) *supra*

13. (1992) *supra*

14. (2002) 9 SCNJ 46 @ 63, per Ayoola JSC, delivering the leading judgment

15. (2002) *supra*

16. See the case of *Okpozo v Bendel Newspaper Corp.* (1990) 5 NWLR (pt. 153)

It is therefore humbly submitted that if all the ingredients of a valid customary arbitration are to be pleaded, it means that the settled position of the law that what is required to be pleaded are facts and not evidence is being jettisoned. Hence, it would work hardship on the party who relies on previous customary arbitration to still plead the ingredients. It suffices if it is pleaded that there was a previous customary arbitration and its ingredients will then be proved by evidence at trial, thus complying with the provisions of the rules of courts relating to pleadings that only facts are pleaded and not evidence.¹⁷ This is the view of the Supreme Court in *P.N. Uddoh Trading Co Ltd v Abere*, per Karibi-Whyte JSC¹⁸

The submission of parties to arbitration must be voluntary. Parties should not be induced, coerced, intimidated or unduly influenced in submitting to customary arbitration. In *Aguocha v Ubiji*¹⁹ the court relied on native law and custom in the effect of the three arbitrations between the parties and the only condition impliedly required by the court was the fact that the parties voluntarily submitted to the arbitrations. In confirming the decision of the arbitrations it was held that it was commonly accepted by the Plaintiff and the Defendant in evidence that where a party had agreed to swear a Juju oath produced by his opponent, and he later on its production, refused to swear to the oath upon the terms prescribed and agreed he would ipso facto under native law and custom lose the res litigiosa to his opponent.²⁰

The arbitrator(s) could be village head or traditional rule or body.²¹ It could be council of chiefs. It could be some elders in the community²² and

17. See Order 25 Rule 4(1) of the High Court (Civil Procedure) Rules 1988; Order 27 Rule 2 (1) of the Kwara State High Court (Civil Procedure) Rules 2005; Order 17 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules 1994 and Order 13 Rule 4 (1) of the Federal High Court (Civil Procedure) Rules 2009

18. (2001) 5 SC (pt. II) 64 @ 78-79. See also the case of *Trade Bank Plc v Yisi (Nig) Ltd* (2006) 1 NWLR (pt. 960) 101 @ 140

19. (1975) 5 SESC 221

20. *Aguocha v Ubiji* (supra) @ 225

21. As in *Ohiaeri v Akabeze* (supra) where the Customary arbitration was made by the traditional ruler and his cabinet. So also in *Awoile v Sotunbo* (1992) 5 NWLR (pt. 514).

22. *Agu v Ikewibe* (supra) where the customary arbitrators were the chiefs and elders of the town. See also *Okere v Nwoke* (1991) 8 NWLR (pt. 209) 317 where the customary arbitration was reached by a body composed of elders.

Ariyoosu D. A.

the arbitration could be conducted by priest wherein oath taking will be administered.²³

It is equally immaterial whether the parties expressly agreed that the decision of the arbitrators would be binding or not as the agreement to be bound by customary arbitration could be by conduct of the parties.

It could happen that particular transactions, such as land matters are usually referred to customary arbitration by the parties. It would therefore not be a defence for either party to contend that there was no agreement that the decision of the arbitrators would be final and binding on them merely because the agreement was not expressly reached.

In *John Onyenge & Ors v Chief Loveday Ebere*,²⁴ the parties agreed to customary arbitration of oath taking and it was even the Defendants/Appellants that were instrumental to the exercise of oath taking. Despite their willingness and intention that the decision of the customary arbitration would be final and binding on them, the defendants/appellants attempted to resile. In this case, Niki Jobi, JSC delivering the leading judgment held:

*One fairly curious aspect in this case is that the appellants, who were instrumental to the exercise of oath taking are trying to resile from it. I do not think that such a position is available to them in law.*²⁵

It is humbly submitted that the mere fact that the Appellants were instrumental to the customary arbitration of oath taking is sufficient to conclude that parties (and particularly the Appellants) accepted that the decision of customary arbitration would be final and binding on them

Similarly, the Supreme Court in *Oparaji v Ohani*²⁶ per Iguh JSC put the point thus:

23. As in *Okarika Onyenge v Samuel* (2005) 7 NWLR (pt. 924) 365. See also *John Onyenge & Others v Chief Loveday Ebere & Others* (2004) 6-7 SC 52 where one Okomkio Chukwuneta, a Juju priest administered his Juju, Ogwugwu Akpu of Obaha Ezike in Okija on the parties in respect of a disputed land. See also Tortola Okweco, *African Customary Law in Comparative Milieu and Related Topics*, Jator publishing company, 2003 P.57

24. (2004) (supra)

25. See *Tobi, JSC in Onyenge & Ors v Ebere & Ors* (2004) supra @ 63

Ariyoosu D. A.

I think I ought to start by restating the well settled principle of law that where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced.

Custom has spatiotemporal variation. It differs from place to place and from community to community. What is custom today may be outdated in the nearest future. Hence, the custom of the parties must be considered and proved to the satisfaction of the court, that is that the

customary arbitration is made according to the custom of the parties and where, for instance, the parties do not belong to the same customary tie result may be made to their trade or business

It must be established by a party asserting the existence of Customary Arbitration that a decision was reached and an award from such decision was published

Without prejudice to the definition of decision in relation to court of law,²⁶ but having regards to the fact that the proceedings of a Customary Arbitration, when binding, operates as estoppel per rem judicatum,²⁷ a decision of arbitrators in Customary Arbitration is any determination of the arbitration in relation to the matter referred to it, how-be-it, the matter must be civil in nature

Another vital issue here is, in a situation where there are more than one arbitrator and they are not unanimous in their decision, whether unanimity can be used in determining the bindingness or otherwise of the decision of the arbitrators

26. (1999) 6 SC (pt. 1) 41; (1999) 9 NWLR (pt. 618) 290 @ 304
27. Section 318 of the 1999 Constitution of the Federal Republic of Nigeria defines decision in relation to a court as "any determination of that court and includes Judgment, Decree, Order, Conviction, Sentence or Recommendation" A.S Hornby: Oxford Advanced Learner's Dictionary of Current English, 6th Edition (Oxford University Press) P. 301 defines decision as "a choice or Judgment that you make after thinking and talking about what is the best thing to do"
28. The issue whether the decision in customary arbitration could operate as estoppel per rem judicatum is discussed in paragraph 3.3 infra

Ariyoosu D. A.

In *Nwosu v. Nwosu*²⁹ the learned trial Judge referred a matter before him to a group of arbitrators who arrived at a majority and minority decisions. The Court of Appeal held that the learned trial Judge was wrong in accepting the majority decision and the arbitration was not acceptable because the arbitrators were not unanimous. The question one may ask is whether the relevant native law and custom requires unanimity in the arbitral decisions.

It is submitted that the duty of the court in such circumstance would be to refer to the relevant native law and custom to find out whether unanimity is the hallmark of arbitral decisions in the community in question.

On the issue of publication of arbitral award, it is submitted that this requirement must be viewed with extreme caution. One may conclude that publishing arbitral awards in Customary Arbitration presupposes that the award will be documented and made known to the public. But having regards to the fact that Customary Arbitration is usually inseparable from customary law, the requirement of publication of award could be said to be alien to customary law. This is because the use of document or even writing of decision and/or publishing same is uncommon, or even alien to customary law. Hence, once the arbitration is Customary, the need for publication of arbitral award should not ordinarily be a condition precedent to the validity of customary arbitration. It suffices if the award is merely pronounced to the hearing of the parties.

In *Gaji v. Paye*,³⁰ the Supreme Court held that Section 4 of the English Statute of Fraud 1677 which requires writing as a pre-requisite for a valid disposition of land is inapplicable to transaction, the subject matter in dispute which was made under customary law. It suffices to say that once there are witnesses to the Customary Arbitration proceedings who can testify to the existence of the award of the decision of the arbitration, the requirement of publication of the award becomes otiose.

Like any other type of arbitration, once all the conditions precedent to be fulfilled for the validity of Customary Arbitration³¹ have been fulfilled, the parties to it are bound by the decision or award of the arbitration and

29. (1996) 2 NWLR (pt. 64)

30. (2003) 5 SC, 53 @ 46

31. See the discussion on the ingredients of a valid customary arbitration earlier discussed

Ariyoosu D. A.

they cannot resile from it. Thus, in *Agudoro Ekpe & Ors v Ben Oke & Ors*,³² the contention of the Plaintiffs was that the land in dispute between them and the defendants was submitted to Customary Arbitration by both parties and that the arbitrators reached a decision and awarded the land in dispute to them (i.e. the Plaintiffs). The Defendants however denied the fact that they submitted to the Customary Arbitration. But the record of proceedings of the arbitration panel with the Defendants statement showing that they (the Defendants) submitted to arbitration and participated in the arbitration proceedings (including their statement which they made to the arbitrators) was tendered in evidence through the Plaintiffs witness. The court noted that both parties submitted to arbitration, made statement and called witnesses. In fact, the members of the arbitration visited the land in dispute and all the parties were given equal opportunities to present their case and call their witnesses. The Supreme Court agreed with the position of the trial court and the Court of Appeal that the arbitral proceedings were without bias and malice. It was held, per Kutigi JSC, delivering the leading Judgment as follows:

It is therefore not correct to say that the Court of Appeal did not consider Exhibit D in its resolution of whether or not the defendants submitted to arbitration. The Trial High Court certainly did and the Court of Appeal agreed with the findings of the High Court that the Defendants did submit to arbitration and that they are therefore bound by the result of arbitration.

IV. BINDINGNESS OF AWARD

It is not in dispute that Customary Arbitrator(s) or arbitration is not a court of law, hence his or its decision cannot by any stretch of imagination be said to be the decision of a court of law. It is not a court established by the Nigerian constitution. Howbeit, Customary Arbitration does not qualify as a court of law within the meaning of courts. It is not even an inferior court outside the constitution, like magistrate or customary courts.

Apart from the fact that the members of the body constituting Customary Arbitration may not be learned in the law, it is a notorious fact that the procedure adopted in adjudication is simple and clearly outside the

32 (2001) 5 SC (pt.1) 180

33 See Page 188 of the report

technical procedure of courts of law. Apart from this, the decisions of Customary Arbitration do not qualify as judgments in the real technical sense of the expression in our jurisprudence and, therefore, cannot pass the test of judicial precedent.

In his characteristic manner, *Niki Tobi JSC* put the position clearly in his concurring judgment in *Sunday Ufomba & Anor v Nwosu Ahuchogu & Ors*³⁴ when he opined:

A Customary Arbitration is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Native or customary arbitration is only a convenient forum for the settlement of native dispute and cannot be raised to the status of a court of law.... In view of the fact that a native or customary arbitration is not a court of law, the learned trial judge, with the greatest respect, was in error when he equated decisions of native arbitration with those of courts of law. While I concede to the learned trial judge that a customary arbitration could be binding on the parties when certain ingredients are fulfilled, decisions of such body do not qualify as "concurrent findings" with those of the High Courts

It should however be noted that parties will be estopped from resiling from the decision of customary arbitration despite the fact that such decision is not a decision of a court of law as an award by a customary arbitration will have the same binding effect as a decision of a court of law if the preconditions for its validity and bindingness are satisfied. This is the view expressed by the Supreme Court in *Okereke v Nwankwo*³⁵

The argument on whether the award or decision of customary arbitration could operate as estoppel per rem judicatum would be incomplete without making reference to the Court of Appeal decision *Okpurunwa v Ekpokam*³⁶ where it was held that our legal system does not recognize the

34. (2003) 4 SC (pt.11) 65 @ 90

35. (2003) supra @ 21, per Edizie JSC. See also *Balogun v Afolayan* (2002) FWLR 331 @ 346 where it was held that the proceedings of a customary arbitration is relevant and sufficient enough for the purpose of establishing or proving the plea of estoppel

36. (1988) 4 NWLR (Pt. 90) 554

practice of elders or natives constituting themselves as customary arbitration to make binding decision between parties in respect of land or other disputes. It is humbly submitted that, having regards to the various Supreme Court decisions on the subject matter,³⁷ the decision of the Court of Appeal in *Okpurinwa v Ekpokam* cannot stand the test of time. Customary arbitration is recognized and could be constituted by elders or native of a particular community

In *Yekkeen Alabi Odonigi v. Aileru Oyedele*³⁸ the Supreme Court per Kalgo JSC delivering the leading Judgment held:

It is no doubt true that customary arbitration is not an exercise of judicial power under the constitution (not a function) exercised by the courts. On the other hand it is now well settled that one of the many ways of settling disputes among African societies is to refer the dispute to either the family head, or elders or chiefs of the community concerned for settlement, and upon subsequent acceptance of the arbitration grant or award, it becomes binding on them.

Above shows without doubt that the decision of customary arbitration can conveniently operate as estoppel per rem judicatum so long as all the preconditions for the validity of customary arbitration are satisfied.

V. DECISION AS ESTOPPEL

The burning and crucial issue is the fact that the ingredients or preconditions for a valid customary arbitration are not the same as those of estoppel per rem judicatum. How then can the decision of customary arbitration operate as estoppel per rem judicatum when customary arbitration is not a court of law?

The principle of estoppel per rem judicatum has been enunciated in our laws, both statutory and case laws. Estoppel generally is a rule which bars a party to a suit from asserting or denying a particular fact, but regarding estoppel per rem judicatum Lord Denning put the position thus in *Fidelis Shipping Co. Ltd v. I. O. Exportchleb*³⁹

37. See *Yekkeen Alabi Odonigi v. Aileru Oyedele* (2001) 2 SC 194; *Balogun v. Afolayan* (2002) supra etc

38. (Supra) @ 203

39. Also known as estoppel by record. It is divided into two kinds: cause of action estoppel and issue estoppel.

40. (1966) 1 QB 630 at 640; (1965) 2 ALLER 4 @ 8

Ariyoosu D. A.

If one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring action against the same party of the same cause.

The Learned Jurist stated further

*Within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties then, as a general rule, neither party can be allowed to fight that issue all over again*⁴¹

The rationale behind the principle of estoppel per rem judicatum is as put by *Ikongbhe JSC in Ikpo v Azubuike*⁴² that it is to ensure that the matter is completely and finally settled or resolved. There ought to be an end to litigation and it is for the general good that solemn adjudication of the courts be not rescinded at will or lightly disturbed

The law is now firmly established that for a plea of estoppel per rem judicatum to succeed the party relying on it must prove the following: being the elements or ingredients:

1. The parties or their privies are the same in both previous and present proceedings
2. The claims or issues in dispute in both proceedings are the same
3. The res or subject matter of the litigation in the two cases is the same
4. The decision relied upon to support the plea of estoppel per rem judicatum must be valid, subsisting and final
5. The court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction Unless the above preconditions are established the plea of estoppel per rem judicatum cannot be sustained.⁴³ Thus, where the claims in the two proceedings are not the same a plea of estoppel per rem judicatum cannot lie.

41. Ibid

42. (2000) 14 NWLR (pt. 686) 166 @ 186

43. See the following cases: *Okpala Ezeokankwo & Ors v. Nwafor Okereke & Ors* (2002) 11 NWLR (Pt. 777) 1 @ 26-27 paras H-D, SC; *Oshodi v. Eyiunmi* (2001) 13 NWLR (Pt. 684) 298 @ 326 paras A-D SC; *Chief Sam Warri Esi v. The Chief Secretary to the Federation of Nigeria* (1973) 11 & 12 SC (Reprint) 115 @ 133-135 paras 15-25; *Adone v. Ikebudu* (2001) 14 NWLR (Pt. 733) 385.

In *Abiola & Sons Bottling Company Limited & Anor v First City Merchant Bank Limited & 2 Ors*⁴⁴ the plaintiffs took a loan from the 1st defendant, secured by a deed of debenture. When the plaintiffs defaulted in repaying the loan, the 1st defendant exercised her powers of sale under the debenture deed and appointed the 2nd defendant as receiver/manager. In exercise of his power as such receiver/manager, the 2nd defendant sold off some of the plaintiffs' assets to the 3rd defendant. Not happy with the sale, the plaintiffs took out a writ of summons claiming several declarations, orders, damages and injunction while in *Abiola & Sons Bottling Company Limited v Seven-up Bottling Company Limited & 2 Ors*⁴⁵ the action was commenced on the main ground that the sale of the plaintiffs assets in *Abiola & Sons Bottling Company Limited & Anor v First City Merchant Bank Limited & 2 Ors* (*supra*) had been carried out during the pendency of another suit challenging and seeking to prevent the sale of the assets. The plaintiffs therefore sued essentially for damages for an alleged wrongful sale of their assets.

The Supreme Court in *Seven-up Bottling Company Limited v Abiola & Sons Bottling Company Limited*⁴⁶ in its unanimous decision held as follows:

The latter action was for various declarations, order, damages and injunction in respect of the debenture deed and appointment of the 2nd Defendant as receiver/manager. The present action was for damages for alleged wrongful sales of Plaintiff's assets. The learned trial judge was right when he held that the cause of action were dissimilar⁴⁷

In a plea of estoppel per rem judicatum, the question whether an issue has been finally decided does not necessarily always need to be tied to the question whether or not there has been an adjudication of the substantive suit on the merit.

44. Unreported Suit No: KWS/122/91

45. Unreported Suit No: KWS/270/89

46. (2001) 6 SC 73; (2001) 13 NWLR (Pt. 730) 469; (2001) 6 SCNJ 18

47. (2001) 13 NWLR (Pt. 730) @ 508

Ariyoosu D. A.

The test most adequate for all occasion is whether the court which gave the decision can vary, re-open or set aside the decision. If it cannot the decision in that context is final. This is the view of the Supreme Court in *Onyeawuchi v INEC & Ors*.⁴⁸ A judgment which has been given by a court without jurisdiction or which is otherwise a nullity for any reason cannot operate as estoppel per rem judicatum.

It is observed that the need to recognize customary arbitration as an important institution stems from the fact that the resolution of disputes and differences, like in other forms of Alternative Dispute Resolution (ADR), is cheaper, less formal and less rancorous than litigation. The legal position seems to be that where an award has been handed down under customary arbitration and accepted by the parties, it will not open to any of the parties to turn around at a later stage and reject it, the operative factor being the initial acceptance of the decision at the time it was given. Hence, awards of customary arbitration operates as estoppels per rem judicatum and this is exactly where the regime of customary arbitration meets with estoppel per rem judicatum.

Where the arbitrators are traditional institutions or chiefs recognized by customary law as possessing the power to act as arbitrators under customary arbitration, it is clear that this recognition is one of the ingredients which will be used in determining the validity of the arbitration.

Unlike other laws, certain procedures exist for the validity and proof of customary law. The 17 court must find out if the customary law passes the validity tests of repugnancy, incompatibility, public policy and applicability. Once the validity tests have been passed the question of proof becomes the next issue to settle. It is observed that in none of the cases or instances of customary arbitration pronounced upon by our courts are the validity tests conducted. They seem to be assumed.

VI. SUMMARY AND CONCLUSION

The assumption of validity tests of customary law in customary arbitration seems to proceed partly from a confusion over the sequence

48. (2002) 4 SCNJ 265 @ 276

49. See *Ovwonikoko v Arowosaiye* (1997) NWLR (Pt. 523) 61 @ 75; *Odotola v Oderinde* (2004) 5 SC (Pt. 11) 90 @ 98

Ariyoosu D. A.

for the application of customary law and partly because neither the parties nor the court before whom the issue of customary arbitration is raised raises the issue of validity tests of customary law. It is submitted and recommended that in every case where a customary arbitration is pleaded or raised, the tests of validity and prove of customary law must follow.

Although customary arbitration itself has its own ingredients for its validity, this does not mean that the usual and established validity tests of customary law should not be passed. It must be determined whether the customary arbitration sought to be relied upon passes the validity tests and if it does the next stage would be to establish, by proof, the ingredients of a valid customary arbitration

Similarly, the requirement that the award of customary arbitration must be published, it is opined, runs contrary to the age long characteristic of customary law that customary law is largely unwritten. The implication of the requirement of publication of the award of customary arbitration is that without the award of the arbitration being published, such customary arbitration is invalid. It is here recommended that where issue of publication is raised a mere pronouncement of the award should be deemed sufficient publication.

This position, however, derogates from, and is liable to barstardise the whole essence of customary law. It is recommended, therefore, that when the occasion arises, our courts should soften the requirement of publication and instead such a requirement should be made merely directory and discretionary, and not mandatory.

The issue of finality and bindingnes of customary of arbitration has been critically appraised in this work. Also being a form of Alternative Dispute Resolution, the essence and importance of arbitration is articulated in this work. Similarly, the essential ingredients of a valid customary arbitration and a plea of estoppel per rem judicatam are examined

Customary Arbitration exists in our society both at the rural and urban areas and therefore should be recognized thereby promoting a dispute settlement mechanism which is simple, less formal, less costly and non-litigious