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Customary Arbitration Of Land Disputes And The Implication Of Finality And The Applicability Of The Principle Of *Res Judicata* Of Awards In Nigeria

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ABSTRACT

Before the coming of the colonial masters into the West African Coast, Nigeria was formally occupied by about 250 independent nations. These nations had their distinct customs and laws, which they brought on board Nigeria that differ from place to place. Customary arbitration was and still remains a widely accepted option for settling disputes. This method of adjudication is governed by the Nigerian customary law. It is endorsed by the Constitution of the Federal Republic of Nigeria 1999 (as amended), and recognized by the courts. Thus, it is neither regulated by common law principles on arbitration nor by the Arbitration and Conciliation Act, Cap. A18 LFN 2004, which is the basic legal framework regulating written agreements to arbitrate in Nigeria. Although the Land Use Act, Cap. 202 Laws of the Federation of Nigeria (LFN) 2004 deals basically with issues of land in Nigeria, the legislation has remained most controversial and the subject of interest in land expectedly complex. The unique characteristics of customary law arbitration in Nigeria are that agreements to arbitrate are usually oral in nature, and customary law arbitral proceedings and awards are not normally recorded in writing. The aim of this paper therefore, is to examine the law and practice of customary law arbitration of land disputes in Nigeria and how the equitable principle of *res judicata* apply to customary arbitration. The objective of this paper is to ascertain how efficient customary arbitration of land dispute is achievable; the issues that militate against the enforcement of customary awards in land disputes and the consideration of the application of *res judicata* to customary awards for effectual conclusion of land disputes. The doctrinal research method was adopted as both the primary and secondary sources of law were adopted. The paper found amongst others that where customary arbitration is pleaded and proved, it is binding on the parties and capable of establishing estoppel *per rem judicatam*, also where parties who believe in the efficacy of customary arbitration resort to oath-taking to settle a dispute, they are bound by the result. It is recommended that customary arbitration should be encouraged in settling land disputes so as to help in decongesting land cases in courts.

Keywords: Res Judicata, Land, Custom, Arbitration, Nigeria.

INTRODUCTION

Disputes, in their various guises, are inevitable part of human interaction.[1] No society exists of which there have never been differences.[2] Indeed, conflicts among human beings are as old as life itself and will always exist.[3] Certainly, factors that can ignite or fuel disputes, controversies, or disagreements between people or communities or groups or societies, even amongst nations are legion and diverse. For example: Disputes may arise from different human transactions including economic activities, family relationships, community and neighbourhood activities, and other social relationships, international activities, religious activities, and other civil activities.[4] It could occur on other different subject matters, such as ideas or beliefs, values, material resources, roles and responsibilities[5] or from personal disagreements, religious crises, political, ethnic, marital disputes, chieftaincy matters, land and community boundary disputes and even economic conflicts.[6] In addition to the foregoing prodigious circumstances, it must be agreed that divergence of opinion among individuals, social groups, or societies; differences in societal values; as well as differences in individual's level of education, tolerance, maturity, understanding, interests, and the different ways by which different individuals, sects, or societies reason and/or react to issues concerning them or their loved ones account for much of the disputes or disagreements in our society, and indeed, the world today.

Experiences have shown that peace is a *sine qua non* for meaningful human existence and development. But peace can hardly thrive where there exist controversies, disagreements or unresolved disputes. In like manner, it is very unlikely for any meaningful development to take place or manifest where there is no peace. For this reason, mankind had ultimately device different means of resolving their differences whenever and wherever it occurs. This is to enable the disputing parties resume their normal cordial relationships once again, and for peace to reign in society. This is more so since the continuance of such controversies or disputes whether it is due to carelessness, mistake, wilful wrongdoing or mere misunderstanding would always energize the conflict between the disputing parties and

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[1] G. C. Nwakoby, *The Law and practice of Commercial Arbitration in Nigeria* (Enugu: Iyke Ventures Production, 2004) 1.

[2] A. M. Beheshi, 'Arbitration in Islam' *Almujtaba Islamic Network* (2012) <http://www.almujtaba.com/en/index.php/left-menu-articl es/73-history/391-arbitration-in-islam> accessed 14 May 2020.

[3] O. Oluduro, 'Customary Arbitration in Nigeria: Development and Prospects' (2011) 19(2) *African Journal of International and Comparative Law* pp. 307-330.

[4] J. O. Orojo & M. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria,* (Lagos: Mbeyi and Associates Nigeria Limited 1999) 1

[5] O. Oludoro (n. 3)

[6] I. Imam, 'The Legal Regime of Customary Arbitration in Nigeria' <www.unilorin.edu.ng/publications...pdf> accessed 20 May 2020

deepen their disagreements and grief against each other.[7] Perhaps, it was against this backdrop that Richard Bruce of the Gray's Inn, in his work, *Success in Law,* wrote:

> A man living on his own on a desert island can behave exactly as he likes. As soon as a second arrives, however, the two of them must come to some arrangement or agreement as to how they are going to get along together … Every society in every age has found it essential to work out a code of rules to which its members must conform, for otherwise there would soon be no society at all – only rival gangs of thieves fighting endless vendettas against one another.[8]

Similarly, the African Mediation and Community Service posited that:[9] Disagreements and misunderstanding are key characteristics of human relationships whether the relationship is a domestic, national or international one. The potential for disputes is even higher where the parties are from different cultural, economic and political backgrounds with different legal systems. Since disputes are such a critical part of human relationships, many countries have mechanisms to resolve them in a manner, which maintains the cohesion, economic and political stability of the state. This is particularly so with regards to disputes related to commerce because commerce is the engine of growth.

Ultimately, it is to aid in the resolution of disputes that customary arbitration, which is the subject matter of this paper, was conceived and born. Although, litigation is the principal method of settling disputes today, arbitration was, and still remains one of the most credible Alternative Dispute Resolution (ADR) mechanisms that are known to mankind. The method has been from immemorial. Land disputes are in the increase. Why land disputes are in the increase is not far-fetched. According to Umuzulike[10] in Nigeria land is a fundamental source of wealth either directly or indirectly, and "It provides about ninety nine percent of the citizens' means of livelihood and, or, sustenance. It has profound and undoubted religious significance in most African Societies". According to Obi[11] "land is a deity, the source of all life, of food and fertility, the custodian of social norms and morals. Both as a good and as a legal person, some form of respect and tribute is due to mother earth". In the light of the fact that land is a most invaluable resource, land disputes cannot but be expected land being a 'hot commodity'.

[7] A. M. Beheshi (n. 3)
[8] R. Bruce, *Success in Law,* (London: John Murray Publishers Limited 1983) p. 1.
[9] African Mediation & Community Service. <http://www.metros.ca/amcs/international.htm> accessed 22 May 2020.
[10] I. A. Umezulike. ABC of Contemporary Land Law in Nigeria (Enugu, Snaap Press Nigeria Ltd, 2013), P.2
[11] Ibid. The learned author cited with approval S.N.C. Obi, The Ibo law of Property, (Buttersworth African Law Series No. 15, 1965), P. 30

HISTORICAL EVOLUTION OF CUSTOMARY LAW ARBITRATION IN NIGERIA

In Nigeria, the original source of customary law arbitration is the Nigerian customary law. Customary law in Nigeria comprises of the indigenous customary law and the Islamic law. History is replete with abundant evidence in support of the existence and use of arbitration for the settlement of disputes in accordance with native laws and customs or customary law long before any form of colonization in Africa.[12] Prior to the advent of the British colonial masters into the West Coast of Africa, there were about 250 nations occupying the geographical entity now known as Nigeria. These nations had their different methods of settling disputes, which were enshrined in their various native laws and customs. The native laws and customs were basically indigenous in character and each usually operates only within a given area.[13] Customary law arbitration was one of the methods adopted by the native for the settlement of their disputes in accordance with their native laws. The natives resorted to customary law arbitration because it is less formal, less rancorous, inexpensive, expeditious, culturally acceptable to them, relevant and suitable for their situations in lives.

In the former Western Region of Nigeria, arbitration was used for settling disputes among the people. Such arbitration was usually conducted in accordance with the various native laws and customs of the diverse people occupying that area. In the ancient Benin Empire, for example, the Oba (King of the Dynasty) or the Uzamas (Elders of the Community) or the Enojies (Heads of Clans) or the Iyases (Special Advisers to the King) functioned as arbitrators on many occasions. In the former Eastern Nigeria, now South East Geopolitical Zone of Nigeria, arbitration in accordance with the indigenous customary laws and customs of the various people and communities occupying the geographical area was well known, and still remains a widely used alternative for the settlement of disputes, particularly land and family disputes whilst amongst the Hausa and Fulani people occupying the former Northern Nigeria, arbitration in accordance with Islamic law was used, and still remains an alternative method of settling disputes in that area.

Upon the arrival of the British colonial masters, and the subsequent introduction of English law, the diverse customs and laws of the different nations that constitute Nigeria were not abolished. Rather, it was a renowned policy of the colonial masters to respect the established laws and customs of their subjects, in so far as the native laws and customs pass the three basic tests set by the colonial masters to standardize their operation.[14] Naturally, the non abolition of the pre-existing customary laws of the various nations meant that each of the different ethnic group or nation that were united by the act of amalgamation by Lord Fredrick Luggard in 1914 came on-board the "new nation," Nigeria, with their own different native laws and customs. Also, the non-abolition of the pre-existing customary

[12] B. A. Temitayo, 'Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers' (2014) 2(1) *Journal of Research & Development.* <www.arabianjbmr.com/pdfs/RD.../4.pdf> accessed 22 May 2020

[13] Kuper and Kuper, *African Law, Adaptation and Development*, p. 7.

[14] Otherwise known as the Repugnancy Test. This disqualifies customs or native laws that were considered to be in discord with natural laws, equity and good conscience.

laws in these nations led to their continued existence up till today. A smattering knowledge of constitutional development in Nigeria reveals that through this process, customary law, and indeed, customary law arbitration is saved. Nigerian customary law, therefore, constitutes an important part of the country's "existing laws" that are saved by the country's Constitution.[15] Evidently, it is through this source that the various customary laws of the various peoples of about 250 different nations that today constitute Nigeria found their way into Nigeria, with the result that today, customary law arbitration is recognized as one of the primary sources of the law of arbitration in Nigeria.[16]

Customary law arbitration had had to suffer grievous setback in Nigeria, and is at the present time, facing serious threat to its development and sustainability. In the early stages of arbitration in Nigeria, the regular courts were reluctant to recognize the decisions or awards of customary law arbitrators. Perhaps, this attitude substantially arose from the rationale that arbitration constituted a rival body to the then English type courts. It was, however, soon realized that arbitration may in fact prove the best way of settling some types of disputes amongst natives. Thus, the attitude of the regular courts to arbitration gradually changed and the courts (in keeping with the erstwhile colonial policy of according respect to the established laws and customs of their subjects, provided that the native laws and customs in question pass the three basic tests set by the colonial masters to standardize its operation) started to accept customary law arbitration as a valid method of resolving disputes amongst natives.[17]

Healthy development was truncated by a sudden change of attitude and reluctance on the part of the courts to recognize arbitration under customary law. This was made manifest in *Okpuruwu v. Okpokam*,[18] where the Court of Appeal stated that "to talk of *customary law* arbitration (having a binding force as a judgment) in this country is … somewhat a misnomer and certainly a misconception".[19] However, in swift reactions, some eminent scholars and jurists frowned at this negative development. For example, in a dissenting opinion, Oguntade, JCA (as he then was) said: "I find myself unable to accept the position that there is no concept known as customary or native arbitration in our jurisprudence."[20] As luck may have it, shortly thereafter, customary law arbitration was reconfirmed as a valid method of resolving disputes amongst natives in Nigeria as the courts began to recognize it again.[21] Despite this positive development, it is still worrisome that the courts have continued to sing discordant tunes on issues concerning customary law arbitration in Nigeria with the result that in Nigeria today, customary law arbitration remains one of the special areas of law that is surrounded with lots of controversies.[22]

[15] S. 318 (1), Constitution of the Federal Republic of Nigeria 1999 (as amended)
[16] G. Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja: Longman Nigeria Plc. 1997) 15.
[17] *Assampong v Kweku Amuaku and Others* (1932) 1 WACA 192 at p. 201.
[18] (1988) 4 NWLR (Pt. 90) 544.
[19] *Okpuruwu v Okpokam supra*, p. 571-3
[20] *Okpuruwu v Okpokam supra,* p. 554.
[21] *Agu v Ikewibe* (1991) 3 NWLR (Pt. 180) 385.
[22] A. Chukwuemerie, 'Salient Issues in the Law and Practice of Arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law.* pp. 1-52 at p. 1; G. Ezejiofor, 'The

A similar fear was expressed in a recent study on African traditional dispute resolution, titled: *Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa,* by Bolaji Owasanoye where he lamented, thus:[23] African traditional system of dispute resolution is closer in nature and character to arbitration than to the colonial system of adjudication. But since African lawyers are trained in the common law system of adjudication which is integrated into the system of governance by the constitution backed by the establishment of courts, judges, the rule of procedures and the enforcement of the judgments, African lawyers have come to rely on and trust the common law system more than any other form of dispute resolution …. As a dispute resolution method, arbitration ought to fascinate African lawyers …. That it is not promoted as much as it ought to in Africa can only be attributed to conservatism imbibed from the common law system. Although African dispute resolution mechanisms cannot be applied to commercial disputes except perhaps those dealing with community land, nevertheless, it offers an insight into the options available outside the adjudicatory system offered by the common law.

In a similar manner, Professor Osita Eze,[24] also remarked that: "Because of well-known problems associated with the formal justice system, being out of cultural context, tendency to promote antagonistic relations rather than lead to sustainable peace, cost, delay etc, and because 80% of the population as a matter of fact and practice resolve their disputes through … customary tribunals or arbitration process it is thought that more attention should be paid to the processes and methods of this customary tribunals if justice is not to be denied to the majority who may never access the formal courts."

It is submitted that the foregoing views lend credence to the view earlier expressed in this study by the researcher to the effect that customary law arbitration in Nigeria is facing serious threat to its development and sustainability, and amply justify this study. Although, Professor Eze has since died, and is no more with us to fraternize and dine with us at Bar Conferences and Law Dinners (as was his stock-in-trade), his intellectual contributions to law, particularly to the body of knowledge regarding customary law arbitration, remains fresh in the minds of those of us who cherish and seek for knowledge. This research, no doubt qualifies *inter alia* as one of the much needed "more attention" in Professor Eze's opinion that is required to be paid to customary law arbitration "if justice is not to be denied to the majority who may never access the formal courts". It equally qualifies as a positive change of attitude regarding the "conservatism imbibed from the common law system" by many African lawyers that tend to trust and rely on the common law system more than any

Prerequisites of Customary Law Arbitration' (2002) 16 *Journal of Private and Property Law,* 34; E. S. Nwauche, 'Customary Law Arbitration and Customary Arbitration' (1999) 3(1) *Nigerian Law and Practice Journal*; V. C. Igbokwe, 'The Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited' *Journal of African Law,* 41 pp. 201-214.

[23] B. Owasanoye, 'Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa' <http://www.duhaime.org/LegalDictionary/A/Arbitration.aspx> accessed 22 May 2020.

[24] O. C. Eze, 'Beyond the Courts – Community Tribunals and the Application of Customary Law' <info.worldbank.org/etools/docs/library/92913/Henny/zip/jr_africa/pdf/eze_paper.pdf> accessed 17 May 2020

other form of dispute resolution. This negative attitude, to Bolaji Owasanoye has caused customary law arbitration not to be promoted as much as it ought to in Africa.

THE VALIDIDTY OF AN AWARD UNDER CUSTOMARY ARBITRATION

According to Ezike, an award of a customary arbitration is not a judgment of a court of law and cannot be enforced until such award is specifically pleaded, carefully examined, and approved by a competent court.[25] This stance is totally in agreement with the earlier postulations of the Professor G. Ezejiofor. Again, like Ezejiofor, Ezike relying on the authorities of *Kwasi v. Larbi,*[26] and *Oline v. Obodo*[27] contends that the parties to customary law arbitration, by voluntarily submitting to arbitration under native law and custom are normally assumed to have agreed to be bound by the decision of the arbitrator or arbitral tribunal or arbitral panel, as the case may be. "It is, therefore, not competent for any party to resile from the arrangement simply because the award did not favour him".[28]

To further buttress this point, the work of G. Ezejio[29] was relied upon to the effect that once disputing parties voluntarily agree to submit their dispute to a particular arbitrator or arbitrators whom they believe would be fair and impartial, they are deemed to have agreed to accept the award. In fact, in the writer's view, having agreed to be bound by the outcome of such arbitration, it would be unacceptable for any of the parties to back out from the arrangement after the arbitrator had handed down its award, simply because the award did not favour such a party as this would be tantamount to 'eating ones cake, and demanding to have it back'.

Another very interesting aspect of Ezike's work pertains to the "unanimity" or otherwise of the decision of customary law arbitration panel composed of more than one person. The writer asks, "Was it (the Court of Appeal)[30] right in demanding that the decision of the arbitral panel (composed of 2 (two) *Ezes* [Chiefs] and their Cabinet)[31] must be unanimous?" In answering this question, the writer says: "As customary arbitration usually involves many elders as arbitrators, their decision could be unanimous. But where a unanimous decision is not possible, a majority decision is sufficient to give validity to their award."[32] The writer further stated:

> In customary law arbitration, the arbitrators need not reach a unanimous decision for their award to be valid … A majority decision is acceptable in customary arbitration. The important thing is that the arbitration satisfies the essential ingredients of

[25] E. O. Ezike, 'The Validity of an Award under Customary Law Arbitration: *Nwosu v. Nwosu*' (1998 – 1999) 7 *The Nigerian Juridical Review* pp. 269-278.
[26] (1952) 13 WACA 76
[27] (1958) FSC 84
[28] E. O. Ezike (n. 24)
[29] G. Ezejiofor (n. 21) 32.
[30] Emphasis ours
[31] Emphasis ours
[32] E. O. Ezike (n. 24) 270.

> customary law arbitration and that the majority decision is fair and just and acceptable to at least one party.[33]

By relying on the authorities of *Njoku v. Ekeocha*[34] and *Oline v. Obodo*[35] the writer opined that for an award to be ratified and enforced by a court, the court must be satisfied that the arbitrators gave the parties a fair hearing and that the award itself is certain, final, reasonable, legal, possible of execution and disposes of all the differences submitted to arbitration; as well as that the parties voluntarily submitted to arbitration, and that they expressly or impliedly agreed before hand to accept the decision of the arbitrators and that the arbitrator was selected in accordance with customary law.

Thus, disagreeing with the Court of Appeal decision in *Nwosu's* case, the learned writer argued that "any insistence on other requirements (other than those listed above)[36] will be stretching the customary arbitration too far and unhealthy for it."[37] He further argued that the validity of customary law arbitral award neither depends on compliance with the requirements of the Arbitration and Conciliation Act[38] nor on the High Court Rules, as customary law arbitration is regulated by customary law.[39]

In the concluding part of the work under review, the writer pointed out that the Supreme Court had in *Igwego v. Ezeugo,*[40] retracted its steps from its decisions in *Agu v. Ikewibe*[41] and *Ohiaeri v. Akabeze,*[42] which the Court of Appeal heavily relied on to arrive at its judgment in *Nwosu's* case. In particular, the writer approvingly drew attention to the dictum of the Supreme Court of Nigeria in the *Igwego's* case, where the court, per Nnaemeka-Agu, J.S.C., who delivered the lead judgment clearly stated that now, the general rule governing arbitration is well known, and it is set out, *inter alia* in the case of *Omanhene Kobina Foli v. Ohene Obeng Akese.*[43] In that case, Deane, C.J. said: "… in submission to arbitration the general rule is that as the parties choose their own arbitrator to be judge in the dispute between them, they cannot when the award is good on its face, object to this decision, either upon the law or the facts."

The writer further noted with passion that in *Igwego's* case *supra,* the Supreme Court of Nigeria also cited and relied on *Ojibah v. Ojibah*[44] to the effect that where two parties to a dispute voluntarily submit their matter in controversy to arbitration according to native law and custom, and agree expressly or by implication that the decision of the arbitrators would

[33] *Ibid.,* at p. 275
[34] (1972) 2 ECSLR 199.
[35] (1958) FSC 84, o *p. cit.*
[36] Emphasis ours.
[37] E. O. Ezike (n. 24) 270
[38] Cap. A18 LFN*2004*
[39] E. O. Ezike (n. 24) 270
[40] (1992) 6 NWLR (Pt. 249) 561 at 586.
[41] (1991) 3 NWLR (Pt. 180) 385 at 407.
[42] (1992) 2 NWLR (Pt. 220) 1.
[43] (1930) 1 WACA 1.
[44] (1991) 5 NWLR (Pt. 191) 296.

be accepted as final and binding, then once the arbitrators reach a decision, it is no longer open to either party to subsequently back out of such decision.

FUNDAMENTAL CONSIDERATIONS IN CUSTOMARY LAW ARBITRATION IN NIGERIA

According to Onuh:[45] "There is always a procedure for settling disputes amongst the people over land matters and other civil matters … A short illustration taken from Amaokwe Item, Imo State of Nigeria, will tend to illustrate this point. If dispute develops between two people or two parties of Amaokwe Item origin concerning any property and in particular land matters or other rights, the one or party who thinks that his right has been encroached upon makes a complaint first to the head of his family. The head calls the supposed offender to verify the complaint. If the parties belong to different families, for e.g., one from Nde Oho and the other from Nde Agu the head of the complainants family informs the head of the offender's family. Where there is a private settlement, this is followed by the offender abiding by the decision of the arbitrators. If the case is not settled at this point, a day is set out by the two family heads for the trial of the issue. In the first place, there must be an issue to be tried, which under the custom of the people is a violation of a right appertaining to the complainant. If the families are unable to settle the dispute, the chief together with his elders called *Ndichie* form a court to decide the case." All that is important is that those people who are free to express their opinions in coming to their decision are guided by a set of rules of human conduct viz customary law of the society.

In some Igbo sub-groups, for example, in Nsukka area, where in the resolution of a dispute by way of arbitration under native law and custom, it appears to the arbitral tribunal that one of the disputing parties is not or likely not to be satisfied with the arbitral award, the arbitral tribunal would direct such a party to produce a juju or shrine for his opponent to swear to the innocence or truth of his claim. If this is done, and the party who swore the oath survives it, he becomes entitled to the arbitral award, after he had celebrated his victory and/or vindication. But if he dies in the process, his opponent becomes entitled to the arbitral award by virtue of the oath that proved his opponent wrong.

Oath-taking, which symbolizes appeal to the supernatural is the court of final appeal in the resolution of disputes between disputing parties by way of arbitration under native law and custom.[46] If after an oath has been sworn, and won or lost, the party against whom the award was made refuses to abide by the arbitral award, then the community would, on the invitation of the successful party, intervene to ensure that the award is respected. This is

[45] J. Onuh, *The Case for the Restatement of Customary Law in Nigeria* (Aba: Okeudo & Sons Press, 1978) pp.
3 - 4.

[46] The courts have held that consultation of an oracle, where it is the accepted custom of the parties to arbitration is valid. See *Agbodike v. Nwabueze* (2002) 12 WRL 58 at 75.

usually achieved through local or traditional arbitral award enforcement mechanisms such as fine, excommunication, or ostracism.[47]

On the other hand, the party in favour of whom the award was made may wish to proceed to a competent court of law with a claim for declaration that the award is valid and subsisting and for its enforcement. In a modern society, this course is highly preferred.

MEANING OF CUSTOMARY LAW ARBITRATION

In Nigeria, customary law arbitration is haunted by the question of definition. Several attempts have been made at defining the concept by various scholars and jurists at various points in time and at various occasions. In the process, varieties of definitions, meanings, characteristic qualities *et cetera,* have been attributed to the concept. Unfortunately, up till now, there has not been any legislative backing for any of such definitions. Often, the terms "customary arbitration" and "customary law arbitration" are interchangeably used to mean one and the same thing. However, some scholars find this practice irksome. For example, E. S. Nwauche[48] argues that there is a wide distinction between "customary arbitration" and "customary law arbitration" but other writers and arbitration law experts in Nigeria, such as Professor Gaius Ezejiofor seems to take side with the general view that both "customary arbitration" and "customary law arbitration" are free to be used interchangeably to mean one and the same thing. It is this latter view that the present writers will adopt in this paper. There is no doubt that in searching for the definition of customary law arbitration, like any other legal concept, several difficulties, such as social, political, ideological, historical, and moral considerations, lie in wait. This is evidently visible and/or more pronounced in the field of customary law and customary law arbitration in Nigeria due to the fact that most of the early missionaries, anthropologists, and writers, to a very large extent, misunderstood indigenous customary laws and customs to be mere detestable aspects of paganism, which they ought to undermine under the guise of both religion and civilization. In like manner, they misunderstood customary law arbitration for mere attempt at negotiated settlement, which is not binding upon the parties and from which a party may back out at any time or even reject the award when not favourable.

As far back as 1956, Elias in his book, *The Nature of African Law*, stated that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or the elders of the community or the chief of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which only becomes binding upon the parties only after signification of its acceptance, and from which either party is free to withdraw at any stage of the proceeding.[49]

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[47] A. Adebolari, 'Ostracism as a Means of Enforcing Judgment of Customary Arbitration in Nigeria and the Challenge of Fundamental Rights' Global Digital and Technology Forum Library. <http://dl4.globalstf.org/?wpsc-product=ostracism-as-a-means-of-enforcing-judgment-of-customaryarbitration-in-nigeria-and-the-challenge-of-fundamental-rights> accessed 20 May 2020.

[48] E. S. Nwauche, 'Customary Law Arbitration and Customary Arbitration in Nigeria' (1999) 3 *Nigerian Law and Practice Journal* 63-72, cited in C. A. Ogbuabor, 'Recurrent Issues in the Validity of Customary Arbitration in Nigeria' in O. D. Amaucheazi and C. A. Ogbuabor, (eds.) *Thematic Issues in Nigerian Arbitration Law and Practice* (Onotsha: Varsity Press Limited, 2008) 88

[49] T. O. Elias, *The Nature of African Law* (Manchester: 1956) p. 212.

Customary law arbitration therefore refers to the method of dispute settlement by third parties neutrals upon the submission of dispute to them. Usually, the arbitrators are family heads, chiefs, community heads, council or elders who apply customary law and custom in arriving at a decision. The parties upon acceptance become bound and the decision/award becoming binding and enforceable.

It is instructive to note that the procedure of Customary arbitration vary from place to place and the type of dispute i.e whether minor or major like land dispute. Writing on the resolution of land disputes, Azinge states: "In resolving land disputes in Ikot Odon, the first step is to plant the traditional injunction, which is *Offod*, warning the warring parties not to interfere with the land pending the resolution of the dispute"[50].

NATURE OF CUSTOMARY ARBITRATION

Customary law arbitration is neither an exercise of judicial powers under the Constitution nor a function exercised by the courts.[51] Also, it is neither regulated by common law principles on arbitration nor by the Arbitration and Conciliation Act,[52] which is the basic legal framework regulating written agreements to arbitrate in Nigeria. It is entirely governed by the customary law – the Nigerian Customary Law.

As we have clearly demonstrated above, other unique characteristics of customary law arbitration in Nigeria is that agreement to arbitrate is usually oral in nature, that customary law arbitral proceedings and awards are not normally recorded in writing,[53] and that customary law arbitrations are concerned only with disputes, which have already arisen and not with future disputes.[54] It must be humbly submitted that it is not wrong if proceedings and awards of customary law arbitration are recorded and preserved in written forms. Indeed, this ought to be encouraged.

As we have seen earlier, written agreements to arbitrate are popular because of their private nature but customary law arbitration is popular not because it is completely private in nature but because of its relevancy to the communities that recognize and use it for the settlement of their disputes.[55] In fact, in customary law arbitration, the whole community is present. Thus, where a party got an award or is vindicated by the gods as a result of an oath he had taken in pursuance of a given arbitration, members of his family or the extended family or the kindred or the village, as the case may be, are present and see to it that the arbitration award is enforced.

[50] Azinge E., Restatement of Customary Law of Nigeria, (Lagos: West African Book Publishers Ltd, 1997), p.58

[51] *Egesimba v. Onuzurike* [2002] 15 NWLR (Pt. 791) 466 at 477.

[52] Cap. A18 LFN, *2004.*

[53] *Oline v. Obodo* (1958) 3 FSC 84 at 86.

[54] G. Ezejiofor, 'The Nigerian Arbitration and Conciliation Act: A Challenge to the Courts' (1993) *The Journal of Business Law* pp. 82-103 at p. 83.

[55] O. C. Eze, 'Beyond the Courts – Community Tribunals and the Application of Customary Law' <info.worldbank.org/etools/docs/library/92913/Henny/zip/jr_africa/pdf/eze_paper.pdf> accessed 17 May 2020

Where however, the other party refuses to comply with the award, such a person is tabooed or socially excluded.[56] The villagers stand in awe of such measures and readily fulfil their parts or obligations when threatened with it. This is why it is often said that the enforcement of customary law arbitration by the natives is not difficult.

According to Amazu,[57] customary arbitration is a known and widely used option, especially in land disputes in the former Eastern Region of Nigeria. Its prevalence notwithstanding, due to its defects and the complex nature of modern commercial disputes, on its own, our customary law arbitration is admittedly inadequate and unsuitable for the settlement of commercial disputes, most of which are international in dimension. It is better we confine customary law arbitration within the banks of the communities that recognize and use it in Nigeria with possible adaptations.

Indeed, customary law arbitration refers to the settlement of disputes by way of arbitration in accordance with native laws and customs, and should be seen and understood in that spirit. The communities that recognize and use customary law arbitration for the settling of their disputes resort to it because it is inexpensive, expeditious, culturally acceptable to them, relevant and suitable for their situations in lives. On the contrary, the court system of adjudication in Nigeria today tends to be out of cultural context. It exhibits high tendency for promoting antagonistic relations rather than lead to sustainable peace. It has grossly proved to be inadequate at processing disputes speedily, in a less confrontational and informal manner, and at affordable costs to litigant.

JUDICIAL ATTITUTE TOWARDS CUSTOMARY LAW ARBITRATION IN NIGERIA

The right of individuals in society to choose their own forum for the purpose of resolving their differences is recognized in all legal systems. The Nigerian customary law, particularly indigenous customary law is not an exception. Thus, the right of individuals in their native communities to choose their own forum for the purpose of resolving their differences is recognized under native law and custom - contract or no contract. Under the indigenous customary law in Nigeria, for example, such right is generally expressed by the voluntary agreement of the disputing parties to submit their disputes to the arbitral tribunal. Oguntade JCA (as he then was) who dissented from the lead judgment delivered by Uwaifo, JCA (as he then was) in *Okpuruwu v Okpokam,*[58] correctly noted that "The right to freely choose an arbitrator to adjudicate with binding effect is not one beyond our native communities."[59]

As a valid ADR technique, customary law arbitration like all arbitrations, derive its legitimacy from the voluntary agreement of the disputing parties to submit their disputes to

[56] B. Owasanoye, 'Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa' <http://www.duhaime.org/LegalDictionary/A/Arbitration.aspx> accessed 19 May 2020.
[57] A. A. Amazu, 'Developing and Using Commercial Arbitration and Conciliation in Nigeria' (1994) 1(1) *Lawyer's Bi-Annual – A Journal of Nigeria and Comparative Law*.
[58] (1988) 4 NWLR (Pt. 90) 544 at 557
[59] *Ibid*

the arbitral tribunal[60] who are usually members of an extended family *(Umunna)* or the elders of the village or chief of the town, in accordance with native laws and customs, to which the parties are subject. In conformity with this position, the West African Court of Appeal, in the case of *Assampong v. Kweku Amuaku & Ors*[61] correctly stated that:

Where matters in dispute between parties are, by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom and a decision is given, it is binding on the parties and the Supreme Court will enforce such decision. Thus, it is commonplace that where disputing parties voluntarily submits their points of disagreement for arbitration under native law and custom, the law will not deny the parties of their inherent rights to so do.[62] Therefore, the voluntary nature of the agreement to arbitrate a dispute, the consent of the parties to submit to arbitration, as well as the conduct of the arbitration in accordance with customary law are basic to the issue of validity and bindingness in all arbitrations.[63]

All voluntary agreements contain within them, the essence of the rules governing the transaction between such parties. These rules derive legitimacies from the consent of the parties. Thus, it is the agreement of the disputing parties to arbitrate their controversies that confers jurisdiction on the arbitral tribunal. In *Agu v. Ikewibe*,[64] Nnaemeka-Agu J.S.C. was quick to point out that the binding effect of the decision of a customary law arbitration derives from the fact that parties, which have their eyes wide open, agreed to opt for a decision by a non-judicial body, the decision of which they voluntarily agreed to be bound. In *Foli v. Akese,*[65] Deans, C.J., cited with approval the dictum of Maule J., in *Fuller v. Fenwick,*[66] to the effect that: "If the case had gone in the usual course of the law, it would have been determined by a jury. The parties have thought fit that arbitration was more proper to decide matters of fact than the jury and could more conveniently dispose matters of law than a judge on account of expense of contesting before a court an intricate point of law."

It is therefore, quite gladdening to learn from the foregoing exposition that the courts have recognized that under native laws and customs, disputing parties have inherent right to choose who and where they should go to settle their differences whenever such need arises in the course of their daily activities - whether it is as a result of divergence of opinion among individual players, disagreement in family relations, religious differences, community or international activities, and other civil, social, economic, or political differences. Therefore, it naturally follows that where individuals who have their rights to resort to the court of law for the resolution of their controversies decide and agree to opt for a decision of an arbitration

[60] G. C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: Iyke Ventures Production 2004) p. 9.
[61] (1932) 1 WACA 192
[62] *Kwesi v. Larbi* (1953) 13 WACA 76; *Foli v. Akese* (1930) 1 WACA 1; *Gyesiwa v Mensah* (1947) WACA 45; *Ankra v. Dabra* (1956) 1 WALR 89; *Abasi v. Onido* [1988] NWLR (Pt. 564) 37.
[63] *Kwesi v. Larbi* (1953) 13 WACA 76; *Foli v. Akese* (1930) 1 WACA 1; *Gyesiwa v Mensah* (1947) WACA 45; *Ankra v. Dabra* (1956) 1 WALR 89; *Abasi v. Onido* (1988) NWLR (Pt. 564) 37.
[64] (1991) 3 NWLR (Pt. 180) p. 390.
[65] (1930) 1 WACA 1.
[66] (1846) 16 LJCP 79.

tribunal, the decision of which they voluntarily agreed to be bound, it cannot be denied that it was their mutual and voluntary consent that conferred jurisdiction on such tribunal.

Consent may be conferred on an arbitration tribunal by the disputing parties either expressly or by conduct. This is because customary law arbitration is concerned with disputes that have arisen. It is rare for people who are quarrelling to meet and agree together to submit their grievances to a certain arbitrator or arbitration tribunal. This was the point made in 1958 by the court in the Ghanaian case of *Yaw v. Amobie,*[67] per Ollenu, J. (as he then was) where the court bravely stated that:

I am not impressed with this argument. It is very rare that two people who are quarrelling would meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates on the disputes.

VALIDITY OF OATH-TAKING UNDER CUSTOMARY ARBITRATION IN LAND DISPUTES

Generally speaking, oath-taking is a universal phenomenon. All religions, be it Christianity, Islam, Buddhism, African Traditional Religion *et cetera*, recognize oath.[68] However, the form may differ from religion to religion, and from occasion to occasion. Oath-taking under customary law arbitration, is a symbolic traditional ritual usually performed before a juju or shrine or with the *ofo,* a symbol and guarantee of truth and justice. In the Igbo traditional setting, no one would swear falsely by the *ofo*. With particular reference to customary law arbitration oath-taking, the practice derives directly from African traditional religious beliefs, which itself is deeply rooted in native laws and customs.

Philosophically speaking, in the Igbo speaking area of Nigeria, the practice represents an appeal to the supernatural - the gods, and the ancestors - as a means of proving innocence or uprightness or guilt, as the case may be, not only before ones accusers, prosecutors or persecutors but before the gods, the ancestors and the community at large, that is to say, 'before man and god'.

In support of this viewpoint, Okogeri and Oaikhena[69] observed as follows:

> "When all … quasi judicial methods have failed to secure redress to the aggrieved person, he can then appeal to the Spirit world i.e., the supernatural tribunal. This is the last "Court of Appeal". Justice is administered by swearing to the oracle. If after the passage of time the oath taker survives and is not, attacked by a

[67] (1958) 3 WALR 406 at 408.

[68] C. A. Ogbuabor, 'Recurrent Issues in the Validity of Customary Arbitration in Nigeria' in O. D. Amaucheazi and C. A. Ogbuabor (eds.) *Thematic Issues in Nigerian Arbitration Law and Practice* (Onotsha: Varsity Press Limited, 2008). 113.

[69] O. Okogeri, and G. E. Oaikhena, 'A Legal Reappraisal of Customary Adjudicatory System in Nigeria' <https://www.nigerianlawguru.com/articles/customary%20law%20and> accessed 19 May 2020.

> terminal illness or death, he generally celebrates his innocence and victory. The natives have absolute faith in this method, and have implicit confidence on the justice more than the one given by the highest court of the land the Supreme Court."

In like manner, Njake remarked that, "Laws and order are maintained because the ancestors so desire and command. And the ancestors so desire law and order because *Chuku* must approve of them."[70] Also, in *Obaji & Ors. v Okpo & Ors*.[71] the court stated that a man staking his life to assert his right is the highest appeal to conscience. A decision of the elders embodying this is pure and simple arbitration by customary law. Indeed, among the indigenous people of Nigeria, oath-taking is widely recognized as a method of establishing the truth of a matter in dispute under native law and custom and is recognized by the courts.[72] This explains why the natives trust and readily rely on it, whenever opportunity presents itself in the course of customary law arbitration proceedings.

A striking feature of traditional African societies is the existence, in every community, of two or more shrines and deities to which it pays homage. The *Ogwugwu Apu* shrine in Okija in Anambra State, the *Isi-eke* deity in Ugbene-Ajima in Enugu State, the *Igwekala Umunoha* in Mbitoli in Imo State, and the *Akpam juju* at Obuzo in Abia State, are but few examples of such shrines and deities in the Igbo group. Different activities, such as oath-taking, confessions, offering of sacrifices to attract the blessings of the gods and the ancestors or to cleanse the communities of calamities, which may be visited on it, and so on, all take place in such shrines on daily, weekly, monthly and yearly basis. Sometimes, sacrifices are made to purge the land or any member of the society of sins that might have been committed knowingly or unknowingly.

The existence of shrines and whatever they represent are cultural realities to which the average Igbo person cannot deny. Every shrine is presided over by a Priest and all priests have *ofo*, which symbolizes authority and means of communicating with the deities, the spirit of the oracles and ancestors. Where in a customary law arbitration, one side makes the other take an oath, the side that made the other take the oath will not be allowed to back out from the understanding.[73]

The general rule governing oath-taking under native law and custom is that once the oath is taken and won or lost, the judgment of the juju or oracle binds the parties and the issue decided by such oath is *res judicata*. Also, a false claimant or perjurer must fall sick or meet with death after a specific period of time, usually one year after he has sworn the oath. This may, however, vary from community to community but the customary period within which the perjurer must die or be deemed to have survived the oath is one year effective from the date on which the oath was sworn.

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[70] E. N. Njake, *Igbo Political culture*. (Los Angeles: North Western County Press 1974) p. 13
[71] (1975) IMSLR 258.
[72] *Ume v. Okoronkwo* (1996) 12 SCNJ 404.
[73] *Oparaji v. Ohanu* (1999) 9 NWLR (Pt. 618) 290 at 304.

Curiously, in some communities, there is no specific period; all that may be required is that those who had sworn to the oath must religiously observe the conditions prescribed by the priest of the deity or failing which the juju will not be able to effectively discharge its task. It may happen, as is often the case, that the false claimant or perjurer would be visited by the juju with madness or sickness or calamities shortly after the oath had been taken. This may prompt the victim to publicly confess to the sins, and ask for forgiveness. Where the victim had become helpless, his immediate family or the *umunna* would come to his rescue for it is believed that one man's sin can plunge the whole community into danger. At present, numerous disputes involving customary law arbitration oath-taking adorn the Law Reports in this country. For example, in the case of *Njoku v. Ekeocha,*[74] a dispute, between the plaintiff's late father and the defendants over the ownership of a parcel of land situate within the community was resolved by customary law arbitration oath-taking in favour of the defendants.

During the arbitral proceedings, which culminated into that verdict, the arbitral tribunal composed of elders of the village had found that the land in dispute belongs to the defendants but directed that if the plaintiff's father were not satisfied with the verdict, he should produce an oath to be sworn by the defendants. Both parties were aware of the exploits of juju oath taking in the community, and both of them believe and trust that the practice would expose the truth of the matter in dispute. They were both aware that if a person swore falsely by the oath, he would be afflicted with serious sickness or would die within one year. In the instant case, it was agreed by both parties that if the defendants who swore to the oath survives it, and did not die after one year, they would be entitled to the disputed land. But if the opposite becomes the case, the land in dispute would become the property of the plaintiff's father.

The oath was produced by the plaintiff's father and sworn by the defendants as agreed. The defendants survived the oath and celebrated their victory. The plaintiff's father accepted the decision and conceded the disputed land to the defendants. However, few years after the death of the plaintiff's father, the plaintiff instituted this action claiming ownership over the same land again. His claim failed. The court held that the plaintiff, like his father was bound by the customary law arbitration oath-taking, which settled the dispute between the plaintiff's late father and the defendants over the same disputed land some years back.

Correspondingly, the plaintiff is estopped from re-opening the matter as the arbitration constituted *res judicata* on the dispute. If, however, oath-taking was prescribed by the arbitrators during an arbitral process but the exercise was aborted, that is, where such oath was not taken, the parties would not be bound by the arbitration since it is inconclusive. This derives from the principle, which says that customary law arbitration must be certain, final, reasonable, legal, and possible of execution and disposes of all the differences submitted to arbitration. Similarly, in the case of *Ofomata & Ors. v. Anoka & Ors.,*[75] there was a dispute between the plaintiffs and the defendants over the ownership of a parcel of land. The parties

[74] (1972) 2 ECSLR 199.
[75] (1974) 4 ECSLR 251.

submitted the dispute for arbitration by elders of the village. The arbitral tribunal found that the land belonged to the plaintiffs but directed that if the defendants were not satisfied, they should produce any oath or juju or shrine of their choice to be sworn by the plaintiffs. It turned out that no oath was sworn as ordered because the parties failed to meet for that purpose as ordered by the arbitral tribunal. The court held that the parties were not bound by the customary law arbitration.

According to the court, this was because the award was not final but conditional and contingent upon oath-taking, which might or might not take place. The arbitration was inconclusive. The arbitral tribunal should have supervised the oath-taking exercise and the proper line of action would have been for the arbitral tribunal to adjourn the award until the oath was sworn. Ironically, in 1993, the Court of Appeal, in *Iwuchukwu v. Anyanwu,*[76] posited that: "The belief … that disputes are settled by swearing juju may well be true as a matter of the past. In this century that would be a retreat to trial by ordeal which is unthinkable any more than swearing juju method of proof."

In 1994, a year after *Iwuchukwu* case,[77] in *Marcus Nwoke & Ors. v. Ahiwe Okere & Ors.*,[78] the Supreme Court of Nigeria rejected the validity of oath-taking before juju, where it stated: The 'juju' method as cheap and quick as it might appear to have been had its own disadvantages. For example, you cannot put a 'juju' in the witness box for any purpose. Its activities, method and procedure would appear to belong to the realm of the unknown even though the effects may be real in the end. The worst of it all is that a 'juju' 'judgment' or 'decision' is not subject to an appeal like the one we are witnessing now in this suit. So that unless and until the 'juju' descends to the level on which we can all understand its working, it will be difficult to enforce its 'decision' in a law court.

With respect, it is humbly submitted that both the Court of Appeal and the Supreme Court of Nigeria were wrong in the two cases, that is, *Iwuchukwu* case and *Marcus Nwoke* case, above referred in failing to recognize the validity of oath-taking under the Nigerian law. Oath-taking was and still remain a valid method of ascertaining the truth of a matter in controversy under native law and custom, particularly for the people who accept it, recognize it, and use it for the settlement of their disputes. The apex court however took a different position in the recent case of *Umeadi v Chibunze*.[79] The facts of the case was that at the High Court of Anambra State, the respondents as plaintiffs took out a writ of summons against the appellants as defendants seeking the following reliefs: (a) A declaration that the land in dispute is the exclusive property of the plaintiffs and are entitled to the customary right of occupancy in and over the said land called "Ishiekpe"; (b) A mandatory injunctive order on the defendants to rebuild the damaged house of the first plaintiff which they destroyed; (c) N10, 000 (Ten Thousand Naira only) as damages for trespass; (d) A perpetual injunction to restrain the defendants by themselves, agents, privies, servants, workmen or whomsoever from further acts of waste and trespass on the land.

[76] (1993) 8 NWLR (Pt. 311) at 323.
[77] *Ibid*
[78] (1994) 5 NWLR (Pt. 343) 159.
[79] (2020) 10 NWLR (PT.1733) 405

The Respondents are members of the Chibunze family in Egbeagu village, Amansea in Awka Local Government area of Anambra State of Nigeria. They and the appellants are of the Umuofuonye kindred in Egbeagu village, Amansea. The respondents claimed to be the customary occupiers of the land in Amansea. They made the case that the land in dispute was part of the family land of Umuofuonye kindred when in about 1940, one Emmanuel Uba, a member of Umuogbocha kindred in Egbeagu village, Amansea, trespassed into the Isi-ekpe land of Umuofuonye kindred. Chibunze, the respondents' father challenged Emmanuel Uba's trespassory acts. The Egbeagu village intervened in the dispute and invited both Umuogbocha and Umuofuonye kindreds for arbitration.

The Egbeagu village decided that Umuogbocha kindred should bring a juju and place it on the land in dispute for the Umuofuonye kindred to swear by removing same. They further claimed that their father, Chibunze, without the support of Umuofuonye kindred – the other members of the kindred, because of the fear of being killed by the Ngene Olineru juju, stayed away – rose to the occasion. On account of this, their father, Chibunze, became the exclusive owner of the Isiekpe land. He, Chibunze, thereafter exercised diverse acts of possession on the land such as farming and planting agricultural palms thereon. Before his death, he, Chibunze, allotted portions of the land in dispute to his male children. In 2004, the appellants pulled down and burnt the bungalows of the first plaintiff, now deceased, bungalows allotted to him by their father, Chibunze. This prompted their action in the High Court.

The Appellants on their part maintained that the land in dispute forms part of the entire land, which was founded by Ofuonye, the great ancestor of the appellants and the respondents. The said Ofuonye, during his lifetime, gave birth to sons who, in turn, gave birth to the present kindred known as Umuofuonye in Egbeagu village of Amansea. The land in dispute, according to them, known as and called Isiekpe is the family land of Umuofuonye kindred. They further maintained that sometime in 1940, a dispute arose between the Umuogbocha and the Umuofuonye families over the Isiekpe land. The Egbeagu village decided that Umuofuonye should take oath for Umuogbocha family. The appellants maintained that the other members of Umuofuonye family assisted the respondents' father to remove the juju placed on the Isiekpe land by the Umuogbocha kindred. They averred that, after the oath-taking exercise, the respondents' father never claimed exclusive ownership of the Isiekpe land as other members of the Umuofuonye family continued to farm on the land collectively unhindered.

The High Court, in its judgment, found for the respondents. Dissatisfied, the appellants appealed to the Court of Appeal, Enugu Division, which dismissed the appeal, affirming the High Court's judgment. Further dissatisfied, the appellants appealed to the Supreme Court. The Court determined the appeal on the following issues:

- Whether the respondents established by cogent evidence the custom that a family member who defends family land by oath taking automatically became the exclusive owner of such family land so as to entitle them to the declaration they sought?

- Was the Court below right when it affirmed the decision of the Trial Court that burden of proof shifted to the appellants when the Respondent failed to discharge the initial burden of proof?

Resolving the issues, the Supreme Court held that the two lower courts were right to hold that the respondents were the owner of the land because the appellants failed to prove their assertion that under customary law, one man does not swear to juju or oath alone in land matters. The Court held that it was wrong for the appellant to claim that the lower Courts shifted the burden of proof on them because they alleged the custom, which has not been judicially noticed by the Courts, and must thus prove same. On the other hand, the respondents had proven their assertion that under customary law, if a person takes oath alone to remove a juju placed on a land and survives it, such person becomes the exclusive owner of that land. This assertion was further proved by the evidence of an eyewitness who saw what transpired at the time, whose evidence shows that Chibunze, the respondents' father, was alone when he took the oath. This is contrary to the evidence of the appellants that Chibunze was supported when he took the oath, which the witnesses for the appellant admitted they were told by other people thus making it hearsay evidence. When such hearsay evidence is placed side by side with the evidence of the person who saw the event take place, and who saw the outcome of that event, the Court would prefer the latter piece of evidence.

In concluding the issues and finding in favour of the respondents, the Court quoted the holding of Tobi, J.S.C. in the case of *Onyenge and Ors. v Ebere and & Ors*[80] as follows:

> "…where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such situation, the proof of ownership or title to land will be based on the rules set by traditional arbitration resulting in oath-taking. In arbitration under customary law, the applicable law is customary law and not the common law principle with their characteristic certainty and ossification…."

Tobi J.S.C. further held in the same case that: "It was wrong for the appellants who were instrumental to the exercise of the oath-taking to resile from it. Such a position is not available to them in law. In view of the fact that the respondents survived after taking oath, the parties were not bound by the niceties of the law as suggested by counsel for the appellants that possession is nine-tenths of ownership. That may well be so under common law but certainly not the position under the customary law under which oath was taken."

The court, following the above principle therefore held that the respondents established by cogent evidence, the custom that a family member who defends family land by oath taking automatically becomes the exclusive owner of such family land. The respondents were therefore entitled to declaration of title to the land in dispute. The Court went further to

[80] (2004) 6 SCNJ 126

conclude at p. 413, ratio 9 that where customary arbitration is pleaded and proved, it is binding on the parties and capable of constituting estoppel.

The message therefore is that the five ways of proving title to land in Nigeria as established by the Supreme Court in *Idundun v Okumagba*[81] and plethora of subsequent decisions, shall not apply where it is established to the satisfaction of the court that title has been proved by the rules of traditional arbitration with the consent of the parties. This recent position is a Lee way for traditionalists who believe more in their native gods than in the courts to settle their land matters according to their belief patterns. Further, it is a tacit recognition and an implied elevation of our customary law in the face of the domination of common law principles.

EXTENT OF PLEADING REQUIRED TO SUSTAIN A PLEA OF ESTOPPEL IN CUSTOMARY ARBITRATION IN LAND DISPUTES

The important questions being pursued here are, what is pleading, what is the purpose of pleading, and what should a good pleading of customary law arbitration contain? Pleading may be described as a formal written statement in a civil action served by each party, that is, the plaintiff and the defendant on each other, containing the allegations of fact that the party proposes to prove at trial, and stating the remedies that the party claims in the action. In its broad sense, however, pleading refers not only to the writs of summons, originating summons or other originating processes used to commence an action in court; it also includes all other documents by which issues in controversy are comprehensively highlighted before the court by the disputing parties.

The main object of pleading is to ascertain with as much certainty as possible, by the production of an issue, the subject for decision and to establish the various matters actually in dispute among the parties and those with which there is agreement between them.[82] Every pleading must, therefore, contain facts and not law, material facts only and not evidence by which the facts are to be proved and must allege the facts positively, precisely, distinctly and briefly. On the other hand, some exponents maintain that pleading must be sufficient, comprehensive and accurate.[83] As we are aware, extra-judicial settlement of disputes is an essential feature of the Nigerian customary law. The courts are directed to observe and enforce the observance of customary law.[84]

An arbitration award can constitute *estoppel* where the constituent elements of an *estoppel per rem judicatam* have been established but where the decision is conditional, the decision is not binding.[85] In a civil suit, a party may wish to rely on a previous customary law arbitration award, which was in that party's favour to raise the defence of *estoppel*. In such a situation, the customary law arbitration must be pleaded specifically. On the other hand,

[81] (1976) 9 – 10 SC 227
[82] *Adesoji Aderemi v. Joshua Adedipe* (1966) NMLR 398.
[83] *James v. Mid-Motors Nigeria Co. Limited* (1978) 11 SC 31 at 63.
[84] This is not, however, without its limitations. See, A. E. W. Park, *The sources of Nigerian Law*, (London: Sweet and Maxwell, 1964) pp. 68 and 149.
[85] *Assampong v. Amuaku* (1932) 1 WACA 192; *Ofomata v. Anoka* (1974) 4ESCLR 251.

the plea of *res judicata* is not open to a plaintiff in his statement of claim. This is because a successful plea of *estoppel per rem judicatam* outs the jurisdiction of the court before which the issue is raised.[86] A plaintiff who is seeking a declaration of title over a parcel of land may plead a previous customary law arbitration award, if any, in his favour not as a *res judicata* but as a relevant fact to the issue in his present action and such an award will be conclusive of the fact of which it decided.[87]

In *Agu v. Ikewibe,*[88] the extent to which customary law arbitration award must be pleaded by a party in order to raise *estoppel* in his favour was one of the issues resolved by the Supreme Court. In that case, Paragraph 8 of the plaintiff's Statement of Claim stated that, "In April, 1970 the defendant trespassed into the land in dispute and the plaintiff summoned him before the chief and elders of the town who gave judgment in favour of the plaintiff and warned the defendant not to trespass again into the said land."

The Appellant/Defendant contended that this paragraph did not properly raise a plea of binding arbitration in favour of the respondent/plaintiff because the necessary facts to be relied upon to establish valid customary law arbitration capable of constituting estoppel in the circumstance were not supplied. This view was rejected by majority of the panel of justices of the Supreme Court, which in the event held that customary law arbitration was properly and sufficiently pleaded by the plaintiff since the pleading contained the fact that the defendant was summoned before the chief and elders of the town who deliberated upon the matter and gave judgment in favour of the plaintiff. Nnaemena-Agu J.S.C., who dissented from the judgment of the majority, maintained that for a binding customary arbitration to raise an *estoppel*, the necessary ingredients of valid customary law arbitration must be pleaded and established by evidence at the trial of the case in court. He cited with approval, part of the provisions of Order 18 Rule 7 of the RSC 1987, which states that every pleading must contain, and contain only, a statement in a summary form of the material facts or defence, as the case maybe, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits. Nnaemena- Agu J.S.C., also cited with approval the dictum of Cotton L.J., in *Philips v. Philips,*[89] as follows, "In my opinion it is absolutely essential that the pleading not to be embarrassing to the defendants, should state those facts which will put the defendant on their guard, and tell them what they are to meet when the case comes on for trial". Furthermore, he relied on *Bruce v. Odham Press Ltd.,*[90] where Scott, L.J., stated that the word 'material' means 'necessary' for the purpose of formulating a complete cause of action (or good ground of defence); and if any one material statement is omitted the statement of claim is bad.

After evaluating these opinion, Nnaemena-Agu J.S.C., concluded that before a party to a case in the high court, which has unlimited jurisdiction under the Constitution can defeat the right of his adversary to have his case adjudicated upon by the court on the grounds that

[86] *Yoye v. Olubode* (1974) 1 All NLR (Pt. 2) 118, pp. 126-127.
[87] *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196} 127; *Esan v. Olowa* (1974) 3 SC 125
[88] (1991) 3 NWLR (Pt. 180) 385.
[89] (1878) 4 WBD 127
[90] (1936) All ER 294

there has been a previous binding arbitration, which raises an estoppels, between them, four ingredients must be pleaded and established by evidence. These are as follows:

- That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons.
- That it was agreed by the parties either expressly or by implication that the decision of the arbitration will be accepted as final and binding.
- That the said arbitration was in accordance with the custom of the parties or their trade or business, and
- That the arbitrators reached a decision and published their award.

It wa pointed out that the court in *Gyesiwa*[91] case applied the above principles and found that there was no arbitration in that case. He, therefore concluded that the pleading in paragraph 8 of the statement of claim under consideration falls short of a proper pleading of customary law arbitration because its ingredients were not sufficiently and adequately pleaded. That being the case, he opined that the High Court should not have received any evidence of arbitration on the basis of such pleading and the Court of Appeal should have drawn no inference from it since the pleading did not contain all the necessary ingredients of valid customary law arbitration. The decision of the arbitral tribunal could not have been a good ground for up-turning the decision of the High Court on the issue of arbitration. Also, in *Ohiaeri's*[92] case, the Supreme Court stated that a party who wishes to rely on customary law arbitration award in order to raise an *estoppel* in his favour must plead all the necessary ingredients of valid customary law arbitration. Coincidentally, Karibi-Whyte, J.S.C., who stated in *Agu's* case that in pleading customary law arbitration, only minimal account of the arbitral process should be contained, conceded to the opinion that all the ingredients of customary law arbitration should be pleaded.

If we follow the principle that every pleading must be sufficient, comprehensive and accurate, then Nnaemeka-Agu J.S.C., postulations would be correct. But, it has been said that every pleading must contain facts and not law; material facts and material facts alone, and not evidence by which the facts are to be proved and must allege the facts positively, precisely, distinctly, and briefly. On this ground, it may be sufficient for a party who wishes to rely on customary law arbitration to raise an *estoppel* in his favour to state that the dispute was the subject of arbitration in accordance with native law and custom, and that there was an award in his favour, and that he relies on the arbitral award to raise an *estoppel* against the other party. At the trial of the matter in court, evidence will then be adduced to establish that there was actually valid customary law arbitration by proving the necessary ingredients.[93] This position is highly preferred.[94]

[91] (1947) WACA 45
[92] (1992) 2 NWLR (Pt. 221) 1
[93] *Okereke v. Nwoke* (1991) 8 NWLR (Pt. 209) 317; *Mogo Chikwendu v. Mbamali* (1980) 3-4 SC 31; *James v. Mid-Mottors Nigeria Co. Limited* (1978) 11 SC 31 at 63.
[94] See also, Ezejiofor, *loc. cit.*

Where a customary law arbitration award qualifies to operate as *res judicata*, both parties shall be entitled to that plea either in the form of a sword or in its form as a shield.[95] The burden of proof in all civil cases, as in the case of customary law arbitration is on the party who alleges the affirmative and the party could be the plaintiff or the defendant, depending on the state of the pleadings. That is, the burden of proof in a proceeding before a court of law lies on the person who would fail if no evidence was given on either side. The first burden is on the party who alleged the affirmative in the proceedings whilst the second burden, the evidential burden lies on the adverse party to prove the negative.[96]

CONCLUSION

It must be reiterated that customary law arbitration is a satisfactory ADR technique evolved by the natives themselves to tackle their ever growing human need and desire for the amicable resolution of disputes arising from time to time between them by an impartial tribunal having the confidence of and authority from the disputing parties in accordance with their trade, usage or native laws and customs. Among the South Easterners and the South Southerners in Nigeria, for example, this task is usually undertaken by the family head, that is, *Opara,* or *Okpara,* or *Onyishi,* depending on the community involved or the elders of the village, particularly from the extended family unit, that is the *Umunna* or the chief, that is, the *Igwe,* or *Eze* of the community. Also, it is quite understandable to note that customary law arbitration predates Nigeria. The practice has been with the 250 ethnic nations that constitute Nigeria, from time immemorial. However, with the birth of Nigeria as a sovereign entity, the introduction of English law, the erosion of indigenous institutions and culture by Western civilization and culture, the penetration of Christianity, Islam, and other religions into all the nooks and crannies of this country, customary law arbitration did not vanish but doggedly continued in use by the communities that recognize and use it for the resolution of their disputes.

Customary law arbitration system of adjudication adheres to the legal and constitutional requirement of fair hearing. The practice promotes access to justice for the poor, the less privileged, and the vulnerable in Nigeria's rural communities. The communities that recognize and resort to customary law arbitration do so because it is inexpensive, expeditious, culturally acceptable, relevant, and suitable for their situations in lives, and leads to sustainable peace. Also, it is less formal, and less rancorous than litigation, and it ensures harmony and eradicates all forms of anarchy and misunderstanding within the community. Indeed, customary law arbitration in Nigeria provides a desirable ADR option available outside the adjudicatory system offered by the common law, and it helps to reduce pressure on the court system of adjudication.

Customary law arbitration is binding on the parties to the arbitration, their privies or representatives. This critical point marks a convergence of understanding between litigation

[95] *Mogo Chikwendu v. Mbamali* (1980) 3-4 SC 31

[96] See the cases of *Akinfosile v. Ijose* (1960) 5 FSC 192; *Fashanu v. Adekoya* (1974) 6-7 SC 83; *Atana v. Amu*(1974) 10 SC 237; *Okechukwu & Sons v. Ndah* (1976) NMLR 368; *Osawaru v. Ezeiruke* (1978) 6-7 SC 135; *Onyenge v. Ebere* (2004) 6 SCNJ 126 at pp.138-139.

in law courts, and written agreements to arbitrate, and common law arbitration, and arbitration in pursuance of Islamic, and arbitration in pursuance of indigenous customary law in Nigeria. On the other hand, it sharply contrasts with the other ADR methods, decisions of which cannot be binding upon the parties unless and until accepted by the parties, and with litigation in the law courts, which is technical, expensive, time consuming, out of cultural context, confrontational in nature, and unduly cumbersome.

RECOMMENDATIONS

It would seem expedient after appraising the law and practice of customary law arbitration in resolving land disputes in Nigeria as this paper has rightly done to proffer recommendations and/or suggestions for the overall improvement of and the repositioning of the system to continue to maintain its enviable place and to continue to provide and improve the quality of justice delivery in rural communities that recognizes and uses this system of adjudication for the resolution of their disputes. It is, however, worthy to note that the recommendations herein advanced are by no means exhaustive but depended on the issues, consider critical for the purpose of achieving both the main and specific objectives of this paper. The recommendations are as follows:

a) Restatement of Customary Laws applicable in various communities in Nigeria.
b) Increase in Education and Awareness on Customary Law Arbitration
c) Improvement of the Quality of and Access to Justice Delivery at the Grassroots by ensuring that all customary awards are signed by both the customary arbitrators and the parties.
d) Arbitrators of land disputes should refer to the land with precision and any land awarded to a successful party should be properly described and possibly marked.
e) A comparative study of the ingredients of customary law arbitration in Nigeria and other jurisdictions in Africa, particularly Ghana, and Tanzania reveals that unlike Nigeria, the ingredients of customary law arbitration in those other jurisdictions have long been settled. Against this backdrop, it is humbly submitted that pleading of customary law arbitration award in Nigeria poses a big problem to practicing lawyers since the courts can always spring surprises on litigants and get away with it. With respect, this defect can be cured by legislation and this is highly recommended now. Courts and the legislatures in Nigeria are urged and encouraged to replicate the good examples exhibited in the African countries of Ghana, and Tanzania, which are very close to us.

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