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Composition of Customary Courts in Rivers State of Nigeria: A Case for Appointment of Chiefs as Members

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ABSTRACT

Customary Court as successor of the old Native Court is established to dispense justice in a cheap, speedy and uncomplicated manner consistent with the form of administration of justice developed in the indigenous communities of Nigeria, particularly those of the southern part of the Federation. The core jurisdiction of customary court is the adjudication of cases involving questions of customary law. Unlike the superior court of record where customary law is treated as a question of fact to be proved by evidence adduced by the parties, members of the customary court are presumed to know the applicable customary law relevant to the matter before the court and are empowered to apply it without proof by the party seeking to rely on it unless the court thinks otherwise. The power of the customary court to rely on its own knowledge of the applicable customary law within its area of jurisdiction underscores the need to appoint chiefs who embody the custom, tradition and culture of their people to serve as members of customary courts. However, the extant Customary Courts Law in Rivers State of Nigeria does not contain any provision according special eligibility to chiefs to be appointed to serve on the customary court bench. It is argued that the appointment of chiefs to serve as members of customary courts will enhance the capacity of these courts to apply customary law and thereby guarantee cheap, speedy and uncomplicated administration of justice. The paper adopts analytical research methodology and relies on library-sourced primary and secondary materials.

Keywords:*Customary court, customary law, chiefs, Rivers State, Nigeria.*

INTRODUCTION

Customary Courts are the lowest courts on the hierarchy of courts at least, in the Southern part of the Federation of Nigeria. As their name implies, these courts are vested with original jurisdiction to adjudicate over civil causes and matters involving application and enforcement of customary law applicable in their areas of jurisdiction. Put differently, the enforcement of rights derived under customary law and punishment for violation of rules of customary law represent the core jurisdiction of Customary Courts.[1]

Customary law refers to rules of law and practices observed and enforced by members of an indigenous community. It consists of practices which by common adoption and long unvarying usages have come to have the force of law.[2] It is the unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behavior in any particular matter. Its major characteristics are that it is unwritten and its origin is rooted in antiquity. Thus, customary law has been described as a "mirror of accepted usage."[3]In *Zaidan v. Khalil Mohssen*,[4] it was held by the

[1]See ss. 6(1) and (2), 11 (1), and First and Second Schedules to the Rivers State Customary Courts Law, 2014.

[2]Bryan A. Garndner (ed), *Black's Law Dictionary*(9th Edition West Publishing Co., 2004) 442 – 443.

[3]Owoniyin v. Omotosho (1961) 1 All NLR 304 (per Bairaman, FJ).

[4] (1973) 11 SC 1 @ 22; see also Anla v. Ayanbola (1977) LPELR-24887 (SC) 1 @ 3-6; Usman v. Umaru [1992] 7 NWLR (Pt. 254) 377; Onuorah v. Ubaike (2016) LPELR-42084 (CA) 1 @ 44-45; Lewis v. Bankole (1908) 1 NLR 81; Kimdey v. Military Governor, Gongola State [1988] 2 NWLR (Pt. 77) 445; the use of the phrase "customary law" to describe the indigenous laws of African societies has been criticised by a learned author who argues

Supreme Court of Nigeria (per Elias, CJN) that "customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway".

The binding force of these rules of customary law distinguish them from ordinary rules of social conduct whose observance by members of the community is not considered obligatory. In other words, customary law constitutes the law of the indigenous community because of its acceptability and enforceability by members of the community.

The Supreme Court underscored these basic features of customary law in *Nwaigwe v. Okere*,[5] when it held that:

Customary law emerges from the traditional usage and practice of a people in a given community which by common adoption and acquiescence on their part, and long and unvarying habit, has acquired to some extent, element of compulsion and force of law with reference to the community.

And because of the element of compulsion which it has acquired over the years by constant consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the customs, rules, traditions, ethos and cultures which govern relationship of members of a community are generally regarded as customary law of the people.

It must not be supposed, however, that customary law is static. It is not! On the contrary, it is organic because it grows and changes with the society. As the Supreme Court noted in *Oyewunmi v. Ogunesan,*[6] customary law is:

. . . Organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of those entire subject to it.

The unwritten nature of customary law implies that it has to be ascertained by the court from the evidence produced by the parties themselves in any particular proceedings where its enforcement is sought. This is what is meant when it is said that customary law is a question of fact to be proved by evidence unless the particular rule of customary law in question can be judicially noticed by the court.[7]However, the rule which requires proof of customary law in judicial proceedings does not apply to customary courts which imply that generally speaking, the customary court is presumed to know the applicable customary law and can ascertain same from the personal knowledge of the members unless the particular customary law is applicable in an area outside its area of jurisdiction.[8]

Given the power of the customary court to apply and enforce rules of customary law based on the personal knowledge of the members of the applicable customary law, appointment of members of the customary court remains critical and fundamental to the administration of justice in the court.

This is because if persons without the requisite knowledge of customary law are appointed to the customary court bench, the speedy dispensation of justice by the court based on customary law would be hampered as the court may have to resort to proof of customary law by parties even in circumstances where such proof would not have been necessary thereby defeating the very essence of establishing these courts to dispense justice in a speedy, cheap and uncomplicated manner.

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that the phrase is jurisprudentially incorrect because custom and law are mutually exclusive; whereas "custom is voluntarily obeyed by all without compulsion, law is obeyed backed invariably by force. Ideally it is not possible to have voluntariness and compulsion in the same conduct. . . Custom relies in the voluntariness of conduct to remain custom. It may be transformed into law when non-compliance of conduct is backed by force. Herein lies the weakness of the concept and inappropriateness of the expression 'customary law' to African indigenous situations"; see A. G. Karibi-Whyte, *Chieftaincy Institution among the Kalabari Ijaw* (Ulamba Publishers Port Harcourt 2017) 218.

[5](2008) LPELR- 2095 (SC) 1 @ 34-35.

[6][1990] 3 NWLR (Pt. 137) 182; (1990) LPELR-2880 (SC) 1 @ 46.

[7] Evidence Act 2011, sections 16, 17, 18 and 70; Dong v. A-G., Adamawa State [2014] 6 NWLR (Pt. 1404) 558, 573-574; Onyenge v. Ebere [2004] 13 NWLR (Pt. 889) 20 @ 38.

[8]See Evidence Act 2011, s. 256 (1)(c); Rivers State Customary Courts Rules, 2011, Order 10, Rule 6 (2) and (3)

This paper examines the relevant provisions of the Rivers State Customary Courts Law, 2014 prescribing the composition and qualification for appointment as chairman and members of customary court in the State with a view to determining whether any special consideration ought to be accorded to chiefs in the composition of customary courts.

It is argued that from the tenor of the statutory provisions the legislature did not evince any intention to grant special consideration to chiefs in the composition of customary courts and that an amendment of the law is desirable if these courts are to fulfill the core essence of their establishment to dispense justice in a speedy, cheap and unsophisticated manner consistent with the form of traditional system of administration of justice with necessary modification to avoid abuse of power and denial of fair hearing.

The paper is divided into four sections with the introductory section providing the background and objectives of the study. The establishment of customary courts, their status, essence and jurisdiction are examined in the second section whilst the third section focuses on the composition of customary courts.

The concluding remarks are contained in the final part.

Establishment of Customary Courts

Customary Courts are not created or established directly by the Constitution of the Federal Republic of Nigeria 1999 (as amended). Rather, they are Courts established directly by laws passed by the Houses of Assembly of the States of the Federation pursuant to power derived from section 6(4)(a) of the 1999 Constitution which provides that:

Section 6(4): Nothing in the foregoing provisions of this section shall be construed as precluding –

- The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High court.

Clearly, although the power of the National Assembly or State House of Assembly to establish customary courts is derived from the 1999 Constitution, every customary court owes its existence to a law enacted by the House of Assembly of a State of the federation or the National Assembly with respect to the Federal Capital Territory, Abuja.[9]

It is clear from section 6(4)(b) of the 1999 Constitution (as amended) that the power of the National Assembly or the House of Assembly of a State to establish customary courts also implies power to abolish such courts any time they are no longer required. Thus, in respect of a State of the federation, the power to establish and abolish customary courts vests in the State House of Assembly.[10] It is equally arguable that although the power to establish customary courts derives from the 1999 Constitution, no State of the federation is bound to establish customary courts if such courts are not considered necessary by the State.

In practical terms, every Customary Court is established by warrant issued under the hand of the Governor of a State pursuant to the provisions of the relevant law enacted by the House of Assembly. In this respect, section 1(1) of the Rivers State Customary Courts Law, 2014 provides that the "Governor may, by warrant, establish for a Local Government Area (in this Law referred to as "Area") a number of Customary Courts as he deems necessary after consultation with the Judicial Service Commission."[11]

The warrant shall: (a) state the name of the Customary Court; (b) define the jurisdiction of the Customary Court; and (c) take effect from the date specified in the warrant and where no date is specified, it shall take effect from the date of publication of the warrant in the Official Gazette of the Rivers State Government.[12] In establishing a Customary Court in an Area, the Governor is required under section 1(2) of the

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[9] *Okhae* v. *The Governor, Bendel State* [1990] 4 N. W. L. R. (Pt. 144) 327, 376; Ojisua v. Aiyebelehin [2001] 11 N. W. L. R. (PT. 723) 44 @ 53

[10] *Obayuwana* v. *Governor of Bendel State* [1982] N. S. C. C. 524 @ 535.

[11] No. 3 of 2014 (hereinafter Rivers State Customary Courts Law); s. 114 of the Law repeals the Customary Courts Law, cap 40, Laws of Rivers State of Nigeria, 1999 and the Customary Courts (Amendment No. 1) Law, No. 9 of 2009; C/f section 1 (1) of the Customary Courts Law Cap. 19, Laws of Lagos State of Nigeria 2003 which provides that "Subject to the approval of the Governor of Lagos State, the Attorney- General may by warrant under his hand establish such number of Customary Courts grades "A" and "B" as he may think fit."

[12] Rivers State Customary Courts Law, s. 1(3)(a)-(c).

Rivers State Customary Courts Law, 2014 to have regard to the following factors:

- The population of the area to be served;
- The ethnic affinity of the people to be served;
- The volume of judicial work that is likely to emerge; and
- The proximity of the Customary Court to the community.

It is clear from the tenor of section 1(1) of the Rivers State Customary Courts Law 2014 that every Local Government Area is entitled to have a customary court or more than one customary court established for it. Indeed, section 6(4) of the Law provides that a customary court shall not serve more than one Local Government Area unless those Local Government Areas belong to one ethnic group or community and have a common historical origin, affinity or interest in traditional customary matters.[13] By virtue of this provision, a customary court could be established to serve two Local Government Areas comprised of people of the same ethnic nationality or community. In interpreting identical provisions of section 3(1) of the Customary Courts Law of Anambra State, 1991 the Court of Appeal (per Lokulo-Sodipe, JCA) held in *Okpalauzuegbu v. Ezemenari*:

- That it is only pursuant to a warrant under the hand of the Governor that a Customary Court is established or comes into existence;
- That Customary Courts are established on the basis of Local Government Areas and that there can be one or more Customary Courts established for a particular Local Government Area;
- That it is in the warrant establishing a Customary Court that the Local Government Area or areas within the Local Government, it has been established for is/are specified; and
- That a Customary Court once established by a warrant under the hand of the Governor is to exercise its jurisdiction only as stipulated or provided for in the enabling law.14

Given that the power of the Governor to issue a warrant establishing customary court is statutory, the same has to be exercised in the manner prescribed by section 1(1) of the Customary Courts Law. This is because where a law prescribes a particular method of exercising statutory power; any other method of exercising it is excluded.[15]

Section 1(1) of the Rivers State Customary Courts Law prescribes that the Governor may by warrant establish a number of Customary Courts for a Local Government Area "after consultation with the Judicial Service Commission." It is very arguable that the intendment of the Framers of the Law in subjecting the exercise of the Governor's power to prior consultation with the State Judicial Service Commission is to place some restraints on the Governor's power. Thus, the Governor cannot exercise his power under section 1(1) of the Law unilaterally without reference to the State Judicial Service Commission.

In other words, there is a clear statutory duty imposed on the Governor to consult the State Judicial Service Commission before exercising his power to establish Customary Courts through the issue of establishment warrants.[16] However, the precise role of the State Judicial Service Commission in the exercise of the Governor's power under reference will depend on the meaning to be placed on the phrase 'after consultation with the Judicial Service Commission' in section 1(1) of the Rivers State Customary Courts Law, 2014. Writing on the limitations placed on executive actions under the repealed Constitution of the Federal Republic of Nigeria 1979, Nwabueze has submitted that consultation with or advice by various executive bodies was a deliberate device introduced in the constitution for restraining executive power.[17] On the precise signification

[13] Section 1(2) of the Customary Courts Law of Lagos State 1973 provides that the number of customary courts that may be established pursuant to the Law shall reflect the prevailing Local Government Council's structure.

[14] [2011] 14 N. W. L. R. (PT. 1268) 492, 519; Madu v. Mbakwe [2008] 10 N. W. L. R. (Pt. 1095) 293 @ 321.

[15] *Abubakar* v. *Nasamu (No. 2)* [2012] 17 N. W. L. R. (Pt. 1330) 523; *Elelu-Habeeb* v. *A.G., Federation* [2012] 13 N. W. L. R. (Pt. 1318) 423@ 494-5l; *Ogualaji* v. *A. G., Rivers State* [1997] 5 S. C. N. J. 240 @ 251.

[16] It would appear from the judgment of the Supreme Court in *WikeEzenwoNyesom* v. *Hon (Dr.) DakukuAdolPeterside*[2016] 1 N. W. L. R. (PT. 1492) 71, 126 that by the application of the doctrine of necessity, the obligation to consult may be displaced where the holder of the office to be consulted has not been appointed into the office.

[17] B.O. Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst & Company, London 1981)144.

of the duty of the executive to consult under the constitution, Nwabueze argues that:

Consultation goes beyond merely giving information or announcing a decision already taken. It implies that an opportunity must be given to the person or body consulted to exercise an opinion, to criticise any proposal brought forward by the president and to offer an advice; and that the opinion, criticism or advice so offered should genuinely be taken into consideration by the president in arriving at a decision.

Having done that, the president is free to decide as seems best to him, whether in accordance with or contrary to the advice. No obligation is cast on him to accept it.[18]

It is submitted that the above juristic opinion represents sound legal reasoning and has received judicial approval in the decision of the Supreme Court in *WikeEzenwoNyesom v. Hon (Dr.) DakukuAdolPeterside*,[19] where the apex court held that although the President of the Court of Appeal is required to appoint the Chairman and other members of the National Assembly Election Tribunal "in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal" in accordance with paragraph 1(3) of the Sixth Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) , the President of the Court of Appeal is not bound by the advice he receives from the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State. Justice AmiruSanusi, JSC, who delivered the leading judgment of the apex court, stated the law lucidly when he held that:

It is my view also, that the President of the Court of Appeal even where she/he made such consultation, is not bound to accept the particular names of candidate he receives from the Chief Judge or President of the Customary Court of Appeal as the case may be.[20]

The obligation to consult imposes a duty on the Governor not only to provide sufficient information to members of the State Judicial Service Commission to enable them reach an informed opinion on the desirability or otherwise of creating a particular Customary Court for a Local Government Area but also to grant members of the commission the opportunity to convey such opinion to him. However, since the Governor is not bound by any advice offered by the council, the decision whether or not to establish a Customary Court for any locality remains ultimately that of the Governor. It would also appear from the decision of the Supreme Court in *Nyesom v. Peterside,*[21]that where the State Judicial Service Commission has not been constituted and it is impracticable for the Governor to hold consultation with the commission, the governor may rely on the doctrine of necessity to issue warrant establishing customary court without any prior consultation with the Commission.

By section 1(4) of the Rivers State Customary Courts Law, 2014 the Governor may by order, after consultation with the State Judicial Service Commission, suspend, vary or cancel the warrant establishing a Customary Court. The import of this provision is to vest the Governor with the power of abolishing any customary court in the State after consultation with the State Judicial Service Commission. The constitutionality of this provision is very doubtful because section 6(4)(b) of the 1999 Constitution (as amended) vests the power to abolish customary courts in the National Assembly or State House of Assembly which has the power to establish such courts in the first instance. Thus, customary courts may be abolished by the National Assembly (in respect of the Federal Capital Territory, Abuja) or State House of Assembly where they are no longer required. In *Obayuwana* v. *Governor of Bendel State*,[22] it was held by the Supreme Court that the provisions of section 3(1) of the Customary Courts Edit of Bendel State (No. 9) of 1978 pursuant to which the respondent purportedly cancelled the warrants of all customary courts in Bendel State with effect from 22nd January 1980

[18]Nwabueze (n6) 145; see also *Rollo v. Minister of Town and Country Planning* [1948] 1 All E. R. 13 (per Buchnill L. J.) where it was held that 'Consultation with any local authorities' within s. 1(1) of the New Towns Act 1946 (c. 68) means that, 'on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice.'

[19]Nyesomv. Peterside(n16).

[20]Nyesom v. Peterside (n16) @ 111.

[21]Nyesom v. Peterside (n16) @ 109-110.

[22]*Obayuwana* v. *Governor of Bendel State* (n10) @ 533-535.

was inconsistent with section 6(4)(b) of the 1979 Constitution which vested the power to abolish customary courts exclusively in the House of Assembly of the State. Idigbe, J. S. C., who delivered the leading judgment of the apex court, was emphatic that: "It is the State House of Assembly (not the Governor) that has the power under the present Constitution to abolish the customary courts."[23]

The Supreme Court reasoned that although the power to abolish customary courts availed military administrators who exercised both legislative and executive power in the States before the coming into force of the 1979 Constitution, such power no longer avails elected governors who are vested only with executive power under the Constitution. Given that section 6(4)(b) of the 1999 Constitution (as amended) is *in parimateria* with section 6 (4)(b) of the repealed 1979 Consitution, it is very arguable that the principle established in *Obayuwana's case*is still good law under the current constitution.[24] Therefore, it is submitted that section 1(4) of the Rivers State Customary Courts Law, 2014 which vests the Governor with power to suspend, vary or cancel establishment warrants after consultation with the State Judicial Service Commission is inconsistent with section 6(4)(b) of the 1999 Constitution and same is null and void to the extent of the inconsistency.[25]

STATUS OF CUSTOMARY COURTS

Customary Courts are inferior courts in the hierarchy of courts in Nigeria. In the language of section 6(4)(a) of the 1999 Constitution (as amended), a customary court is a court "with subordinate jurisdiction to that of a High court." As an inferior court, the customary court is a court of special or limited jurisdiction "whose record must show the existence of jurisdiction in any given case to give its ruling presumptive validity".[26] Thus, unlike a court of unlimited jurisdiction which has competence to entertain any action unless specifically excluded,[27] the customary court has no power to entertain any action unless expressly granted. There is therefore, no presumption of jurisdiction in favour of the customary court with respect to any matter before it. In *Timitimi&ors.*v. *Amabebe,*[28]Coussey, J. A., held that:

In the first place want of jurisdiction is not to be presumed as to a Court of superior jurisdiction; nothing is out of its jurisdiction but that which specially appears to be so. On the other hand an inferior Court, such as a Native Court, is not presumed to have any jurisdiction but that which is expressly provided.[29]

The same principle has been restated by the Supreme Court (per Oputa, JSC) in *African Newspapers Ltd*. v. *The Federal Republic of Nigeria*[30]:

Nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which specifically appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.

Thus, in *Siwoniku* v. *Odufuwa,*[31] it was held by the Supreme Court that where "the jurisdiction

[23]*Obayuwana* v. *Governor of Bendel State* (n10) @ 535.
[24]*Nwobodo* v. *Onoh* [1984] 1 S. C. N. L. R. 1 @ 25; *Izuora* v. *Queen* 13 WACA 313 @ 316; *Okon* v. *State* (1988) 2 S. C. (Pt. 1) 140 @ 155-156.
[25] Under s. 1(1) and (3) of the 1999 Constitution (as amended), the constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria and accordingly, if any other law is inconsistent with the provisions of the constitution, the constitution shall prevail, and that other law shall to the extent of the inconsistency be void; *Udenwa* v. *Uzodinma* [2013] 5 N. W. L. R. (Pt. 1346) 94 @ 119; A. C. N. v. INEC [2013] 13 NWLR (Pt. 1370) 161; INEC v. Musa [2003] 3 NWLR (Pt. 806) 72 @ 157; Ugba v. Suswan [2014] 14 NWLR (Pt. 1427) 264.

[26]Garner (n2); Erhunmwunse v. Ehanire, [1990] 1 N. W. L. R. (PT. 127) 421 @ 441.
[27]*Tukur* v. *Government of Gongola State* [1989] 4 N. W. L. R. (Pt. 117) 517 @ 560-561.
[28]14 WACA 374 @ 376.
[29] See also *Shodehinde* v. *The Registered Trustees of Amadiya Movement in Islam* [1980] A. N. L. R. 64 @ 101; *C O. P.* v. *KaluMba* 4 ECSLR 294 @ 297; In *Emerah& Sons v. A-G., Plateau State* [1990] 4 NWLR (PT. 147) 788 @ 804, the court held that a superior court of record is a court that is "presumed to have jurisdiction until the contrary is proved.''
[30] [1985] 2 N. W. L. R. (PT. 6) 137, 159; Ogunmokun v. Military Administrator, Osun State [1999] 3 N. W. L. R. (PT. 594) 261, 280.
[31] [1969] N. S. C. C. 190 @ 193; see also *Akrobotu* v. *AmetameNormeshie&Ors.* 14 W. A. C. A. 290;*However, in Ejike* v. *Ifeadi* [1990] 4 N. W. L. R (Pt.142) 89, 100, it was held by the Court of Appeal that since customary courts are now established expressly by legislation which also confers them with jurisdiction, the issue of jurisdiction has to be determined by reference to the relevant constitutive legislation and that this development has removed

of a customary court is in issue, the burden of establishing that the court has jurisdiction is upon the party who asserts the jurisdiction."[32] In *Gbagarigha* v. *George,*[33] the Customary Court of Bayelsa State, Kaiama awarded judgment in favour of the appellant in excess of its prescribed monetary jurisdiction of N5, 000.00 under s. 6(1) of the Rivers State Customary Courts Edict (No. 7) of 1987 and item 6 of the First Schedule thereto as applicable to Bayelsa State.[34] On appeal, the judgment of the Customary Court was declared null and void for want of jurisdiction. In his concurring judgment, Fabiyi, J. C. A., (as he then was) stated the law at page 190 of the Law Reports:

A court must be taken to know the limit of its jurisdiction. When the limit placed on jurisdiction has to do with figure relating to a specific amount of money, the court cannot be in doubt. By section 6(1) of the Rivers State Customary Courts Edict (No. 7) of 1987 applicable to Bayelsa State and more precisely item 6 of the First Schedule thereto; the limit of jurisdiction of the Customary Court in civil actions in contracts, torts at common law and at customary law is N5, 000. The trial Customary Court entered judgment for the appellant in the total sum of N9, 035. The said court appreciated that it exceeded its jurisdiction . . . Any order made without jurisdiction is a nullity. No court can imbue itself with jurisdiction where none exists. And parties cannot by consent, real or tacit, confer jurisdiction on a court where none exist.

Although ranked as inferior courts in the sense defined above, customary courts are courts of record. Section 1(6)(a) of the Rivers State Customary Courts Law, 2014 declares that a "Customary Court shall be a court of record." A court of record as known to law is a court that is not only required to keep records of its proceedings but also possesses the power to fine and imprison people for contempt.[35] Customary Courts in Rivers State satisfy both requirements of courts of record. First, section 21(1) of the Customary Courts Law, 2014 prescribes that in any proceedings before a customary court, the Chairman or the Member presiding shall record the oral evidence given before the court in writing. By section 21(2) of the Law, a record taken under subsection (1) shall be deemed to be the official record of the proceedings.[36]

Order 24, Rule 1(1) of the Rivers State Customary Courts Rules, 2011 also provides that all "proceedings, including notes of evidence given before the court, shall be recorded in English in the proper record book by the Chairman." By Order 24, R. 1(2) of the Rules, the "Chairman and members shall sign the record book at the end of the proceedings in each cause or matter and at the end of each's day business." Secondly, by the combined provisions of sections 65, 67, 68, and 69 of the Rivers State Customary Courts Law, 2014 and items 6, 8, 9, and 10 in the Second Schedule thereto, every Customary Court in Rivers State has power to punish for contempt of its proceedings.

Rationale For Establishing Customary Courts

It is now trite law that the overriding rationale for establishing customary courts is to make "administration of justice available to the common man in a cheap, simple and uncomplicated form."[37] Thus, customary courts are established to administer justice in our respective localities in a simple manner

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the burden that would have otherwise lied on the claimant who invokes the jurisdiction of the court to prove such jurisdiction.

[32] See also *Akrobotu* v. *AmetameNormeshie* 14 WACA 290 @ 291 where Korsah, J., stated thus: "It follows that jurisdiction of Native Courts now having been conferred by Statute, the burden of proof, whether a particular Native Court can exercise jurisdiction in matter before it, is upon the party who asserts the jurisdiction."

[33] [2005]17 N. W. L. R. (Pt. 953) 163 @ 190; see also *Iwuagolu* v. *Azyka* [2007] 5 N. W. L. R. (Pt. 1028) 613.

[34] The said law has been repealed and the current monetary jurisdiction of Customary Courts in Rivers State in civil actions in contracts and torts at common law and at customary law is N5, 000.000; see s. 6(1) and item 6 of the First Schedule to the Rivers State Customary Courts Law, 2014.

[35] Garner (n2) 407.

[36] See Andrew v. INEC [018] 9 NWLR (Pt. 1625) 507 @ 541, 569 where the Supreme Court held that the record taken by the Chairman of an Election Petition Tribunal constitutes the official records of the tribunaland not the notes kept by other members.

[37] Ohutu v. Okigbo [1995] 4. N. W.L. R. (Pt. 389) 352, 399 (per Akintan, J. C. A; as he then was); see also Onwuama v. Ezeokoli [2002] 5 NWLR (PT. 760) 353, 370; Mba v. Agu [1999] 12 NWLR (PT. 629) 1; Oladapo v. Akinsowon [1957] WRNLR 215; Akpa v. Itodo [1997] 5 N. W. L. R. (Pt. 506) 589 @ 421.

consistent with the system of administration of justice under native and custom which is devoid of the sophistications and technicalities of administration of justice under the received English law. In *Okeke v. President& Members of Grade 'C' Customary Court, Mapo,*[38]the Court of Appeal (Akintan J. C. A., as he then was) emphasized the simplicity of the procedures being adopted in customary courts in the determination of matters before them as follows:

The justification of the above position is not farfetched. This is because the customary Courts are required to adopt the simplest procedures in dealing with cases before them. For example, pleadings are never filed in such courts. Similarly, strict rules are not followed in many cases before them. Thus, it is not uncommon for a litigant wishing to commence an action to just walk into the court clerk and tell him, "Mr. A bought a goat from me for N500 3 months ago and he failed to pay me. I want the curt to help me recover my money from him.'' The court is expected to write down the complaint and issue the necessary court summons for service on Mr. A. or as in the instant case: Mr. C walks into the Court Clerk's office and tells him that "I am the agent or caretaker in charge of Mr. D's house at No. Z Street. He has instructed me to tell Mr. Y, the tenant in the shop in the house, to leave the shop because he wants to use it himself. I gave notice to the man but he refused to vacate the shop." The court clerk is required to write down the complaint and issue the necessary summons on Y to appear before the court to defend himself against the plaintiff's claim against him.

Similarly in *Erhunmwunse* v. *Ehanire*,[39]the Supreme Court (per Iguh, JSC) restated the principle that:

Customary Courts, however, are not superior courts of record. No pleadings are filed in them either. Accordingly, the technical rules and/or procedure which govern the trial of actions in the superior courts of record neither are nor stringently applied in those courts. The only material before the Customary Courts is the plaintiff's claim which is the initiating process in all civil suits filed in those courts. Trials are conducted in the Customary Courts in a summary manner and the only opportunity a defendant has to project his case is by oral evidence when he and his witnesses testify before the court in his own defence. In this connection, it cannot be over-emphasised that the form of an action in customary courts must not be stressed where the issue involved is clear. The law is long settled that it is the substance of such actions that is the determinant factor.

In this regard, Order 3, Rule 3(i) & (ii) of the Rivers State Customary Courts Rules, 2011 provides that application for summons may be made in writing or orally. If application for summons is made in person, the clerk of the customary court shall record all the particulars of the claim which are necessary for the completion of the proper summons.[40] Thus, a prospective litigant who walks into the registry of the Customary Courts and narrates his claim or complaint to the Registrar of the Customary Courts is entitled to have his claim reduced into writing by the Registrar so that a summons could be issued against the defendant once the Registrar is satisfied that the claims falls within the jurisdiction of the court.

It is clear from the foregoing provisions of the Customary Courts Rules that the simple and unsophisticated procedures adopted in proceedings before the courts are designed to ensure the dispensation of substantial justice with little or no emphasis on technicalities.[41] Thus, it is the substance of the proceedings before the Customary Courts, rather than the form that matters.[42] Therefore, the wheel of

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[38] [2001] 11 N. W. L. R. (Pt. 725) 507 @ 516-; see also AbiodunOlalekan v. Commissioner of Police[1962] 2 NSCC 308 @ 310; Amadasun v. Ohenso [1966] ANLR 439 @ 443- 445; Kuusu v. Udom[1990] 1 N. W. L. R. (PT. 127) 421 @ 441; Nuhu v. Ogele [2003] 18 N. W. L. R. (PT. 852) 251 @ 274.

[39] [2003] 13 NWLR (Pt. 837) 353 @ 377; *Timothy* v. *Fabusuyi* [2013] 1 NWLR (Pt. 1335) 379 @ 399.

[40] See also Order 1, Rule 1 of the Customary Courts Rules 1987, cap. C17, Laws of Bayelsa State, 2006; Order 3, Rule 3(i) & ii) of the Customary Courts Rules 1972, Cap C.19 Laws of Lagos State of Nigeria 2003.

[41] Kofi Badoo v. OheneKwesiAmpung 12 WACA 422;

[42]Gbagbarigha v. Toruemi [2013] 6 NWLR (PT. 1350) 289 @ 308; Zangina v. Commissioner of Works, Borno State [2001] 9 NWLR (PT. 718) Ar382 @ 483-484; Timothy v. Fabusuyi [2013] 1 NWLR (PT. 1335) 379 @ 399; Oguanuhu v. Chiegboka [2013] 6 NWLR (PT. 1351) 588 @ 594; Apata v. Olanlokun [2013] 17 NWLR (PT. 1383) 221 @ 227; Garuba v. Yahaya [2007] 3 NWLR (PT.

justice in Customary Courts cannot be clogged by adherence to technical rules of procedure. The deliberate emphasis placed on the dispensation of substantial justice by Customary Courts and the relaxation of technical rules of procedure in proceedings before these Courts are reflected in the various Customary Courts Laws across the Federation. For instance, section 15 of the Rivers State Customary Courts Law, 2014 provides that:

No proceedings, summons, warrant, order, decree or other process issued or made by a Customary Court shall be varied or declared void on appeal solely because of a defect in procedure or want of form; but a court exercising appellate jurisdiction under this law or any other law, shall decide matters brought to it on appeal from a customary Court according to substantial justice without undue regard to technicalities. [43]

The Supreme Court interpreted identical provisions in section 61 of the Area Courts Edict, 1968 of Benue State, in *Kuusu v. Udom*[44]and came to the conclusion that:

Our new judicial system having accommodated our indigenous system of administration of justice has recognised its informality, malleability to the particular areas in which the court exercises jurisdiction, has made provision within the limits of the statutory provision enabling them to administer justice as understood by the people and to do substantial justice between the parties before them. Thus what the enabling statutory provisions aim at achieving is the doing of substantial justice in accordance with the native laws and customs of the parties before them, any technicality which will stultify the realisation of this objective will be rejected by the Courts. (See s. 61 Area Courts Edict 1968). Area Courts are therefore given wide latitude to enable them do substantial justice.

Clearly, the existing substantive legislation not only gives customary courts power to determine cases brought before them with a view to doing substantial justice between the parties but also empowers the appellate court hearing appeals from decisions of the customary courts to determine such appeals in accordance with substantial justice without recourse to technicalities unless a miscarriage of justice has resulted from the procedure adopted by the customary courts.[45]The attainment of substantial justice is thus the overriding consideration in the exercise of the substantive and procedural jurisdiction vested in customary courts.[46]

Although the phrase "substantial justice'' is not defined in section 15 of the Rivers State Customary Courts Law, 2014, it is submitted that its import must been seen within the wider concept of justice.The word "substantial'' which qualifies the word "justice" within the meaning of section 15 of the Rivers State Customary Courts Law could only mean actual, real, considerable, concrete, significant or ample.[47] Thus, "substantial justice" implies the dispensation of justice that is actual, real, considerable, concrete, significant or ample. It is justice that not only addresses the wrong which the court is called upon to adjudicate but also provides tangible succour in terms of judicial reliefs without being constrained by

1021) 390 @ 394-5; Kuusu v. Udom (supra) @ 447-8.

[43]See also s. 15 of the Customary Courts Law of Bayelsa State;

[44] [1990] 1 NWLR [PT. 127) 421, 442; Ekpa v. Utong [1991] 6 NWLR (PT. 197) 258; Garuba v. Yahaya [2007] 3 N. W. L. R. (PT. 1021) 390; Anyabine v. Okolo [1998] 13 N. W. L. R. (PT. 582) 444; Ikeagwu v. Nwamkpa (1966) 1 SCNLR 238; Iyayi v. Eyigebe [1987] 3 N. W. L. R. (PT. 61) 523.

[45] The phrase ''miscarriage of justice'' simply means failure of justice. See *Akapeye v. Akapeye* [2009] 11 NWLR (PT. 1152) 217 @ 237.

[46]Oladapo v. Akinsowon(1957) W. R. N. L. R. 215; Jitte v. Okpulor[2016] N. W. L. R. (PT. 1497) 542, 572-3;Chukwunta v. Chukwu (1953) 14 WACA 341; Akpan v. Utin [1996] 7 NWLR (PT. 463) 634; Ikpang v. Edeho (1978) 2 LRN 29; in Kuusu v. Udom (n44) the Supreme Court held that the following principle enunciated by De Lestang, F. J., in Chiagbana v. The Queen (1957) SCNLR 98 in relation to the proper attitude of an appellate court to decision of the District Officer applied equally to decisions delivered by customary courts: "In particular the court should not lose sight of the conditions under which administrative officers exercising judicial functions, have to discharge those functions in remote places. They are not usually trained lawyers and they do not have the assistance of counsel, who are indeed not permitted to appear before them. Their aim is to do justice. Where it is therefore obvious to everyone, that in their anxiety to do justice they have departed somewhat from the ordinary rules of practice and procedure, this court will be very slow to interfere and will only do so when it is satisfied that some injustice might have resulted.''

[47]Angbazo v. Ebye[1993] 1 NWLR (PT. 268) 133 @ 143.

technical rules of procedure. Substantial justice is justice that triumphs over technicalities as embodied in the Rules of courts which, in reality, are designed as the handmaid of justice; it is the opposite of justice that lays prostrate before technicalities or rules of practice and procedure.[48]

Composition of Customary Courts

The composition of the Customary Courts in Rivers State is prescribed by the Rivers State Customary Courts Law, 2014. By virtue of section 2 (1) of the Customary Courts Law, a Customary Court shall consist of a Chairman and two Members who are appointed by the State Judicial Service Commission on full time basis. The Chairman of the Customary Court shall be designated as (i) Chairman Grade I; and (ii) Chairman Grade II respectively.[49]

Under section 2(2) (b)(i) and (ii) of the Customary Courts Law, 2014, a person shall not be qualified for appointment as Chairman Grade I or Chairman Grade II of a Customary Court unless he is qualified as a Solicitor and Advocate of the Supreme Court of Nigeria, and has been so qualified for a period of not less than eight years in the case of Chairman Grade I or six years in the case of Chairman Grade II.

It is clear from the tenor of section 2 (2) (b) of the Customary Courts Law that only a Solicitor and Advocate of the Supreme Court of Nigeria, that is, a legal practitioner as defined under section 24 of the Legal Practitioners Act is qualified to be appointed as Chairman of any Customary Court in Rivers State.[50] To put it plainly, the State Judicial Service Commission cannot appoint a lay person as Chairman of any Customary Court in Rives State because the extant law has effectively abolished lay chairmanship of Customary Courts. It follows from this interpretation, that no Chief or traditional ruler in Rivers State is qualified or eligible to serve as Chairman of a Customary Court unless such Chief or Traditional Ruler is also a legal practitioner.

The above interpretation remains valid even with the saving provisions in section 2(2)(c) of the law which provides that "Notwithstanding the provision of this section, a person who is a Customary Court Chairman at the commencement of this Law is deemed to be qualified as Chairman Grade I or II under this Law." The practical implication of this provision is that a person already appointed and designated as Chairman Grade I or II of any Customary Court prior to the coming into force of the Rivers State Customary Courts Law, 2014 shall be deemed to have been qualified for appointment as Chairman Grade I or II as the case may be even if he was not so qualified in point of fact under section 2 (2)(b) of the Law. This interpretation derives from the use of the word "deemed" in section 2 (2)(c) of the law which has been interpreted to mean treating or regarding a thing as something that it was not initially or as possessing certain qualities which it lacked originally. In *Orji v. Dorji Textiles Mills (Nig.) Ltd.,*[51]the Supreme Court (per Tobi, J. S. C.) defined word "deemed" as follows:

The operative and telling expression or word in section 79(1) is "deemed." The present tense of the word is "deem," it means to treat a thing as being something that it is not or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions. . . The deeming provision is intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provision. When a person, for example, is deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of parliament requires him to be treated as if he were.

Thus, a person "deemed to be qualified as Chairman Grade I or II'' under section 2(2) (c) of the Law is a person already appointed and serving as Chairman of a Customary Court but

[48]Combe v. Edwards(1878) LR 34 PD 103 @ 142; See also A-G., Bendel State v. Aideyan [1989] 4 NWLR (PT. 118) 646@ 681; Aighobahi v. Aifuwa [1999] 13 NWLR (PT. 635) 412 @ 423.
[48]Combe v. Edwards (n48) @ 142; Aighobahi v. Aifuwa (n48) @ 423.

[49]See s. 2 (2) (a) of the Customary Courts Law.
[50]Cap. L11, Laws of the Federation of Nigeria, 2004; section 24 of the Legal Practitioners Act defines the term "legal practitioner" to mean a "person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings."; see Yaki v. Baguda [2015] 18 N. W. L. R. (Pt. 1491) 288, 320; Okafor v. Nweke [2007] 10 N. W. L. R. (Pt. 1043) 521, 534; Brathwaite v. Skye Bank Plc. [2013] 5 N. W. L. R. (Pt. 1346) 1.

[51][2009] 18 NWLR (Pt. 1173) 467 @ 497.

who did not meet the post-call qualifications prescribed under section 2(2) (b) of the Law as at the date that Law came into force on 20th day of August, 2014. Such person shall be treated or considered as if he possesses the post-call qualifications prescribed under section 2 (2) (c) of the law.

It will be recalled that under the repealed Rivers State Customary Courts (Amendment) Law, 2009,[52]Chairmen of Customary Courts were designated as Chairman Grade I (equivalent to Chief Magistrate); Chairman Grade II (equivalent to Senior Magistrate Grade I); and Chairman Grade III (equivalent to Senior Magistrate Grade II). Section 2(2)(i) and (ii) of the said repealed law prescribed a post-call qualification of 7 years for appointment as Chairman Grade I, 5 years post-call qualification for Chairman Grade II and 4 years post-call qualification for Chairman Grade III respectively. Thus, although the post-call qualification for appointment under the extant law is higher than that prescribed under the repealed law, what is common is that under both legislation, only a legal practitioner is qualified to serve as Chairman of any Customary Court.

Section 2 (3) of the Customary Court Law prescribes that a member of a Customary Court shall be a graduate of any discipline with at least 5 years post-graduation standing. It is clear from a community reading of section 2 of the Customary Courts Law that whereas only a legal practitioner is eligible for appointment as chairman of a customary court, a person who is not a member of the legal profession may be appointed as a member of Customary Court provided that he is a graduate with at least 5 years post-graduation standing. Furthermore, from the express provisions of the Customary Courts Law, the legislature has not evinced any intention to give special preference to the appointment of chiefs or traditional rulers as members of customary courts.

Section 3 of the Law provides that that a person shall not be qualified for appointment as a Chairman or Member of a Customary Court unless he:

- Is a fit and proper person;
- Has a good knowledge of the language which is predominately spoken in the area in which the Customary Court is situated;
- Has sufficient knowledge of the customary laws and usages prevailing in the area of jurisdiction of that Customary Court; and
- Is not less than thirty years of age?

The phrase “fit and proper person” is not a term of art. To be sure, a “fit and proper person” is one who is:

> . . . apt and fit to execute his office, who has three things, honesty, knowledge, and ability; honesty to execute it truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it. [53]

It is submitted that a “fit and proper person” within the contemplation of section 3 of the law, is one who is mentally and physically alert and possesses the capacity to discharge the onerous functions of his judicial office honestly, fairly and impartially without fear or favor, affection or ill-will. In addition, the person to be appointed must be legally eligible in terms of possessing all the qualifications prescribed for appointment by the enabling law.

Two other qualifications for appointment as Chairman or Member of a Customary Court prescribed under section 3 (b) and (c) of the Customary Courts Law are good knowledge of the language which is predominately spoken in the area in which the court is situated and sufficient knowledge of the customary laws and usages prevailing in the area of jurisdiction of the customary court. The necessity for these qualifications cannot be over-emphasized. Customary Courts as successors of the old Native Courts are created specially to administer justice in an unsophisticated manner in accordance with applicable rules of customary law. Unlike the position in the superior courts where custom is a question of fact to be proved by evidence unless the same can be judicially noticed, proof of customary law before a Customary Court is the exception, rather than the rule. This is because a Customary Court is empowered under Order 10 Rule (2) of the Rivers State Customary Courts Rules, 2011 to apply its knowledge of the applicable customary law within its area of jurisdiction in determining cases before it without the party seeking to rely

[52]Amendment (No. 1) Law (No. 9) of 2009.

[53] John S. James, Stroud’s Judicial Dictionary of Words and Phrases, Volume 2 (4th edn. Sweet & Maxwell, London 1972) 1055.

on that custom proving it before the court unless the court thinks otherwise.[54] Proof of custom becomes statutorily necessary only where the custom in question is applicable within an area outside the area of jurisdiction of the court. [55]

It is indisputable that no customary court can effectively invoke the provisions of Order 10, Rule 6(2) of the Customary Courts Rules 2011 by applying the applicable rule of customary law within its area of jurisdiction in the adjudication of cases before it unless its members possess sufficient knowledge of the customary laws and usages prevailing in its area of jurisdiction. Clearly, where the Chairman and members of a Customary Court lack sufficient knowledge of the customary laws and usages prevailing in the area of jurisdiction of the court, the intendment of Order 10, Rule 6 (2) of the Customary Courts Rules would be defeated to the extent that the court cannot rely on its own knowledge of the applicable customary law and usages in adjudicating on the matter before it. In such circumstance, the customary court would be bound to call on the party seeking to rely on the particular customary law and usage to prove them contrary to the express provisions of the Customary Courts Rules. The effects of such non-compliance with the provisions of Order 10, Rule 6 (2) of the Customary Courts Rules is that precious time of the court would be wasted by taking evidence on the applicable customary law and thereby defeat the speedy dispensation of justice by the court.

The same argument can also be advanced in support of the qualification that the Chairman and Members of a Customary Court shall possess good knowledge of the language which is predominately spoken in the area in which the Customary Court is situated because a people's custom cannot be divorced from their language. The language spoken by a people remains the primary medium through which their custom is preserved, nurtured, developed, communicated, practised and transmitted from one generation to the other. It is therefore inconceivable to talk about knowledge of a people's custom without sufficient knowledge of their language. It is submitted that the Rivers State Customary Courts Law 2014 does not contemplate the appointment of persons to the Customary Court bench who lack basic knowledge of the prevailing customary law including the dominant language spoken in the area of jurisdiction of the court. Thus, persons who may aptly be described as "native foreigners" should have no place on the customary court bench.

The provisions of the Rivers State Customary Courts Law restricting appointment of chairman and members of a Customary Court to a legal practitioner and graduates respectively have been criticized for being inconsistent with the customary law of the indigenous societies in Rivers State. In particular, the lack of any provision in the law according a special eligibility to chiefs or traditional rulers for appointment as chairman or member of the customary courts has been condemned as robbing the customary court of the pristine honor and dignity it deserves. According to Karibi-Whyte, since the "Chiefs are persons presumed to know the laws of their communities and are intricately intimate with them to be familiar with their laws and custom. . . it would therefore be more useful in the appointment of members of their courts, to chose from the ranks of chiefs."[56] The learned author further argued that a "situation where an inconsequential or insignificant member of the society was appointed chairman or member of the court where the Chief was outside the system does not infuse any confidence in such institution."[57]

There is justification for the above criticism of the Rivers State Customary Courts Law as it relates to the appointment of members of a Customary Court, rather than the appointment of the Chairman of the court. In indigenous Nigerian societies, particularly Southern Nigeria, the title "Chief" which is used interchangeably with "Traditional Ruler" refers to the traditional head or leader of a family, group of families or community. Section 35 of the Rivers State Traditional Rulers' Law 2015 defines the term "Traditional Ruler" to mean the "holder of a traditional title who was selected by his people according to their tradition and usages to exercise authority over the people in a town or community."[58]The same section 35 of the Rivers State Traditional Rulers' Law, 2015 defines a "Family Chief" as a "titled person

[54]Okeke v. President & Member of Grade "C" Customary Court Mapo(n38) @ 516-517; Ababio II v. Nsemfoo 12 WACA 127; Oguigo v. Oguigo [2001] 1 W. R. N. 131 @ 149-150.
[55]See Order 10, Rule 6 (2) of the Rivers State Customary Courts Rules, 2011.

[56]Karibi-Whyte (n4) 247.
[57]Ibid.
[58]No. 4 of 2015.

selected by his people according to their customs and usages not being a village, town or community head by virtue of the provisions of this Law".

According to Karibi-Whyte, a "Chief is a person who is a paramount leader in his group and among his community, and carries with it both social and political functions and prestige."[59] Clearly, the chief is the undisputed custodian and repository of the custom, culture and tradition of his people and the embodiment and representation of their ancestors. He is the ultimate authority in the family, chieftaincy House or community and therefore personifies the chieftaincy family or House which operates as a corporation sole.[60]As the embodiment and repository of the custom, culture and tradition of his people and the representation of the ancestors of the family, House or community, the Chief is presumed to have sufficient knowledge of the customary law of his people and is arguably the most competent person to declare the customary law on any particular issue. To put it differently, the Chief is the embodiment of the customary law of his people.

It is very arguable therefore that since the present Customary Court is a mere successor of the old Native Court and remains in the same category as a Native Court charged primarily with the application of customary law, the dispensation of justice in the customary court could be enhanced considerably where chiefs who possessed sufficient knowledge of the applicable customary law in the locality are appointed to serve as members of the court.[61] This is the only way the provisions of the Rivers State Customary Courts Rules 2011 which empower the customary court to apply customary law within its area of jurisdiction in the determination of cases before it without proof by the parties could be effective.

The foregoing submission is not weakened by the provisions of "section 88 (1)"of the Rivers State Customary Courts Law 2014 which empowers the customary court to summon any chief to appear before it for the purpose of giving evidence where it becomes necessary in a matter before the customary court to ascertain an alleged change in the custom of the community on an issue. It is clear from this provision that chiefs could be summoned by the customary court to give evidence on any change in a rule of customary law so as to guide the court on that issue. However, the limitation inherent in this provision is that the summoning power is exercisable by the court only where it is alleged that a change has occurred in the customary law relevant to the issue before the court. Thus, where no change is alleged to have occurred in a rule of customary law relevant to the issue before the customary court, no chief could be validly summoned by the court to give evidence.

The effect of the foregoing interpretation is that the lacuna created in the provision of the law relating to appointment of chiefs to serve as members of customary courts could not be cured by reference to section 88(1) of the Law.

The practical implication of the current state of the Rivers State Customary Courts Law is that where members of the customary court lack sufficient knowledge of the applicable customary law in the area of jurisdiction of the court, the court will call for proof of such customary law by the party seeking to rely on it contrary to the spirit and intendment of the provisions of Order 10, Rule 6 (2) and (3) of the Customary Courts Rules, 2011.

However, the same argument cannot be canvassed in respect of the appointment of the Chairman of the customary court. The Chairman of the customary court presides at every sitting of the court unless he is absent in which case, the members present shall choose one of their members based on seniority of grade to preside but where the court has a legal practitioner as member, the legal practitioner shall preside as the chairman in the absence of the chairman.[62]

Clearly, the Chairman of the customary court directs the proceedings of the court and ensures that the court remains the master of its proceedings. The need for the judge or judex to remain the master of the proceedings before him has been emphasised by the Court of Appeal in *EFCC v. Akingbola*[63] where it was held that:

Like Caesar's wife, a judge must always be above board. In AJONUMA & ORS v.

[59]Karibi-Whyte (n4) 122.

[60] A-G., Federation v. NNPC (2003) LPELR- 630 (SC) 1 @ 24-25; Alapiki v. Governor of Rivers State [1991] 8 NWLR (Pt. 211) 245.

[61]Ogunnaike v. Ojayemi[1987] 1 NWLR (PT. 53) 760 @ 773-774; Amadasun v. Ohenso[1966] ANLR 439 @ 443- 445. .

[62]See Order 2, Rule 1 of the Customary Courts Rules, 2011.

[63](2015) LPELR-24546 (CA) 1 @ 64.

SEBASTINE NWOSU & ORS (2014) LPELR-24015(CA), it was emphasized that every judge should act as the master of his own court and should not allow any counsel/person (no matter how highly placed) to teleguide and dictate to the court how to conduct its proceedings, in the light of its laws and rules. See also the statement of NGWATA, JSC in MFA & ORS v. INONGHAO (2014) LPELR-22010(SC) when he held: "The court has a duty to guard against an attempt by any of the parties to make an ass of the law and rule of procedure.

There is no doubt that the proceedings of the Customary Courts are regulated by the Customary Courts Rules, 2011 which are designed to serve as handmaids of justice. It is very arguable that only a legal practitioner could effectively interpret and apply the provisions of the Rules in order to attain substantial justice. The role of the Chairman is better appreciated when it is realised that by virtue of section 27 of the Customary Courts Law, legal practitioners are entitled to appear before customary courts in Rivers State to represent their clients. It is submitted that a lay chairman will lack the capacity to direct and control the proceedings of the court and resolve the several issues of law that may be raised by counsel in the course of the proceedings. Besides, lawyers appearing before the court chaired by a lay person may be easily tempted to dictate to the court how it conducts its proceedings.

Concluding Remarks

Customary Courts are indispensable in the administration of justice in our localities because most of the disputes that usually arise involve questions of application and enforcement of rights guaranteed under customary law including chieftaincy matters. Given that customary courts are established to apply and enforce customary law relating to land held under customary law, matrimonial causes in respect of marriage under customary law, custody of children and other causes relating to children under customary law, inheritance and chieftaincy causes and matters, there is no doubt that the appointment of chiefs who are versed in the applicable customary law to serve as members of customary courts will enhance speedy dispensation of justice. [64]

The necessity for appointment of chiefs as members of customary courts is further underscored by the fact that unlike the superior courts of record where question of customary law is treated as a matter of fact to be proved by evidence, members of the customary court are presumed to know the applicable customary law within their area of jurisdiction and are empowered to apply it without any proof by evidence. The whole essence of these provisions in the Rules of the customary courts is to ensure speedy and uncomplicated procedure in the adjudication of cases. As embodiments of the customary laws of their localities, the appointment of chiefs as members of customary courts will guarantee that effect is given to the provisions of the rules of customary courts.

It is accordingly recommended that section 2 (1) of the Customary Courts Law should be amended to make specific provisions for the appointment of chiefs to serve as members of customary courts in terms set out hereunder:

"S.2 (1)" A Customary Court consists of a Chairman and two members one of whom shall be a chief, who are appointed on full time by the Judicial Service Commission.

Citation: *Z. Adangor, Kato Gogo Kingston PhD (East London), BL "Composition of Customary Courts in Rivers State of Nigeria: A Case for Appointment of Chiefs as Members" Journal of Law and Judicial System, 1(3), pp.82-95*

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[64]See First Schedule to the Customary Courts Law, 014.