International Journal of Business & Law Research 12(4):82-95, Oct-Dec, 2024

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doi:10.5281/zenodo.14223531

Understanding the Rule of Evidence Applicable in Customary Courts Practice and Procedure

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ABSTRACT

Customary courts are established directly by law passed by the State House of Assembly in Nigeria Pursuant to power derived from section 6(4)(9) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The customary courts are established to administer justice in our respective localities in a simple manner consistent with the system of administration of justice under native law and custom. The rule of evidence applicable in Customary Courts are devoid of technicalities of administration of justice under the evidence Act. The Evidence Act though not applicable but as a guide to administration of justice and in compliance of the customary court rules. The paper examined how customary courts utilizes different types of evidence types (oral, documentary and hearsay) and adapt rules of admissibility to focus on substantial justice. Given that customary courts are not bound by conventional legal formalities, this article highlights how these courts interpret relevance and admissibility as central tenets in the administration of justice. Using different cases law, the paper illustrated how flexibility is applied to balance community customs with the principles of fairness and equity, while statutory references, including the Rivers State Customary Court Rules, support the evolving practices in these courts. Through analysis and discussion, this paper suggested legislative and procedural reforms to address current challenges and inconsistencies, including a call for law reporting of customary court judgments and the enactment of community-specific customs into formal statutes.

Keywords: Rule of Evidence, Customary Courts Practice and Procedure in Nigeria.

1. INTRODUCTION

Customary courts hold a unique position within the Nigerian legal system. They are designed to provide accessible and affordable justice to the ordinary citizen, especially on issues that pertain to the custom and tradition of the people. However, the rule of evidence in customary court and the application varies significantly from the application in High Court. In High Court, the Evidence Act 2011 is applicable. As a result, frontloading of statement of claim or defense and evidence of witness on oath and exhibits are allowed as a matter of procedure. In customary court practice and procedure, what the parties are expected to file before the Customary Court are the claims of the Claimant and defense of the Defendant by way of counter claim. The Rule applicable in Customary Court is that the evidence of the witness shall be recorded in the record book of the court.[1] The Evidence Act is not applicable in Customary Courts.

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The Customary Court are enjoined to adopt a rule which is aimed at doing substantial justice that is justice without the technicalities of Evidence Act. The exclusion of the Evidence Act 2011 from customary court has made it essential to explore the rule of evidence in relation to practice and procedure in customary courts in Nigeria.

2. DEFINITION OF KEY TERMS

1. **Evidence:** This means testimony, whether oral, documentary, or real, which may be legally received in order to prove or disprove some facts in dispute. It also means by which facts are proved by excluding inferences and arguments.
2. **Custom:** This means a rule which, in a particular district, has, from long usage obtained the force of law.[2] It can also be defined as a tradition and widely accepted way of behaving that is specific to a particular society, place, or time.
3. **Customary Law:** This is a system of law, not being the common law (of England), and not being a law enacted by a competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its way

3. ESTABLISHMENT OF CUSTOMARY COURTS IN NIGERIA

The Customary Courts are established by law passed by the House of Assembly of state of the federation pursuant to power derived from section 6(4) (a) of the CFRN 1999 (as amended). The power of the National Assembly or state House of Assembly to establish customary courts is derived from the provisions of the CFRN 1999. Thus, 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 in respect of the Federal Capital Territory as seen in *Okhae v The Governor, Bendel State*[3] and *Ojisua v Aiyebelehim*[4]

Customary Court being a court created by a law passed by the National Assembly (in respect of the Capital Territory, Abuja) or the state House of the Federal Capital Territory, Abuja, can only exercise jurisdiction on matters with respect to which the National Assembly has power to make laws by virtue of section 6(5)(i) and (k) of the CFRN 1999 (as amended) that the power of the National Assembly or state House of Assembly 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 as seen in *Obayuwana v. Governor of Bendel State*.[5] It is therefore arguable that although the power establish Customary Courts drives 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 establishing Customary Court in an area, the Governor is required, under section 1(2) of River State Customary Court Law 2014, to have regard to the following factors:[6]

1. The population of the area to be served;
2. The ethnic affinity for the people to be served
3. The volume of judicial work that is likely to emerge, and
4. The proximity of the Customary Court to the community.

Section 1(1) of the Rivers State Customary Courts Law 2014 is clear from the tenor that every local government 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 these local government areas belong to one ethnic group or community and have a common

[1] Rivers State Customary Court Rules, 2011, or 10 r 4(1).
[2] Evidence Act 2011, s 258(1).
[3] (1990) 4 N.W.L.R (pt. 144) pg 327,376
[4] (2001) 11 N.W.L.R (pt. 723) pg 44, 53.
[5] (1982) N.S.C.C. pg 524, 535
[6] Section 1 (2) of Rivers State Customary Court Law 2014

historical origin, affinity or interest in traditional customary matters.[7] Section 192 of the customary court law of Lagos State 1973 also provides that: the number of customary courts that may be established pursuant to the law shall reflect the prevailing.[8]

4. EVIDENCE ACT 2011 NOT APPLICABLE IN CUSTOMARY COURTS

The Evidence Act 2011 regulates the use of evidence in all proceedings in courts in Nigeria. It is trite that the evidence Act cannot apply to proceedings under arbitration or court material or any Customary Court of Appeal, Sharia Court of Appeal, Area Court or Customary Court in any part of Nigeria.[9] The rigid standard of proof provided for by the evidence Act does not necessarily apply in respect of proceedings in customary or Area court, but only to be guided by it. In Ogunnaike vs. Ojayemi[10]. The supreme court of Nigeria held that "Evidence Act would not apply to judicial proceedings in or before a customary or Area court unless the Governor shall by order confer upon it power to enforce any of its provision."

Recently, the supreme court in the case of *Oguanuhu & Ors vs. Chiegboka*[11] has stated that 'strict rules of pleading and application of provisions of the Evidence Act are not observed in those customary or native courts. Their decisions however must be based on common sense and reasonableness of their finding.' What is reasonableness in this regard? The above decision of the supreme court with due respect did not explain what constituted common sense and reasonableness. Though the law is trite that supreme court decision is final. But in my own considered view, "common sense and reasonableness" put together are what an ordinary man in the street "a man on the *Clapham omnibus*" would apply to an issue and it will result to what is fair, correct and good decision or sound judgment at any given point in time. It is further submitted that the evidence act applies to the area court over criminal cases[12].

5. Classification of Customary Law of Evidence

To understand the rule of evidence applicable to customary court proceeding, judicial evidence has been classified into oral, documentary, hearsay, real, direct and circumstantial evidence. The classes of evidence that can be discussed here for the purpose of these research topic are oral evidence, hearsay evidence and documentary evidence.

a Hearsay Evidence:

According to the rule of evidence, a witness may only testify to things that he has personally seen, heard, or experienced not to things that he has been told by someone who is not being called as a witness in the case. The exception is that hearsay evidence is applicable only for the purpose of proving the existence of communal tradition in a land matter. The customary court admit hearsay evidence in a land matter, where the witness is repaired to proof the root of title over communal or family land. The history of who founded and deforested a particular portion of land is passed from one generation to another till the present head of family in custody of the family land.

By clear provision of order 10, Rule 5(2) of RSCCR 2011, hearsay evidence is rendered in admissible. The hearsay evidence maybe admissible where it is the only available evidence to prove and or establish the traditional history over a communal or family land. The burden of proving that a piece of evidence which admittedly amounts to hearsay, is admissible under the provisions, lies on the party seeking to tender it. In *Ogbonna vs. Ogbuji*[13] hearsay evidence may be documentary where a witness seeks to tender a document containing material facts which were neither recorded by him nor within him personal

[7] Section 6 (4) RSCCL, 2014
[8] Section192 CCL of Lagos State 1973
[9]Section 256 (1) (c) of the Evidence Act 2011.
[10](1987) NWLR (pt.53) pg 760
[11] (2023) vol.221 LRCN (pt 2) pg 117
[12]Sec 256 (1) and (2) of the evidence act 2011

[13] (2012) 4 N.W.L.R (pt.1290) pg 207 at 233

knowledge, the document may amount to documentary hearsay. The evidence Act 2011 section 83(1) provides the circumstances where hearsay evidence becomes admissible in judicial proceedings.[14]

The case of *Maxwell & Ors vs Emu*[15] is instructive on the discussion about admissible hearsay in customary courts. The parties in this case are from Omuogo family in Umuechen in the Etche Local government Area of Rivers State, whereas the respondent are from Igwuruta in Ikwerre Local Government Area of Rivers State. The both actions where consolidated, with the respondent as the claimant and the Appellants as the defendant. At the trail court, the respondent claimed that their ancestors, Egwu, along with his descendant, had a historical connection to the land. They asserted that their ancestors, Egwu, and his children had continuously possessed and used the land, and after the death of Egwu, the land devolved on his descendant as family property. The respondent asserted further that they leased the property to the Appellants and the Niger Delta Rubber company and its successor-in-title, The Delta Rubber Company Limited since 1962 and where being paid annual rent by the company and the Appellants. The respondent are also part of the association of landlords (Rubber, Estate Landlord association) to the delta rubber company limited.

On the other hand, the Appellants asserted that their ancestor, Echem, had founded the land, and they were the rightful owners, although they did not state how the land was founded, and or acquired neither did they lead evidence surrounding the founding of land. The Appellants also denied being customary tenant of the respondent, and having paid tribute to the respondent. The Appellant also stated that they had being landlords to the shell petroleum development company (SPDC) since 1971.

The trial court ruled in favour of the Appellant, finding that the respondent failed to prove that the Appellant where their customary tenant and that their traditional history was unreliable. The respondents appeal to the court of appeal was successful the court fund that though their where loopholes in their traditional history that the respondent relied on as proof on long-term act of ownership exercised by the respondent to hold in their favour. The court of appeal also held that the failure of the Appellants to lead evidence as to how their founder, Echen, founded the land, was fatal to their traditional history and essentially, the Appellants case. Dissatisfied with the judgment of the lower court, the Appellants appealed to the Supreme Court.

The sole issue adopted by the Appellate court in its determination of the appeal is whether having regard to the pleaded facts and evidence lead at the trial, the honorable justice of the court of appeal were not right in reversing the judgment of the trial court. On the sole issue, counsel of for the appellant set out the selected five ways of proving title to land, and cited the case of *Idundun V. Okumagbu*[16]in support. Counsel submitted that both parties relied on traditional history in this case, and that a party relying on traditional history as his root of title has provide detailed information about who founded the land, how it was founded, and the intervening owners. Counsel contended that the current position of law allows for the naming of a progenitor as the funder, presupposing that the land as originally founded by settlement, thereby making if unnecessary to provide extensive details about how it was founded, he relied on the case of *Salisu v Moolaji*[17]. Counsel asserted that the Appellants ancestor, Echew, was the first to settle on the land in question. And engaged in farming activities.

He faulted the lower court for relying on recent acts had already proven their ownership through traditional history counsel also challenge the lower courts use of the respondents Association as proof of lad ownership, and argued that membership of this association is not a legally recognized method of proving land ownership ad violates the constitutional right of association which includes the right not to associate counsel contended that the evidence presented, including exhibits 0-1-019, demonstrated that the Appellants had a stronger claim to recent act of ownership, such as their 1964 law suit against the Eastern Nigeria Development corporation and their right to receive payments furthermore, counsel argued that the lower court misunderstood the significant of exhibit M, which they claimed with a peace panel

[14] Evidence Act 2011, s 83(1)
[15]IHC/105/2022/IHC/26/2023 (Unported)
[16](1976) 9& 10 S.C 27
[17](2016) 15 NWLR (pt 1535) pg 242

report not an Arbitration panel report they contended that the report was subject to an oath, and would not be considered a customary Arbitrations report in response to the Appellants submission counsel for the respondents argued that both parties relied on traditional history as their root of title. However, the respondent ahead to plead their numerous acts of log and recent possession, with exhibits the Appellants pleading in support of their claim of ownership to the dispute land by traditional history was faulted, as they omitted to plead how the land was founded.

In response to the submission of the Appellants counsel that once a named progenitor is said to have founded a land, it presupposes that the land was originally owned by settlement, counsel for the respondents submitted that neither the case of *Saisu v Mobolaji*[18]and *Titiloye v Olupo*[19], relied on by the Appellants, did the Apex court deviate from the established requirements of burden of proof on a party claiming title by traditional history. Counsel submitted further that if the Appellants were aware of the facts surrounding the founding of the disputed land, they would have clearly pleaded same, he argued that having failed in dispute, the Appellants are not entitled to lay claim to the land by virtue of traditional history. The cases of *Addah v Ubandawaki*[20] and *Ainloye v Eyiyola*[21] were cited in support.

The Respondent contended that the lower court rightfully concluded that the traditional evidence presented by both parties, as in conclusive hence, it relied on acts of ownership that extended over a significant period, benefiting the Respondents counsel argued further that delta rubber company limited occupied part of the disputed land, and that the Respondents were among the landowners who granted the company access, while the Appellants did not belong to the landowners Association. Regarding exhibit 0-019, counsel submitted that these exhibits did not reflect the Appellants suing Delta Rubber Company Limited, but instead, related to the Appellants Umuechem larger family suing shell petroleum development company, counsel for the respondents defended exhibit M as a Customary Arbitral panel decision, disputing the Appellants argument that if needed to be submitted to a court for legal effect, they ensured that the panel as set up with the courts permission, and that arbitral awards are generally considered final judgment.

Deciding the sole issue, the supreme court held that "were a party relies on traditional history, he is duty bound to prove by evidence the founder of the land, how the land was founded, and the names of the persons who owned the land from the founder to the current titles holder." *Addah v Ubandawaki*[22]the court noted that a party claiming declaration of titled of land through traditional history must lead and lead cogent and reliable evidence as to show how the land was founded by the named founder, otherwise his claim will fail. By its nature, *evidence of traditional history is hearsay* which would ordinarily be inadmissible, but it is elevated to the status of admissible evidence by virtue of section 44 of the evidence Act 2011. Thus, it must be established through uncontradicted believable evidence. Hence, the omission to do so was fatal to the Appellants claim of title to the land, and the lower court was right in holding that the evidence of traditional history relied on by both parties were inclusive……"

In conclusion, the Apex court held the decision of the lower court allowing the respondent's ownership claim, noting that civil matters are decided on balance of probabilities as in terdrill (Nig) Ltd V UBA plc[23]. The appeal was dismissed, as lacking the merit of judgment of the court of Appeal port Harcourt, which set aside the judgment of the high court, Rivers State as there by affirmed. The purpose of giving the full facts of this case and the Supreme Court decision is for the understanding of the legal effect of hearsay evidence. It is trite that hearsay evidence is inadmissible, but the rule of evidence in customary court admits hearsay where it become the only available evidence to proof the traditional history of how a party owns a piece or parcel of land as provided in order 10 rules 5 (2) of the River State customary court Rules 2011 cited above.

[18]Saisu vs. Mobolaji (supra)
[19](1991) 7 NWLR(PT. 205) 519
[20](2015) EJSC 125
[21](1968) NWLR 72
[22](2015) ALL FWLR (pt. 775) 200
[23](2017) 13 NWLR (pt 1581) pg 52

b Documentary Evidence:

It must be noted here that documentary evidence is unknown to native law and custom. Native law and custom are proved as facts. The documentary evidence with writing on it, includes, maps, plans, graphs or drawing, photographs or film, audio recordings, computer records. A document can further be defined as a form of information that might be useful to a user or set of users. This information can be in digital or non-digital form. The customary court Rules have made provision for the admissibility of documentary evidence in customary court proceedings. Generally, relevancy is the hall mark of admissibility of documentary evidence. In *Aregbesola v Oyinlola*[24] the court held that the test to be applied, both in civil and criminal cases, in considering whether documentary evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how it was obtained.[25]

c Public and Private Documents

Document are classified in section 102 and 103 of the evidence Act 2011 as public and private document. Section 102 (a) define public document as documents forming the official acts and record of the act of the sovereign authority, of the official bodies and tribunal and of the public officers, legislature, judicial and executive whether of Nigeria or elsewhere. It is my submission here that record of evidence of parties, or record of proceedings, order and judgment of courts are public documents. The above classification of public document is as decided in the case of Ekiti State VS Ojo[26]. Section 103 the Evidence Act, 2011, provides that all documents other than public document are private document.[27] Private document is in form of letters, receipts, invoice, will of testator etc.

d. Oral Evidence:

In customary court, the rule of evidence applicable to the proceeding are the rule of naïve law and custom. The parties come before the customary court to proof their claim through oral evidence stating the facts of their case in accordance to the native law and custom applicable in their community. The customary law and custom which the party relied must be one that is in existence at the relevant time. The custom must be proved as a fact. In *Olubodun v. Lawa*[28], the Supreme Court was explicit that major characteristic of customary law or custom was that it must be in existence at the relevant time and must be recognized and adhered to by the people to make it binding, and secondly, that it is a well-established principle of law that documentary evidence is unknown to native law and custom.

The law is trite that provides that[29] "where a custom cannot be established as one judicially noticed, it shall be proved as a fact." This position enjoys judicial support in *Orlu v. GogoAbite*[30]and *Quen v Ozogula*[31]where the Court stated that "it is extremely important that custom should be strictly proved. Though such proof is not by the number of witnesses called, it is not enough that one who asserts the custom should be only witness. Another witness who is versed in the alleged custom should also testify." The Court went further to hold that: "native law and custom were matters of evidence to be decided on facts presented before the Court, unless it is of such notoriety and has been so frequently followed by the Courts that judicial notice would by taken of it without proof on evidence and that such evidence which is usually based on tradition has to be averred on pleading and proved as being in line with the custom of a particular family or community."

Similarly, in *Olubodun v. Lawal*,[32] the court held that: "native law and custom not judicially noticed can be proved by oral evidence of witnesses belonging to the community to show that the people in that particular area regard the alleged customary law as binding on them." There are numerous implications of

[24] (2011) 9 N.W.L.R (pt. 1253) pg 458 at 572
[25] *Ibid.*
[26](2006) 17 NWLR (Pt. 1007) pg 95 act 127 para. C-F per
[27]Evidence Act, 2011, s 103.
[28](2008) 35 NSCQR 570
[29]Section 18 (1) to the Evidence Act
[30](2010) 41 NSCQR 458 RATIO 4 AND 11
[31](1962) WNLR pg 136
[32] *Ibid.*

these statutory provisions. Among them, no custom is law unless the court established through the instrumentality of the State declares it as such or, in the alternative, it is successfully proved as a fact. Barring these two conditions people can only allow custom to regulate their transactions at their peril. But there is even a bigger peril confronting customary law. The Evidence Act stipulates that "in any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience."[33]

A Customary Court shall administer:

(a) the appropriate customary law provided it is not:

(i) repugnant to natural justice, equity and good conscience, or

(ii) incompatible directly or by necessary implication with any written law in Nigeria.

It is trite that the rules of natural justice are founded upon two pillars, namely, that all parties to a dispute must be heard and that no person shall be the judge in a case in which he is a party which is expressed in the legal maxim as *nemo judex in causa causasua*. Thus, it is only the judge before whom such issue is raised that can determine, albeit most often arbitrarily, which facts or particular sets of circumstances were equitable or of good conscience. The statutes also add another formidable constraint, that is, for such customary law to the enforced it must be the incompatible with any written law in force within the jurisdiction of the court applying the customary law. For instance, section 12(1) (a) Ebonyi State Customary Courts Law 2009 provides that:

> The Customary law prevailing in the district or area of jurisdiction of the court is binding upon any of the parties so far as it is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law for the time being in force in the state.

Generally, the oral evidence given by a witness in court, is usually under oath. Oral evidence include evidence that, by reasoning of any disability, disorder, or other impairment, a person called as a witness gives in written or by sign or by way of any device. The oral evidence given in court must be in line with rule of evidence applicable in customary court. The oral evidence must be recorded by the Chairman of the customary court as provided in the customary court law provides that:[34]

1. In any proceedings before a customary court, the chairman or the member presiding shall record the oral evidence given before the courts in writing.
2. A record taken under subsection/is deemed to be the official record of the proceedings.
3. The chairman and members shall, before signing the record of proceeding, examined and ascertained that they are an accurate record of the oral evidence given before the court.
4. Members of the customary court sitting at the hearing of the case to whish the record relates shall sign the record but where a member disagrees with the record of the chairman, he shall, at the time of signing, endorse his disagreement stating the reasoning.
5. A chairman, members or an officer of a customary court who falsifies or misrepresent the true purport or meaning of oral evidence recorded in this section, commits an offence.

(a) commits a offence and is liable on conviction to a fine of ₦ 50,000.00 or to a term of imprisonment for 1 year or both or

(b) May be tries summarily for contempt of court and sentenced to a fine ₦ 10,000.00 or to a term of imprisonment for 3 month or both

The rule of evidence in practice and procedure desire as the chairman and members of the customary court should record the evidence. The recorded oral evidence in court helps the court to form an opinion on the said evidence led before it upon a holistic and thorough evaluation of the entire and relevant

[33] Evidence Act, 2011, s 18(3).

[34]Section 21 RSCCL in the River State customary law No.3,204

evidence led in a matter before it. The piece of evidence led before a court are not evaluated or analyzed in isolation of order as illustrated in *Eriki v Eriki*[35] and *Awuse v Odili.*[36]

6. **RULE OF AVAILABLE EVIDENCE, IN RELEVANCE AND ADMISSIBILITY**:

The rule of evidence in Customary Court is to the effect technicalities of evidence Act must not determine justice, but the need to do substantial justice. This position is clearly stated in, the Rivers state customary courts Rules 2011[37], which governs admissibility of evidence is completely silent about the concept of relevancy as the primary basis of admissibility. Thus, order 10 Rules (1) of the Rivers state customary courts Rules provides that 'in every cause or matter, the court shall admit only the available evidence having regard to the circumstance of the case.' Generally, where a document is sought or tendered by a witness during trial to be admitted in evidence. The said document must meet the requirement of the law for it to be admitted as an exhibit in the case. A public or private document must meet the legal standard such as 'original copies, and certification of photocopy" to be admitted in evidence as exhibit. It is submitted that requirement of availability as the primary bases of admissibility of evidence in customary court is not intended to display the importance of relevancy in the admissibility of evidence.

The phrase "available evidence" is not defined in the Rivers State Customary court rules, 2011 and it is clearly not a legal term. The Rivers State Customary Court rules, 2011 provides that in every cause or matter, the court shall admit only, the available evidence, having regard to the circumstance of the case.[38] Considering that the word "available" means "accessible", "at hand", "handy, "obtainable", or "ready or free for use", "present or ready for engaging."[39] It is therefore arguable that the phrase "available evidence" means any form of evidence that is hardy, or accessible or one that the party can easily produce before court without unnecessary constraints. In other words, availability implies the accessibility of a piece of evidence that is relevant. Therefore, where a piece of evidence is considered relevant, the court will then determine whether the form in which it is presented is accepted as being the only available one. Available evidence, thus means evidence which is relevant and handy or easily accessible by the party seeking to tender it.

This submission may be illustrated thus: if a claimant before the customary court seek to tender a *photocopy* of a document which is found to be relevant to the issue in the proceedings, the court can admit the document if he states that it is the only available form of the document in his possession. The party is not required under the customary court rules of evidence to prove the where about of the original or the impossibility of producing same as a precondition for tendering the photocopy. The explanation by the party that the photocopy of the document is the only one in his possession is sufficient to render it admissible as the only available evidence in the circumstance of the case.

a. Public Document

A public document tendered in evidence during trial, it is trite that the public document must be certified. What is certification of document in Nigeria? Certification of document in Nigeria involves verifying the genuineness or otherwise of a public document; that is, documents which are copies of government agencies Therefore, certified document are copies of important documents. Which need to be certified as true copies of the originals by a person authorized to do so. A certified true copy (CTC) of a public document is duly made if certification is duly signed and dated with the official title of the person who certified it.[40]

Evidence Act 2011 and the case of *Matori v Dan Bauchi* are instructive in this context.[41] Also, in the case of *Stirling Geotechnical (Nig) Ltd v Galamas International Ltd*,[42] document is said to be certified only

[35] (2017) LPELR 42423

[36] (2005) 16 NLR (Pt.952) 416; *Onwualu & Ors V Mokwe & Ors* (2016) LPELR 42092

[37] Order 10 rule 5 (1) of the Rivers State Customary Courts Rules 2011

[38]Order 10 rule 5 (1) of Rivers State Customary Court rules, 2011

[39]Merriam Westerns collegiate dictionary (11th edition) pg 84.

[40]section 104(1) and 2 of the Evidence Act 2011

[41](2004) AFWLR (Pt. 197)pg 1010 para E-G

after it has been dated and subscribed by the public officer who has the custody of the document. In subscribing to it, the public officer must state his name and official title and stamp same. The next vital question relates to who can tender a public document. In court, the law permits Lawyers to tender documentary evidence in a specified circumstance. Although documentary evidence should ordinarily be tendered through witness during trial, where a public document is relied upon, a copy of the document certified by a public officer or any person authorized to do so may be tendered by a Lawyer from the Bar.

b. Uncertified Document

It is my submission here that considering the rule of available evidence, once a particular document is made available before the court, the certification of such document would not be an issue to determine its admissibility in customary court proceeding. Any document or object that is considered relevant in a customary court's proceedings should be admitted without adherence to technicalities, the provision of Evidence Act does not apply in customary courts. In *Amudipe v Faleye,* the court held:[43]

> Admissibility cannot be determined by such issues as certification, proper custody of primary documents, lack of signature or improper execution, failure to comply with illiterates' protection Act. The customary court is only bound to look at any document or thing presented before it and then determine whether it is relevant to facts in issue or not, Relevancy in this respect does not relate to the provision of the Evidence Act, but the need to do substantial justice.

Where a document is uncertified, it is admissible in customary court proceedings. The certification will only affect the weight attached to the document during evaluation of evidence.

c. Photocopied Document

Generally, in circumstance where the version sought to be admitted in evidence as proof of the record of the court and statement of the respective witness is its photocopy (the secondary evidence) such copy will not be admitted in evidence unless it is signed and certified as a true copy by the officer as appointed to do so. The rule of evidence in Customary Court the photocopy of the original is admissible, where the witness has laid foundation that the photocopy is the only available evidence in his possession, he must not state the where about of the original. The weight to be attached to the photocopy document is during the evaluation of evidence

d. Private Documents

A private document. A document made and or produced by an individual or a private person. Private documents are kept in the custody of the person to whom it belongs, and it is not available for inspection to the general public. Examples of private documents are IDC and gift deed, passport and all private documents. Private document is also admissible in customary court proceeding even in the absence of the maker. Ordinarily the law is trite that a person must acknowledge the document was one made by him "see Tijani V Akinwunmi[44]."Once the fact contained in the document are facts connected to the facts in issue (res gestae) the customary courts are enjoined to admit the document without adherence to the technical rule of "certification, signatures, or irregular signatures.

7. RULES OF SUBSTANTIAL JUSTICE IN ADMISSIBILITY OF EVIDENCE

It is argued that Customary Court would not be offending any law or acting *ultra vires* its power or mandate in insisting for the certification of the photocopy of the public document, though provided for in the Evident Act. The courts are not vulnerable and will not fall prey to every manner of documents the admission of which in most cases would lead to grave injustice. Customary court rely on such rule of evidence which are rich and rooted in the enthronement of substantial justice, notwithstanding the fact that such rule is therein provided in the Evidence Act. The courts insist on such rules the absence or

[42](2010) 4 NWLR (pt 1184) at 361 at 379
[43](1975) NMLR 398
[44](1990) I NWIR (pt.125) pg 237 at 249 E (CA)

neglect of which is anathema and antithetical to natural justice which is the hallmark of substantial justice.[45]

It is further submitted that the entire essence of insisting on certification of photocopies of public document is to arrest mischief and fraud, since the main target or aim of the court is not just to do substantial just, but for substantial justice to be seen to have been done. Customary courts would rely on rules of evidence not rooted in technicality, but rich in attainment of substantial justice, notwithstanding the facts that such rule of evidence is provided for in the Nigerian Evidence Act. The point must be made that such rules of evidence are not observed or applied in customary court on the basis that they are provided in the Evidence ACT, rather they are been observed because they are rooted and rich in natural justice and ultimately to achieve substantial justice in the matter before the court.

The above position is fortified and more ventilated by the provision of the law under annotation on certification of a copy of the record of the court before it is accepted in evidence in proof of the record of the court it seeks to represent. The Rivers State Custom Court Law No.3, 2014 provides that:[46]

> The minutes and notes of evidence including the record of referred to in subsection (2) or a copy signed and certified as a true copy by the officer in subsection (1) shall, without further proof, be admitted as evidence of the proceedings and statements of the witness.

It is therefore not contrary to rule of evidence where customary court insist on certification of its record.

8. ADMISSIBILITY OF DOCUMENTARY IN CUSTOMARY COURT PROCEEDING.

The term "admissibility or admissible evidence is evidence that may be presented before the Trier of facts for them to consider in deciding the case. The Rules of evidence determine what type of evidence is admissible rule to the case. Also, the term "admissibility" denotes the absence of any applicable rule of law which would exclude a particular piece of evidence.[47] A piece of evidence is said to be admissible when it is legally received in the proceeding to prove or disprove a fact in issue or other relevant facts. The term has been defined to mean the "quality or state of being allowed to entered into evidence in a hearing, trial, or other official proceedings**".** The Rules of evidence which in the work is the Rules of evidence applicable in customary courts will determine what type of evidence is admissible.[48]

Relevancy

Relevance is a requirement that must be met before the court can consider the value the evidence may have. In *Okonji v Njokanma,*[49] the court held:

> Evidence is relevant when it "has any tendency to make a fact more or less probable than if would be without the evidence". And "the action. A piece of evidence is relevant if "it provides the existence or non-existence of any fact in issue; it is also relevant by the Act. In both cases, it is the surrounding circumstance that will determine the relevancy".

A relevant fact is thus a fact which possess a logical nexus or relationship with the fact in issue in a judicial proceeding to the extent that when it is produced in evidence at the trial, it necessarily proves the truth or falsity of the fact in issue. Any facts which lack such logical relationship is irrelevant. In customary court proceeding parties are restricted to presenting only those facts which have logical bearing or connection with the facts in controversy. The law is trite that once a piece of evidence is relevant, it is

[45]His Honor, Henry Achor Nnoka Esq practiced and procedure in customary court (2020)pg 287.
[46]Section 23 (3) of the Rivers State Custom Court Law No.3, 2014
[47]Black's Law Dictionary (9th edition, west publishes company, 2004) pg53
[48]order Rule 5(1) of the River State Customary Court Rules, 2011
[49] (1999) 14 NWLR (pt.2) pg150 at 157

admissible irrespective of how it was obtained as was emphasized in *Ayeni v Dada*[50] and *Fawehinmi v NBA*[51] In the case of *Torti v Wkpabi*,[52] the Supreme Court stated that the only test of admissibility is relevancy.

The law is trite that "facts which, though not in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different time and places. This principle is referred in Latin as of *Res Gestae* of the case. This Latin maxim is considered in the case of *Akingbade v Elemosho*[53] where the court held that facts that are not in issue but are related to facts in issue are relevant. It is submitted that the requirement of availability as the primary basis of admissibility of evidence is not intended to displace the importance of relevancy in the admissibility of evidence. Once a piece of evidence is not relevant to the fact in issue it is rejected and marked as rejected.

9. PERFORMANCE OF CUSTOMARY INSTITUTION IN APPLICATION OF RULE EVIDENCE

The application of rules of evidence in customary court is anchored in doing substantial justice in the cause or matters which is brought before the customary court for adjudication in civil and criminal matters. Instance such as proof of causes or matters, evidence of boundary on land in dispute, absence of maker of document.

a. Absence of Maker of a Document or Statement

The concept of available is applied I the circumstance where the maker of the document is available but is not called as a witness. A statement contained in a document notwithstanding the absence of the maker is admissible in so far it is relevant to the issue before the court. Requesting that it must be the maker of the document or statement contained therein is a technicality of the evidence Act which is not applicable in customary court rule of evidence, but on the need to do substantial justice. It is my submission therefore, that even a piece of document was picked along the road side and the content are relevant to the facts in controversy before the customary court, once the witness wishing to tender the document as evidence has laid foundation to its admissibility, the said document should admissible without adherence to technicalities. The customary court rule of evidence is made to do substantial justice. This rule is well established in the case of Fawehinmi V N.B.A[54], the supreme Court held that *"*where a piece of evidence is relevant it is admissible irrespective of how it was obtained*"*

b. Proof of Causes or Matter in Customary Court.

There are basically two standards of the proof in Law, namely; proof beyond reasonable doubt which is applicable in criminal proceedings and proof on the balance of probabilities or preponderance of evidence which is applicable in civil proceedings. The standard of proof on the preponderance of evidence or on the balance of probabilities. The State Customary Courts Rules 2011 provides that subject to the provision of this order, the court shall in any civil cause or matter decide for the party in whose favour there is a preponderance of evidence which is believed by the court.

Causes or matters in customary court may either be proved by witnesses or by books. Customary laws may be proved through witnesses who are Chiefs or other individuals who may be reasonably expected to know the Customary law of that area. This fact has already been posited in the previous pages of this research work. The rules of evidence applicable in Customary Court in prove of matters or cases are to the effect, that any party who alleges the existence of a particular custom must proof same. The law is that the customary court must administer the customs which are not repugnant to natural justice, equity and good conscience.

The River State Customary Courts law No.3 2014 provides that subjected to the provisions of the law, a customary court shall administer the appropriate customary law provided it is not; repugnant to natural

[50] (1978) 3 S.C. pg 35 at 59
[51] (1989)2 NWLR (pt. 105) pg 558 at 621-2 GB.SC.
[52] (1984) 1 SCNLR pg 214 at 227 GH SC
[53](1994) ANLR pg 146 at pp 49-150
[54] *Fawehinmi vs. N.B.A* (supra)
[55] Order 10 Rule 6 (1) of Rivers state customary court Rules, 2011

justice, equity, and good conscience or incompatible directly or by necessary implication with any written law in Nigeria. In this issue of prove of causes or matters, we shall anchor in civil matters such as prove of "Ownership of land in customary court".

c. To Proof Ownership of Land:

A party who alleges title over a piece or parcel of land must give evidence to establish how he became the owner of the land. The evidence includes applying the appropriate customary law. The Phrase "appropriate customary law" is defined in the River State Customary Court Law No. 3 2014 customary court law of Bayelsa State, section 20 of the CCL of Lagos State to include:

1. In a land matter, the law of the place where the land is situates;
2. In a matter arising from inheritance, the law applying to the deceased;
3. In a civil matter, where both parties are not indigenes of the area of jurisdiction of court and the parties agree that the, customary law of that area should regulate their obligation, the law in force in the area of jurisdiction of the court.
4. Where one of the parties is not an indigene of the area of jurisdiction of the court and the parties agree that their obligation should be regulated wholly or partly by the customary law applying that the party, the customary law applying to that party shall bind the parties and
5. in any other civil case, the customary law of the area of jurisdiction of the court. The party who alleges ownership of a piece or parcel of land has the onus to proof how he becomes the owner of the land.[56]

d. Inheritance:

Inheritance is defined as anything capable of being taken by inheritance, "for instance the son is to inherit the property of his father". Inheritance also means passing of the ownership of the property of the deceased to person accordance with the customs and traditions of the deceased person's family. The Claimant shall lead evidence to that he inherited the land in dispute form his progenitors. The Claimant must also state successive heads of families who held this land before it gets to him as the present head of the family. It has been held that when a Claimant leads evidence that the land is communal, the onus is on the defendant who assert the contrary to establish that the land belongs to him personally or exclusively as seen *Odukwe v Ogunbiyi*.[57] This principle is derived from the settled rule of evidence in Customary Court that where the issue is whether the land in dispute is family land or individual, the presumption is in favor of family or communal holding and the party asserting the contrary has the burden of proving same.

In any action of declaration of title to land by an individual against the family or community or by a family against a lawyer family of which it constitute a part or against a community, the burden of proof lies on the claimant who will lead evidence to establish exclusive personal or family ownership, as against communal ownership to prove how the family or community was divested of its ownership to create the land holding claimed. It will amount to a misplacement of burden of proof for the court to require the defendant to establish communal ownership in answer to the individual ownership claimed by the Claimant because there is a clear presumption in favour of communal ownership as demonstrated in *Udueakpueze v Igiliegbe*[58]and *Udeza v Chidebe*[59].

The rule of evidence in order 9 rule 4(1) of Rivers State Customary Court rules 2011 provides that where the defendant admit the claim the court shall hear and record the facts of the case and gives its judgment.[60] Order 9, rule 4 (2) of the River State Customary Court, on the other hand, provides that where the defendant does not admit the claim, the claimant shall adduce evidence in support of his claim. Though, it is clear that under order 9, rule 4(1) of River State Customary Court rules, where the defendant admits the claim the court shall hear and record the fact of the case and gives its judgment".

[56] Section 10 (2) RSCCL No. 3, 2014. Section 10 CCL Bayelsa State, Section 20 CCL of Lagos State.
[57] (1988) 6 S.C.N.J. pg 102, at 179. Ekennia vs. Nkpakara (1997) 5 S.C.N.J. pg. 70 at 80-93
[58] (1952) 14 W.A.C.A, Udeza V Chidebe
[59] (1990) 1 S.C.N. pg.104
[60] Oder 9 Rule 4 (1) RSCCR, 2011

The above law is in conjunction with the rule of evidence that customary court is a court of summary trial, where all the technicalities of evidence Act are not stringently applied. Where the defendant admits the claim the claimant may simply states the fact of the case as endorsed in the particulars of claim and the reliefs sought and thereupon the courts can award him judgment. See order 3 rule3 of RSCCR, 2011; see order 9, rule4 of CCR Lagos State; order 23 CCR, Bayelsa State. Evidence is only required to be adduced where the claimants claim is disputed by the defendant under order 9 rule (2) of the rules, which provides that. Where a defendant wishes to plead:

(a) That the court has no jurisdiction, or
(b) That the claim does no disclosed any cause of action or
(c) That the subject matter of the claim has been previously adjudicated upon, the defendant may make such a plea at any time but before judgment and such plea shall be recorded by the court.[61]

e. Evidence of Boundary On the Land.

The claimant to succeed in his claim of ownership of the land in dispute he must state his boundary neighbors on the land. The customary court proceedings require the evidence of traditional boundaries on the land to ascertain the area in dispute. It is submitted that a person who cannot prove to have been in possession of a defined and ascertained area of land cannot claim to have dominion over any specific land to the exclusion of any of other person of prior right thereto. He cannot therefore claim earlier possession of such land that any other person who is able to prove possession of a known area with well demarcated boundaries. *Ekpechi v Owhonda*.[62] The proof of traditional boundaries on the land in dispute, for instance in Ikwerre Custom and tradition boundary mark are live trees such as Ukpo, Ovu (animal pit trap) Abosi, Odumara tree etc.

The parties can establish the boundaries by proving the existence of the above boundary marks. The custom and tradition of Ikwerre people in Rivers state, is that a boundary marks cannot be planted by one person, the party relying on the traditional evidence must lead evidence to establish the fact that the live tree on the boundary were planted by both parties on the boundaries on the land in dispute. This on the other hand means that a boundary mark cannot be planted by one person alone. I must state here that it is against the custom and tradition as applicable in Ikwerre ethnic National for a party to remove and or to destroy a boundary mark, such person who removed and or destroy boundary marks face customary sanction by the elder and principal members of the family. This custom is consistence with the law as provided in the criminal code.[63]

The rule of evidence and the criminal jurisdiction of customary court did not cover this area of customary law offence, there is therefore a lacuna in the customary court criminal jurisdiction, the existence of boundary marks as stated above are available evidence to establish and or ascertain the boundaries on the land in dispute. Also, erection of survey pillars on boundary line is sufficient act of possession even if that is the only available evidence[64].

10. CONCLUSION AND RECOMMENDATIONS

The rule of evidence in customary courts in originated from the establishment of customary court in Nigeria. The rule of evidence in customary court are guided by the customary court laws of the states and customary court rules of the state. The customs of any particular community is proved by the party who assert the existence of the custom. To establish the existence of a custom the party may rely on historical evidence the evidence of more than one person is important to establish the existence of a customary law applicable in the area within the jurisdiction of the customary court. More so, the rule of evidence applicable in customary court are admissible based on the need to do substantial justice not on the

[61] Order 3 Rule 3 of RSCCL 2011, Order 9 Rule 4 CCL of Lagos State, Order 23 CCR, Bayelsa State
[62] (1998) 3 NWLR (pt543) pg 618 at 625
[63]section 457, 458 of the criminal cod act cap 77law of the Federation, 1990, which provides
[64]Ayinde V Salavu **(**supra).

technical provision of Evidence Act. The Rivers State Customary Court Rule in order 10 rules 5 also made mention that every available evidence is admissible in evidence this is also on the bases of substantial justice.

Based on the above discussions, the paper therefore recommends as follows:

1. As a matter of urgency, the national assembly should amend some legislation that do not fully provide for practice and procedure of the customary courts.
2. The national assembly should incorporate the provision of international instrument which provide for dispute resolution, such as the united nation commission on international trade law (UNCITRAL) on dispute resolution, protocol to the African continental free trade area (AFCFTA) status of international court of justice (ICJ) into Nigerian laws.
3. The custom and traditions of communities should be enacted into law which could be referred to when faced with natters of customary law.
4. The customary court laws should be amended to include the use of vernacular by witness who do not understand English Language, since the Chairman and members are versed in the knowledge of the language and custom of the communities within the jurisdiction of the court.
5. There should be law reporting of decision or judgment of customary courts in Nigerian so that there would be coherent in the judgment of customary court.