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JUDICIAL NOTICE OF CUSTOMS BY CUSTOMARY COURTS: AN AFFRONT TO RIGHT TO FAIR HEARING*

Abstract

Decisions of courts are primarily based on concrete, convincing and credible evidence placed before them in the course of trial by the disputing parties. A non-negligible right in such trials is the fair opportunity given to a party to a case to assert and prove facts which he relies upon either in support of his claim or in establishing his defence to a claim. However, this cardinal principle that all facts must be proved before they can be acted upon by the court admits exceptions which include facts are admitted or judicially noticed. This article considered the application of the principle of judicial notice to questions of custom in the customary courts using the Customary Court Laws and Rules applicable to Abia, Ebonyi and Imo States as case studies. It observed that by their Rules, the customary court has great deal of latitude to either call or refuse evidence on an issue of custom raised before it thereby inhibiting the constitutional right of parties to fair hearing. Customs being dynamic in nature, it is recommended that proof by evidence should not in any circumstance be dispensed with in recognition of the parties' constitutional right of hearing except on admission of such customs.

Keywords: Custom, Customary Law, Customary Court, Judicial Notice and Fair hearing.

Introduction

Generally, custom is a fact to be proved by evidence except where it is judicially noticed in which case it need not be proved. The court has no machinery for discovering, without the aid of the parties, matters of fact that are disputable and disputed, nor is an independent investigation into the disputed facts by the court permitted.[1] Proof presupposes that each party to a dispute in recognition of his right to fair hearing is allowed to present evidence to support his or her version of the custom he asserts or denies and the court in general acts as an impartial arbiter to hear and determine on balance of probabilities whose evidence to believe. The use of judicial notice by the courts which appears to be most prominent in matters of native law and customs bars parties from exercising such right to fair hearing in matters so noticed. Majority of the cases where judicial notice has been applied arose from courts where the Evidence Act[2] is applicable. Invariably, judicial notice of customs under the Act has always been the focus. Though judicial notice has been adopted and applied by the customary courts little reference is made to the rule as provided under the Customary Court Law or Rules. The practice has been to rely on the Evidence Act as a guide. Proceedings of the customary court are, by law, regulated by the rules of that court and not the Evidence Act. Thus, a study of judicial notice under these rules becomes imperative.

Custom or Customary Law

The jurisprudence of the Nigerian legal system is replete with case laws as well as opinion of writers on the meaning of custom and customary law.[3]The Customary Court Laws of Abia

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[1] E Morgan, 'Judicial Notice', [1944],*Harvard Law Review*,(57), 269-294.

[2]2011.

[3]M Eseyin and E Nsungurua, 'The Distinction Between Custom and Customary Law: Division Without Partition', (2015), *International Journal of Law and Legal Jurisprudence Studies*, (Volume 2 Issue 6), 14.

State, Ebonyi and Imo States all used the term "customary law" as opposed to custom used in the Evidence Act. Accordingly, customary law means a rule or body of customary rules regulating rights and imposing correlative duties being customary rule or body of customary rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter dispute, issue or question.[4]Obaseki JSC in *Oyewumi v. Ogunesan*[5] defined customary law as: "the organic and living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people. Customary law goes further to import justice to the lives of those subject to it"

In *Nwaigwe v. Okere*,[6] the Supreme Court per Tobi JSC (as he then was) defined customary law thus:

> *And what is customary law? Customary law generally means relating to custom or usage of a given community. Customary law emerges from the tradition, custom and usage and practice of people in a given community which, by common adoption and acquiescence on their part and by long and unvarying habit, has acquired, to some extent, element of compulsion and force of law with 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 custom, rules, traditions, ethos and cultures which concern the relationship of members of a community are generally regarded as the customary law of the people.*

There is no definition of custom under the Customary Court laws ofthe three states in view. However, generally in law, custom refers to the established pattern of behavior that can be objectively verified within a particular social setting.[7] It consists of customs accepted by members of a community as binding among them.[8] According to *section 258* of the Evidence Act, custom is a rule which in a particular district, has, from long usage, obtained the force of law.[9]The Court of Appeal adopted this definition in *Falowo v. Banigbe&ors*[10], where Adekeye JCA defined custom as follows:

> *What then is native law and custom? Section 2(1) of the Evidence Act Cap 112 Laws of the Federation of 1990 defines custom as a rule which in particular district has from long usage obtained the force of law.*

It does appear that the law creates a measure of distinction between custom simpliciter and customary law.[11] In view of this, the inevitable question then is-when does a custom become customary law? The prevailing argument is that a custom becomes customary law when:
a. It passes the repugnancy/ Incompatibility/public policy tests;

[4]*Section 2* of the Customary Court Laws of Abia State, Imo State and Ebonyi State.
[5] (1990) 3 NWLR (Pt. 137) 182 at 207.
[6] (2008) ALL FWLR (Pt. 431) 870.
[7]Customary law, <https://en.wikipedia.org/wiki/Customary_law> accessed on 18/5/2019.
[8]A O Obilade,*The Nigerian Legal System*, (Ibadan: Spectrum Books Ltd, 1979) p. 83.
[9]See *Dakar v. Dapal* (1998) 10 NWLR (Pt. 577).
[10](1998) 6 SCNJ 43 at 63.
[11] M Eseyin and E Nsungurua, *op. cit*, p.17.

b. When it is judicially noticed;
c. When it is proved before a court of law.

The categorization above is not entirely effective in the wake of contemporary revelations. Certain customs are nonetheless the binding laws of a particular set of people even when they have not been submitted for judicial determination as per their repugnancy status or judicially noticed. Even when some customs have been out rightly prohibited by legislation or declared repugnant, a vast majority of the practitioners of the custom still have themselves willingly tied to the apron string of the custom. [12]

Despite the attempts to draw a distinction between custom and customary law, both terms seem to be used interchangeable to represent the rules binding a particular set of people. In *Oguntayo v Adelaja*,[13] both terms were used to describe the same thing where the court held that:

> *Customary law* is a question of fact to be proved by evidence. Hence a person who alleged the existence of a particular *custom*must adduce sufficient evidence in support and establish its existence to the satisfaction of the court.

Customs acquire force of law when they become the undisputed rule by which certain rights, entitlements and obligations are regulated between members of the community.[14] In *R v Secretary of State for Foreign and Commonwealth Affairs*,[15] Lord Denning said:

> these customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.

Judicial Notice

Judicial notice is a doctrine which enables a judge to accept a fact without the need of a party to prove it through evidence. It is a litigation tool allowing a court to fast-forward and accept some notorious facts without any evidence: things of common knowledge.[16]Nnaemeka Agu, JSC, described judicial notice as an anomalous appendage in the law relating to proof. Though regarded as part of the law of evidence; it has not the trammel of the law of evidence, such as scrutiny under cross-examination, the rules of admission and so on. Save in such cases as ascertainment of notorious custom in which evidence may be required before judicially noticeable in the first instance, it has really nothing to do with the rules of evidence.[17]A popular definition of the term which was adopted by the Supreme Court in *Amaechi v INEC*,[18] is the one offered by Lord Summer in the case of *Commonwealth Shipping Representative v P. O. Branch Services*[19] where the Court said –

[12]*Ibid.*
[13] (2009) 15 NWLR 150 SC.
[14]W B Chik, 'Customary Internet-ional Law': Creating a Body of Customary Law for Cyberspace. Part 1: Developing Rules for Transitioning Custom into Law, (2010). Computer Law and Security Review, 26, (1), 3-22.
[15] (1982) 2 All E.R 118.
[16] Duhaime's Law Dictionary,<http://www.duhaime.org/LegalDictionary/J/JudicialNotice.aspx> retrieved on 12/5/2019.
[17]Nnaemeka JSC in *Osafile v Odi* (1990) 5 SC (Pt. II) 1706.
[18]*(2008) 5 NWLR (Pt 1080).*
[19](1923) AC 191 at 212.

> *judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.*

The doctrine of judicial notice is an exception to the fundamental rule that matters relevant to an action must be established by formal proof.[20] As Professor McNaughton has noted, "the one distinguishing characteristic of judicial notice is the concept that the tribunal has the right, in appropriate instances, to inform itself as to a material matter by methods in addition to the reception of formal evidence, and it is implicit that the information may be obtained by resort to sources other than those adduced by the litigating parties."[21] In essence then, judicial notice refers to the acceptance of a matter of fact or law by the court, without the necessity of formal proof in the form of evidence adduced by one of the parties.[22]These facts can thus be ones of which the judge has either actual or acquired knowledge, and they are usually referred to as "notorious facts" on account of their being common knowledge either throughout the country or within the locality of the court. The prevalence of the use of this doctrine was recognized by Thayer when he posited that: "in conducting a process of judicial reasoning, as of other reasoning not a step can be taken without assuming something which has not been proved."

The very essence of this principle is to abridge time usually spent in litigation. According to Drummond[23], "the purpose of this momentary presence in the adversarial traffic of facts is to swoop down and scoop irrelevant facts out of the arena of dispute so as to minimize the presentation of moot issues and foreclose the claim or defense of false issues, thus expediting the process. The range of matters which are amenable to judicial notice are propositions, legal and extra-legal, which are so probably true as to be notoriously indisputable amongst reasonable men. The judge, as the arbiter of what is notoriously indisputable among reasonable people, immunizes these facts from proof or disproof by formal evidence in taking judicial notice. This immunization does not operate as a presumption. It is a manoeuver that forecloses further evidence.[24]

Judicial notice is taken of matters of both law and fact sometimes referred to as legislative and adjudicative facts. Adjudicative facts are those facts that are personal to the immediate parties before the court. They relate to their actions, their activities, their possessions, involving determinations of 'who did what, where, when, how, and with what motive or intent'." Determinations on these questions should be treated by the parties through formal methods of proof. With this order of fact, independent judicial investigation is inappropriate. The judge is properly passive with regard to these facts, active only with regard to the proper disposition of the law in regard to process and substance. Legislative facts, however, do not invite the same treatment. Legislative facts are those that aid the court in determining the content of the rules which they are mandated to apply. They are general propositions, not only affecting the particular parties before the court but having ramifications on the interests of future litigants.[25]

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[20] A Flanz, 'Judicial Notice', [1980], *Alberta Law Review*, (VOL18, NO. 3), 471.
[21] J McNaughton, 'Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy',(1969) *Vanderbilt Law Rev*. (14), 778 at 786.
[22] A Flanz, *op. cit.*
[23] S Drummond, 'Judicial Notice: The Very Texture of Legal Reasoning', [2000], *Canadian Journal of Law and Society*, (15.1),1-38.
[24] A Flanz, *op. cit.*
[25]S Drummond,*op.cit*.

Whether law or fact, it seems from a view of all the decided cases that matters which can be judicially noticed fall into two broad classes. First: there are those which are so notorious that the court automatically takes notice of them, once it is invited to do so. Secondly: there are others which, although judicially noticeable, the court will not do so until something is produced, though not formally tendered as evidence, in order to inform the court or refresh its memory on the matter before it notices it.[26] In *Omeron v. Dowick* [27], Lord Ellenborough declined to take judicial notice of the King's proclamation because counsel failed or neglected to produce a copy of the gazette in which it was published. The underlining assumption is that cases of the first category are matters of knowledge of which the Judge knows or is expected to know. He is not expected to know or remember off hand matters falling within the second category. But because of their very nature, the court can be informed of them or his memory be refreshed thereon without the matter requiring to be proved by evidence.

Judicial notice is a matter of law. Where there is no provision under any laws providing for it, it should not be allowed. In very many cases, however, it is for the party to lay the foundation and call upon the Judge in the appropriate manner to take judicial notice of the fact.

Litigants' Constitutional Right to Fair Hearing

In the context of administration of justice, to hear a matter means to listen to a matter attentively, consider and decide on it.[28] In the case of *Akoh v Abuh*[29] , the Supreme Court of Nigeria held that to hear a Cause or Matter means to hear and determine the Cause or Matter. A Matter is in the process of being heard from its commencement up to, and including the delivery of final judgment.

A hearing can only be fair when all the Parties to a dispute are given an equal opportunity to be heard.[30]In.*INECv Musa*[31]the Apex Court in Nigeria reemphasized this principle when it held that:

> *Fair hearing, in essence, means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principles.*

According to J.E. Ekanem J.C.A, in *Garba v University of Maiduguri,*[32] fair hearing requires that a person must be given not only an opportunity but a fair opportunity to cross- examine her accusers.

Fair hearing is derived from the principle of natural justice. Its twin pillars are *audi alteram partem* and *nemo judex in causa sua*. It is of general application in Nigerian courts and the courts are expected at all times to adjudicate in accordance with the rules of natural justice. That is to say a judge should allow both parties to be heard and he should listen to the point of view or the case of each side before delivering a judgment. This practice is well rooted in all

[26] Per Nnaemeka, JSC in *Osafile v Odi* (1990) 2 NWLR (Pt.137).
[27] (1809) 2 Camp. 44.
[28] C Nwagbara, 'The Role of Fair Hearing In The Dispensation Of Justice In Nigeria - A Legal Perspective', [2016], *International Journal of Innovative Legal & Political Studies*,1.
[29] (1988) NWLR (Pt. 85) 676.
[30] C Nwagbara, *op.cit*.
[31] (2003) 3 NWLR (Pt. 806) 72.
[32](1986) 1 NWLR (Pt. 18) 550 at 618.

civilized societies and has its roots in the Old Testament in the Bible. The Lord had overwhelming evidence that Adam had eaten the forbidden fruit, the apple, which the Lord told him never to eat, but still gave Adam an oral hearing before judgment was passed.[33]

Fair hearing is not just a principle, it is a constitutional right. The Supreme Court while acknowledging this held in *Attorney-General of Rivers State v Ude &Ors*[34]that:

> *the right to fair hearing is a fundamental Constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria 1960,1979, and 1999, and a breach of it in trials or adjudications vitiates the proceedings rendering the same null and void and of no effect. Any judgment which is given without due compliance and which has breached fundamental right of fair hearing is a nullity and is capable of being set aside either by the court that gave it or by an appellate court.*

Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 clearly provides thus:

> *in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.*

The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case.[35]It is only when the party aggrieved had been heard that the trial judge would be seen as discharging the duty of an unbiased umpire."[36]
There are certain basic criteria and attributes of fair hearing, these include:

(i) that the court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case;
(ii) That the court or tribunal shall give equal treatment, opportunity and consideration to all concerned;
(iii) That the proceedings shall he held in public and all concerned shall have access to be informed of such a place of public hearing and
(iv) That having regard to all the circumstances, in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have done.[37]

To determine whether the basic criteria and attributes of a fair trial are satisfied, the Court must ensure that the person to be affected by the proceedings is given the following rights:

a. to be present throughout the proceedings and hear the evidence against him;

[33] Per B. Rhodes - Vivour, JSC in *Action Congress of Nigeria v. Sule Lamido &Ors* (2012) 8 NWLR (Pt.1303) 560.
[34] (2006) 17 NWLR (Pt.1008) 436.
[35]*Kakih v. PDP&Ors* (2014) 15 NWLR (Pt.1430) 374.
[36]*Victiono Fixed Odds Ltd. v Ojo & Ors* (2010) 7 NSCR 25 at 37 para C.
[37]Per Ejiwunmi JSC in *Unibiz Nigeria Limited v Commercial Bank Credit Lyonnais Ltd.*

b. to cross examine or otherwise confront or contradict all the witnesses that testify against him;
c. to have all documents tendered in evidence at the trial read before him;
d. to have disclosed to him the nature of all relevant materials of evidence, including documentary and real evidence prejudicial to him;
e. to know the case he has to meet at the hearing and to have adequate opportunity to prepare for his defence; and
f. to give evidence by himself, call witnesses, if he chooses to, and make oral submissions, whether personally or through a Counsel of his choice.

Once a trial is conducted in accordance with the above requirements, it will be said to be fair.[38]

Proof of Custom under the Evidence Act

Generally, there are two ways of proving custom: proof by evidence or judicial notice. In Nigeria, the doctrine of judicial notice finds its root in the Evidence Act. *Section 16 (1)* of the Evidence Act clearly states that:

> *A custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence.*

In line with the fundamental principle of evidence law and procedure that he who asserts must prove, the burden of proving a custom shall lie upon the person alleging its existence.[39] This burden can be discharged by evidence of persons who are likely to know of the existence of such custom.[40]Proof is dispensed with when the court judicially notices a custom.*Section 122(1)* of the Act clearly declares that: "no fact of which the court must take judicial notice under this section need be proved." The Act goes ahead to provide an array of things that can be so judicially noticed[41] one of which is custom. According to *Section 122(2)(l)*:

> *122(2) The court shall take judicial notice of the following facts-*
> *(l) all general customs, rules and principles which have been held to have the force of law in any court established by or under the Constitution and all customs which have been duly certified to and recorded in any such court.*

By this provision, a court can *suo moto* take judicial notice of a *general custom* which has been pronounced by superior courts of record to be valid and existent. The duty of the court here appears to be mandatory considering the word "shall" used in the section. Where there is a specific custom which either has not been established by judicial precedents or certified and recorded by the superior courts, a party or witness to a proceeding can invite the court to take judicial notice of such custom but the court's power to judicially notice the custom is discretionary depending on production of a documentary authority to enable the court do so. To this effect, *Section 122(4)* of the Act provides that:

> *if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such a person*

[38] See *Olugbenga Daniel v. Federal Republic of Nigeria (*2014) 8 NWLR (Pt. 1410) 570 at 577.
[39]*Section 16(2)* of the Evidence Act.
[40]*Section 18* of the Act.
[41]*See section 122(2)* of the Evidence Act.

> *produces any such book or document, as it may consider necessary to enable it do so.*

Where the court decides to notice the custom judicially upon application of a person, production of such book or document appears to be conclusive proof of the custom relied upon by that person. By implication, oral evidence is excluded from being produced under this subsection. Nevertheless, such oral evidence of custom can be relied upon is *section 124 (1) (a)*of the Act where its existence is common knowledge within the locality where the proceeding is being held and is reasonably, undisputable.

Under the Evidence Act therefore, a custom is judicially noticed where :

a. It has been acted upon once and established by a superior court of record;[42]
b. there is a book or document showing its existence;[43] or
c. there is common knowledge of the custom in the locality of the court where it is being raised and such knowledge is reasonably questionable.[44]

The Evidence Act not being applicable to proceedings in the Customary Courts,[45] its provisions on judicial notice are clearly excluded from customary court proceeding *albeit*, the word "court" includes all judges and magistrates and except arbitrators all persons legally authorized to take evidence. The phrase *all persons legally authorized to take evidence in this interpretation section seems to include customary courts.*[46]The Supreme Court of Nigeria has put the controversy on the import of this section to rest in *Ogunnaike v. Ojayemi*[47], when it held, per Kawu JSC (as he then was):

> *now in my view, the clear wordings or provisions of Section 1(4)(c) of the Evidence Act leaves no room for any doubt that the provisions of the Act do not apply to judicial proceedings before Native Courts*.

Obaseki J.S.C. (as he then was), while concurring with the lead judgment of Kawu J.S. stated as follows:

> *it is erroneous to argue that the provisions of the Evidence Act applies to Customary Court when the Evidence Act has expressly excepted the application of the Act from judicial proceedings before a Native Court.*

The law makers may have to revisit the interpretation of court in the Act to bring it in conformity with other sections of the Act.

[42]*See section 17*of the Act.
[43]*Section 122(4).*
[44]*section 124 (1) (a).*
[45]*Section 256* of the Act.
[46] See *Alao v Alabi* (1997) 6 NWLR (Pt. 508) 351 where the court held that the law as it is now is that the Evidence Act applies to all Courts established in Nigeria. This decision has been subject of criticism.
[47](1987) NWLR (Pt. 53)760.

The Legal effect of Judicial Notice in the Customary Courts on a Party's right of Fair Hearing

Customary courts in some cases are known as Native or "Traditional" Courts. These courts being close to the grassroots citizens, can safely be referred to as grassroots Courts.[48]The courts are established under the relevant state laws[49] recognized by the clear provisions of the Constitution.[50] Every customary court is court of record (though described as inferior court of record). Customary courts exist in all the states of Southern Nigeria. In many states of Nigeria, customary courts have both civil and criminal jurisdiction. Notionally, the courts are to dispense justice in matters relating to custom and traditions of the people where the court is situated in accordance with their laws and rules.[51]In *Arum v Nwobodo,*[52] the court stated the cardinal principle governing the Court's proceedings is the attainment of justice based on the reasonable practice, tradition and custom of the local people.

The customary courts like other courts and tribunal, are bound by the principles of fair hearing in the administration of justice. No matter the grade of court where proceedings are conducted, the rule of fair hearing must be observed.[53] This was the reasoning of the Court in the case of *Falodun v. Ogunse*[54] where the court held *inter alia*:

> *Although Customary Courts are not bound by technical rules of procedure, the provisions of Section 36 of the constitution relating to fair hearing is a very far-reaching provision. The requirements of fair hearing are so ubiquitous that even proceedings in Customary Courts must observe them.*

In line with the requirements of fair hearing, the Customary Court Rules have made provisions allowing a party to an action the opportunity to state his own side of the case. This is evident in the rule on service of processes on the opposing party[55], examination, cross-examination and re-examination of witnesses[56], right of address etc. However, it is our submission that with the principle of judicial notice of customs still in the Rules, the right is incomplete particularly, where such judicial notice forms an integral part of the proceedings: trial.

Claims in the customary courts are usually hinged on customs and traditions of the parties before the courts. Thus, proof of custom becomes the central point of all trials at the customary courts. Being so, every party should be allowed to test the veracity of any assertion of the

[48] U Idem, 'The Judiciary and the Role of Customary Courts In Nigeria', [2017],*Global Journal of Politics and Law Research*, (Vol.5, No.6), p.34.

[49] In Imo and Abia States – Customary Courts Edict, No. 7 of 1984 of the then Imo State (now applicable in both States). In Anambra and Enugu States – the Customary Courts Edict No. 6 of 1984 of the then Anambra State (now applicable to both States). In Edo and Delta States – the Customary Courts Edict No. 2 of 1984, of the then Bendel State (now applicable to both States). The present extant law is the Amended Customary Court Law of 1985.

[50] Section 315 of the Constitution of the Federal Republic of Nigeria, 1999.

[51]The Evidence Act and Its Applicability to Customary Courts in Nigeria: Quo Vadis? http://www.nigerianlawguru.com/articles/practice%20and%20procedure/THE%20EVIDENCE%20ACT%20AND%20ITS%20APPLICABILITY%20TO%20CUSTOMARY%20COURTS%20IN%20NIGERIA%20QUO%20VADIS.pdf accessed on 17/5/2019.

[52] (2013) 10 NWLR (Pt. 1362) 374.

[53] U Idem, "The Judiciary and the Role of Customary Courts in Nigeria", (2017) Global Journal of Politics and Law Research Vol.5, No.6, pp.34-49.

[54] (2010) All FWLR (Pt. 504) 1404 at 1427.

[55] See Order III Rules 6 to 11.

[56] See Order X Rules 2 and 3 of the Customary Court Rule.

existence or otherwise of such customs particularly, in the changing world where customs have become dynamic.

Custom remains a fact to be proved by evidence. The onus is on a party who relies on a custom to plead and establish it by evidence.[57] However, not all customs are opened to proof. Some customs can be judicially noticed if they have been proved, pronounced and acted upon by the courts to such extent that it can be said that they have acquired notoriety. [58]
As earlier pointed out, judicial notice is a matter of law which means that it must expressly be provided by the law establishing the court or rules guiding its proceedings. In confirmation of this, the Supreme Court in *Ehigie v Ehigie*[59] held that:

> *Customary Courts have their practice and procedure as embodied in the Customary Courts Law and Rules of the State in the country where they are applicable. By virtue of the native form of customary laws they relate to the traditional unwritten law of the people handed down from generation to generation. Where members of the courts are familiar with the custom of a community they can apply it without first requiring evidence.*

The above principle was also reiterated by the court in *Longe v Ajakaiye[60]* that "Customary Court, like any other Court, is bound by its rules of practice and procedure".

Indubitably, judicial notice has been severally applied to matters pending at the customary court using the Evidence Act as a guide. In most of these cases little or no reference is made to the customary court laws and rules applicable to the courts. Though no express mention was made of the term judicial notice in the Customary Court Rules of the *Abia*, *Ebonyi* and *Imo* States respectively, *Order X Rule 6 (3)* recognizes the principle as follows:

> where in any cause or matter before a Customary Court any party wishes to rely on the customary law of the area of jurisdiction of the court, there shall be no need to prove the customary law before the court unless the court thinks otherwise.

By the above provision, the customary courts have the discretionary power to take judicial notice of customs applicable to the area of their jurisdiction basically upon the application of any party to the proceeding. Where such is done, it dispenses with proof of the custom except where the court thinks otherwise.

Unlike the Evidence Act, there are no conditions for the notice to be taken by the court. For example, the customary law need not have been acted upon by the any superior court of record before it can be judicially noticed neither does it need to get notoriety. In *Ehigie v Ehigie[61]*, Both the appellant and the respondent are children of the same father, one Late EhigieEdise, a native of Benin. The respondent is the eldest son of Ehigie Edise and the appellant the eldest daughter. After the funeral ceremonies of their father, the respondent summoned his brothers and sisters to a family meeting at which he distributed the properties left by his late father, both

[57] See *Kimdey v. Military Governor, Gongola State* (1988) 2 NWLR (Pt.77) 445.
[58] See *Romaine v. Romaine* (1992) 4 NWLR (Pt. 238) 650.
[59](1961) 1 All NLR. 842.
[60]FSC/372/1961.
[61] *Supra*.

real and personal, including the property in dispute which formed part of the share of the respondent. Being dissatisfied with the share she received because it did not include a house, the appellant moved into the property in dispute which prompted the suit by the Respondent. The learned President of the Grade "A" Customary Court, Benin City He also found as a matter of Benin customary law of inheritance *inter alia* that, the property passed to the respondent as the eldest surviving son. The share his brothers and sisters get are gifts from him. One of the contentions of the Appellant was that the court did not rely on any judicial precedent where the said custom had been acted upon in arriving at his decision. The court held that no such requirement that the custom must have been established by a superior court like it's provided under the Evidence Act is applicable to the customary courts except where the court is not knowledgeable in the custom of the area where it is sitting.

The above cited provision of the Customary Court Rules is borne out of a presumption that the customary court sitting in an area knows the customs and traditions of the area where the court is sitting and as such may not need the custom to have been acted upon by court of superior record before taking judicial notice of same. The conventional practice of the customary courts is to apply the rule of judicial notice based on judicial precedents. In *Ababio II v. Nsemfoo*[62], it was held that the proof by evidence of a Native Custom is not necessary before a Native Court whose members are familiar with that custom. As is the case with all customary law, it has to be proved in the first instance by calling witness acquainted with the Native Customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.[63]

Except the customary court thinks proof is necessary to establish a custom, once a party wishing to rely on the custom, raises it, and the court can judicially notice it without proof, except on appeal. By implication, the court automatically denies the party against whom the custom is relied upon the opportunity of challenging it through cross-examination or counter submissions. The enormous power given to the customary courts by this provision is totally inconsistent with the right of fair hearing which a party is entitled to even in matters of discretion of the court. The law is trite as stated by Y.B. Nimpr, J.C.A in *Tetrazzini Foods Limited v Abbacon Investment Limited & Anor*[64]that all parties must be given a hearing before issues are determined that is the basic component of the canon of fair hearing.

Accordingly, every party must be allowed the opportunity to address the court on every issue before the court including issues to be taken judicial notice.
In a failed attempt to remedy this legal anomaly and restore the right to fair hearing of parties, the Rules *via*its *Order X Rules (6)(4) and (5)* provides that:

> *(5) any Appellant aggrieved by the decision of the Court with respect to the appropriate customary law may apply to the Appeal Court for leave to adduce evidence of customary law in the appeal Court for leave to adduce evidence of customary law in the Appeal Court and such application may be granted.*
> *(6) whenever any party is allowed to adduce evidence of customary law in the appeal Court, any other party shall be*

[62]12 WACA 127.
[63]See *OgberoEgiri v. EdeahoUperi* (1973) 11 SC. 299 at 305-308.
[64](2015) LPELR-25007 (CA).

> *entitled to adduce evidence either in rebuttal or in support of the evidence adduced.*

Consequently, where a party loses the opportunity to be heard on the custom judicially noticed at the trial customary court, he can reclaim his right to fair hearing on appeal but this isn't going to be an easy ride. Firstly, this right is exercisable subject to leave to adduce evidence on appeal first sought and obtained from the Appellate court. The power of the court to grant such leave is discretionary. Secondly, the Customary Court rules do not apply to the Customary Court of Appeal. The Customary Court of Appeal has its own rules which guides its proceedings. Unfortunately, no such provision for adducing fresh evidence on appeal is contained in the Customary Court of Appeal Rules. Worst still, while judicial precedents on adducing further or additional evidence exist, no such caselaw exists on adducing fresh evidence. In *Onwubuariri & Ors. v Igboasoiy*i*& ORS*,[65]the Supreme Court re-iterated as follows:

> *It is settled law that an appellate court has the power to receive and admit further or additional evidence on questions of fact but such additional evidence is receivable only on special circumstance. It is also settled law that the power conferred on the Court of Appeal is generally exercisable reluctantly sparingly, and with great circumspection since the law is reluctant in allowing a party to re-open an issue after it had been duly determined/decided by a court of competent jurisdiction, on the excuse of that new facts, which could have been discovered and used at the trial are now found.*

Lastly, an appellate court is not permitted to interfere with the findings of fact made by the trial court save in exceptional cases. It is quite difficult if not impossible for a party before customary court who has lost his right to challenge any custom judicially noticed at the trial court to succeed in exercising such right on appeal.[66]

It is noteworthy that in very many cases where the court has taken judicial notice of customs, the court has not done so in open court. In fact, most times the parties get to hear it for the first time from the judgment of the court. This formed one of the grounds of appeal in *Ehigie v Ehigie*[67], earlier cited. This is the worst case scenario of denial of fair hearing. In *Jalingo v Nyame*[68]the Court per C.C. Nweze, JCA emphasized that "it is an infraction to fair hearing for the court to do in Chambers what a party has not himself done in advancement of his case in the open court.''

Conclusion

The constitutional right to fair hearing in civil suits does not entertain any limitation. The major, reason for the rule on judicial notice is to ensure expeditious and speedy trial of cases. The right of parties to a dispute to always present their own side of the case cannot be sacrificed on the altar of speedy trial.

Principles of fair hearing are mandatory. The Rules allowing the customary court a discretion whether or not to permit such right to be exercised in issues of customary law is not only

[65] (2011) 4 NSCR 65 at 80 para D.
[66] See *Adekoya v. State (2013)* ALL FWLR *(Pt. 662) 1632 at 1654 Paras. C-D.*
[67] (*Supra*)
[68](1992) 3 NWLR (Pt. 231) 538.

inconsistent with the provisions of the Constitution, it is also an affront to the right to fair hearing.

Further, in *Adedibu v. Adewoyin and another,r*[69] it was held that "native law and custom is a matter of evidence and not law. This position of the law realizes that customs are not static. A fact established as custom of a people in 1960's may have been abolished in the modern times; for example, the rights of women to partake in the sharing of their fathers' estate upon his demise.[70]

It is recommended therefore that customs remain in the class of facts to be proved at all times. The principle of judicial notice be restricted to written laws. Where the rule must be retained in issues of fact, it should be made in an open court and every party given a fair opportunity to react to it or waive his right to react.

[69]13 WACA 191 at 192.
[70]*Ukeje v Ukeje; (supra).*