

SUPREME COURT OF NIGERIA
 10TH OCTOBER, 1995. SC. 66/1993
CORAM:- M. BELLO, S. M. A. BELGORE, LL. KUTIGI,
M. E. OGUNDARE, A. I. IGUH, JJSC.

1. LYDIA MODUPE LAWAL-OSULA DEFENDANTS/
2. EDITH GUOBADIA	APPELLANTS
 3. V. EMOVON	 DEFENDANT/RESPONDENT
4. BIRIKISU ODODO ODARO DEFENDANT/APPELLANT
AND	
1. K. O. LONGE	
2. G. EBORIE ME (EXECUTORS)	. DEFENDANTS/RESPONDENTS
AND	
CHIEF SAKA LAWAL-OSULA	
& 3 OTHERS PLAINTIFFS/RESPONDENTS

CUSTOMARY LAW - Repugnancy - Bini customary law of inheritance - Whether repugnant to natural justice.

LIMITATION OF ACTIONS - Native law and custom of Bini - Whether the Limitation Law provisions - Were meant to defeat or protect some customary practices.

LIMITATION OF ACTIONS - Statute bar - Bini custom - That vests the family house in the eldest son - Whether there is any limitation in the custom to make plaintiffs' action statute barred.

SUCCESSION - Paternity - Whether 1st plaintiff has established his legitimacy - As the eldest son of the testator.

SUCCESSION - Will - Capacity to make a will - In the former Bendel State - Is subject to entrenched native law and custom - That the family house can only be vested in the eldest son.

SUCCESSION - Will - Validity - Will that did not vest the family house in the eldest son - Whether completely invalidated thereby.

FACTS

This is a case of inheritance and succession based on Bini customary law. The testator, who was a Bini traditional Chief died and left a will. The defendants in the case are the beneficiaries, and include Mrs. Lydia Modupe Lawal-Osula, his wife by registry marriage. The plaintiffs, who also claim to be children of the testator, went to court seeking that the Will be set aside and declared null and void. They also sought a declaration that the testator be regarded as having died intestate. The executors of the Will are joined as fifth and sixth defendants. The trial judge upheld the validity of the Will and dismissed the reliefs sought by the plaintiffs, except to rule that the first plaintiff is the legitimate oldest surviving male child of the testator. On account of that, the court held that the first plaintiff is entitled to possession of the testator's "Igiogbe" ie the house where the testator lived and died, in accordance with Bini customary Law. Orders in furtherance of this aspect of plaintiff's claim were made.

Dissatisfied, all the parties appealed. The Court of Appeal, Benin gave effect to the reliefs sought by the plaintiffs while dismissing the case of the defendants. In essence, the Court of Appeal declared the testator's Will null and void, and of no effect. Aggrieved, the defendants have appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

- 3.1. Whether the Respondents' action was statute barred.
- 3.2. Whether on the evidence the 1st Respondent established his claim as the acknowledged legitimate senior son" of the Testator.
- 3.3. Whether the Bini Customary law of inheritance as established in this case is incompatible with general law or repugnant to natural justice equity and good conscience and therefore inapplicable to the testator's estate.

HELD (Unanimously allowing the appeal per Lead Judgment of **BELGORE JSC**)

Limitation of actions - Native law and custom of Bini

1. The Limitation Law as argued by learned counsel for the appellant was not meant to defeat the native law and custom of any community in the former Bendel State a fortiori, the law is to make sure that some customary practices are not vitiated; and that is the purport of section 1 (2) of Limitation Law (quoted earlier). To employ the provisions of s.33 of Limitation Law (supra) will do injustice and serious mischief to age long and time honoured Bini custom as to not only the succession but also to the estate of a hereditary chief. The provisions of s. 1 (2) (supra) are deliberately inserted to save the

situation such as exist in Bini. S.33 (1) has an equivalent in section 20 of Limitation Law of Lagos State but there is no equivalent of s. 1 (2) in that of Lagos. Therefore the provisions that influenced the decision in Elias vs. Akinrimisi (1987) NWLR (Pt. 57) 487, 497 by the Lagos Division of the Court of Appeal are peculiar to Lagos State which has no provisions like those in Section 1 (2) of Limitation Law of Bendel State. Therefore the provisions of Section 4 (2), Section 6 (2) and Section 20 Limitation Law of Bendel State create a combined effect to make a world of difference to the decision in Elias v. Akinrimisi. (p. 2006 E)

Statute bar - Bini custom

2. The clear provisions of S. 1 (2) of Limitation Law read along with Section 3(1) Wills Law (supra) do not call for the interpretation the appellants wish this Court to apply in this case. The effect of Sections 4 (2), 6 (2), 7 (2) and 20 of Limitation Law has no bearing on this case or any part of the Plaintiffs' claims. The action is not statute barred because it is only from the conclusion of the second burial that the 1st Plaintiff had vested in him the "*Igiogbe*" and the right to challenge the act of the defendants. By Benin custom there is no limitation of time as to second burial but the eldest son cannot succeed his father and take over "*Igiogbe*" without performing its rites. (p. 2007 F)

Succession - Paternity

3. As to the issue of paternity of the 1st Plaintiff, this Court has seen the findings and decisions of the two lower courts clearly showing that the 1st Plaintiff, as well as the other Plaintiffs were born before the 1st Defendant's Ordinance marriage in 1950. There was evidence of three previous marriages - whether by native law and custom or under Muslim law which produced these plaintiffs before the marriage of the 1st Appellant to the testator. All these were accepted as a fact by the trial Court; the Court of Appeal upheld the findings. These findings were based on sound evidence before the trial Court, there is no illegal reception of the evidence and there is nothing perverse in them. These concurrent findings cannot be interfered with by this Court. The 1st Plaintiff/Respondent has clearly established his legitimacy and there is no reason to interfere with the concurrent findings of the lower Courts on this. There is nothing perverse in those findings as the evidence they are based upon was properly and legally received. (p. 2007 H)

Customary Law - Repugnancy

4. The Bini customary law of inheritance cannot be said to be repugnant to

equity, good justice or indeed to natural justice. The inheritance under English law as relevant to succession to seat and estate of hereditary person - duke or earl - is not far different from Bini customary law. It is designed to keep family tradition and maintain orderly continuity. The eldest son to inherit “*Igiogbe*” is not incompatible with natural justice, equity and good conscience. (p. 2008 G)

Capacity to make a will

5. All that the Wills Law seeks to achieve, which I believe it amply achieved, is to make disposition in Will a possibility for every citizen of former Western Nigeria of which former Bendel State was a part. Every person can make a will, but that capacity is subject to entrenched native law and custom. Testator must bear in mind what his position is in his community before he embarks on making devices, bequests or dispositions in a Will. The Bini hereditary chief giving his eldest son his “*Igiogbe*” (his house or houses where he lived as such a chief) does only the obvious; but to pass it on to other person other than the eldest son makes a bequest that is void, the other parts of the will can then be saved. (p. 2009 B)

Will - Validity

6. I therefore allow the appeal and restore the order of the High Court giving Igiogbe to the 1st Plaintiff. The Will is valid subject to the device on Igiogbe which the Testator could not by Will dispose off to anyone as it automatically devolves on the 1st Plaintiff at the testator’s death. Further the executors - Mr. K. O. Longe and Mr. G. Eborieme should account for any rents and or other benefits that might have accrued to the Igiogbe at 34 Lagos Street, Benin to the 1st Plaintiff. (p. 2009 E)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Paternity - Whether proof is possible without evidence of parents

It is not the law, in my respectful view, that the issue of paternity of a child cannot be determined without the evidence of either or both parents. There is sufficient evidence on record to support the finding made by the learned trial Judge and affirmed by the Court of Appeal on the issue of the paternity of the 1st Plaintiff. I cannot say, therefore, that the finding is perverse or unsustainable. (p. 2014 E)

2. Succession - Change of personal law - Not canvassed by counsel

In paragraph 7 of his Will (Exhibit A) the deceased declared as follows:

“7. I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this Will. It is my Will that the native Law and Custom of Benin shall not apply to alter or modify this Will.” I do not express any opinion as to whether this declaration is sufficient to lead one to hold that the deceased had changed his personal law from the Benin Customary Law to the common law or any other type of law as we have no advantage of submissions of counsel on the issue. (p. 2015 D)

REPRESENTATION

- Oku Asuquo for the Appellants
- O. Evbuomwan for the 1st - 4th Plaintiffs/Respondents
- C. Aghoja for 5th Defendant/Respondent

CASES REFERRED TO

- Elias v. Akinrimisi (1987) NWLR (Pt. 57) 487 497
- Idehen v. Idehen (1991) 4 NWLR (Pt. 198) 3821
- Kimdey v. Military Governor Gongola State (1988) 2 NWLR (Pt 77) 445
- Dibiamaka v. Osakwe (1989) 3 NWLR (Pt. 107) 101
- Coker v. Oguntola (1985) 2 NWLR (Pt 5) 87
- Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799
- Nigerian Bottling Co. Ltd v. Ngonadi (1985) 1 NWLR (Pt. 4) 739
- Lewis v. Majekodunmi (1966) 1 All NLR 189, 195 - 196
- Ogiamen v. Ogiamen (1967) NMLR 245
- Ayisa v. Akanji (1995 7 NWLR 129 F

STATUTES REFERRED TO

- WILLS LAW, Cap 172, Laws of Bendel State of Nigeria, 1976; ss. 3(1) (2) (a) (b) (c) (d)
- WILLS (LIMITATION) LAW, Cap 89, Laws of Bendel State of Nigeria, 1976; ss 1 (2), 4 (2), 6 (2), 20 (1) (2) (3), 33(1).

LEAD JUDGMENT BY BELGORE JSC

Chief Usman Mofeyintoluwa Lawal-Osula died on 2nd December 1972 and left a Will, Exhibit A in this matter. In this Will he devised to 1st Defendant, Mrs. Lydia Modupe Lawal-Osula that he described as “...my darling wife ... whom I met in November 1948 and married at the Benin Divisional Office Registry, Benin City before Mr. D.O Saville (Assistant District Officer) on the 26th day of January, 1950, and who has been faithful, loyal, kind-hearted and has been a devoted Wife and life partner to me and who

Lawal-Osula v. Lawal-Osula (1995) 10 KLR Belgore JSC 2001
has given me a full and all-round happy life”.

The evidence before the trial Court is that the testator, prior to his Registry Marriage (as distinct to Christian Marriage as 1st Defendant kept on hammering) under the Marriage Ordinance, had had previous wives either under Benin native law and custom or under Muslim Law or combination of both. By the evidence, the testator was a Muslim prior to his marriage under the Ordinance and this B has been amply corroborated by the 1st Defendant herself, who insisted that because she was a pastor’s daughter, she would not marry the testator unless he converted to Christianity. It would seem the 1st Defendant regarded Marriage under the Ordinance as Christian marriage. Prior to the Ordinance marriage, the testator through his previous marriages had children, some C had however died long before the said marriage, The 1st Defendant had three issues, but two predeceased the testator and was left with only a daughter, Ododo Odaro who was given a Muslim name of “Briskisu” - perhaps “Bilkis”, The 2nd and 3rd Defendants came from the same mother, they are now Edith Ramotu Guobadia and Madinatu Violet Emovon respectively D after each got married. The 3rd Plaintiff and the 1st Plaintiff (i.e. Tawa Aghedo and Saka Lawal-Osula) are from the same mother in that order of seniority. The second Plaintiff Ebu Olatunji is half sister to all of them and her full name is Sikirat Ebum Olatunji.

The deceased in making his Will devised several things in his estate, including the houses where he lived to his wife (1st Defendant) and his other children apart from the special ones to the only issue of the 1st Defendant, Ododo Odaro (4th Defendant). The deceased made the following declaration in the Will (Exhibit A):

“I DECLARE that I make the above demise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this Will. It is my will that the native law and custom of Benin shall not apply to alter or modify this Will”,

The testator was a Benin Chief, being the “Arala of Benin”. By Benin Native Law and Custom, a Benin traditional Chief is succeeded at death by his eldest son, according to the evidence at trial Court. His Will, however, completely omitted the 1st Plaintiff and some other children including the 3rd Defendant. It is as a result that the plaintiffs instituted the action claiming the following reliefs:

“(a) A declaration that the pretended Will and last Testament of Chief Usman Mofeyintioluwa Lawal-Osula, the Arala of Benin dated 22/11/68 is null and void and of no effect for non compliance with the applicable Wills Law and as such, the said Testator died intestate.

(b) A declaration that the 1st Plaintiff having performed the final

burial ceremonies of his late father the Arala of Benin under Benin Native Law and Custom and as the acknowledged legitimate senior son entitling him to the hereditary title and having been conferred with the said hereditary chieftaincy title of his late father (Arala of Benin) steps into the later father's shoes as the head of the family of Chief Usman Mofeyintoluwa Lawal-
B Osula.

(c) A declaration that the purported marriage of the 1st defendant under a Christian or monogamous system of marriage at Benin City on the 26th January, 1950 to the deceased is null and void and of no effect whatsoever such marriage having been contracted during the subsistence of a marriage under native law and custom and Moslem rites to one [dada the
C mother of the 2nd and 3rd defendants who also survived the deceased.

(d) An order compelling the defendants to submit a comprehensive inventory of the whole properties real and personal comprised in the estate of the said Chief Usman Mofeyintoluwa Lawal-Osula (deceased) to the 1st
D Plaintiff forthwith.

(e) An order revoking or recalling the grant letters of probate and administration granted to the defendants if any.

(f) An order for the position and condition of the properties comprised in the estate handing over the keys to the property not hitherto occupied by tenants to the 1st Plaintiff hereof, and a true and full account of all rents, profits and/or monies collected by or paid to the defendants by the tenants and/or occupiers of properties comprised thereof, and payment into court of all monies as received for the estate by the defendants either jointly or severally from grant of letters of probate and administration up to the
F date of judgment and or date as may be directed by the court in favour of the plaintiffs.

(g) Such further order or other orders may be made and directions give" as the Court shall think just in the circumstances of the case ."

The trial Court, in a lengthy review of the evidence and assessment
G thereof finally gave judgment and declared that the 1st Plaintiff, Saka Lawai Osula, as well as the other plaintiffs are legitimate children of the testator. He also rejected the defendants' contention in their statement of defence and reliance on Limitation Law of Bendel State that the plaintiffs' suit was statute barred or caught by laches. As a result, the Plaintiffs appealed to the Court of
H Appeal on the other reliefs rejected by the trial Court. The Defendants also cross-appealed on the issue of legitimacy of the 1st Plaintiff a and plaintiffs, and on the issue of Limitation Law.

The Court of Appeal, in allowing Plaintiffs' appeal came to the following conclusions:

(a) A declaration that the dispositions of the property of the Testator (the late Usman Mofeyintioluwa Lawal-Osula) made in the Will of the said Testator dated 22nd November, 1968, are null and void and of no effect whatsoever for non-compliance with the Wills Law, Cap 172 of the Laws of Bendel State of Nigeria 1976.

(b) An order that the 1st, 2nd, 3rd, 4th, 5th and 6th Appellants, jointly and severally shall, within 21 days of the date of this order, submit a comprehensive inventory of all the properties, real and personal, comprised in the estate of Chief Usman Mofeyintioluwa Lawal Osula (deceased) to the 1st respondent. Such comprehensive inventory shall be verified by affidavit of each of the 5th and 6th appellants who shall file a copy thereof in the registry of this court within the same period of 21 days from the date of this order.

(c) An order revoking or recalling the grant of probate and letters of administration granted to all or some of the respondents in relation to the property purportedly disposed of by the said late Usman Mofeyintioluwa Lawal-Osula (Late Arala of Benin) in his aforesaid Will.

(d) An order requiring the 5th and 6th appellants to furnish the 1st respondent within 21 days of the date of this order with the particulars of the positions and condition of the properties comprised in the estate of the aforesaid testator (Usman Mofeyintioluwa Lawal-Osula) the late Arala of Benin, and to hand over within 21 days of this order, to the 1st appellant the keys to any property not hitherto occupied by the tenant or tenants.

(e) An order requiring each of the appellants to supply the 1st respondent within 21 days of the date of this order a true and full account, verified by his/her affidavit, of all rents profits and/or monies collected by or paid to any of respondents by the tenants and/or occupiers of any of the properties purportedly disposed of in the Will of the aforesaid testator (Usman Mofeyintioluwa Lawal-Osula) the late Arala of Benin, and to pay into court within the period of 21 days from the date of this order all monies received by any of the respondents in respect of any of the properties purportedly disposed of in the said Will of the testator from the date of the purported grant of probate and letters of administration to all or some of the respondents in relation to the estate of the testator to the date of the judgment in this appeal.

(f) An order restraining the appellants jointly and severally from administering, expending disposing of or otherwise dealing in any way with any of the properties real or personal, purportedly disposed of in the Will of the said Testator (Usman Mofeyintioluwa Lawal-Osula), the late Arala of Benin .”

It must be pointed out that in the course of trial at the trial High Court

several amendments were made to the pleadings which the learned trial judge amply adverted to in his judgment. The Court of Appeal was therefore afforded a clear picture of the pleadings and the evidence before the trial Court. Against the judgment of the Court of Appeal, the Defendants/ Appellants appealed to this Court and raised several grounds of appeal upon which the following issues were formulated for determination by this Court, to wit:

- “3.1. Whether the Respondents’ action was statute barred.
- 3.2. Whether on the evidence the 1st Respondent established his claim as the acknowledged legitimate senior son” of the Testator.
- 3.3. Whether the Bini Customary law of inheritance as established in this case is incompatible with general law or repugnant to natural justice equity and good conscience and therefore inapplicable to the testator’s estate. “

As against these issues for determining the plaintiffs, now respondents, raised the following issues for determination:

- “1. Whether the Plaintiffs/Respondents Action or Claim mainly based on family status, and Inheritance under Bini Customary Law was statute-barred.
- 2. Whether having regards to the evidence on record the concurrent finding of facts of the two lower courts that the 1st Plaintiff/Respondent is the acknowledged legitimate senior son of Chief Usman M. Lawal-Osula Arala of Benin (Deceased) is justified.
- 3. Whether having regard to the reliefs claimed, the evidence led and the relevant Bini Customary Law of Inheritance proved pertaining to a Bini Hereditary Chief the Customary Law is incompatible with general law or repugnant to Natural justice, equity and Good Conscience. “

In the question relating to the estate of a Benin Chief, who has left a Will, the issue of Limitation Law or that a suit is statute barred cannot be considered without adequate reference to WILLS LAW of Bendel Stall (Cap 172, Laws of Bendel State of Nigeria 1976). The testator, Usman Mofeyintoluwa Lawal-Osula, was not only an indigene of Benin but also a hereditary chief, the Arala of Benin. Binis, like some other tribes in Nigeria have got some age-long traditions and norms, some peculiar to them, others in common with the other, races in the other parts of the world that cannot easily be written off by a mere legislation. To legislate to ban some of the native laws and customs, would lead to serious disorder that makes governance and obedience difficult. It is in the light of these that instead of entirely discarding a practice that have been tried and tested over centuries, legislations are carefully drafted to accommodate the laws and customs in question and to regulate their practice.

Lawal-Osula v. Lawal-Osula (1995) 10 KLR Belgore JSC 2005
Thus the WILLS LAW (Cap 172, Laws of Bendel State of Nigeria 1976) provides:

"3. (1) *Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator.*

(2) *The power hereby given shall extend to -*

(a) *estates pur autre vie whether there shall or shall not be any special occupant thereof and whether the same shall be freehold or of any other tenure and whether the same shall be a corporeal or an incorporeal hereditament;*

(b) *all contingent, executor or other future interest in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will;*

(c) *all rights of entry for conditions broken and other right of entry; and*

(d) *such of the same estates, interests and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. "*

Then relevant to the above provisions of the Wills Law the Limitation Law F of Bendel State (Cap 89 Laws of Bendel State 1976) provides:

"20 (1) *Subject to subsection (3) of this section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a Will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued.*

(2) *Subject to subsection (3) of this section, no action to recover arrears of interest in respect of any legacy or damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due.*

(3) *No period of limitation fixed by this Law shall apply to an action against personal representative or any person claiming through him where the claim is founded on any fraud to which the personal representative was a party or privy. "*

To be read along with s.20 (supra) is section I (2) of the same law reading:

B “1. (2) *Nothing in this law affects actions in respect of the title to land or any inheritance in land held by customary tenure or in respect of any matter which is subject to the jurisdiction ‘of a customary court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death.* “

C The Bini native law and custom relating to a hereditary chief is not as complex as some people appear to view it. When a hereditary chief dies, whether ‘testate’ or intestate (I underline to show that the word is not meant in the form of statutory provision but in the form of deceased having expressed a wish that could be honoured if possible), he will be buried according to the native law and custom at his usual place of abode in the traditional way by performing certain rites. After this burial, all his property are held by the eldest son in trust up to such a time when he can perform the second burial, then he holds the Igiogbe and the other items of the estate can be shared. “*Igiogbe*” comprises of the house or houses where the deceased hereditary chief lived or used as seat or seats as a Bini chief. This cannot be taken away from the eldest son who succeeds him to the title or office and perhaps this includes the paraphernalia of office. It is in the light of this native law and custom that the phrase “*subject to any customary law relating thereto*” has been employed in section 3 (1) Wills Law (supra) and the clear provisions of section 1 (2) of the Limitation Law (supra) reinforce the desire of the legislature not to derogate from time honoured native law and custom of Benin. The Limitation Law as argued by learned counsel fill the appellant was not meant to defeat the native law and custom of any community in the former Bendel State a fortiori, the law is to make sure that some customary practices are not vitiated; and that is the purport of section 1 (2) of Limitation Law (quoted earlier). To employ the provisions of s. 33 of Limitation Law (supra) will do injustice and serious mischief to age long and time honoured Bini custom as to not only the succession but also to the estate of a hereditary chief. The provisions of s.1 (2) (supra) are deliberately inserted to save the situation such as exist in Bini. S.33 (1) has anequeivalent in section 20 of Limitation Law of Lagos State but there is no equivalent of s.1 (2) in that of Lagos. Therefore the provisions that influenced the decision in Elias vs. Akinrimisi (1987) NWLR (Pt. 57) 487, 497 by H the Lagos Division of the Court of Appeal are peculiar to Lagos State which has no provisions like those in Section 1 (2) of Limitation Law of Bendel State. Therefore the provisions of Section 4 (2), Section 6(2) and Section 20 Limitation Law of Bendel State create a combined effect to make a world of difference to the decision in Elias v. Akinrimlsi (supra). The argument in this case on

appeal concerns the position of children born under marriage other than that under Marriage Ordinance, inheritance under customary law that could be a proper matter for trial in Customary Court, the succession to chieftaincy title by the eldest son of a hereditary chief, the position of his “*Igiogbe*” i.e. his seat and abode as chief, and devolution of his estate that are entirely governed by Benin native law and custom. None of the parties ever contended that Chief U sman Mofeyintoluwa Lawal-Osula was not a hereditary Benin Chief as Arala of Benin. He never renounced this title up to his death; perhaps he renounced Islam, but he certainly had a traditional burial in his house.

This takes me to when the estate of the testator in this case actually vested. The estate vests (in the case of a Chief) when the eldest son performs the second burial. From his death the eldest son takes charge of the estate in trust for the entire family, in this case, because of Exhibit A, the Will, the 1st Defendant, her daughter 4th Defendant and the 5th and 6th Defendants who are executors of the Will took charge and excluded the Plaintiffs. There was ample evidence, which the learned trial judge accepted and which the Court of Appeal found no reason to disturb that the 1st Plaintiff and his other sisters who are co-plaintiffs are children of the testator, the 1st Plaintiff being the only surviving son. The Wills Law in Section 3 (1) (*supra*) makes the making of a Will subject to “*Customary Law relating thereto*” so that a person can make a will, but the device, bequest or disposition therein shall not be inconsistent with the established customary law and shall at any rate be governed by the relevant customary law. The phrase “*relating thereto*” in this context relates to customary law in respect of the device, bequest or disposition (See Idehen vs Idehen (1991) 4 NMLR (Pt 198) 382). The clear provisions of S.I (2) of Limitation Law read along with Section 3 (1) Wills Law (*supra*) do not call for the interpretation the appellants wish this Court to apply in this case. The effect of Sections 4 (2), 6 (2), 7 (2) and 20 of Limitation Law has no bearing on this case or any part of the Plaintiffs’ claims. The action is not statute barred because it is only G from the conclusion of the second burial that the 1st Plaintiff had vested in him the “*Igiogbe*” and the right to challenge the act of the defendants. [Arase vs Arase (1981) 5 S.C. 33, 62-63; Idehen vs Idehen (1991) (*supra*). By Benin custom there is no limitation of time as to second burial but the eldest son cannot succeed his father and take over “*Igiogbe*” without performing its rites. The cases of Olowosago vs Adebajo (1988) 4 NWLR (Pt 88) 275, 295, Ademola vs Sodipo (1992) 7 NWLR (Pt 253) 251, 269 are decided on completely different issues and have no bearing on this case.

As to the issue of paternity of the 1st Plaintiff, this Court has seen

the findings and decisions of the two lower courts clearly showing that the 1st Plaintiff, as well as the other Plaintiffs were born before the 1st Defendant's Ordinance marriage in 1950. There was evidence of three previous marriages - whether by native law and custom or under Muslim law - which produced these plaintiffs before the marriage of the Ist Appellant to the testator. All these were accepted as a fact by the trial Court; the Court of Appeal upheld the findings. These findings were based on sound evidence before the trial Court, there is no illegal reception of the evidence and there is nothing perverse in them. These concurrent findings cannot be interfered with by this Court. [See line of decisions e.g. in Re Mogaji (1986) 1 NWLR (Pt 19) 759; Kimdey vs militar Governor, Gongola State (1988) 2 NWLR (Pt 77) 445; Dibiamaka vs Osakwe (1989) 3 NWLR (Pt 107) 101; Coker vs Oguntola (1985) 2 NWLR (Pt 5) 87; Onobruhere vs Esegine (1986) 1 NWLR (pt 19) 799; Nigerian Bottling Co. Ltd. vs Ngonadi (1985) 1 NWLR (Pt 4) 739. The 1st Plaintiff/Respondent has clearly established his legitimacy and there is no reason to interfere with the concurrent findings of the lower Courts on this. There is nothing perverse in those findings as the evidence they are based upon was properly and legally received [See Odubeko vs Fowler (1994) NWLR (pt 308) 637; Okonzua vs Amosu (1992) 6 NWLR (Pt 248) 515, 430]. [See also Otiotoju vs Government of Ondo State (1994) 4 NWLR (Pt 340) 518,533]. The case of Lewis vs Majekodunmi (1966) 1 All NLR 189, 195-196 cited by counsel for the appellants has no bearing on this case.

The next and the last issue by the appellants touches on whether Bini customary Law of inheritance is not repugnant to natural justice, equity and good conscience, or generally incompatible with the general law. The British as colonial masters inserted in most of their given laws via their Ordinances the provisions of "... *incompatible with laws of general application in England, natural justice, equity and good conscience.*" This phrase has not been defined with certainty till today. There are some cases where repugnancy to natural justice, equity and good conscience disallowed some family relations [See Ekenyion Edet vs Nyom Essien (1932) 11 NLR 471 and courts so held, the Bini customary law of inheritance cannot be said to be repugnant to equity, good justice or indeed to natural justice. The inheritance under English law as relevant to succession to seat and estate of hereditary person - duke or earl - is not far different from Bini customary law. It is designed to keep family tradition and maintain orderly continuity. The eldest son to inherit "*Igiogbe*" is not incompatible with natural justice, equity and good conscience. Ademola CJN seems to advert to this in Ogiamen vs Ogiamen (1967) NMLR 245 when he held, obiter inter alia as follows:

“.... It is common ground that according to Benin custom, the eldest son succeeds to all property of the father.... This culture the learned judge dubbed as repugnant to natural justice, equity and good conscience, he refused to be bound by it. As it is not a point material to this appeal, we refrain from making comments on this except to say that it is not unknown in some highly civilized countries of the world.

B

That is very true.

All that the Wills Law seeks to achieve, which I believe it amply achieved, is to make disposition in Will a possibility for every citizen of former Western Nigeria of which former Bendel State was a part. Every person can make a will, but that capacity is subject to entrenched native law and custom. Testator must bear in mind what his position is in his community before he embarks on making devices, bequests or dispositions in a Will. The Bini hereditary chief giving his eldest son his “*Igiogbe*” (his house or houses where he lived as such a chief) does only the obvious; but to pass it on to other person other than the eldest son makes a bequest that is void, the other parts of the will can then be saved.

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D

For the foregoing reasons, this appeal must be allowed subject to the order hereinafter made on *Igiogbe*. I must mention, however, that the paternity of the 1st Plaintiff is the only one in issue and it should not have been extended to the other plaintiffs whose legitimacy was never extended.

E

I therefore allow the appeal and restore the order of the High Court giving *Igiogbe* to the 1st Plaintiff. The Will is valid subject to the device on *Igiogbe* which the Testator could not by Will dispose off to anyone as it automatically devolves on the 1st Plaintiff at the testator’s death. Further the executors - Mr. K. O. Longe and Mr. G. Eborieme should account for any rents and or other benefits that might have accrued to the *Igiogbe* at 34 Lagos Street, Benin to the 1st Plaintiff. I make no order as to costs.

F

BELLOCJN

I had the opportunity of reading in advance the judgment of my learned brother, Belgore JSC. I entirely agree. I adopt it as mine.

G

KUTIGIJSC

I have had a preview of the judgment read by my learned brother Belgore JSC. I agree with him that the Will (Exhibit A) made by the deceased is valid except the portion which purports to devise the “*Igiogbe*” - No. 34 Lagos Street, Benin City - to any person other than the deceased’s eldest

H

surviving male child as provided for under Bini customary law.

OGUNDARE.JSC

Chief U. M. Lawal-Osula (hereinafter is referred to as the deceased) B was an indigene of Benin; he lived in Benin. He died on December 2, 1972 and until his death he was the Arala of Benin, a traditional chieftaincy.

Before he died he made a Will which contained detailed provisions for his wife Lydia Modupe Lawal-Osula (the 1st Defendant in the proceedings leading to this appeal), his children by this woman and two other children of C his by other women. No mention was made in the Will of the Plaintiffs. The deceased's Will was proved by the executors named therein and the estate has been administered by them since then. However, on 26th May 1986 the Plaintiffs, who claim to be children of the deceased, and, in the case of the 1st plaintiff, his eldest and sole surviving male child, instituted the action leading D to this appeal. The first four defendants are beneficiaries under the Will whilst the 5th and 6th defendants are the executors of the said Will. By the amended Writ of Summons the plaintiffs claimed as here- under:

“(a) A declaration that the pretended Will and last Testament of Chief Usman Mofeyintioluwa Lawal-Osula the Arala of Benin dated 22/11/ E 68, is null and void and of no effect for non-compliance with the applicable Wills Law and as such, the said Testator died intestate.

(b) A declaration that the 1st Plaintiff having performed the final burial ceremonies of his late father the (Arala of Benin) under Benin Native Law and Custom and as the acknowledged legitimate senior son entitling F him to the hereditary title and having been conferred with the said hereditary chieftaincy title of his late father (Arala of Benin) steps into the late father's shoes as the head of the family of Chief Usman Mofeyintioluwa Lawal-Osula.

(c) A declaration that the purported marriage of the 1st Defendant G under a Christian or monogamous (sic) system of marriage at Benin City on the 26th January, 1950 to the deceased is null and void and of no effect whatsoever such marriage having been contracted during the subsistence of a marriage under Native Law and Custom and Moslem rites to one Idadu the mother of 2nd and 3rd Defendants who also survived the deceased.

H (d) For an order compelling the Defendants to submit a comprehensive inventory of the whole properties real and personal comprised in the estate of the said Chief Usman Mofeyintioluwa Lawal-Osula (deceased) to the 1st Plaintiff forthwith.

(e) An order revoking or recalling the grant of letters of Probate and Admin-

(if) *An order for the position and condition of properties comprised in the estate handing over keys to the property not hitherto occupied by tenants to the 1st Plaintiff hereof, and a true and full account of all rents, profits and/or monies collected by or paid to the Defendants by the tenants and/or occupiers of properties comprised thereof, and payment into Court of aUo_o monies as received for the estate by the Defendants either jointly or severally from grant of letters of Probate and Administration up to date of judgment and or date as may be directed by the Court in favour of the Plaintiffs.* B

(g) *That such further order or other orders may be made and directions given as the Court shall think just in the circumstance of this case.* C

After pleadings have been filed and exchanged and amended by orders of court the action proceeded to trial. The learned trial Judge considered the evidence before him and the submission of learned counsel for the parties and found as follows:

(1) Validity of marriage between testator (that is the deceased) and the 1st defendant: *“The presumption of regularity is so strong in favour of the marriage and cannot be displaced by the negative evidence of a witness for the plaintiffs.* “ He upheld the validity of the marriage. D

(2) Validity of the Will: The learned trial Judge found that the deceased at the time of making the Will was well and fit and was in no way incapacitated. He also found that the Will was duly executed and upheld its validity. E

(3) Paternity of the 1st Plaintiff: The learned trial Judge, on a balance of probabilities, found that the Ist Plaintiff was a child of the deceased and that he was the eldest and only surviving son of the deceased. F

In consequence of his findings. he entered judgment in favour of the Plaintiffs in respect of their 2nd relief concerning the paternity of the I st Plaintiff. He dismissed all the other reliefs sought by them. G

Both sides were unhappy with aspects of this judgment. The Plaintiffs were dissatisfied with the dismissal of all their reliefs except the 2nd relief and, therefore, appealed to the Court of Appeal. The defendants for their part, were also dissatisfied with the findings in favour of the Plaintiff on the issue of paternity and the grant of the 2nd relief and consequently cross -appealed to the Court of Appeal. The Court of Appeal (Benin Division) in its judgment allowed Plaintiffs’ appeal, set aside the judgment of the trial High Court in respect of claims (a), (d), (e), and (f) and made the following consequential orders: H

“(a) The Will of the said testator dated 22nd November, 1968, are null and void and of no effect whatsoever for non-compliance with the Will Law, Cap. 172 of the Laws of Bendel State of Nigeria, 1976.

(b) An Order that the 1st, 2nd, 3rd, 4th, 5th and 6th respondents jointly and severally shall, within 21 days of the date of this order, submit a comprehensive inventory of all the properties, real, and personal; comprised in the estate of Chief Usman Mofeyintioluwa Lawal-Osula (deceased) to the 1st Appellant. Such comprehensive inventory shall be verified by affidavit of each of the 5th and 6th respondents who shall file a copy thereof in the registry of this court within the same period of 21 days from the date of this order.

(c) An Order revoking or recalling the grant of probate letters of administration granted to all or some of the respondents in relation to the property purportedly disposed of by the said late Usman Mofeyintioluwa Lawal-Osula (Late Arala of Benin) in his aforesaid Will.

(d) An Order requiring the 5th and 6th respondents to furnish the 1st Appellant, within 21 days of the date of this order, with the particulars of the position and condition of the properties comprised in the estate of the aforesaid testator (Usman Mofeyintioluwa Lawal-Osula), the late Arala of Benin, and to hand over, within 21 days of this order, to the 1st Appellant the keys to any property not hitherto occupied by tenant or tenants.

(e) An Order requiring each of the Respondents to supply the 1st Appellant, within 21 days of the date of this order a true and full account, verified by his/her affidavit, of all rents, profits and/or monies collected by tenants and/or occupiers of any of the properties purportedly disposed of in the Will of the aforesaid testator (Usman Mofeyintioluwa Lawal-Osula) the late Arala of Benin, and to pay into Court within the period of 21 days from the date of this order all monies received by any of the respondents in respect of any of the properties purportedly disposed of in the said Will of the testator from the date of the purported grant of probate and letters of administration to all or some of the respondents in relation to the estate of the testator to the date of the judgment in this appeal, and

(f) An Order restraining the respondents jointly and severally from ad ministering, expending, disposing of or otherwise dealing in any way wuh any of the properties real or personal, purportedly disposed of in the Will of the said testator (Usman Mofeyintioluwa Lawal-Osula), the late Arala of Benin. “

The Defendants’ cross-appeal was dismissed, thus affirming the finding of the trial court on the issue of the paternity of the 1st Plaintiff. It is against that judgment that the defendants have now appealed to this Court.

The parties filed and exchanged their respective Briefs of argument. Three main issues are identified in the Defendants’/Appellants’ Brief and they are as follows:

“1. Whether the Respondents’ action was statute-barred.

2. Whether on the evidence the 1st Respondent established his claim as the acknowledged legitimate senior son’ of the Testator.

3. Whether the Bini Customary law of inheritance as established in this case is incompatible with general law or repugnant to natural justice, equity and good conscience and therefore inapplicable to the testator’s estate .” B

The issues as formulated in the Plaintiffs/Respondents’ Brief are not dissimilar to the above.

I may pause here to mention that during the proceedings in the two lower courts, the 3rd Defendant Mrs. V. Emovon was not on the side of the other Defendants but allied herself with Plaintiffs. At the trial court, she filed a separate Statement of Defence which was substantially in line with the case put up by the Plaintiffs. Again in the Court of appeal she maintained the same stance; she filed a separate Brief. Similarly in this Court her Brief of Argument was substantially in support of the Plaintiffs and against D the other Defendants. She is referred to in the proceedings in this Court as the 5th Defendant/ Respondent. C D

I am also to mention that whilst the appeal was pending in this Court the 1st Defendant Lydia Modupe Lawal-Osula died and by order of this Court made on 12/12/94 Hajia Morenike Ibrahim Yahaya, Mrs. Iyabo Akai, Mrs. E Edugie Agada were substituted in her place. They thereby became the 1st to 3rd Defendants/appeallants. E

I shall now proceed to consider the issues placed before us in the light of arguments submitted by learned counsel for the parties both in their respective Briefs of arguments and in oral arguments. F

Issue 1: The Defendants (except the 3rd Defendant now 5th Defendant/ Respondent) pleaded in their amended Statement of Defence, inter-alia, as follows:

“27. The Defendants contend that the Plaintiffs’ action is statute-barred.” G

The learned trial Judge rejected this defence. In respect of relief (b) which he granted, he held that the 1st Plaintiff could not reasonably be expected to know that his paternity was being challenged by the Defendants until when he wanted to perform the second or final burial of the deceased and the Defendants attempted to stop him from so doing. The Court of Appeal / upheld this finding of the learned trial Judge. After a consideration of the various sections of the Limitation Law cited both in the Brief and in oral arguments by learned counsel for the parties, I agree entirely with the two courts below that relief (2) is not in any way affected by the Limitation Law of Bendel State applicable to the present proceedings. Relief (b) raises issue of H

the family status of the 1st Plaintiff in the Lawal-Osula family and is a matter subject to the jurisdiction of a customary court. It is excepted from the provisions of the Limitation Law by Section 1(2) thereof.

As regards the other reliefs, in view of the conclusion I later reach in this judgment on them, I do not consider it necessary to determine whether they are caught by the Limitation Law. It is sufficient, however, to say that as those reliefs touched on the validity or otherwise of the deceased's Will and his marriage under the Marriage Act to the 1st Defendant, they do not come under the exception in Section 1(2) of the Law which reads:

"1 (2) nothing in this Law affects actions in respect of the title to land or any interest in land held by customary tenure or in respect of any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death. "

The validity or otherwise of a Will made under the Will Law or of a marriage conducted under the Marriage Act or matters pertaining thereto are certainly not matters coming under the jurisdiction of a customary court.

Issue 2: The two courts below found that the 1st Plaintiff is a son of the deceased. The attitude of this Court to concurrent findings of fact made by the courts below has been stated and restated in a long line of cases and it is that this Court will not interfere with such findings unless they are shown to be perverse or erroneous or legally or procedurally unsustainable - see Ayisa v. Akanji (1995) 7 NWLR 129. It is not the law, in my respectful view, that the issue of paternity of a child cannot be determined without the evidence of either or both parents. There is sufficient evidence on record to support the finding made by the learned trial Judge and affirmed by the Court of Appeal on the issue of the paternity of the 1st Plaintiff. I cannot say, therefore, that the finding is perverse or unsustainable. In the circumstance, therefore, I can find no justification for interfering with that finding.

Issue 3: In dealing with this issue it must be borne in mind that both courts below found in favour of the validity of the Will of the deceased in the sense that it was validly made. The divergence lies in the interpretation given by the Court of Appeal to the phrase "*subject to Customary Law relating thereto*" in section 3(1) of the Wills Law. The court below, that is, the Court of Appeal is right in holding that that phrase is not a qualification of the testator's capacity to make a Will but a qualification of the subject matter of the property disposed of or intended to be disposed of by Will. See Idehen v Idehen (1991) 6 NWLR 382 and other similar cases. This Court held on a number of occasions (and we have not been invited in this appeal to recon-

sider that decision with a view to setting it aside) that the “*Igiogbe*”, that is the house where a Bini deceased lived and died, devolves on his eldest surviving male under Benin Customary Law. I do not want to proffer any views as to whether this custom is repugnant until such occasion when we are invited to reconsider our previous decisions on it. Applying the earlier decisions of this Court to the facts of the case here, the deceased in this case Chief U. M. Osula-Lawal could not dispose by Will of his ‘*Igiogbe*’ unless to his eldest surviving male child. Any devise of his “*Igiogbe*” to any other person will, on the authorities as they stand, be void. Subject to this qualification, Chief Lawal-Osula was at liberty to bequeath and devise his real and personal estate to anyone of his choice - see Idehen v. Idehen (supra). It is admitted by both sides that the deceased’s “*Igiogbe*” is the property situate at No. 34, Lagos Street, Benin-City. That property, under the Will, was devised to persons other than the eldest surviving male child of the deceased. That devise, therefore, is void. I do not share the views of the court below that all the other devises are equally void as the Will being valid, all those other devises and bequests are valid.

In paragraph 7 of his Will (Exhibit A) the deceased declared as follows:

“7. I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this Will.

It is my Will that the native Law and Custom of Benin shall not apply to alter or modify this my Will. “

I do not express any opinion as to whether this declaration is sufficient to lead one to hold that the deceased had changed his personal law from the Benin Customary Law to the common law or any other type of law - see Olowu v. Olowu (1985) 3 NWLR 372, as we have no advantage of submissions of counsel on the issue.

The conclusion I reach, therefore, is that the decision of the court below to the effect that the Will (exhibit A) is invalid must be set aside. It cannot in one breadth hold that the Will was validly made and in the second breadth hold that it is void. As all the consequential orders made by the court below are based on this erroneous decision, they must be set aside. Consequently I allow this appeal. I set aside the judgment of the court below granting to the Plaintiffs their reliefs (a), (d), (e) and (f). I restore the judgment of the trial High Court dismissing all those reliefs. For the avoidance of doubt, I declare that all bequests and devises in the Will of Chief U. M. Lawal-Osula (deceased) (exhibit A) (except the devise of the ‘*Igiogbe*’ situate at No. 34 Lagos Street, Benin-City) are valid.

By the judgments of the two courts below, as affirmed by this Court, the 1st Plaintiff is the only surviving male child of the deceased, Chief U. M.

Lawal-Osula. Consequently, he is entitled, under Bini customary law, to the “*Igiogbe*’ that is No. 34 Lagos Street, Benin-City. Plaintiffs have claimed in their relief (f) for “*a true and full account of all rents, profits and/or monies collected by or paid to the Defendants by the tenants and/or occupiers of properties comprised thereof*” In view of the conclusion just reached in
B respect of the property situate at No. 34 Lagos Street, Benin-City the 1st Plaintiff only is entitled to succeed on claim (f) to the extent also only of that property which was the deceased’s ‘*Igiogbe*’, The 7th and 8th Defendants/
Appellants being the executors of the Will of the deceased are accountable to the 1st Plaintiff for any rents, profits etc. collected by them or anyone else in
C respect of that property.

In consequence, therefore I subscribe to the consequential order relating to the said property made in the judgment of my learned brother Belgore JSC a preview of which I had a privilege of before now. I also sub-
D scribe to the order for costs made by him.

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, JSC.

E He has adequately considered all the issues canvassed in this appeal and I agree entirely with his reasonings and conclusion.

Accordingly, I, too shall allow this appeal in terms stipulated in the lead judgment.

F I abide by the consequential orders including those as to costs therein made.

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