

**SUPREME COURT OF NIGERIA**

TUESDAY 11TH JUNE, 1996. SC. 224/1992

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI,  
E. O. OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC**

WILLIAM AGIDIGBI ..... 1ST DEFENDANT/APPELLANTS

AND

1. DANAH AGIDIGBI ..... PLAINTIFF/CROSS-APPELLANT

2. SOLOMZON ERESU ..... 2ND DEFENDANT/RESPONDENT

3. GRACE AGIDIGBI ..... 3RD DEFENDANT/RESPONDENT

**ACTIONS** - Alternative claim - Where the major claim succeeds - Whether the alternative should still be considered.**PRACTICE & PROCEDURE** - Costs - Awarded against a party that succeeded partially on appeal - whether a mistake.**SUCCESSION** - Wills - Where a defendant is estopped from denying the validity of a Will - Whether he is estopped from a taking a benefit under the will.**SUCCESSION** - Bini customary law - Testator cannot dispose of his Igiogbe by Will - Save to his eldest surviving son.**SUCCESSION** - Bini customary law - Whether all or just one of the three houses - Constitute the Igiogbe in this case.**WILLS** - Executors of a will - Proposed executor within a will - Must apply to the Probate Registrar - Before he can become an executor in place of an existing executor.**WILLS** - Validity - Where a defendant is estopped from denying validity of a will - Whether trial court need consider evidence of proper execution of the will.**WORDS & PHRASES** - Wills - "Subject to any customary law relating thereto" - Proper effect of the phrase.

### **FACTS**

The parties are Executors and Executrix of the last Will and Testament of Pa Agidigbi - the Testator. By his last Will and Testament (Exh. 80), the Testator bequeathed and gave his properties and monies to his children and relations as fully provided in his said last Will. Plaintiff claimed inter alia before the Benin High Court, an order that the Estate left by the Testators be administered according to the provisions of his Will, and sought unctio restraining the 1st and 2nd defendants from administering the property comprised in the aforesaid estate.

The 1st defendant in his counter claim sought inter alia to set aside clauses of the Will that offended against his rights as the eldest son of the Testator. The trial court found in favour of the plaintiff save in respect of 34C Dawson Street being the last place of abode of the Testator (Igiogbe). Being dissatisfied, both sides appealed to the Court of Appeal which dismissed the appeal of both sides but partially allowed the 1st defendant's appeal. Further aggrieved, both plaintiff and 1st defendant have now appealed to the Supreme Court raising 3 and 5 issues respectively

### **ISSUES FOR DETERMINATION**

1. *Whether the Court of Appeal was right in affirming that part of the judgment of the trial court relating to the application of Benin Customary Law of Intestacy in this case entitling the 1st Defendant as the eldest son to inherit the house in which the testator lived and died.*

2. *Whether the 1st Defendant and 2nd Defendant ceased to be Executors of the Will and Estate of the Testator on the attainment by Peter Agidigbi of the age of 21 in 1979. Etc. see pp. 1133 & 1139*

**HELD** (Unanimously dismissing both appeals - save 1st defendant's appeal on costs - per lead judgment of **KUTIGI JSC**)

### ***Defendant estopped from denying the validity of a Will***

1. The will (Exhibit 80) was declared valid. And having found as above, the trial court was perfectly right too, to have proceeded to consider the right of the 1st Defendant, as the eldest son of the Testator, to inherit under Mini Customary Law, the house or houses in which the Testator lived and died. The 1st Defendant was only estopped from denying the validity of the Will. He was not estopped from taking a benefit under the Will. I cannot therefore see any inconsistency in the tenor of the judgments with the plea of estoppel upheld against the 1st Defendant as submitted by Dr. Odje. (p. 1136 E)

### ***Words & phrases - Wills***

2. The lower courts were right in holding that the opening phrase “subject to any customary law relating thereto”, is only a qualification of the subject matter of the property disposed of or intended to be disposed by Will, is not a qualification of the Testator’s capacity to make a Will. The evidence of customary law is that the eldest son of the testator is entitle inherit without question the house or houses known as Igiogbe in which testator lived and died. It is common ground that this is the normal. This court too, had held in a number of cases that the Igiogbe is the house or houses where a Bini testator lived and died (p. 1137 A)

### ***Disposing of the Igiogbe by Will***

3. Now, applying the decisions in the cases above to the facts of the instance case, the Testator could not have validly disposed of the Igiogbe by Will except to his eldest surviving male child, which is the 1st Defendant herein. Any devise of the Igiogbe to any other person will on the authorities be void. I am therefore unable to agree with Dr. Odje that section 3(1) of the Wills Law did not avail the 1st Defendant and was being used as an engine of fraud. There is no issue of fraud here. (p. 1137 D)

### ***Executors of a Will***

4.1 am therefore of the view that the Court of Appeal was right when it said on page 284 thus -

*“I hold the view that the learned trial judge erred when he held that the appellant ceased to be an executor upon the attainment of the age 21 years by Peter Agidigbi. In order to make Peter Agidigbi an executor he must apply to the Probate Registrar, the mere declaration by the Testator in Clause 23 of Exhibit 80 cannot revoke the grant of probate made to the Appellant (meaning 1st Defendant).”*

Clause 23 clearly manifested an intention to make Peter an executor of the Will at the age of 21 years. He may decide to accepted or decline the offer, hence the necessity to formally apply to the Probate Registrar. (p. 1139 A)

### ***Actions - Alternative claim***

5. The short answer to the alternative relief of N900,000.00 claimed by the Plaintiff against the 1st Defendant for money had and received, is that claim is clearly in the alternative to claim 4 for an order for account. So that claim 4 for an order of account having succeeded, there was no need for the learned trial judge to have considered claim (5) for N900,000.00. And as rightly observed by Mr. Eghobamien there was no appeal against that part of

the judgment of the High Court which ordered the 1st Defendant to render the account. The issue therefore does not arise in this Court. If the 1<sup>st</sup> defendant has not complied with the order of the High Court to render an account, that alone cannot be an authority for us to grant him the alternative relief when the order for accounts still stands and binding on the 1st Defendant. (p. 1139 C)

***What constitutes the Igiogbe***

6. In the present case although three houses were involved, the evidence e the court was mat only one of the three houses to wit No. 34C; is the Igiogbe. The court is bound by the evidence led before it. So it is in this case. It must however, be emphasized here that Clause 16 of the Will which purports to devise “*freehold houses at the premises of No. 34 Dawson Road to all my children*”, is only void to the extent that it also purported to devise 34C therein to all the children other than the 1st Defendant only as the it son. (p. 1141 A)

***Evidence of proper execution of the Will***

7. The short answer here is that both the High Court and the Court of Appeal found, and I have already agreed with them considering Plaintiffs appeal above, that the 1st Defendant having regard to his expressed and implied conduct regarding the Will, was estopped from denying the validity of the Will under which he had benefited immensely. The evidence of D.Ws 2, 3 & 4 and any other Defendant’s witness for that matter, were therefore of no consequence after that conclusion and the High Court needed Hot to have even considered their evidence. But in fairness, the High Court considered and disbelieved with reasons, the evidence of both D.Ws. 3 & 4. And D.W.2 under cross-examination directly confirmed that the Testator, though blind, was mentally alert and could sign his signature. The trial High Court made findings of facts and came to the conclusion that the Will was duly attested and executed, and the Court of Appeal had no difficulty in upholding the findings and conclusions of the learned trial judge. I think the Court of Appeal was right and properly dismissed Plaintiffs appeal in that respect. The Will (Exhibit 80) was valid in all respects. (p. 1141 D)

***Costs - Awarded against a party that succeeded partially***

8. I agree with Mr. Eghobomien that the award of N2,000.00 costs against the 1st Defendant who partially succeeded in the appeal before the Court of Appeal was a mistake since the Plaintiff who had also appealed to that court failed completely. It could be a mistake of the pen and not of the head.

Costs must necessarily follow the event and it is a successful party lit, normally entitled to costs. In the circumstances I find no difficulty in tiding the N2,000.00 costs awarded against the 1st Defendant by Court of Appeal. (p. 1142 B)

**B REPRESENTATION**

Dr. Mudiaga Odje, S.A.N. with A. M. Odje for the Plaintiff  
A. O. Eghobamien, S.A.N. with G.E. Ozomo for 1st Defendant

**CASES REFERRED TO**

- C Nwosu v. The State (1986)4 NWLR (Pt. 35) 348 at 359 F - G per Aniagolu J.S.C.**  
Obijuru v. Ozims (1985)2 NWLR (Pt.6) 167 at 185 (185)4 S.C. (Pt. 1) at 179  
Macfoy v. U.A.C. Ltd (1962) AC 152  
Oke v. Oke (1974)1 NWLR 351  
**D Arase v. Arase (1981)5 S.C. 33**  
Ogiamien v. Ogiamien (1967) NMLR 245  
Adeniaye v. Governor in Council, Western Region (1972)3 S.C. 12  
Obayagbona v. Obazee (1972) 5 S.C. 247  
Lawal-Osula v. Lawal-Osula (1995) 10 KLR 1996  
**E**

**LEAD JUDGMENT BY KUTIGI JSC**

- The parties herein are Executors and Executrix of the last Will and Testament of Pa Agidigbi Uwagboe (hereinafter called "the Testator"), as well as beneficiaries under the said last Will and Testament. The 2nd defendant is a nephew of the Testator while the other parties are only three of the Testator's children. By his last Will and Testament dated the 3rd day of February 1975 (Exhibit 80 in the proceedings), the Testator devised, bequeathed and gave his lands, houses, business interests, chattels and monies to his children, including his grand children, as well as his relations as fully provided and set out in his said last Will. The plaintiff's claims are set out in para. 28 of the Statement of Claim dated 9/3/82 which read as follows -

- H** "28. WHEREFORE the plaintiff, as Executor of the Will of the Testator the said Agidigbi Uwagboe, and Beneficiary thereunder, seeks from this Honourable Court reliefs against the defendants as Executors/Executrix and Beneficiaries under the said Will as follows .

(1) As against all the defendants jointly and severally

A declaration that the last Will and Testament of Agidigbi Uwagboe

(otherwise referred to as “the Testator”) dated 3rd February 1975 proved in common form of law on or about 20th April 1978 by the plaintiff and all the defendants herein is valid and/or effectual as regards the testamentary dispositions contained therein.

(2) An order that the Estate left by the testator be administered and/or distributed according to the tenor and/or provisions of his Will aforesaid. B

(3) As against the 1st and 2nd defendants jointly and severally  
An order of Injunction restraining the 1st and 2nd defendants from administering, expending, disposing of or dealing in any way with the property comprised in the Estate aforesaid or part thereof. C

(4) As against the 1st defendant only and specifically

(i) An account of all sums of money and/or property comprised in the Estate left by the Testator received by the 1st defendant either by himself or by and/or through his agents, servants or attorneys belonging to or for on account of the plaintiff (and other beneficiaries) by virtue of the dispositions contained in the Will of the Testator. D

(ii) An order for payment over and/or distribution to the plaintiff of all sums of money and/or property aforesaid found due to him (and other Beneficiaries) upon the taking of such account.

(iii) All further and/or proper accounts, inquiries, directions and orders as the justice of the case shall require. E

(5) In the alternative to relief 4 above,

The plaintiff claims against the 1st defendant the sum of N900,000.00 (nine hundred thousand naira) being money had and received by the 1st defendant to the use of the plaintiff (and other Beneficiaries).” F

The 1st defendant filed a Statement of Defence and Counter-Claimed against the plaintiff. The 2nd defendant also filed a Statement of Defence. The 3rd defendant filed no defence but was present throughout the trial and participated fully in it through her counsel.

The 1st defendant’s Counter-Claim is set out in para. 24 of the Statement of Defence and Counter-Claim thus - G

“24. WHEREOF the 1st defendant counter claims against the plaintiff as follows:

(a) A declaration to set aside and declare as null and void clauses 16, 16(a), 16(b), 16(c) and 16(d) of the Will of late Agidigbi Uwagboe dated 3rd day of February 1975 in that it offends against Benin Native Laws and Customs which automatically vests No. 34 Samuel Ogbemudia Street, (now Dawson Road) Benin City on the 1st surviving son of the said H

*late Agidigbi Uwagboe on his death.*

*(b) A declaration that the 1st Defendant who is the eldest surviving son of the deceased having performed the funeral obsequies at the said 34 Samuel Ogbemudia Street,*

B *(now Dawson Road) Benin City registered as 25/25/59 at Benin City the last abode or house where the late Agidigbi inherited by the 1st defendant to the exclusion of any other person.*

C *(c) An order of perpetual injunction restraining the plaintiff, 2nd and 3rd defendants, servants, and or privies from altering, demolishing, transferring and or doing anything whatsoever to the said No. 34 Dawson Road, Benin City.*

D *(d) A declaration to set aside and declare as null and void clauses 20, 21, 22 and 23 of the said Will in that under Benin Native Laws and Customs all the properties of the deceased on death pass to the eldest son. On completion of the burial ceremonies he inherits the properties and in accordance with custom invites the family to distribute portions to his contributions towards the funeral. Benin Native Laws and custom do not allow a father to dispose any of his properties which will pass on his death to the eldest son without consultation with the eldest son. If this is done the eldest son is allowed by a Customary Law approve or disapprove of transfer.*

*(e) For the plaintiff to give an account of all monies, rents and properties which plaintiff has collected from estate on behalf of himself and his children particularly the following:-*

F *(i) The sum of N390,000.00 received sometime in November 1980 from the account of the estate at Benin City*

*(ii) One freehold house and premises known as No. 95, Akpakpava Street, Benin City.*

G *(iii) The ground floor of Plot 1714 LEDB at No. 39 Rasaq Balogun Surulere, Lagos.*

*(iv) A storey building at No. 114 Upper Lawani Street, Benin City.*

*(v) A piece of land measuring 50 x 60 feet Opposite Edo Market, New Benin, Benin City.*

H *(vi) A land measuring 112 feet by 140 feet at Uzebu Quarters, Benin City.*

*(vii) Rubber Plantation at mile 18 Benin/Sapele Road.*

*(viii) First Floor of No.2, Oba Market Road, Benin City.*

*(ix) House at No. 18 Ivbiogie Street, Benin City.*

*(x) House at No. 38, Airport Road, Benin City.*

(f) A declaration that the 1st defendant claims that this Honourable Court shall declare as null and void the said Will dated at Benin City the 3rd day of February, 1975 in that it failed to comply with S. 6 of Wills Law Cap. 172 the Laws of Bendel State of Nigeria 1976 and other essential formalities of a valid Will. That is to say, that the said Will was not properly executed in that it was not read to the deceased in the presence of witnesses or witnesses who attested the Will. And so it was not proved that the deceased who was blind understood the contents of the Will and signed. B

(g) The 1st defendant claims a revocation by this Honourable Court of the grant of Probate dated 30th April, 1978 with a Will dated 3rd February 1975 annexed at Benin City; in that Probate Registrar failed and or refused to comply with Order 33 Rule 24 of the High Court (Civil Procedure) Rules Cap 65 Laws of Bendel State of Nigeria 1976, and other relevant Laws before issuing the said grant of probate and other essential formalities for the issuance of Probate. C D

At the trial before Ohiwerei J., holden at the High Court, Benin City, the plaintiff testified for himself and called no witnesses. The 1st defendant did not only testify but he called five other witnesses who testified on his behalf. As stated above the 3rd defendant filed no defence and so did not testify. In a reserved judgment the learned trial Judge considered the evidence before him and the submissions of learned counsel for the parties and held as follows:- E

“From my findings in this action the plaintiff is entitled to judgment in terms of his claims except in respect of No. 34C, Dawson Road, Benin City. Accordingly, I declare Exhibit 80 - the last Will and Testament of Agidigbi Uwagboe (Deceased) - dated 3rd February, 1975 and proved in common form on 30th April, 1978 valid as regard the testamentary dispositions contained therein subject to the testamentary disposition of No. 34C, Dawson Road, Benin City which I hereby declare null and void. Consequent upon this declaration I make the following orders:- F

(2) That the Estate of Agidigbi Uwagboe (Deceased) be administered and/or distributed strictly in accordance with the provisions of Exhibit 80 No. 34C excepted. G

(3) That the 1st and 2nd defendants be and are hereby restrained from further participation in the administration of the Estate of Agidigbi Uwagboe other as Executors or Trustees, and from expending, disposing or dealing in any way with same. H

(4) That the 1st defendant do within 60 days hereof file in this court an account, verified by affidavit in respect of -

(a) Rents collected from No. 39 Rasaq Balogun Street, Surulere,

Lagos.

(b) *Financial Management of Agidigbi Uwagboe Sawmill at Owoseni Street, Benin City from 1976 to January 1985, including the machine and motor vehicles connected therewith.*

B (c) *Forest Concessions granted to Agidigbi Uwagboe.*

(d) *Proceeds of logs sold to WATA Timber Company Limited.*

(e) *N6,000.00 removed from safe of late Agidigbi Uwagboe.*

(f) *N81,000.00 collected from AT & P Sapele and WATA Timber Company Limited respectively.*

C *It is further ordered that a copy of the account so prepared be served on the plaintiff and each of the other children of Agidigbi Uwagboe with liberty to the plaintiff to file and serve notice of affidavit of objection to the said account within 30 days of the service on him of a copy of the account. Thereafter the court shall settle areas of dispute."*

D With regard to the counter-claim of the 1st defendant, the learned trial Judge stated thus -

*"I accept the evidence tendered by the 1st defendant and his witnesses in respect of No. 34C, Dawson Road, Benin City. Accordingly, I declare:*

E *(1) The testamentary disposition of No. 34C, Dawson Road, Benin City void ab initio as it offends against section 3 of the Wills Law. I further declare the 1st defendant, as the oldest surviving son of his deceased father, entitled, as of right, under Bini Customary Law, to inherit the No. 34C, Dawson Road, Benin City.*

F *(2) That the 1st defendant has satisfied the condition precedent to inheritance under Bini Native Law and Custom by performance and completion of the second burial of his deceased father (Agidigbi Uwagboe).*

*The 1st defendant, however, failed to prove reliefs (d), (e), (f) and (g) which are therefore hereby dismissed."*

G Both the plaintiff and the 1st defendant were dissatisfied with the judgment of the learned trial Judge. The plaintiff was dissatisfied with that part of the judgment which declared as null and void clause 16 of the Will (Exhibit 80), and adjudged No. 34C Dawson Road, Benin City to the 1st defendant and declaring Exhibit 79 as not binding on the parties. He therefore appealed to the Court of Appeal. The 1st defendant on his own part was not satisfied with the entire judgment and consequently cross-appealed to the Court of Appeal. The Court of Appeal sitting in Benin City in its judgment delivered on 13th day of December 1991 concluded as follows -

H *"After considering the arguments canvassed by both counsel, the appeal (meaning the 1st defendant's appeal) is dismissed save that part*

*which declares that the appellant ceased to be an Executor upon the attainment of the age of 21 years by Peter Agidigbi. In respect of that order the appeal (meaning 1st defendant's appeal) is allowed.*

*The cross-appeal (meaning plaintiff's appeal) is dismissed. The respondent is entitled to the costs of this appeal which I fix at N2,000.00 against the appellant (Meaning 1st defendant)."*

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(Words in bracket supplied by me).

Further aggrieved by the decision of the Court of Appeal both the plaintiff and the 1st defendant have now respectively appealed to this court. The two appeals will be taken in turn.

#### Plaintiff's Appeal

In the Notice of Appeal filed by the plaintiff he said he is complaining against that part of the judgment "*striking down and/or nullifying the provisions of clauses 16 and 23 of the Will respectively devising to all the children of the testator the Igiogbe at No. 34C Dawson Road, Benin City where he lived and died; and directing the cesser of the 1st and 2nd defendant's Executorship of his Will and estate on the attainment of 21 years by his son Peter Agidigbi as well as that part of the judgment which dealt with the plaintiff/appellant's alternative claim of N900,000.00 but failed to grant such relief.*"

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Six grounds of appeal were filed. Dr Mudiaga Odje SAN, learned counsel for the plaintiff in his brief submitted the following three issues as arising for determination -

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"1. Whether the Court of Appeal was right in affirming that part of the judgment of the trial court relating to the application of Benin Customary Law of Intestacy in this case entitling the 1st defendant as the eldest son to inherit the house in which the testator lived and died.

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2. Whether the 1st defendant and 2nd defendant ceased to be Executors of the Will and Estate of the Testator on the attainment by Peter Agidigbi of the age of 21 in 1979.

3. Whether having regard to the facts and circumstances of this case, the plaintiff is entitled to the judgment/order of this Honourable Court for the sum of N900,000.00 being relief claimed as alternative to order for account and payment over to him.

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On issue (1) it was submitted that the Court of Appeal was not right in affirming part of the decision of the trial court adjudging No. 34C Dawson Road, Benin City to the 1st defendant under an alleged Benin Customary Law of Intestacy. He said there was no satisfactory proof that the Benin Customary law alleged was applicable to the special facts of this case having regard to the all embracing and pervasive estoppel by Conduct successfully raised, found and established against the 1st defendant. That this is not a case in which the courts could take judicial notice of the

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application of the Bini Customary Law designed for normal, just and deserving situations. He said the High Court having found that the 1st defendant having regard to the express and implied conduct is estopped from denying the validity of the Will (Exhibit 80), a finding with which the Court of Appeal agreed, the lower courts ought not to have proceeded to consider the right of the 1st defendant as the eldest son of the Testator to inherit under Benin Customary law, the house in which the later lived and died i.e. No. 34C Dawson Road, Benin City. That the misconduct of 1st defendant disentitled him to his right of inheritance under Benin Customary Law governing intestacy. To that extent the judgments of the High Court and the Court of Appeal herein are contradictory and unsatisfactory, and ought to be set aside. He referred to the case of *Felix Nwosu v. the State* (1986) 4 NWLR (Pt.35) 348 at 359 F-G per Aniagolu, J.S.C.

It was further contended that nullifying clause 16 of the Will was tantamount to permitting the 1st defendant to use section 3 of the Wills Law as an engine of fraud. That having regard to the conduct of the 1st defendant in accepting and adopting provisions of the Will under which he has benefitted over the years, he is debarred from further relying on or taking benefit under section 3 of the Wills Law as he is no longer regarded as the eldest son of the Testator. He said the 1st defendant's claim to customary inheritance right under section 3 of the Wills Law is in conflict with the rule of equity which frowns on the use of a statute as an engine of fraud and that the rules of equity should prevail in the matter. He cited in support the case of *Obijuru v. Ozims* (1985) 2 NWLR (Pt.6) 167 at 185; (1985) 4 S.C. (Pt.1) 142 at 179; *N.I.C.O.N v. Power & Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt.14) 1 at 29; (1986) 1 S.C. 1 at 52.

An alternative submission to the above was also made. It was that assuming but without admitting, that the customary law of inheritance alleged by the 1st defendant was satisfactorily proved, then the Igiogbe of the Testator is No. 34C Dawson Road, where he lived, died and was buried, and does not include No. 34A and 34B Dawson Road, notwithstanding that all the three houses were built on a piece of land covered by one deed of conveyance executed in 1967, Exhibit 70 in the case. That the wish and intention of the Testator expressed in his Will (Exhibit 80), describing and designating No. 34C as his Igiogbe is clear. Further the Testator never lived at Nos. 34A and 34B Dawson Road which were used for his commercial purpose by being let to the Ministry of Education. The 1st defendant had also joined the other children and beneficiaries of the Will and Estate in sharing the rents received from the Ministry of Education. That the limited extent

of the Igiogbe of the Testator having been settled by the concurrent findings of the lower courts should not be disturbed.

Replying, Mr. Eghobamien, Learned Counsel for the 1st defendant submitted that the Will (Exhibit 80) having been admitted to probate can only be set aside by a judicial order which was what the 1st defendant sought to do. He said what was pleaded in paras. 1, 2, 6, 7, 10, 17 & 20 of the 1st defendant's Statement of Defence and counter claim, did not amount to a declaration that the Will was valid. He said if the Will was void, its acceptance by anybody would not validate it and similarly deriving a benefit from an unlawful act or under a void document, did not make such an act or document unchallengeable. We were referred to the case of Macfoy v. U.A.C. Ltd. (1962) AC 152. B  
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It was also submitted that the devise of No. 34C Dawson Road, Benin City comprising 3 buildings by the Testator "*to all the children to be used as a family house*", was contrary to section 3(1) of the Wills Law, because there was abundant evidence on record particularly Exhibits 70, 79 & 80, that the Testator lived and died at No. 34C Dawson Road, Benin City. The entire No. 34 therefore constituted "Igiogbe" in this case. And the Igiogbe under Benin Customary Law and the decisions in Oke v. Oke (1974) 1 NMLR 351 and Idehen v. Idehen (1991) 6 NWLR (Pt.198) 282, automatically belongs to the eldest surviving son. It was therefore wrong for the trial court and the Court of Appeal to have granted to the 1st defendant as the eldest surviving son of the Testator only No. 34C Dawson Road, Benin City to the exclusion of No. 34A and No. 34B Dawson Road, which are part of the Igiogbe. He said the Court of Appeal failed to follow the decisions in Oke v. Oke (supra); Idehen v. Idehen (supra); Ogiamien v. Ogiamien (1967) NMLR 245; Arase v. Arase (1981) 5 S.C. 33 and Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372. D  
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It is clear from the submissions of counsel that while the plaintiff said the 1st defendant by his conduct was not entitled to inherit from the Testator under Bini Customary Law and should be confined to what he has already got from the courts, the 1st defendant is saying that what he was awarded so far by the courts has fallen short of what he ought to have got. You will remember that the 1st defendant was awarded No. 34C Dawson Road. He now wants in addition to be awarded No. 34A and No. 34B Dawson Road, Benin City. G

The record clearly shows that Dr. Odje had a lot to say already about the conduct of the 1st defendant both in the High Court and in the Court of Appeal. He had therefore in fact nothing new to say about that in this court. And the courts below largely agreed with him. Thus the learned H

trial Judge on page 26 of the judgment said -

*"I agree entirely with Dr Odje's submission that having regard to the express and implied conduct of the 1st defendant regarding the Will (Exhibit 80), the 1st defendant is estopped from denying the validity of the Will."*

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On page 263 he continued thus -

*"By positive acts manifested in the Exhibits enumerated and relied on by Dr Odje and the fact that the 1st defendant obtained immense benefits from the Will, I hold that the 1st defendant cannot now be heard to say that the Will is invalid. He is estopped."*

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The Court of Appeal affirming the finding of the learned trial Judge said on page 568 thus -

*"I am of the view that the learned trial Judge was perfectly right in holding that by the positive acts manifested in the numerous Exhibits enumerated above and the fact that the appellant (that is the 1st defendant), obtained immense benefits from the Will (Exhibit 80), he (1st defendant) is estopped from denying the validity of the Will he has consistently propounded. The law is well established that one cannot approbate and reprobate - that is, one cannot take the advantage of a document or legal right and at the same time say that it is not a document which binds one or is not a legal right of which one is entitled to have the advantage."*

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I am clearly of the view that the lower courts were both right. The will (Exhibit 80) was declared valid. And having found as above, the trial court was perfectly right too, to have proceeded to consider the right of the 1st defendant, as the eldest son of the Testator, to inherit under Bini Customary Law, the house or houses in which the Testator lived and died. The 1st defendant was only estopped from denying the validity of the Will. He was not estopped from taking a benefit under the Will. I cannot therefore see any inconsistency in the tenor of the judgments with the plea of estoppel upheld against the 1st defendant as submitted by Dr. Odje

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This brings me to the applicability of section 3(1) of the Wills Law 1976, and whether the lower courts were right in holding that only No. 34C Dawson Road, Benin City can be said to be the Igiogbe to the exclusion of No. 34A and No. 34B Dawson Road, Benin City. I have already said above that the 1st defendant was not estopped from benefitting under the Will. Section 3(1) of the Wills Law therefore in my view applied it reads -

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*"Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner herein after 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."*

The lower courts were right in holding that the opening phrase "subject to any customary law relating thereto", is only a qualification of the subject matter of the property disposed of or intended to be disposed by Will, and is not a qualification of the Testator's capacity to make a Will see Oke v. Oke (1974) NMLR 35; Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372; Idehen v. Idehen (1991) 6 NWLR (Pt.198) 282; Lawal-Osula v. Lawal-Osula (1995) 9 NWLR (Pt.419) 259.

The evidence of customary law is that the eldest son of the testator is entitled to inherit without question the house or houses known as Igiogbe in which the testator lived and died. It is common ground that this is the normal rule. This court too, had held in a number of cases that the Idiogbe is the house or houses where a Bini Testator lived and died (see for example Oke v. Oke (supra); Idehen v. Idehen (supra) and Lawal-Osula v. Lawal-Osula (supra).

Now, applying the decisions in the cases above to the facts of the instant case, the Testator could not have validly disposed of the Igiogbe by Will except to his eldest surviving male child, which is the 1st defendant herein. Any devise of the Igiogbe to any other person will on the authorities be void see Idehen v. Idehen (supra); Lawal-Osula v. Lawal-Osula (supra). I am therefore unable to agree with Dr Odje that section 3(1) of the Wills Law did not avail the 1st defendant and was being used as an engine of fraud. There is no issue of fraud here.

The learned trial Judge on page 268 of the judgment observed as follows

*"The fact that the testator lived and died at No. 34C Dawson Road is not in dispute. I accept the evidence tendered by the 1st defendant that the house which a deceased makes his permanent home before his death, known in Benin as Igiogbe, passes to his eldest surviving son under Bini Native Law and Custom upon the eldest son completing the customary burial rites of his deceased father. There is a long line of decided cases in support of this custom and I take judicial notice of it. It is indisputable that Agidigbi Uwagboe's Igiogbe is No. 34C Dawson Road, Benin City. It is common ground that there are three buildings at No. 34 Dawson Road, Benin City, namely: 34A, 34B and 34C. The visit by the court to the said No. 34 Dawson Road, confirmed this. It is also common ground that No. 34C, was the permanent place of residence of the testator before his death and that No. 34A was rented out to the Ministry of Education. No. 34B*

*was unoccupied by anybody."*

Confirming the view of the learned trial Judge above, the Court of Appeal said on page 575 as follows -

B *"I think all the parties in this case agree that No. 34C Dawson Road is the principal house of the testator where he lived and died and where he was buried. There are two other houses in the compound No. 34A and 34B Dawson Road. No. 34A was let to the Ministry of Education and No. 34B was unoccupied. The learned trial Judge visited the premises in the presence of all the parties. They all saw that the houses are state and distinct."*

C I entirely agree.

These are concurrent findings of facts. There is no reason to interfere. Dr Odje in his alternative submission has in fact urged us to uphold the findings. This is the appropriate time for me to do so as I have done Dr Odje having lost the principal submissions. Issue (1) therefore fails.

D Issues (2) & (3) will be taken together. Dr Odje submitted that having regard to Clause 23 of the Will the 1st defendant and the 2nd defendant ceased automatically to be executors of the Testator's Will and Estate on the attainment by Peter Agidigbi of the age of 21 in 1979 as found by the trial court. He said the 1st defendant himself  
E admitted under cross-examination that Peter Agidigbi was 21 when he testified on page 222 of the record.

It was also submitted that simply because the 1st defendant has not filed any account of his dealings with the estate as ordered by the trial High Court, this court should award to the plaintiff the  
F N900,000.00 claimed by him as alternative relief for accounts.

Mr. Eghobamien in response submitted that the Court of Appeal was right when it held that Peter Agidigbi could not automatically become an executor on attaining 21 years, unless he applied to the Probate Registrar for grant of probate. Counsel also submitted  
G that since the plaintiff did not appeal in respect of his claim for N900,000.00 from the High Court to the Court of Appeal, this court lacks the necessary jurisdiction to pronounce on the matter now.

Now, Clause 23 of the Will reads as follows -

H *"I direct my trustees to hand over my estate to Danaha, Peter, Osaror, Osazuwa, Mrs. Amumwengbere Evbuomwan, Osayimwenbe and Uwagboe when Peter attains the age of 21 years of age. I further direct that any four of these my said children can take resolution affecting my property."*

There was evidence clearly that Peter attained the age of 21 years

in 1979. The 1st defendant admitted this as well. I am therefore of the view that the Court of Appeal was right when it said on page 284 thus -

*"I hold the view that the learned trial Judge erred when he held that the appellant ceased to be an executor upon the attainment of the age of 21 years by Peter Agidigbi. In order to make Peter Agidigbi an executor he must apply to the Probate Registrar; the mere declaration by the Testator in Clause 23 of Exhibit 80 cannot revoke the grant of probate made to the appellant (meaning 1st defendant)."*

Clause 23 clearly manifested an intention to make Peter an executor of the Will at the age of 21 years. He may decide to accept or decline the offer, hence the necessity to formally apply to the Probate Registrar. Enough of that.

The short answer to the alternative relief of N900,000.00 claimed by the plaintiff against the 1st defendant for money had and received, is that that claim is clearly in the alternative to claim 4 for an order for account. So that claim 4 for an order of account having succeeded, there was no need for the learned trial Judge to have considered claim (5) for N900,000.00. And as rightly observed by Mr. Eghobamien there was no appeal against that part of the judgment of the High Court which ordered the 1st defendant to render an account. The issue therefore does not arise in this court. If the 1st defendant has not complied with the order of the High Court to render an account, that alone cannot be an authority for us to grant him the alternative relief when the order for accounts still stands and binding on the 1st defendant.

Issues (2) & (3) therefore fail.

All the three issues having failed, the plaintiffs appeal must be dismissed. It is hereby dismissed.

1st defendant's appeal

Mr. Eghobamien SAN, Learned Counsel for the 1st defendant on page 5 of his brief identified the following issues for determination in the appeal:

1. Were the learned Justices of the Appeal Court right in holding that No. 34C Dawson Road, Benin City which is part of the premises known as No. 34 Dawson Road, Benin City where the deceased lived, died and was buried can be said to be Igiogbe (ancestral home) to the exclusion of No. 34A and No. 34B, Dawson Road, Benin City in view of Exhibits 70, 79 and 80, i.e. can only part of a compound be the Igiogbe?

2. Did the Court of Appeal apply properly Section 3(1) of the Wills Law of Bendel State 1976 and follow the decisions of the Supreme Court in Idehen v. Idehen (1991) 6 NWLR (Pt.198) 382 at 411-421 and Oke v.

Oke (1974) 1 NMLR 351 at 355/7 after holding that Clause 16 of Exhibit 80 was void?

B 3. Whether the learned Justices of the Appeal Court were right in declaring the disputed Will, Exhibit 80, valid when they failed to pronounce on the vital issues canvassed before them relating to the evidence of D.W.2, D.W.3 and D.W.4

4. Having regard to the totality of the evidence were the Justices of the Appeal Court right in not upholding the appellant's (meaning 1st defendant) appeal?

C 5. Whether costs does not follow the cause in the circumstance of this case.

Issues (1) and (2) above would appear to have been answered by me already when I considered the plaintiff's issue (1), and came to the conclusion that the Court of Appeal was right in affirming the part of the judgment of the trial court relating to the application of Benin Customary  
D Law of Intestacy in this case entitling the 1st defendant, as the eldest son, to inherit the house in which the Testator lived and died. The lower courts found and I agree with them, that No. 34C Dawson Road is the house where the Testator lived, died and was buried. It was his permanent home. No. 34A was rented out while No. 34B was unoccupied. The learned trial  
E Judge also visited the premises in the presence of all the parties. They all saw the three houses which were separate and distinct. Mr. Eghobamien contended that since in Exhibit 70 which is the Deed of Conveyance, the property was simply described as No. 34 Dawson Road, Benin City, and in Exhibit 79 "Secret Important Hints about my Birth, Life and Burial", the  
F Testator described himself as living at No. 34 Dawson Road, the lower courts ought to have come to the conclusion that the Testator made Clause 16 of the Will without regard to section 3(1) of the Wills Law and that the 1st defendant is entitled to succeed to all the three houses at No. 34 Dawson Road, that is houses Nos. 34A, 34B & 34C respectively. I think it should be  
G clear by now that no provision in any of the Exhibits 70, 79 and 80 or other exhibits for that matter, can override the provisions of the Wills Law. And I think that is all that this case is about. I have said earlier that applying the earlier decision of this court to the facts of this case, the lower courts properly and correctly applied section 3(1) of the Wills Law and properly and correctly followed too, the decisions in *Idehen v. Idehen* (supra); *Oke v. Oke* (supra); *Olowu v. Olowu* (supra) amongst others. For example in *Idehen v. Idehen* (supra) two houses at No. 62 Akpakpava Street and No.1 Oregbemi Ikpoba Hill respectively both in Benin City, were constituted as the Igiogbe  
H on the ground that on the evidence before the court the

deceased lived in these houses in his life time. Also in Oke v. Oke (supra), No. 43 Warri-Sapele Road was regarded by all the parties as only one home even though it consisted of a complex of three units. The evidence was that the testator lived therein during his life time and regarded same as the Igiogbe.

In the present case although three houses were involved, the evidence before the court was that only one of the three houses to wit No. 34C; is the Igiogbe. The court is bound by the evidence led before it. So it is in this case.

It must however, be emphasized here that Clause 16 of the Will which purports to devise "*freehold houses at the premises of No. 34 Dawson Road to all my children*", is only void to the extent that it also purported to devise No. 34C therein to all the children other than the 1st defendant only as the eldest son. The other houses Nos. 34A & 34B are still available for distribution in accordance with the wishes of the Testator if necessary. It is therefore not correct to say that the whole of Clause 16 of the Will is void. I repeat it is only void to the extent that it purported to dispose of No. 34C to any person other than the 1st defendant who is the Testator's eldest son.

Issues (1) and (2) therefore fail.

Issues (3) and (4) concern the validity of the Will in relation to the evidence of D.Ws 2, 3 & 4. The short answer here is that both the High Court and the Court of Appeal found, and I have already agreed with them considering plaintiff's appeal above, that the 1st defendant having regard to his expressed and implied conduct regarding the Will, was estopped from denying the validity of the Will under which he had benefitted immensely. The evidence of D.Ws 2, 3 & 4 and any other defendant's witness for that matter, were therefore of no consequence after that conclusion and the High Court needed not to have even considered their evidence. But in fairness, the High Court considered and disbelieved with reasons, the evidence of both D.Ws 3 & 4. And D.W.2 under cross-examination directly confirmed that the Testator, though blind, was mentally alert and could sign his signature. The trial High Court made findings of facts and came to the conclusion that the Will was duly attested and executed, and the Court of Appeal had no difficulty in upholding the findings and conclusions of the learned trial Judge. I think the Court of Appeal was right and properly dismissed plaintiff's appeal in that respect. The Will (Exhibit 80) was valid in all respects. Issues (3) & (4) must also fail.

Issue (5) is on costs. It was contended that the Court of Appeal erroneously awarded N2,000.00 costs against the 1st defendant who partially succeeded in the appeal but awarded no costs against the plaintiff who lost his entire appeal. Counsel said it is trite law that costs should

follow

the event and that a successful party is entitled to costs. That the court should have exercised its discretion judicially and judiciously. That a successful party must not be deprived of his costs without cogent reasons. We were referred to the case of *Adenaiya v. Governor in Council, Western Region* (1962) 1 SCNLR442; *Obayagbona v. Obazee* (1972) 5 S.C. 247.

B I observed there was no response from Dr. Odje on the issue of costs in his brief. He probably realised the mistake. I agree with Mr. Eghobamien that the award of N2,000.00 costs against the 1st defendant who partially succeeded in the appeal before the Court of Appeal was a mistake since the plaintiff who had also appealed to that court failed completely. It could be a mistake of the pen and not of the head. Costs must necessarily follow the event and it is a successful party that is normally entitled to costs. In the circumstances I find no difficulty in setting aside the N2,000.00 costs awarded against the 1st defendant by the Court of Appeal. Issue (5) therefore succeeds and it is allowed.

D Conclusion

Plaintiff's appeal having failed it is hereby dismissed. 1st defendant's appeal also fails except on costs. It is also dismissed. The 1st defendant's appeal having succeeded in part, he is entitled to costs. He is awarded costs assessed at N1,000.00 (One Thousand Naira) only.

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### **BELGORE JSC**

I have had a preview of the judgment of my learned brother, Kutigi, J.S.C. and I am in full agreement with him on his reasoning and conclusion.

F In *Idehen v. Idehen* (1991) 6 NWLR (Pt.198) 382 411-421; *Oke v. Oke* (1974) 1 NMLR 351, 355-357; *Olowu v. Olowu* (1985) 3 NWLR (Pt.13) 372. and *Lawal Osula v. Lawal-Osula* (1995) 9 NWLR (Pt.419) 259 this court has expressed clearly the Benin Customary Law of inheritance vis-a-vis the Wills Law about the position of Igiogbe, the seat of the deceased, whose estate comes into question. I am satisfied that the plaintiffs appeal has no merit and I dismiss it. The 1st defendant's appeal succeeds only as to costs which is fixed at N1,000.00 otherwise his appeal also fails.

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### **OGWUEGBU JSC**

I have had the advantage of a preview in draft of the judgment just delivered by my learned brother Kutigi, J.S.C. I entirely agree with him that the plaintiff's appeal be dismissed and the 1st defendant's appeal be allowed

in part for the reasons leading to the conclusions. I also agree with the orders made by him.

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**MOHAMMED JSC**

I entirely agree with the opinion of my learned brother, Kutigi, J.S.C., in the lead judgment, just read, that the 1st defendant's appeal could only succeed on the issue of costs.

The appeal against the refusal of the two lower courts to declare the entire compound of No. 34 Dawson Road, Benin, as the Igiogbe has also no merit at all.

There are three separate houses in No. 34 Dawson Road. They were known during the life of Mr. Agidigbi, the testator as Nos. 34A, 34B and 34C. The testator lived, died and was buried at Nos. 34C No. 34A was rented to the Ministry of Education and No. 34B unoccupied.

The customary law relating to Igiogbe has been stated in several decisions of this court - see: *Arase v. Arase* (1981) 5 S.c. 33; *Oke v. Oke* (1974) 1 NMLR 351 and recently the case of *Idehen v. Idehen* (1991) 6 NWLR (Pt.198) 382. The Learned Senior Advocate, Mr. Eghobarnienis correct that in *Idehen v. Idehen* (supra) this court declared 3 houses as the Igiogbe. But the testator clearly wanted No. 34C to be regarded as the Igiogbe because in Clause 16(d) of his Will, Mr. Agidigbi Uwagboe dedicated the first and second parlours of 3rd floor of No. 34C as permanent praying premises. The testator lived, died and was buried in No. 34C. Above all the two lower courts have made concurrent findings that only No. 34C could be declared as the Igiogbe.

I will therefore dismiss the appeal of the 1st appellant except for the issue of costs. I abide by the award made in the lead judgment. I also dismiss the cross-appeal.

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**IGUH JSC**

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree that both plaintiff's and the 1st defendant's appeals are without substance and should be dismissed.

I therefore dismiss both appeals and abide by the order to costs contained in the lead judgment.