

SUPREME COURT OF NIGERIA
TUESDAY 9TH JULY, 1996. SC. 144/1990
CORAM:- M. L. UWAIS, A. B. WALI,
M. E. OGUNDARE, S. U. ONU, Y. O. ADIO, JJSC

GBADAMOSI RABIU APPELLANT

AND

SILIFATU ABASI RESPONDENT

CUSTOMARY LAW - *Proof of a custom relied upon - The onus is on a party relying on a custom - To plead and establish it by evidence.*

JUDGMENTS - *Appeals - Failure of the main relief embodying other reliefs granted - Where there is no appeal against those other reliefs - Whether the entire claim will be dismissed.*

SUCCESSION - *Yoruba native law and custom - Real property of a deceased - Goes to the children to the exclusion of other blood relations.*

FACTS

No. 20 Olowu Street Lagos, being the property in dispute belonged to one Madam Awape, the appellant's mother. The plaintiff/respondent is the daughter of one Idirisu, another son of Madam Awape. Idirisu did not survive her mother. Madam Awape, though the respondent did. Respondent filed an action against the appellant seeking to established that she has stepped into her late father's position to now be entitled to share the property in issue with the appellant.

The trial court erroneously relied on the case of Danmole v. Dawodu 3 F.S.C. 46 in finding for the respondent. Appellant's appeal to the Court of Appeal was dismissed as that court upheld the trial court's judgment. Being aggrieved, appellant has further appealed to the Supreme Court which had to determine the appeal based on a main issue.

ISSUE FOR DETERMINATION

Whether the children of a person, who does not survive his parent that has died intestate, are entitled, under Yoruba customary law, to share the property of their father's parent with the surviving children of their father's parent.

HELD (Unanimously allowing the appeal per lead judgment of **ADIO JSC**)

Proof of a custom relied upon

1. The onus is on a party who relies on a custom to plead and establish it by evidence as it is a question of fact. It can be judicially noticed if it has been no often proved, pronounced and acted upon by court of superior or coordinate jurisdiction in the same area to such an extent that it can be said that it has acquired notoriety. There is, however, an authority for the proposition that, contrary to the contention of the learned counsel for the appellant, a customary law can be judicially noticed on the basis of a single decision of a court of superior jurisdiction. The onus was, therefore, on the respondent to lead evidence to support the Yoruba customary law on which she relied. (p. 1384 H)

Succession - Yoruba native law and custom

2. The legal position, in the circumstances in this case is that, under Yoruba native law and custom, the real property of a deceased person who dies leaving children surviving him, goes to the children to the exclusion of oilier blood relations. The real property does not go to the deceased's uncles, aunts and cousins. The answer to the only main issue is in the negative. The appeal succeeds and it is hereby allowed. (p. 1387 C)

Failure of the main relief

3. The judgment of the court below dealt only with the relief in paragraph (1) of the respondent's claim. The learned trial judge also granted all the reliefs set out in paragraphs (2) to (5) and there was no appeal against the judgment of the learned trial judge to the Court of Appeal in that connection. As the reliefs claimed in paragraphs (2) to (5) of the respondent's claim depended on her success in respect of the relief claimed in paragraph (1), the judgment of the Court of Appeal and the judgment of the learned trial judge are hereby set aside. In their places is hereby substituted an order dismissing the respondent's claim in its entirety. (p. 1387 D)

NOTABLE POINTS OF INTEREST

ADIO JSC

Redevelopment of a family property - Effect

1. Assuming, for the purpose of argument, that the property of Madam Awake, a Yoruba woman who died intestate, devolved on the appellant and the respondent as family property under Yoruba customary law, the fact that the appellant spent his money to redevelop it from bungalow to a four-storey building will not in any way affect or diminish the right of the respondent therein because improvement of family property by a member of the family does not divest the property of its original character, it remains a family property. (p. 1383 H)

Ascribing to a case what it did not decide

2. The question whether, in circumstances similar to the present circumstances, a grandchild could, under Yoruba native Law and custom share in the property of his grandfather, who has died intestate, when the father of the grandchild did not survive the grandfather at the time of the grandfather's death, was not raised or decided in *Danmole's* case. That was to be expected because the legal principle is that a court should limit and confine itself severely to the issues raised by the parties in the case before it. (p. 1387 A)

REPRESENTATION

Chief A. O. Adefala - For the Appellants

S. Abayomi, Esq. - For the Respondents

CASES REFERRED TO

Danmole v. Dawodu 3 F.S.C. 46

Shelle v. Chief Ereko II 2 F.S.C. 65

Din v. African Newspapers of Nigeria Ltd. (1990) 3 N.W.L.R. (Pt. 139) 392

Kindey v. Military Governor, Gongola (1988) 2 N.W.L.R. (Pt. 77) 445

Romaine v. Romaine (1992) 4 N.W.L.R. (Pt 238) 650

Olugbemiro v. Ajagungbade III (1990) 3 N.W.L.R. (Pt. 136) 37

United Bank for Africa Ltd. v. Achoru (1990) 6 N.W.L.R. (Pt 156) 254

Adeseye v. Taiwo (1956) 1 F.S.C. 84

LEAD JUDGMENT BY ADIO JSC

The property in dispute is at No. 20 Olowu Street, Lagos. It belonged to one Madam Ayisatu Awape (hereinafter referred to as "Madam Awape"). In her lifetime she had three children, namely, Alhaji Gbadamosi Rabiu (the defendant/appellant), Idirisu (the father of the plaintiff/respondent) and Abudu Salami. The said Abudu Salami had no child and he died in 1920. In the case of Idirisu, he died about 1940 and he was survived by a daughter, Silifatu Abasi, who is the present respondent. Madam Awape who was, of course, the grandmother of the respondent, died about 1950 and she was survived by only one son, the present appellant.

Sometime in 1952 the property aforesaid at No. 20, Olowu Street, Lagos, was pulled down and was re-developed into a four storey building with money allegedly provided by the appellant. After the death of Madam

Awape, there was a disagreement between the appellant and the respondent on the question whether the aforesaid property should be inherited by the appellant alone or by the appellant and the respondent. The contention of the respondent was that she was entitled to whatever would have been her father's share in the property of Madam Awape if her father had survived Madam Awape. For that reason, she, as plaintiff, instituted an action against the appellant in the High Court of Lagos State in which she claimed the following reliefs:-

"(1) A declaration that the property situate and known as No. 20, Olowu Street, Lagos, belong (s) to the plaintiff and the defendant under native law and custom.

(2) An order for partition of the said property consisting of 20 (Twenty) rooms and one store.

(3) An order for injunction restraining the defendant, his servants and/or agents from interfering with the plaintiff's possession of the said property.

(4) An order for account for all the monies collected by the defendant in respect of the said property from the 1st day of August, 1981.

(5) Payment over to the plaintiff of what is due to her on the taking of such an account"

The learned trial Judge gave judgment in favour of the respondent and granted all the reliefs claimed by her. Relying on the decision in *Danmole & Ors. v. Dawodu & Ors*, 3 (1958) SNCLR 6; (1958) FS.C.46 he held that the respondent was entitled to share in the property aforesaid left by Madam Awape who was a Yoruba woman that died intestate. Dissatisfied with the judgment, the appellant lodged an appeal against it to the Court of Appeal. The court below affirmed the judgment of the learned trial Judge, with modification. Dissatisfied with the judgment of the court below, the appellant lodged a further appeal to this court.

There is a matter which should be dealt with as a preliminary issue. This is to ensure that it does not becloud the fundamental and the only main issue in this case, which is whether the respondent could legally claim what would have been her own father's share in the property of Madam Awape though Madam Awape was not survived by the respondent's father. There was allegation that the appellant re-developed Madam Awape's property in question at his own expense. The question is whether the re-development of the aforesaid property at the expense of the appellant in any way affects the determination of the main issue in this case. The answer to the question is in the negative. Assuming, for the purpose of argument, that the property of Madam Awape, a Yoruba woman who died

intestate, devolved on the appellant and the respondent as family property under Yoruba customary law, the fact that the appellant spent his money to re-develop it from bungalow to a four-storey building will not in any way affect or diminish the right of the respondent therein because improvement of family property by a member of the family does not divest the property of its original character, it remains a family property. See *Shelle v. Chief Asajon of Oloja Ereko II* (1957) SCNLR 286; (1957)2 F.S.C. 65.

The parties filed and exchanged briefs. The appellant filed an appellant's brief and the respondent filed a respondent's brief. A number of issues for determination were set down in the brief of each of the parties. I stated above that, in my view, there was only one main or fundamental issue to be determined by this court. There were five reliefs claimed by the respondent. According to the court below, four of the reliefs had been determined by the learned trial judge and there was no appeal against the determination of the learned trial Judge in respect of each of the four reliefs. The court below, in this connection, stated, *inter alia*, as follows:-

To clarify what I have said above, it is necessary to emphasise that the appellant had not appealed against the orders made in October, 1984. In other words, there is no appeal about the partitioning of the property between the appellant and the respondent. There is no appeal about the injunction granted in favour of the respondent preventing the appellant from interfering with respondent's possession of part of the premises. There is no appeal against the order for filing of an account and there is no appeal about payment over all sums of money to the respondent."

Indeed, none of the issues set down for determination in the briefs filed by the parties had anything to do with the four reliefs mentioned in the statement of the court below quoted above. Apart from the question raised under the main issue which I set out hereunder, all the other issues set down in the briefs filed by the parties were, in my view, secondary issues. Wherever possible efforts should be made by learned counsel to avoid formulation of secondary issues because invariably they obscure the main or real issues requiring determination. See *Din v. African Newspapers of Nigeria Ltd.* (1990) 3 NWLR (Pt 139) 392. The main issue for determination in this appeal is, therefore, as follows:-

Whether the children of a person, who does not survive his parent that has died intestate, are entitled, under Yoruba customary law, to share the property of their father's parent with the surviving children of their father's parent

The onus is on a party who relies on a custom to plead and establish it by evidence as it is a question of fact See *Kindey v. Military Governor*,

Gongola State (1988) 2 NWLR (Pt.77) 445. It can be judicially noticed if it has been so often proved, pronounced and acted upon by court of superior or co-ordinate jurisdiction in the same area to such an extent that it can be said that it has acquired notoriety. See *Romaine v. Romaine*, (1992) 4 NWLR (Pt.238) 650. There is, however, an authority for the proposition that, contrary to the contention of the learned counsel for the appellant, a customary law can be judicially noticed on the basis of a single decision of a court of superior jurisdiction. See *Olagbemiro v. Ajagungbade III*, (1990) 3 NWLR (Pt.136) 37.

The onus was, therefore, on the respondent to lead evidence to support the Yoruba customary law on which she relied. What really happened was that the respondent led evidence that, in the circumstance, under Yoruba customary law, she could step into the shoes of her late father who did not survive Madam Awape and share her (Madam Awape's) property with the appellant. The appellant too led evidence that under Yoruba customary law, he alone in the circumstances was entitled to inherit Madam Awape's property. The learned trial judge after evaluation of the evidence came to the conclusion that the evidence led by each of the parties, on the point, was unreliable and he reject it. He then went on to state, inter alia, as follows:

"From decided cases, it is settled that when a Yoruba man dies intestate, the property of which he dies possessed devolved as family property on his children

where a deceased Yoruba person dies leaving an only son, the property devolves on that only son not as family property but absolutely."

The learned trial Judge did not base his conclusion, on the point, on the principles stated above. He went on further to state, inter alia as follows:

"Professor Nwabueze, the learned author of Nigerian Land Law, seemed to have accepted the proposition of Okaro produced (sic) above as a general custom in Nigeria at page 381 of his book.

But I think that if indeed there is such custom in Ibo land and other parts of the country there is an exceptional situation in Lagos or perhaps Yoruba land. In the case of Danmole & ors. v. Dawodu & ors. (1958) SCNLR 6; (1958) 3 F.S.C. 46, the Federal Supreme Court seemed to have accepted that a grandson can succeed to the estate of his deceased grandfather where his own father predeceased the grandfather but leaving the grandson surviving his father. The grandson in such situation stands in the shoes of his father."

It was for the foregoing reasons that the learned trial Judge held that the property of Madam Awape belonged to the appellant and the

respondent who, in his view, survived Madam Awape. The issue was again raised and argued by the learned counsel for the parties in the Court of Appeal and, in dismissing the appeal, the court below endorsed, with modification, the view of the learned trial Judge and stated further as follows:

B *"The right question to be asked is, in my view who are those entitled to have share in the property left by Madam Ayisatu Awape at the time of her death in 1950?"*

..... *The property then becomes family property under native law and custom and has not got the character of being an exclusive property of the appellant as contended on his behalf. I think the case of*
 C *Danmole v. Dawodu (supra) apart from emphasising that the distribution or the succession of the property of an intestate should be divided according to the idi-igi system rather than ori-o-jori system also established the fact that grandchildren of the ancestor who are alive at the time of the ancestor's death and whose father had pre-deceased the ancestor could*
 D *inherit or in other words could take the share that should have belonged to their father.*

It is in this wise that the respondent come in to have a share in Madam Ayisatu Awape's property

..... *Generally, the appeal fails and the declaration granted by the*
 E *learned trial Judge is modified to read that the property situate and known as No. 20 Olowu Street, Lagos. belong (sic) to the descendants of Madam Ayisatu Awape which include the appellant and the respondent, their issues and descendant."*

The submission in the appellant's brief was that Danmole's case
 F did not establish the principle ascribed to it by the learned trial Judge which was affirmed by the Court of Appeal. The aforesaid case did not decide that, in the circumstances in this case, a person in the position of the respondent could legally share in her grandmother's property. In the case of the respondent, the submission was that Danmole's case established the
 G principle that was ascribed to it by the learned trial Judge and that the Court of Appeal was right in affirming, with modification, the aforesaid view of the learned trial Judge. I think that there is substance in the submission made for the appellant. The facts in Danmole's case were not the same as the facts in the present case and the issues for determination in
 H both cases were not the same. A careful reading of the facts in Danmole's case and of the issues for determination clearly shows that the case did not establish or purport to establish the principle that in a case like this the property of an intestate ancestor, would under Yoruba customary law, be shared or inherited by all descendants or grandchildren whose father prede

ceased the ancestor. The issues involved in Danmole's case (Supra) were: (a) distribution, under Yoruba customary law, of the estate of a person who died intestate; (b) proper method of distribution; and (c) application of equitable rule of equality. The question whether, in circumstances similar to the present circumstances, a grandchild could, under Yoruba native Law and custom, share in the property of his grandfather, who has died intestate, when the father of the grandchild did not survive the grandfather at the time of the grandfather's death, was not raised or decided in Danmole's case. That was to be expected because the legal principle is that a court should limit and confine itself severely to the issues raised by the parties in the case before it. See *United Bank for Africa Ltd., v. Achoru* (1990) 6 NWLR (Pt. 156) 254. B

The legal position, in the circumstances in this case is that, under Yoruba, native law and custom, the real property of a deceased person who dies leaving children surviving him, goes to the children to the exclusion of other blood relations. The real property does not go to the deceased's uncles, aunts and cousins. See *Adeseye & ors v. Taiwo & ors.*, (1956) SCNLR 265; (1956) 1 F.S.C. 84; (1956) SCNLR 265 and *Yusuff v. Dada*. (1990) 4 NWLR (Pt. 146) 657. C

The answer to the only main issue is in the negative. The appeal succeeds and it is hereby allowed. The judgment of the court below dealt only with the relief in paragraph (1) of the respondent's claim. The learned trial Judge also granted all the reliefs set out in paragraphs (2) to (5) and there was no appeal against the judgment of the learned trial Judge to the Court of Appeal in that connection. As the reliefs claimed in paragraphs (2) to (5) of the respondent's claim depended on her success in respect of the relief claimed in paragraph (1), the judgment of the Court of Appeal and the judgment of the learned trial Judge are hereby set aside. D

In their places is hereby substituted an order dismissing the respondent's claim in its entirety. The appellant is hereby awarded N500 as costs in the court below and N1,000.00 as costs in this court. E

UWAIS CJN

I have had the opportunity of reading in advance the judgment read by my learned brother Adio, J.S.C. I entirely agree with the reasoning and conclusion therein. I too allow the appeal and adopt the order as contained in the said judgment. F

G

H

WALI JSC

I have had a preview of the lead judgment of my learned brother Adio, J.S.C and I subscribe to the reasons he gave for allowing the appeal.

For these same reasons I too hereby allow the appeal set aside the judgments of both the trial court and the Court of Appeal and in place thereof substitute an order of dismissal of the respondent's claim. N1,000.00 costs is awarded to the appellant in this appeal and N500.00 at the court below.

C

OGUNDARE JSC

I have had the privilege of reading in draft the judgment of my friend Adio, J.S.C. just read. I agree with his conclusion and the reasoning leading thereto which I adopt as mine.

D

ONU JSC

Having had the advantage of reading before now the judgment of my learned brother Adio, J.S.C. just delivered, I am in entire agreement with him that this appeal succeeds and is allowed by me.

I wish to add by way of elaboration the following comments of mine.

The judgment of my learned brother has so lucidly stated the facts of the case and how the issues that would have engaged our attention for resolution ought to and should be narrowed down, so as to make what is left for our consideration of them to fall within a narrow compass, to wit;

Whether the children of a person, who does not survive his parent that has died intestate, are entitled, under Yoruba Customary law, to share the property of their father's parent with the surviving children of their father's parent.

In setting about answering this issue it is well to state the general Yoruba Customary Law as applicable in the Yoruba speaking areas of Lagos, Ogun, Oyo, Oshun and Ondo States. In relation to the property of a deceased Yoruba man the law is that it devolves primarily on his children as "family property" vide *Ogunmefun v. Ogunmefun* (1931) 10 NLR 82. Indeed, no individual members of the family has the right to alienate the property since in effect, such property is indivisible among the heirs.

The implication of the foregoing is that it having been established at the trial in the instant case that only the appellant of the three children of Madam Awake, who died about 1950 (her two other sons and heirs, Abudu

Salami having predeceased her in 1920 and Idirisu who was the respondent's father, also having predeceased her in 1940) survived her, on the principle enunciated in *Ogunmefun v. Ogunmefun* (supra) became absolutely entitled to all the property left behind by her.

Be it noted that there was no appeal by the appellant against the judgment of the learned trial Judge partitioning the piece of land on which stands the property in dispute. Be that as it may, the learned trial Judge, even though mindful and conscious of the customary law to apply, would not appear to have been properly guided when he observed in his judgment, *inter alia*, as follows:-

"The right question to be asked is in my view who are those entitled to have share in the property left by Madam Ayisatu Awape at the time of her death in 1950? x x x x x x"

The property then becomes family property under native law and custom and has not got the character of being an exclusive property of the appellant as contended on his behalf x x x x x x x x x x x x x x x x I think the case of Danmole v. Dawodu (supra) apart from emphasising that the distribution or the succession of the property of an intestate should be divided according to the idi-igi system rather than Ori - Ojori system also established the fact that grand children of the ancestor who are alive at the time of the ancestor's death and whose father had predeceased the ancestors could inherit or in other words could take the share that should have belonged to their father.

It is in this wise that the respondent come (sic) in to have a share in Madam Ayisatu Awape's property..."

Earlier on in his judgment, the learned trial Judge would appear to be re-stating the general law as enunciated in the *Ogunmefun* Case (supra) when he said, *inter alia*, that -

"From decided cases, it is settled that when a Yoruba man dies intestate, the property of which he dies possessed devolved as family property on his children....."

When a deceased Yoruba person dies leaving an only son, the property devolves on that only son not as family property but absolutely."

He then went on to refer to Professor Nwabueze's book, *Nigerian Land Law* which seemed to have accepted the proposition by Nwakama Okoro in his own book as to the general custom in Nigeria at page 38, adding that -

"But I think that if indeed there is such custom in Ibo land and other parts of the country, there is an exceptional situation in Lagos or perhaps Yoruba land. In the case of Danmole & ors v. Dawodu & ors (1958) SNLR 6:(1958) 3 FSC 46 the Federal Supreme Court seemed to

have accepted that a grand son can succeed to the estate of his deceased grandfather where his own father predeceased the grandfather but leaving the grandson surviving his father. The grandson in such situation stands in the shoes of his father."

(underlining is mine)

B The interpretation given to the Danmole's Case (supra) by the learned trial Judge in the above Italicized extract, is in my view, too wide and out of context with what was decided.

In that case, Abbot, F.J. (Foster-Sutton, F.C.J, De Lestang FJ. Concurring) delivering the judgment of Federal Supreme Court held idi - igi (per stripes) method of distribution as an integral part of Yoruba Native Law and Custom should be adopted, idi - igi not being repugnant to natural justice, equity and good conscience. The case did not decide, as stated by the learned trial Judge, and as affirmed by the Court below, that a grandchild could, under Yoruba Native Law and Custom, share in the property of his grandfather (in the case in hand a grandmother) when the father of that grandchild did not survive the grandfather (in the case herein, grandmother). From the foregoing, I doubt if there is dearth of authorities to augment the Yoruba Native Law and Custom for the proposition that the real property of a deceased person who dies leaving children surviving him, goes to the children to the exclusion of other blood relations. The privy Council in Dawodu v. Danmole (1962) 2 SCNLR 215; 1 All NLR 702, on appeal from the earlier case, thus upheld the Federal Supreme Court decision to call fresh evidence as the Native Law and Custom which applied the per stirpes principle to the distribution of such an estate of a deceased person who died intestate. See also Yusuff v. Dada (1990) 4 NWLR (Pt. 146) 657 following Adeseye & ors v. Taiwo & ors (1956) SCNLR 265; (1956) 1 F.S.C. 84; (1956) NSCC 76. In the instant case, it would appear clear, in my judgment, that the respondent cannot derive any benefit from unproven Custom not supported by decided cases of Yoruba Native Law and Custom to entitle her to a share in the estate of her deceased grandmother especially as here, where her father predeceased his mother.

G For the reasons I have given and the fuller ones contained in the lead judgment of my learned brother Adio, J.S.C I also allow the appeal. I abide by the consequential order made therein including those for costs.

H