

SUPREME COURT OF NIGERIA
6TH MARCH, 1998. SC. 193/1991
CORAM:- I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, S. U ONU, A. I. IGUH, JJSC

JOHN IMADE DEFENDANT/APPELLANT
AND
ODEMWINGIE OTABOR PLAINTIFF/RESPONDENT

LAND LAW - Title - Claim to a declaration of entitlement to a right of occupancy - Plaintiff must rely on the strength of his case - Title of his predecessor must be established.

LAND LAW - Customary law of Bini - Oba's approval - Where not obtained by plaintiff's grandfather - Title of predecessor is not proved and the case ought to fail.

LAND LAW - Customary law of Bini - Igiogbe under Bini custom - How properly defined.

LAND LAW - Customary law of Bini - Igiogbe under Bini custom - How properly defined.

LAND LAW - Customary law of Bini - Igiogbe is inherited by the eldest surviving son - After performing his father's second burial.

LAND LAW - Survey plan attached to certificate of occupancy - Where found to be in respect of a land two miles away - The certificate confers no title.

SUCCESSION - Customary law of Bini - Igiogbe cannot be given out in one's lifetime - And any such gift would be void - As succession to Igiogbe is by inheritance.

FACTS

Before the High Court Benin City, the plaintiff/respondent filed an action against the defendant/appellant claiming a declaration that he is entitled to statutory right of occupancy to the land in dispute and perpetual injunction. He also sought a substitution of the survey plan attached to his former certificate of occupancy which reflected a land two miles away from the land in dispute. Plaintiff tried to establish that his grandfather acquired an interest in the land in dispute which was passed on to plaintiff's father as the Igiogbe under Customary law of Bini. He claimed the land was given to him by his father as the eldest son (though his father was still alive). Plaintiff applied to elders of the relevant Ward for the grant of the land which was approved but was not sent to the Oba of Benin for approval.

The defendant also claimed the land through his grandfather who applied through one of the Wards and latter secured the Oba's approval. The trial court dismissed the plaintiff's claim. His appeal to the Court of Appeal was allowed. The defendant being aggrieved has now appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

"(i) Can the definition of an 'Igiogbe' as given by the Supreme Court in Arase v. Arase 1981 5 SC 33 at page 63 be extended and if so by who?

(ii) If, as indicated in the evidence of the Plaintiff/Respondent at page 48 of the Record of trial lines 10-14, that the Survey Plan Plaintiff/Respondent submitted for his Certificate of Occupancy is in respect of a different land two miles away from land in dispute, could it be said that the land in dispute and his alleged Igiogbe are one and the same land?

(iii) Can an Igiogbe be given away by the donor as a gift Intervivos to his first son while donor is still alive under the Benin Customary law.

(iv) Could material conflicts and contradictions in the evidence of the Plaintiff/Respondent and his witnesses not have been resolved against the Plaintiff and in favour of the Defendant/Appellant in the

appeal before the learned Justices of Appeal.

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

Claim to right of occupancy

1. Where a Plaintiff claims a declaration of entitlement to a right of occupancy in respect of a piece of land, as in the case on hand, the duty on him is clear. He must, relying on the strength of his case rather than on the weakness of the defence, satisfy the court that he is entitled on the evidence brought by him to have a declaration made in his favour. This has been the law in this country since, at least, 1935 when the west African Court of Appeal decided KODILINYE V. MBANEFO ODU (2 WACA 336), the classicus on the subject. He must establish by evidence his title. And where he claims through a predecessor, the title of that predecessor must be established. Of course, the plaintiff is entitled to take advantage of any evidence adduced by the defence which tends to establish his title and support his case. JOSIAH AKINOLA V. FATOYINBO OLUWO (1962) 1 ALL NLR 224; (1962) ANLR 225. His first task at the trial would be to prove that Pa Osunde acquired interest in the land in dispute. Did he discharge this burden? Regrettably, my answer must be in the negative. This is all the evidence Plaintiff led on the point.

(p. 505 D)

Oba's approval - Where not obtained

2. On the authorities on Bini customary law on land tenure, Plaintiff's grandfather Pa Osunde would only be a mere occupier of the land in dispute and not the owner unless he obtained the Oba's approval thereto. As there was no such evidence, Plaintiff has failed to prove the title of his predecessor through whom he claimed and his case on that score alone ought to fail. He failed to establish that the land in dispute was his grandfather's 'Igiogbe'. The Court below, with respect, appeared not to have correctly considered the evidence on this all important issue. Had it done so it would have decided otherwise. (p. 509 A)

Igiogbe properly defined

3. Going by the evidence of this witness and that of PW2, an Igiogbe is necessarily a dwelling place except for the third category which is often referred to as a homestead. By the pleadings and evidence Plaintiff's B 'Igiogbe' could not have come under that category but under the second category. With profound respect to their Lordships of the Court below there was no basis for their saying, per Omo JCA, that -

C *"The evidence of these witnesses apart from drawing attention to other types of Igiogbe, supports the proposition that land on which a Benin man builds his homestead 'the principal house', (which the trial Judge restricted the word 'Igiogbe' to), continues to be so called and regarded as an 'Igiogbe' even when the Principal House has fallen into ruins."* (underlining is mine)

D The above passage has no support in the evidence of PW2, PW3 and/or PW4. Plaintiff has not claimed that his 'Igiogbe' falls under the third category given by PW4. I think the learned trial Judge was right when he said that "Igiogbe" "is a Principal House and not a piece of land." E (p. 513 B)

Igiogbe is inherited by the eldest surviving son

4. The next question is: how does an Igiogbe pass? I think, on this, the F authorities and the evidence in this case are id idem to the effect that it is inherited by the eldest surviving male of a deceased after his performing the secondary burial obsequies (or second burial, to use the common parlance) of his father. That is, it passes on inheritance. (p. 513 F)

G ***Igiogbe cannot be given out in one's lifetime***

5. As was shown by IDEHEN V. IDEHEN (1991) 6 NWLR 382; (1991) 22 NSCC (pp. 2) 370, a testator cannot, by will, give the 'Igiogbe' to anyone else but the eldest surviving male child. Having regard to the H nature of the 'Igiogbe' I cannot see how it can be given out in the lifetime of the owner to someone who may not be the eldest surviving male at his death. At all times relevant to this case, Plaintiff's father was alive. He was, however, not called to give evidence. The purported gift of an

Igiogbe, if at all the land in dispute could be said to be an Igiogbe, by him to the Plaintiff in 1957 would be void. Succession to an 'Igiogbe' is not by gift but by inheritance. I would need a strong evidence of Bini custom to hold to the contrary. (p. 514 G)

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Survey plan attached to certificate of occupancy

6. It is sufficient to say that as the plan attached to the Certificate of Occupancy (Exhibit D) issued to the Plaintiff is of a piece of land two miles away from the land in dispute; that certificate confers no right or title to the Plaintiff in respect of the land in dispute. (p. 516 B)

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REPRESENTATION

Parties are absent and are not represented by counsel

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CASES REFERRED TO

Kodilinye v. Mbanefo Odu (2 WACA 336)

Akinola v. Oluwo (1962) 1 ALL NLR 224

Nwagboe v. Evbuomwan (1959) 4 FSC 91

Bello v. Eweka (1981) 1 SC 101, 130

Inneh v. Aguebor (1970) 1 ALL NLR 1 (1970) ANLR 1

Arase v. Arase (1981) 5 SC 33

Aigbe v. Edokpolor (1977) 2 SC 1

Idehen v. Idehen (1991) 6 NWLR 382 (1991) 22 NSCC 370

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LEAD JUDGMENT BY OGUNDARE JSC

The plaintiff (who is now Respondent before us) has sued the defendant (now Appellant) claiming:

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"(a) A declaration of possessory title to all that piece or parcel of land lying and being at Iyekogba Ward 36A, Benin City within the Benin Judicial Division and covered by Certificate of Occupancy No. BDSR 366 dated 22nd day of February 1979 and registered as No. 20 at page 20 in volume 139 of the Lands Registry in the office at Benin City. A survey plan of the parcel of land will be delivered with the Statement of Claim.

(b) Perpetual Injunction restraining the defendant, his servants and or agents from further acts of trespass on the said piece or parcel of land."

Pleadings were ordered, filed and exchanged and subsequently amended, with leave of Court, in the case of the Plaintiff's Statement of Claim. By paragraph 26 of the amended Statement of Claim the plaintiff sought the following reliefs:

"(a) A declaration that he is entitled to statutory right of occupancy in respect of the land shown on survey Plan No. ER3214 filed with this Statement of claim.

(b) A declaration that plan No. ER3214 be substituted for plan No. MWC/201/75 attached to the Certificate of Occupancy NO. BDSR 366 dated 22nd day of February 1979 and registered as No. 20 at page 20 in volume 139 of the Lands Registry in the office at Benin City.

(c) Perpetual Injunction restraining the defendant his servants and or agents from further acts of trespass on the said piece or parcel of land verged pink in Plan No. ER3214."

At the close of trial and after addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, held that the plaintiff had not made out a case to warrant the reliefs sought and dismissed his case with costs to the defendant.

Being dissatisfied with this judgment the plaintiff appealed to the Court of Appeal which latter Court reversed the judgment of the trial High Court and entered judgment in favour of the plaintiff on his claims (a) and (c) above. It is against this judgment that the defendant has now appealed to this Court upon 4 grounds of appeal. And in his Brief of Argument filed pursuant to the rules of this Court he set out the following issues for determination -

"(i) Can the definition of an 'Igigobe' as given by the Supreme Court in Arase v. Arase 1981 5 SC 33 at page 63 be extended and if so by who?

(ii) If, as indicated in the evidence of the Plaintiff/Respondent at page 48 of the Record of trial lines 10-14, that the Survey Plan Plaintiff/Respondent submitted for his Certificate of Occupancy is in respect

of a different land two miles away from land in dispute, could it be said that the land in dispute and his alleged Igiogbe are one and the same land?

(iii) Can an Igiogbe be given away by the donor as a gift Intervivos to his first son while donor is still alive under the Benin Customary law. B

(iv) Could material conflicts and contradictions in the evidence of the Plaintiff/Respondent and his witnesses not have been resolved against the Plaintiff and in favour of the Defendant/Appellant in the appeal before the learned Justices of Appeal. C

The plaintiff in his own Respondent's Brief formulated the issues for determination as follows-

"1. Whether or not the learned Justices of appeal were right in accepting the contention of the Plaintiff/Appellant/Respondent that the learned trial judge did not properly and fully consider all aspects of the term Igiogbe and whether or not the learned trial judge came to a right conclusion? D

2. Whether or not the learned Justices of the Court of Appeal were right in concluding that a gift intervivos was possible under Bini Customary Law and that the learned trial judge was wrong to have insisted on proof in accordance with English Law?

3. Whether or not the Oba of Benin's approval is a sine qua non F to all transfer of interests in land in Benin, even before 1961.

4. Whether or not the learned Justices of the Court of Appeal were right in their conclusion when they held that the learned trial judge did not properly appreciate and adequately consider the Plaintiff/Appellant/Respondent's case?" G

The issues formulated in the two briefs raise substantially the same questions that is to say, (a) the nature and incidents of 'Igiogbe' in Bini custom and (b), whether the evidence supported Plaintiff's case.

The appeal was set down for hearing on 8th December, 1997 H but the parties were absent at the hearing and were not represented by counsel. Pursuant to Order 6 rule 8(6) of the Rules of this Court the appeal was taken as argued on the briefs and judgment was accordingly

reserved.

The facts relied on by the plaintiff in support of his case can be summarised briefly as follows - The plaintiff's grandfather Pa Otabor Osunde many years ago acquired an interest in a piece or parcel of land at Owina village behind the Government Residential Area Benin city; the land in dispute is part of that land. Pa Osunde maintained several Ikhinwin trees on the land which he used to demarcate its boundaries. Pa Osunde built his house on the land. On the death of plaintiff's grandfather his own father Pa Joseph Egharevba Otabor, being the eldest male child of Pa Osunde, succeeded to the land in accordance with Bini custom after performing the burial rites of Pa Osunde. Pa Joseph Otabor, that is, plaintiff's father, who was alive at the time these proceedings were in the High Court, gave the land in dispute to the Plaintiff his eldest son, in 1957 in appreciation, according to the plaintiff, of his (plaintiff's) care for him (Pa Joseph Otabor) and being also the latter's eldest son. Plaintiff maintained that the land in dispute was his grandfather's Igiogbe even though the house built by his grandfather on the land had gone into ruins. Following the grant of the land to the plaintiff by his father, he the plaintiff applied to the Ohen and elders of Ward 36A Iyekogba for a grant of the land to him, the Ward elders approved his application on 12th June, 1957. It was however not sent to the Oba of Benin for his approval. Following the promulgation of the Land use Decree (now Act) 1978 the plaintiff applied for Certificate of Occupancy and the Governor of Bendel State approved and granted him Certificate No. BDSR 366 which was registered as No. 20 at Page 20 in Volume 139 in the Lands Registry in the office at Benin City. On discovering that the plan attached to the said Certificate of Occupancy No. BDSR 366 was that of a piece of land 2 miles distant from the land in dispute, he sought to have the Ministry of Lands substitute the Plan of the land in dispute for that other plan. The Ministry refused. He subsequently instituted the action leading to this appeal against the defendant who also claimed the land in dispute. Plaintiff claimed that the defendant challenged him over the land in dispute in 1979 and that the latter went on the land and built thereon.

The defendant, for his part, also lays claim to the land in dispute.

He traced his root of title to his own grandfather who died in 1962. His father inherited it and he subsequently inherited it in 1969 from his father. It is defendant's case that his grandfather applied in 1961 to the Plot Allotment Committee of Ward 17H for the land to be allocated to him. The land measuring 100 ft. by 200 ft. (100' x 200') at the Government Residential Area Benin City is, according to the defendant, in Ward 17H. The defendant's grandfather's application was approved by the Oba of Benin. On his inheriting the land from his father, the defendant gave part of it to one Dr. G. Aletor and built on the remaining part. It is that remaining part that is now the land in dispute.

From the arguments proffered in the briefs of arguments of the parties, issues (1), (3) and (4) in the Appellants' brief and (1)-(3) in Respondent's brief dovetail into each other and they are therefore, best taken together; they relate to the nature and incidents of 'Igiogbe' in Bini custom.

Issues (1), (3) and (4)

Where a Plaintiff claims a declaration of entitlement to a right of occupancy in respect of a piece of land, as in the case on hand, the duty on him is clear. He must, relying on the strength of his case rather than on the weakness of the defence, satisfy the court that he is entitled on the evidence brought by him to have a declaration made in his favour. This has been the law in this country since, at least, 1935 when the west African Court of Appeal decided KODILINYE V. MBANEFO ODU (2 WACA 336), the classic on the subject. He must establish by evidence his title. And where he claims through a predecessor, the title of that predecessor must be established. Of course, the plaintiff is entitled to take advantage of any evidence adduced by the defence which tends to establish his title and support his case. JOSIAH AKINOLA V. FATOYINBO OLUWO (1962) 1 ALL NLR 224; (1962) ANLR 225.

Plaintiff in this appeal, claims through his grandfather Pa Otabor Osunde. He pleaded, inter alia, thus:

"Further to paragraph 7 above, the plaintiff's said grandfather Pa Otabor Osunde first Acquired interest in the parcel of land verged

green on Plan No. ER 3214 filed with this statement of claim including the land in dispute and that he maintained several Ikhimwin trees (i.e.) Benin customary beacons for marking out boundaries) which clearly marked out the boundaries of his land. The said Pa Osunde built his home-stead there many years ago." (Underlining is mine)

His first task at the trial would be to prove that Pa Osunde acquired interest in the land in dispute. Did he discharge this burden? Regrettably, my answer must be in the negative. This is all the evidence Plaintiff led on the point.

"The land in dispute belongs to me. My father Joseph Egbarevba Otabor inherited the land in dispute from his own father Otabor Osunde who first developed the land and occupied the land and built his house on the land and lived in the house many years ago."

Now, the land is situate in Benin City. At all times relevant to this case, the law was that there was no individual ownership of land in Benin and that all lands in Benin were vested in the Oba in trust for the people - see: NWAGBOE V. EVBUOMWAN (1959) 4 FSC 91. This statement of the law is not disputed by the Plaintiff. In his evidence, he said:

"To some extent I know the Benin native law and custom land tenure. By custom I am aware that the Oba of Benin is the Trustee of all communal land in Benin. Unless the Oba of Benin approves a piece of land for anyone, no one owns land in Benin."

His witnesses admitted as much. Thus, for anyone to claim ownership of land in Benin, he must trace his root of title to the Oba of Benin. In ATITI GOLD V. BEATRICE OSASEREN (1970) 1 ALL NLR 132, (1970) ANLR 129 this Court approved the statement of Idigbe CJ (as he then was) regarding the requirement of customary law for obtaining valid titles to native lands in Benin. Idigbe, CJ had at the trial of that case laid it down:

"A native may occupy land (i.e. any land not already in previous occupation of any individual) for farming purposes, and although such an 'occupier' is usually loosely referred to as an 'owner' he is not under Bini custom the legal owner until he has got the approval of the Oba of Benin to 'own' that land; this is because basically all land in Benin is

owned by the community for whom the Oba of Benin holds the same in trust and, it is the Oba who can transfer to any individual the ownership of such land and until so transferred the occupier may continue to hold it for purposes of farming only. When therefore any one wants or wishes to own such land for purposes other than farming, i.e. of true ownership, that person must apply to the Oba through the plot allotment committee for ownership of it. It appears from the evidence that the procedure for obtaining complete ownership of such land by a non-occupier is this: the applicant must first negotiate with the occupier (usually farmer) to buy the occupier's interest (i.e. his crops) in the land and having settled with the occupier, he must then apply to the plot allotment committee who should satisfy that negotiation for transfer or purchase of the crops thereon has been settled thereafter the committee would recommend to the Oba confirmation or approval of ownership of the land by the applicant." D

See also: BELLO V. EWEKA (1981) 1 SC 101, 130. This statement of law is in line with the evidence of PW2 Chief Uzawere, the Ohen-Evian who testified thus:

"The Oba of Benin is the holder of Benin land as Trustee for the people. It is the Oba of Benin alone who gives grant of land to people under Bini custom of land tenure. After any one has taken possession of land which no one has owned before that person could ask for the Oba to approve the land for him and the land will be approved for that person." F

The procedure for obtaining the Oba's approval since 1961 was spelt out in a number of decisions of this Court - see: Atiti Gold v. Osarerem (supra), OKEAYA INNEH V. AGUEBOR (1970) 1 ALL NLR 1; (1970) ANLR 1; ARASE V. ARASE (1981) 5 SC 33; AIGBE V. EDOKPOLOR (1977) 2 SC 1; Bello v. Eweka (supra); UHUNMWANGHO V. OKOJIE G (1982) 9SC 101. Prior to 1961 it would appear that applications for grants were made to the Oba direct. Whatever the procedure, one thing that is clear is that the Oba's approval must be sought and obtained before true ownership was transferred to anyone. H

The attempt by the Plaintiff to show otherwise failed. He pleaded in paragraphs 12 & 13 of his pleadings thus -

"12. The Plaintiff avers and will at the trial establish that prior

to 1961 when the wards were constituted into Plot Allotment Committees by His Highness Akenzua II the Oba of Benin, various wards existed and such wards were at liberty to give out land in their area of authority, particularly wards outside the first moat i.e. the moat that runs behind the Oba's palace and comes out at Murtala Muhammed Way and Iyaro. The plaintiff will at the trial lead evidence in support of this averment.

13. The plaintiff avers and will establish at the trial of this suit that prior to 1961 Ohens and Elders of the various wards outside the first moat (Iya Oguola) were responsible for allocating parcels of land in the villages in their wards."

He led no evidence whatsoever in support of these averments. I can find no evidence on record to support the assertion of the Court below (per Omo JCA, as he then was) wherein it is said:

"Since the appellant's application was made pre-1961, it was made to the Elders of the Ward, through whose agency it has been state (sic) above the Oba of Benin exercised his power as owner of all the land. The appellant averred in paragraph 12 of his pleading (Amended Statement of Claim) as follows:-

'The plaintiff avers and will at the trial establish that prior to 1961 when the wards were constituted into Plot Allotment Committees by His Highness Akenzua II the Oba of Benin, various wards existed and such wards were at liberty to give out land and in their area of authority, particularly wards outside the first moat i.e. the moat that runs behind the Oba's palace and comes out at Murtala Muhammed Way and Iyaro. The plaintiff will at the trial lead evidence in support of this averment.'

He gave evidence in support of the averment in the pleading. Yet this was not at all considered by the trial Judge. This was another serious error. In the circumstances, this court can now consider the evidence led. No evidence was led or authority cited to show that Oba's 'approval' (a document) was necessary for title to land pre-1961. I am of the view, and so find, that the Ohen and Elders of Ward 36A to whom Exhibit B was sent and who signed same, were as at 1957 the persons who had power to grant approval to 'ownership' of land within their ward, albeit acting on behalf of the Trustee of the land - the Oba of Benin."

On the authorities on Bini customary law on land tenure, Plaintiff's grandfather Pa Osunde would only be a mere occupier of the land in dispute and not the owner unless he obtained the Oba's approval thereto. As there was no such evidence, Plaintiff has failed to prove the title of his predecessor through whom he claimed and his case on that score alone ought to fail. He failed to establish that the land in dispute was his grandfather's 'Igiogbe'. The Court below, with respect, appeared not to have correctly considered the evidence on this all important issue. Had it done so it would have decided otherwise.

Rather, the Court below was carried away by the issues of Igiogbe, and gift inter vivos raised by the Plaintiff and upon which he based his claim. It is Plaintiff's case that the land in dispute was his grandfather's 'Igiogbe' which, on the death of the latter, his father Pa Otabor as the eldest male child, inherited after performing the secondary funeral obsequies of Pa Osunde. His father Pa Otabor gave the 'Igiogbe' to him inter vivos in consideration of the filial services he rendered to him. The land became his own 'Igiogbe' and was so recognised by the Oba. He needed no Oba's approval to owning it, although he applied to, and obtained, the approval of the Ohen (Village head) and Elders of Ward 36A. The learned trial Judge found:

1. "... the plaintiff did not give evidence of Igiogbe and so cannot be heard to say that the land in dispute is his 'Igiogbe'. There is no authority to support a piece of land as 'Igiogbe' at least not from the authority so far handed down from the Supreme Court in the case of Arase vs. Arase (supra). It is a Principal House that is 'Igiogbe' and not a piece of land."

2. There was no proof under English law of a gift inter vivos.

3. The Plaintiff has not established a legal estate in him to the land in dispute.

4. "..... I do not see the proof that the Oba of Benin recognised the land for the plaintiff as the Plaintiffs' 'Igiogbe'."

5. That the land in dispute does not qualify as 'Igiogbe' under the accepted native law and custom of Benin

6. *"The house cannot, in the light of the evidence that the plaintiff's father is still alive, be regarded as the plaintiff's 'Igiogbe' or his ancestral home until he inherits it from his father under the customary law of inheritance."*

B 7. *"Having regard to the fact therefore that the land in dispute couldn't qualify for an 'Igiogbe' for the various reasons given earlier in this judgment the plaintiff's claim to the land as his 'Igiogbe' cannot be maintained."*

C On the certificate of occupancy issued to the Plaintiff by the Ministry of Lands, the learned trial Judge had this to say:

D *"I have already held that this land is not qualified for the status of 'Igiogbe' and consequently therefore, the land falls into the category of an ordinary piece of land for which a certificate of occupancy had issued. Has the certificate of occupancy had issued. Has the certificate of occupancy been properly and legally issued in respect of the forms the subject matter of Exhibit 'N' Exhibit 'O' and Exhibit 'B'? The answer is No on the ground that the land itself by reason of the exhibits is a piece of*
E *land acquired by the plaintiff twenty one years ago before the commencement of the Land Use Act 1978. That being so and by the evidence of P.W.6 and P.W.8, Exhibits 'N', 'O' and 'B' should have been approved by the Oba of Benin as the authority for the Plaintiff to own the land in*
F *dispute."*

On Plaintiff's appeal to the Court of appeal, that Court reversing the trial Court, found -

(i) that it was not Plaintiff's case that the land in dispute was his 'Igiogbe'.

G (ii) that the dictum of this Court in Arase v. Arase (supra) as to the definition of 'Igiogbe' "ex facie, does not exclude any other 'thing' being called 'Igiogbe' Nor does it exclude the possibility of various types of 'Igiogbe' being in existence under Benin Customary Law."

H (iii) *"..... from a preponderance of evidence before the trial Judge, it is not only a house that can be an 'Igiogbe'. The land on which the house stands (or stood) is part of the 'Igiogbe'. Furthermore, it seems only reasonable to conclude that once an 'Igiogbe' is inherited as such, it*

does not cease to be so regarded because the Principal House falls into ruins".

(iv) that the Property and Conveyancing Law was wrongly applied by the trial judge to the facts of the case

(v) that gift inter vivos could be effected under customary law and need no memorandum in writing to evidence it. B

(vi) that the Ohen and elders of a village could grant land prior to 1961.

What is an "Igiogbe" in the Bini concept? All existing authorities seem to agree that it is the principal house where a deceased lived and was buried. It is an ancestral home. The Plaintiff admitted as much in paragraph 4 of his amended statement of claim wherein he pleaded: C

"The Plaintiff avers that this ancestral home is that area verged green in Plan No. ER3214 while the area trespassed on by the defendant is shown verged pink in plan No. ER3214 filed with this statement of claim." (underlining is mine for emphasis) D

So also did PW2 who testified thus:

"Where one's father died and inherited by the 1st son is the one we called 'Igiogbe' in Benin. The house that a person inherits is Igiogbe and the one that a person erect himself is not Igiogbe." E

At the time the Plaintiff claimed he succeeded to the land in dispute there was no house on it that could be described as "ancestral home", except ruins; it was vacant land. The learned trial Judge held: F

"Properties or house become 'Igiogbe' if the House or property falls within the description that it is a Principal House in which the deceased lived and died. See Arase v. Arase (1981) 5 SC. P. 33 at 63 where the Supreme Court held: G

'The Principal House in which the deceased lived in his lifetime and died is called 'the Igiogbe'"

He had earlier observed:

"..... the plaintiff did not give evidence of Igiogbe and so cannot be heard to say that the land in dispute is his 'Igiogbe'. There is no authority to support a piece of land as 'Igiogbe', at least not from the authority so far handed down from the Supreme Court in the case of

Arase v. Arase (supra). It is a Principal House that is 'Igiogbe' and not a piece of land."

The Court of Appeal was of the view that the trial Court did not consider the evidence of PW4 in coming to this conclusion and, relying on that evidence, held that the land in dispute was an 'Igiogbe.'

PW4, Chief Robert Osuyade Izevbizua-Iyamu, the Esogban of Benin had testified as follows:

"I am familiar with land term (sic) in Benin under the native law and custom. A man's ancestral home is called in Benin language 'IGIOGBE'. 'Igiogbe' is the ancestral home of a Benin man and his first 2nd and 3rd generations. There are three types of 'Igiogbe'. The first when a man have where he lives and has his children and grand children and the children build houses somewhere else, these children regard their father's house as 'Igiogbe'. The 2nd type of Igiogbe is when a Benin man dies and his property is being distributed to the children, the eldest is asked to inherit that house where the father lived and died after performing the necessary burial ceremonies. The 3rd type is when a group of persons has in a village and a new road is constructed which now links other villages, the people move their original home to the new Road to form a new settlement. The place or part of the village, they moved from is now their Igiogbe. I am familiar with land tenancy (sic) in Benin and no ward members has any right to allocate an Igiogbe to any person. It is not customary for an igiogbe to be recommended to the Oba of Benin for approval by ward members. The third type of Igiogbe belongs to the owner. The igiogbe of the third type cannot be allocated to any person and recommended to the Oba of Benin for approval. The Oba of Benin's approval is not required for an Igiogbe. My house now was built in 1906 by my grandfather and I inherited it as my Igiogbe. When I inherited it, I had no approval for it.

XXN by Mr. Ojeme:- By tradition all communal land in Benin are owned by the Oba of Benin in trust for the people of Benin. There is no exception to this traditional ownership of land by the Oba of Benin. An owner of an Igiogbe can apply to the Oba of Benin for an approval for his Igiogbe. This man's application will go through the ward to the Oba of

Benin. The ward Plot Allotment Committee ensures that there is no dispute on the land before it is sent to the Oba of Benin to approve the application. A man can always have one igiogbe. 'Igiogbe' can become a bush as a result of the third type of Igiogbe. Bush can grow on the 1st and 2nd type of 'Igiogbe' No one can abandon 'Igiogbe' whether bush or not." B

Going by the evidence of this witness and that of PW2, an Igiogbe is necessarily a dwelling place except for the third category which is often referred to as a homestead. By the pleadings and evidence Plaintiff's 'Igiogbe' could not have come under that category but under the second category. With profound respect to their Lordships of the Court below there was no basis for their saying, per Omo JCA, that - C

"The evidence of these witnesses apart from drawing attention to other types of Igiogbe, supports the proposition that land on which a Benin man builds his homestead 'the principal house', (which the trial Judge restricted the word 'Igiogbe' to), continues to be so called and regarded as an 'Igiogbe' even when the Principal House has fallen into ruins." (underlining is mine) D E

The above passage has no support in the evidence of PW2, PW3 and/or PW4. Plaintiff has not claimed that his 'Igiogbe' falls under the third category given by PW4. I think the learned trial Judge was right when he said that "Igiogbe" "is a Principal House and not a piece of land." F

The next question is: how does an Igiogbe pass? I think, on this, the authorities and the evidence in this case are id idem to the effect that it is inherited by the eldest surviving male of a deceased after his performing the secondary burial obsequies (or second burial, to use the common parlance) of his father. That is, it passes on inheritance. See, for instance, the evidence of PW2 wherein he stated: G H

"'Igiogbe' is inherited by the 1st son of the deceased father." (underlining is mine for emphasis)

As Omo JCA reading the judgment of the Court below put it:

"It is Bini Customary law that an Igiogbe automatically devoves (sic) on the first son of the deceased holder, so long as the necessary customary burial rites of the deceased have been performed by him. This has been given judicial recognition by Arase v. Arase supra."

B He, therefore, cannot be correct when later in his judgment he said:

"There was therefore evidence which he could have evaluated to come to the conclusion whether a gift inter vivos of an Igiogbe is possible under Bini customary law. The consequence of this failure would also be that this court can consider the available evidence and decide thereupon whether it is possible (i) to transfer an Igiogbe by way of gift and (ii) for an Igiogbe of a grandfather to be so transferred by a father who inherited same) to his son. The answer to both questions must in my finding be in the affirmative. Having held that 'land' can be an Igiogbe, it can (as any other land) be transferred by gift, pawn, sale or otherwise by the person who inherited it; in the instant case, the appellant's father. There is nothing in Bini customary law which prevents such a transfer to be made to the son of the inheritor."

E I can find no evidence on record to support the conclusion reached by the Court below. An 'Igiogbe' would appear not to be just any landed property that could be treated as such but one that carries with it special notions of customary law such as that it is inherited by the eldest surviving male child of a deceased. The plaintiff acknowledged this fact when
F in his evidence he stated:

"By Benin custom, the Igiogbe become (sic) mine automatically when my father died." (underlinings are mine)

G It is to be noted that his father was still alive at the time of the trial of the action. PW2 testified:

"The plaintiff's father is at home sick. He is not dead. The plaintiff's father is living in his own personal house."

See also the evidence of pw3 which confirmed the above assertion. As
H was shown by IDEHEN V. IDEHEN (1991) 6 NWLR 382; (1991) 22 NSCC (pp. 2) 370, a testator cannot, by will, give the 'Igiogbe' to anyone else but the eldest surviving male child. Having regard to the nature of the 'Igiogbe' I cannot see how it can be given out in

the lifetime of the owner to someone who may not be the eldest surviving male at his death. At all times relevant to this case, Plaintiff's father was alive. He was, however, not called to give evidence. The purported gift of an Igiogbe, if at all the land in dispute could be said to be an Igiogbe, by him to the Plaintiff in 1957 would be void. Succession to an 'Igiogbe' is not by gift but by inheritance. I would need a strong evidence of Bini custom to hold to the contrary.

The Court below, per Omo JCA, after quoting a passage from the judgment of the learned trial Judge to the effect that:

"He said he had no Oba's approval for the land because the land is his 'Igiogbe' and it is not customary for one to obtain an approval over the land from the Oba of Benin in respect of an 'Igiogbe'

(Note: underlining mine)"

remarked:

"The appellant never said that the land in dispute is his 'Igiogbe'."

With respect, I think their Lordships misdirected themselves for the Plaintiff, in his evidence, stated:

"I told the Ministry of Land when I was applying for the certificate of occupancy that the land was my 'Igiogbe'" (underlining is mine for emphasis)

Again he said under cross examination:

"Apart from the Certificate of occupancy and the land being my 'Igiogbe'. The other is the Oba of Benin's recognition of the land as my 'Igiogbe'. The Oba of Benin did not give me any written recognition on the land being my 'Igiogbe'. My ownership of the land in dispute as my 'Igiogbe' is customarily recognised by the Oba of Benin." (Underlinings are mine)

I think the passage from the judgment of the learned trial Judge correctly summarised the evidence of the Plaintiff on the point and the criticism of it by the Court below is misplaced.

On whether the Oba of Benin recognised the land in dispute as the Plaintiff's 'Igiogbe', I think the following passage from the judgment of the learned trial Judge provides the answer. The learned Judge said:

" I do not see the proof that the Oba of Benin recognised the land for the plaintiff as the Plaintiff's 'Igiogbe'. It is (sic) customarily recognised by the Oba of Benin as the Plaintiff's Igiogbe, it must be established before this Court that the Plaintiff's father had died and the Plaintiff as the eldest surviving son of his father had performed all the customary burial obsequies and then 'inherited' the property."

Issue 2:

I do not deem it necessary to consider the arguments advanced on this issue. **It is sufficient to say that as the plan attached to the Certificate of Occupancy (Exhibit D) issued to the Plaintiff is of a piece of land two miles away from the land in dispute; that certificate confers no right or title to the Plaintiff in respect of the land in dispute.**

In conclusion, for the reasons -

1. that Plaintiff failed to prove that his predecessor Pa Osunde (his grandfather) had title to the land in dispute,
2. that the land in dispute could not, in 1957, qualify as the igiogbe of anyone, let alone that of the Plaintiff,
3. that a gift inter vivos of an Igiogbe would be void,
4. that Plaintiff had no Oba's approval in respect of the land in dispute and the Ohen and Elders of a village had no right to confer title on anyone over land in Benin,

this appeal must succeed and it is allowed by me. The judgment of the Court of Appeal together with the order for costs made therein is set aside. The judgment of the trial High Court (Akensua, J) dismissing Plaintiff's case is hereby restored. I award to the Defendant/Appellant costs of this appeal assessed at N10,000.00 (Ten thousand naira). I also award to the Defendant/Appellant costs in the High Court and the Court of Appeal which I assess at N300.00 and N700.00 respectively.

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KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with him that the plaintiff/appellant

failed to prove that his grandfather and predecessor in-title, Pa. Osunde, had any title to the land in dispute. Consequently, the issue of whether or not the land qualified as an "Igiogbe" which could or could not be given as a gift inter vivos did not arise. It is for this reason alone and none else, that I agree to allow the appeal and dismiss plaintiff's claims. The appeal is accordingly allowed with costs as assessed.

MOHAMMED JSC

I agree that there is merit in this appeal. My learned brother, Ogundare, J.S.C., in the lead judgment, just read, has put in more elucidation on the issue of "Igiogbe". Since, as has been explained, the father of the plaintiff was alive when the Igiogbe was given to him (plaintiff) as a gift the evidence of the father is very crucial and failure to call the father to give evidence is fatal to the case of the respondent. With the father still alive the issue of inheritance of Igiogbe does not arise at all. This appeal is accordingly allowed. The judgment of the Court of Appeal is hereby set aside. The judgment of Akenzua J. in which the learned trial judge dismissed the action filed by the respondent is hereby restored. I abide by the order made by my learned brother, in the lead judgment, on costs.

ONU JSC

Having been privileged to read before now the judgment of my learned brother Ogundare, JSC just delivered, I agree with his reasoning and conclusion that this appeal is meritorious and ought to succeed. Accordingly, I too allow it and abide by the consequential orders therein made inclusive of costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Ogundare, J.S.C. and I agree with the

reasoning and conclusions therein reached. I have nothing to add.

Accordingly, I, too, allow this appeal, set aside the judgment of the court below and restore the decision of the trial High Court.

I abide by the order for costs contained in the leading judgment.

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