

SUPREME COURT OF NIGERIA
17TH DECEMBER, 1999. SC. 105/1994
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
A. I. KATSINA-ALU, O. ACHIKE, U. A. KALGO, JJSC

PRINCE FELIX I. OGIUGO DEFENDANTS/APPELLANTS
AND
PRINCE ANTHONY E. ORHUE OGIUGO PLAINTIFFS/
RESPONDENTS

ACTIONS - Chieftaincy - Hereditary stool - Causes of action - Survival of - The action survived the dead Parties.

APPEALS - Customary law - Customary Courts Rules, 1978 - Order 10 rule 6(6) - By that provision where there is no fresh evidence in rebuttal of the Customary law in the Customary Court of Appeal - That Court should not have reversed the decision of the Area customary court on appropriate Customary law.

CHIEFTAINCY MATTERS - Bini Customary law chieftaincy stool - Primogeniture - Procedure for the selection of an Enogie - Where there is no surviving male child - The Principle of primogeniture is not strictly applied.

CHIEFTAINCY MATTERS - Bini Customary law - Stool of Ogiugo - Necessary traditional requirements for appointment to the Stool.

CUSTOMARY LAW - Bini Customary law - Customary Court - It is only the members of the trial Customary Court - That can state the appropriate customary law from their personal knowledge.

FACTS

In the Orhionmwon Area Customary Court holden at Abudu in the former Bendel State (but now Edo State) the plaintiff/respondent Claimed against

the defendant/appellant inter alia for declaration that the plaintiff and not the defendant is the person entitled to be installed as the Enogie of Ugo-Niyeke Ikpoba, in Orhionmwon Local Government Area. The title of Enogie of Ugo-Niyeke Ikpoba became vacant following the death of the last Enogie, Obamwonyi who died in 1978. He died leaving three daughters surviving him and without a male issue to succeed him. Succession to the title is based on the principle of primogeniture. The said Enogie Obamwonyi had no brothers either. The family had to select a successor from three of his uncles namely, Ikponminwingie (plaintiff), Orhue (defendant) and Okwnrobo. They were the three surviving sons of Enogie Emuze the grandfather of Enogie Obamwonyi. A meeting of the elders of Ogiugo family was held, even though the defendant was older than the plaintiff he was not selected because he did not meet the traditional requirements. The plaintiff was selected and presented to the Oba of Benin as Ogiugo (Enogie) - elect at his palace. The Oba told them to go home and perform the funeral rites of the last Enogie. They went home and the plaintiff performed the ceremonies and acted as Enogie all through. The Plaintiff was surprised when the Defendant came from nowhere to claim that he was the Enogie. Hence the present action. The defendant on his part denied that he did not meet the traditional requirements. He claimed that the plaintiff was presented to the Oba of Benin by Ogiugo family, that the Oba disapproved the plaintiff's candidature in the face of competing claim from him, an elder brother. He stated that the Oba approved his candidature and directed that he be installed. He was traditionally installed as the Enogie of Ugoneki during the pendency of their case.

The Area Customary Court in its considered judgment found that the plaintiff was the rightful candidate duly elected by the family and should be installed as the Enogie. It nullified the installation of the defendant. The defendant being dissatisfied appealed to the Customary Court of Appeal, sitting at Benin-City. That Court allowed the defendant's appeal. Aggrieved, the plaintiff appealed to the Court of Appeal, Benin Division, which Court dismissed his appeal. The plaintiff has now further appealed to the Supreme Court. The original parties died during the pendency of the appeal and they were substituted by their first sons. The

present respondent has cross - appealed questioning the capacity of the present appellant to prosecute the appeal.

ISSUES FOR DETERMINATION

"Whether the Court of Appeal was right in affirming the judgment of the Customary Court of Appeal which reversed the findings and statement of what is the appropriate customary law in relation to this case having regard to the provisions of S.25 (6) of the Customary Court Edict of 1984 as well as the provision of Order X Rule 6(3), (5) and (6) of the Customary Court Rules, B.S.L.N. 29 of 1978.

Is the title in this case one in rem or in personam to allow for substitution?"

HELD (Unanimously allowing the appeal and dismissing the cross appeal per lead judgment of **OGWUEGBU JSC**)

Appeals - Customary law

1. Order 10 rule 6 (6) of the Customary Courts Rules, 1978 provides for what a person aggrieved by the decision of the Customary Court should do in respect of the decision of the Customary Court on the appropriate customary law. The record of appeal did not show that the defendant applied to the Customary Court of Appeal for leave to adduce evidence in rebuttal. No leave was granted and no contrary evidence was adduced in the Customary Court of Appeal. In the absence of such leave as well as evidence in rebuttal of the customary law in the Customary Court of Appeal, the latter should not have reversed the decision of the Area Customary Court on appropriate customary law. (p. 2987 D)

Bini Customary law - Chieftaincy Stool

2. I am therefore in no doubt that both the Customary Court of Appeal and the Court of Appeal were wrong in reversing the decision of the Area Customary Court as to the appropriate customary law applicable in the area. I am satisfied that the Orhionmwon Area Customary Court was right in its conclusion as to the customary procedure for the selection or election of the Ogiugo. The Oba of Benin under cross-examination stated thus:

"Where the title is hereditary, it devolves on the eldest child except where there is no male child."

This statement agrees with the case of the plaintiff which was accepted by the Area Customary Court that the situation as it affected Ogiugo at B Ugoneki is slightly different where there is no surviving male child of the last Enogie of Ugo-Niyeke Ikpoba. The principle of primogeniture is therefore not strictly applied in such a situation. (p. 2989 A)

C Bini Customary law - Stool of Ogiugo

3. I agree with the Area Customary Court that the appointment or selection of the Ogiugo is the responsibility of Ogiugo family and he is duly appointed or elected after he performs the burial of the last Ogiugo and other necessary traditional rites. The Oba gives his formal approval. In D the case of the defendant, only Osula branch of Ogiugo family selected and presented him to the Oba who gave his approval when his selection was not done by the entire Ogiugo family and he did not perform the traditional rites. The Area Customary Court was right in nullifying his E installation based on that approval. (p. 2989 H)

Bini Customary law - Customary Court

4. The Customary Court of Appeal went out of its way and brought its F presumed personal knowledge of Bini customary law into its judgment when there was no contrary evidence before it as provided by the rules of that court. It was only the members of the trial customary court that can state the appropriate customary law from their personal knowledge. Neither the Customary Court of Appeal nor the Court of Appeal can do G so. (p. 2990 B)

Actions - Chieftaincy

5. Ogiugo stool is hereditary by virtue of the Administration of Estates H Law of Bendel State. Having regard to the state of the law and the facts, the action survived the dead parties. (p. 2991 D)

NOTABLE POINT OF INTEREST

KALGOJSC

1. Exceptions to the Power of the Customary Court to declare the customary law

According to the applicable law in Edo State, the Area Customary Court has the power to declare the customary law of the area within its jurisdiction in any particular case before it. If it did so, as in this case, then the customary law so declared, is presumed to be correct unless the contrary can be proved in either of the following two ways:-

(i) *If the declared custom is shown to be in conflict with any previous subsisting judgment of the High Court, Court of Appeal or the Supreme Court; or*

(ii) *If additional evidence is called on appeal in the Customary Court of Appeal and the evidence contradicts the custom so declared.* (p. 3003 H)

REPRESENTATION

Dr. M. Odje, S.A.N. (With him A. Akpamudje, Esq.) for the Appellant. S. Eghobamien, Esq. for the Respondent.

CASES REFERRED TO

- Egiri v. Uperi (1973) 11 S.C. 299 at 305
- Ogiamien v. Ogiamien (1967) N.M.L.R. 245
- Idehen v. Idehen (1991)6 N.W.L.R. (Pt.198) 382
- Kodilinye v. Odu 2 WACA 335
- Akinloye v. Eyiola (1968) N.M.L.R 92. 95
- Balogun v. Agboola (1974) 10 SC 111, 117 - 119
- Ogbero v. Edeaho (1973)9-12 S.C. 299 at 305-309
- Haav v. Kundu (1997)5 N.W.L.R (Pt. 505) 313
- Eyesan v. Sanusi (1984) 4 S.C.115
- Chinwendu v. Mbamali (1980) 3-4 SC. 31
- Kale v. Coker (1982) 12 SC 252
- Akeredolu v. Akinremi (1989) 2 NWLR (Pt.108) 164

STATUTES & RULES REFERRED TO

Customary Court Edict No. 2 of 1984; ss. 22 (a), 25(6) and 68

Customary court Rules, of Bendel State 1978, Q 10 r 6 (3), (5) and (6)

LEAD JUDGMENT BY OGWUEGBU JSC

B The original parties to the proceedings were Prince
Ikponminwingie Emuze Ogiugo as plaintiff and Prince Orhue Emuze
Ogiugo as defendant. The plaintiff's claim against the defendant in the
C Orhionmwon Area Customary Court holden at Abudu in the former Bendel
State of Nigeria is for:-

"(1) A declaration that the defendant is not the Enogie of Ugo-
Niyeke Ikpoba Orhionmwon Local Government Area within the jurisdic-
tion of this Honourable Court.

D (2) A declaration that the plaintiff and not the defendant is the
person entitled to (sic) installed as the Enogie of Ugo-Niyeke Ikpoba,
Orhionmwon Local Government Area, Bendel State.

E (3) A declaration that the plaintiff having performed the burial
ceremony of his late Enogie and other traditional rite, should be in-
stalled the Enogie of Ugo-Niyeke Ikpoba (Ugoneki) according to Bini
Native Law and Custom applicable at Ugo-Niyeke.

F (4) An injunction restraining the defendant from parading him-
self as the Enogie of Ugo-Niyeke Ikpoba (Ugoneki) Orhionmwon Local
Government Area, Bendel State."

The facts of the case briefly stated are as follows: The title of Enogie of
Ugo-Niyeke Ikpoba in Orhionmwon Local Government Area of the former
Bendel State became vacant following the death of the last Enogie,
G Obamwonyi who died in 1978. He died leaving three daughters surviv-
ing him and without a male issue to succeed him.

Succession to the title is based on the principle of primogeni-
ture. The said Enogie Obamwonyi had no brothers either.. The family
H had to select a successor from three of his uncles, namely, Ikponminwingie
(plaintiff), Orhue (defendant) and Okunrobo. They were the three sur-
viving sons of Emuze the grandfather of the last Enogie. Emuze himself
was an Enogie.

When the three could not agree among themselves as to which of them should succeed the last Enogie, the family decided to select one of them. According to the plaintiff, a meeting of the elders of Ogiugo family was held in December, 1979 and three of them were present at the meeting; that even though the defendant was older than himself, he was not selected because he did not meet the traditional requirements. B

The plaintiff further stated that after his selection, he was presented to the Oba of Benin as the Ogiogu (Enogie)- elect of Ugo-Niyeke Ikpoba and at his palace, the Oba told them to go and perform the funeral rites of the last Enogie. They went home and he performed the ceremony which lasted fourteen days. He stated that he acted as Enogie and performed all the necessary ceremonies associated with the stool including the Ebomisi ceremony. He acted as Enogie from 1978. He was surprised when the defendant came from nowhere to say that he was the Enogie. He therefore instituted the action which led to this appeal.. D

The defendant on his part denied any admission that his mother did not fulfil the traditional role required of her as the father's wife. He claimed to have been born in wedlock and being the eldest of the then surviving sons of Emuze, he was the rightful person to succeed the last Enogie in accordance with Bini custom. It was part of his case that the plaintiff was presented to the Oba of Benin by Ogiugo family, that the Oba disapproved the plaintiff's candidature in the face of a competing claim from him, an elder brother and that the Oba directed the family to carry out the funeral ceremonies of the late Enogie. The defendant further stated that on completion of the ceremonies, his family presented him to the Oba who approved his candidature and directed that he be installed. He stated that he was traditionally installed as the Enogie of Ugoneki during the pendency of his case in the Orhionmwon Area Customary Court pursuant to the Oba's approval. F G

Both parties testified, called witnesses and tendered documents. The Area Customary Court in its considered judgment found that the plaintiff was the rightful candidate duly elected by the family and should be installed as the Enogie. It nullified the installation of the defendant. The defendant who was dissatisfied with the judgment appealed to the H

Customary Court of Appeal of the former Bendel State of Nigeria sitting at Benin City. That court allowed the defendant's appeal. The plaintiff being aggrieved by the decision of the Customary Court of Appeal, appealed to the Court of Appeal, Benin Division. The Court of Appeal dismissed his appeal and affirmed the decision of the Customary Court of Appeal. The plaintiff who was not satisfied with the judgment of the court below, has further appealed to this court.

On 7th January, 1998, the court granted the defendant leave to cross-appeal on one ground of appeal which complained of the locus standi of the appellant to prosecute this appeal.

Briefs of argument were filed by both parties in respect of the main appeal and the cross-appeal.

The appellant formulated the following issues for our determination in the appeal:-

"1. Whether the Court of Appeal was right in affirming the judgment of the Customary Court of Appeal which reversed the findings and statement of what is the appropriate customary law in relation to this case having regard to the provisions of S.25 (6) of the Customary Court Edict of 1984 as well as the provision of Order X Rule 6(3), (5) and (6) of the Customary Court Rules, B.S.L.N. 29 of 1978.

2. Whether the evidence given by the Oba settled the issues put in dispute by the parties to wit the customary procedure for the selection or appointment of the Enogie in the peculiar circumstances of this case.

3. Who has the right under Bini Customary Law to select or elect the Enogie and what is the significance of Oba's approval.

4. Can the Customary Court of Appeal as an appellate court set aside the specific findings of fact made by the trial court as affirmed by the Court of Appeal?

5. Was the Court of Appeal right in affirming the judgment of the Customary Court of Appeal which relied on a book titled "Benin Studies" by R.E. Bradbury?

6. From the evidence tendered by both parties who discharged the burden of proof on the balance of probability?"

The respondent is of the view that the following issues are relevant

for the resolution of the appeal:-

"1. Whether the lower courts of appeal were right in evaluating the evidence at the trial court which had failed to evaluate or properly evaluate and to have upheld the decision of the Customary court of Appeal?"

B

2. What is the relevance of the Oba of Benin's evidence in the appointment of an Enogie and his relevance as the prescribed Authority and in view of the Traditional Rulers and Chief's Edict, 1979.

3. Whether the Supreme Court can take judicial notice and act on section 39 of the 1979 Republican Constitution and sections 41 and 74 of the Evidence Act in this case suo motu?"

C

4. Is the title in this case one in rem or in personam to allow for substitution?"

The respondent's Issue Nos. 3 and 4 do not arise from the grounds of appeal filed by the plaintiff. The said No.4 is an issue arising from the cross-appeal which will be considered when I will deal with the cross-appeal. The respondent's Issue No.3 does not also arise from the plaintiff's appeal or the cross-appeal of the defendant. It was not even an issue before the court below. I will consider the appeal on the issues formulated by the plaintiff and they cover the two remaining competent issues identified by the defendant.

D

It was submitted in the appellant's brief that the court below was wrong in affirming the judgment of the Customary Court of Appeal which reversed the decision of the Area Customary Court when a statement as to the appropriate customary law in respect of an issue of customary law made by the appropriate Customary Court is presumed to be correct and that the presumption can only be rebutted by evidence in the Customary Court of Appeal.

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It was contended that the Customary Court of Appeal relied on the evidence of the Oba which was considered and rejected by the trial Area Customary Court and used the said evidence in reversing the decision of the trial Customary Court and that the Customary Court of Appeal was wrong to have done so. The appellant's counsel referred the court to section 25(6) of the Customary Court Edict, 1984 and Order 10

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Rule 6(3), (5) and (6) of the Customary Court Rules of Bendel State (B.S.L.N. 29 of 1978). It was further contended that the Customary Court of Appeal can only reverse the decision of the trial Area Customary Court on an issue of appropriate customary law where fresh evidence is adduced in the Customary Court of Appeal with leave of that court.

B It was argued that no fresh evidence of appropriate customary law was adduced in the Customary Court of Appeal and the Customary Court of Appeal wrongly preferred the evidence of the Oba of Benin which evidence had been considered and rejected by the trial Area Customary Court. That in the peculiar circumstances of this case where both parties were not direct sons of the last Ogiugo, the first son rule did not apply and that the new Ogiugo must be selected or elected by the Ogiugo family and not by the Oba. It was finally submitted on this issue D that the decision of the Area Customary Court as to the appropriate Customary law is final as it is presumed to be correct and the Customary Court of Appeal had no power to reverse the decision of the trial court on the appropriate customary law when there was no contrary evidence E before them. The court was referred to the case of Egiri v. Uperi (1973) 11 S.C. 299 at 305, Order 10, Rule 6(3), (5) and (6) of the Customary Court Rules of the former Bendel State, 1978 and section 25(6) of the Customary Court Edict No.2 of 1984 of the said Bendel State.

F On issue Numbers 2 and 3, it was submitted that the evidence of the Oba did not settle the issue submitted by the parties for adjudication because the Customary Court of Appeal and the Court of appeal did not direct their minds to the provisions of section 25(6) of the Customary Court Edict and order 10 Rule 6(3), (5) and (6). It was further submitted G that the evidence of the Oba re-stated the position of Bini customary law generally with regard to inheritance of the Enogie title and that the piece of evidence was not in dispute between the parties. It was contended that the issue was whether the hereditary principle of primogeniture applied where the deceased Enogie was not survived by any male child. H The court was referred to the evidence of the Oba in answer to cross-examination at page 74 of the record which suggested that the principle of primogeniture did not apply in the case before the court and that his

evidence was not conclusive on the matter.

It was also submitted that from the totality of the evidence, no person can be approved by the Oba except he has been selected and presented by the Ogiugo family and that if as found by the Customary Court of Appeal and the Court of Appeal, the respondent being older than the appellant automatically becomes the Enogie, then there would have been no need for the family to do the selection or appointment, and, consequently, no need for burying the last Enogie and performing the traditional rights at Urhomehe. We were referred to the evidence led as well as Exhibits "A" and "B".

On Issue number (4) it was submitted that the Customary Court of Appeal reviewed the evidence and made specific findings of fact which were affirmed by the court below and that the Oba's evidence did not resolve completely the issue in dispute, namely, the procedure to be followed in the selection of the Enogie of Ugo-Niyeke Ikpoba in the special circumstances of this case where the Enogie died without a son to succeed him.

On Issue number (5), the court was urged to hold that it was wrong for the two appellate courts to rely on the book titled "Benin Studies" by R.E. Badbury (1973) in reversing the judgment of the trial court when they held that the principle of primogeniture applied and that it was not shown that the book is generally accepted in Nigeria and elsewhere as a standard work or authority on relevant traditional history and that the author was not called as a witness.

On the sixth issue, it was contended that the case of the appellant at the court of trial was that if a Bini first son is born out of wed-lock, even though he is senior, he would not inherit by primogeniture and his younger brother born in wed-lock would inherit and that the respondent admitted before the family that he was born out of wed-lock and under Bini custom, he could not inherit the title of the Enogie even though he was older than the appellant. It was further argued that only the trial Customary Court can state the appropriate customary law from its personal knowledge and not the Customary Court of Appeal.

It was submitted in the respondent's brief that the appellant tried

to change the custom of the people by claiming that the procedure is one of selection or election which is contrary to the primogeniture rule agreed by both parties as the custom to which was affirmed by the Oba. The cases of Ogiamien v. Ogiamien (1967) N.M.L.R. 245 and Idehen v. Idehen (1991) 6 N.W.L.R. (Pt.198) 382 were cited. Sections 22(a) and 25(6) of the Customary Court Edict No. 2 of 1984 and Order 10 Rule 6(5) of the Customary Court Rules, 1978 were also referred to. It was also submitted that the Oba of Benin being the custodian of the customary law of Bini people, his evidence on the issue which is not contrary to the accepted principles of law and equity, settled the point and the court of trial had no option than to accept it.

On Issue (2), the court was referred to the evidence of the Oba at page 72 lines 5 to 8, 17 to 21 and 27 to 29 of the record to the effect that the eldest of all the eligible sons is the rightful person to the title. It was also submitted in the respondent's brief that an appellate court can interfere with the finding of a lower court where such finding is perverse.

It was further submitted that no where in the proceedings did the appellant give evidence as to the procedure for selection of a younger person in preference to an elder brother born out of wed-lock and that the trial court relied on custom which it formulated. The court was referred section 14(3) of the Evidence Act, Laws of the Federation of Nigeria, 1990. We were urged to dismiss the appeal.

The Area Customary Court of the former Bendel State holden at Abudu after a careful review of the oral and the documentary evidence produced by the parties identified the issue for determination thus:-

"The crux of this matter is the customary procedure to be followed before Ogiugo can be appointed or elected, who does the appointment? At what stage can Ogiugo be said to have been elected validly and lastly the role of the Oba of Benin in the appointment and approval of an Ogiugo."

It proceeded to answer the above questions having regard to the oral and documentary evidence before it. The court of trial held that in a normal situation where an Enogie dies and was survived by a male child, the

principle of primogeniture applied and that the situation is slightly different in the case before it where Obamwonyi, the last Enogie died leaving behind him three daughters who, according to Bini custom, could not claim any right to the stool.

The trial court stated as follows:

"According to the D.W.2, he said as a traditional Bini Chief that a duke in Benin custom is born and not made. We agreed entirely with him. Thus the situation as it affects the Ogiugo today in Ugoneki is slightly different because there is no surviving male child who automatically ascends the royal throne any Ogiugo for this moment has to be made or elected. The family having chosen the Emuzes and those who should produce the next Ogiugo is of necessity bound to produce one. The stool becomes an open contest among the children of Emuzes."

At the meeting of the elders of Ogiugo family held on 22-12-79, the family elected the plaintiff as the most qualified among the sons of Emuze as the Ogiugo-elect based on the traditional method. The traditional criteria used by the Ogiugo family were given as follows:-

"(a) Birth age, i.e. seniority in age.

(b) Born to wed-lock i.e. (legitimate son).

(c) The mother should have stayed with the father and served in all capacity as a wife (i.e Oghi Keghu) which was very vital in the life marriage of a woman with the husband."

The contest as earlier stated was between the plaintiff, the defendant and Okunrobo. These were the surviving sons of Emuze at the time Obamwonyi, the grandson of Emuze died without a male child to succeed him. Of the three, the defendant was the eldest and Okunrobo was the youngest son of Emuze. The last Enogie (Obamwonyi) had no brother either.

The plaintiff who was the younger brother of the defendant emerged as the Enogie-elect having satisfied the three criteria set out above. The defendant was said to have satisfied only the first criterion. Exhibit "A" is the minutes of the meeting of Ogiugo family where the plaintiff was elected.

In its judgment, the Area Customary Court enumerated the necessary

customary rituals or rites which a prospective Ogiugo has to perform before he could be made one. The court stated as follows:

"Before we proceed further in this judgment, we would like to state clearly the necessary customary rituals or rites a prospective Ogiugo has to perform before he could be made one: (1) He must bury the last Ogiugo; (2) He must be from the Royal family; (3) He must perform the various rituals at Urhomehe; (4) He proceeds to Ugonoba for the final installation and in the case of an Ogiugo who is not a direct son of the last Enogie of Ogiugo, then he must be validly elected or appointed by Ogiugo royal family and must also have the support of the various sub-villages or community. The final lab (sic) being the blessing of the Oba of Benin."

The trial court found as follows:

"After a careful review of the evidence of the plaintiff and the defendant, it is reasonably clear that while the plaintiff gave detail (sic) account of all the ceremonies and rites he performed after his nomination, the defendant presented his own version hap-hazardly, in an unimpressive manner..... Again that the defendant is the most senior son as submitted by his counsel does not give him automatic right to the title, after all he is not a direct child of the last Enogie. Before the plaintiff went on performing or fulfilling the various conditions precedent for the stool, the plaintiff and the defendant were equally entitled to the stool (but from available evidence plaintiff is better entitled)...... The choice of Ogiugo is the choice of the entire Ogiugo family, community and not that of Oba of Benin nor a group of Osula family as was done in the case of the defendant. Exhibit "A" and "B" are authentic there is no reason why we will not consider them. Exhibit "A" it was manifestly clear that a large member (sic) of the various families making up the Ogiugo family were present at the meeting where plaintiff was elected including the defendant in this case. We believe as of fact that it is the plaintiff who performed the burial of the last Enogie purposely for the throne in which he became a prospective Enogie in view of his selection by the family; it is our finding of fact also that he was the person duly and validly elected by the

family. That the defendant was hand picked by a group of the Osula family who consequently presented him to the Oba for approval, this we have said, they lack the power and authority to do. We also find as a fact that as a result of the plaintiff's election or appointment by his family he functioned in the capacity of the Ogiugo until this action." (the under- B
lining is for emphasis).

The above are some of the findings of fact made by the trial court. I will come to other findings when I will consider the other issues for determination in the appeal. The Customary Court of Appeal reversed the findings of the trial Area Customary Court. It held as follows: C

"The trial court found on the concurrence of evidence on both sides that the appellant is older than the respondent but that because he was born out of wedlock i.e that his mother was not strictly speaking a wife of Emuze (i.e Iyee ma kewu) he was thus disqualified from being D
nominated as Ogiugo-elect. This, we must say was a wrong application of the Bini customary law on the nomination of Ogiugo-elect. The appellant both in his natural and customary position in the Ogiugo family suffers no customary taboo whatsoever to deprive him of his customary E
right to the throne of Ugoneki. The family wrongly dealt with him as if he was the first born son of Ogiugo Emuze and as if he was to succeed Emuze as Ogiugo....."

We agree that it is not part of Bini custom, as was rightly stated by some F
of the defence witnesses that a child out of wedlock does not succeed to the throne.....

The summary of all this is that, the appellant, not being a first-born son of Emuze, does not suffer any customary inhibition or taboo in succeeding his father Emuze if that was the succession in question. If he could not be disqualified from succeeding his father Emuze, it is far fetched G
and most contrary to Bini customary law of succession to rely on his being purportedly born out of wedlock to Emuze to deny him of his undisputed right to the throne of Ugo-Neki - he being the naturally ac- H
knowledge eldest surviving person on the Ogiugo royal line." (the underlining is for emphasis).

The Court of Appeal after considering all the issues canvassed before it

concluded its judgment thus:

"The Customary Court of Appeal also reviewed the evidence as the grounds of appeal were in essence omnibus and found the findings of the trial court perverse in the face of the evidence of Oba of Benin, the Custodian of Bini Custom whose evidence was not shaken, contradicted or otherwise discredited either under cross-examination or otherwise. The Oba's evidence is therefore deemed to be unchallenged and accepted as the fact found by the trial court. And evidence and findings of the trial court to the contrary are deemed perverse. *Kodilinye v. Odu* 2 WACA 335. *AKINLOYE V EYIYOLA* (1968) N.M.L.R 92. 95; *Balogun & Ors. v. Agboola* (1974) 10 SC 111, 117 - 119.

In the circumstances, this appeal fails and is dismissed.....

The area Customary Court found for the plaintiff and held that where the last Enogie left no surviving male child, the principle of primogeniture is not strictly applied. It confirmed the necessary customary rites which a prospective Enogie must perform before he could ascend the throne and that the plaintiff performed them.

At this stage I will consider the relevant statutory provisions, rules of court and decided cases cited and relied upon by the counsel in support of their various contentions on the plaintiff's Issue No. 1.. These are sections 22(a), 25(6) and 68 of the Customary Court Edict No. 2 of 1984, Order 10 rule 6(3), (5) and (6) of the Customary Court Rules, 1978, the cases of *Egri v. Uperi* (supra) *Ogiamien v. Ogiamien* (1967) N.M.L.R. 245 and *Idehen v. Idehen* (1991) 6 N.W.L.R. (Pt. 198) 382.

I am unable to find section 22(a) in Edict No. 2 of 1984 (Customary Court Edict, 1984). But section 22 which I found in the said Edict No. 2 of 1984 provides:

"22 In civil causes or matters a customary court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof."

I believe the learned respondent's counsel who referred to that section of the law had section 24(a) in mind and Section 24(a) provides as follows:

"24 Subject to the other provisions of this Edict, a customary court shall administer-

(a) the appropriate customary law specified in section 25 of this Edict in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force.

(b)..... B

(c).....

Section 25 (3) and (6) state as follows:

"25 (1).....

(2).....

(3) (b) in all other civil causes and matters the appropriate customary law to be administered shall be the customary law prevailing in the area of jurisdiction of the court. C

(4).....

(5)..... D

(6) Evidence of customary law shall be adduced in a customary court in all such cases as may be provided in the rules made under section 68 of this Edict."

Section 68 provides:

"68 Subject to the provisions of this Edict, the president of the customary court of appeal shall make rules providing for any or all of the following matters:-

(a) the practice and procedure of customary courts in their original jurisdiction and in respect of appeals; F

(b) (q)"

The rules of court in force at the time of trial are the Customary Court Rules 1978. Order 10 Rule 6(3), (5) and (6) of the Customary Court Rules, 1978 provide as follows: G

"6 (1)

(2)

(3) Where in any cause or matter before a customary court any party wishes to rely on the customary law of the area of jurisdiction of the court there shall be no need to prove the customary law before the court. H

(4)

(5) *Any customary law which the court in its judgment states to be the customary law shall subject to section 22(a) (sic) of the edict be presumed to be correct until the contrary is proved except where the stated customary law conflicts with any previous subsisting judgment of the High Court, Federal Court of Appeal or the Supreme Court.*

(6) *Any appellant aggrieved by the decision of the court with respect to the appropriate customary law may, apply to the Appeal Court for leave to adduce evidence of customary law in the appeal court and such application shall be granted.*

(7)"

By section 25(3) (b) of Edict No. 2 of 1984, the appropriate customary law applicable in this case is the customary law prevailing in the area of jurisdiction of Orhionmwon Area Customary Court holden at Abudu to which both parties are natives and by section 24(a), the Area Customary Court shall administer the appropriate customary law in all civil matters or causes in so far as it is not repugnant to natural justice, equity and good conscience and not in conflict with any subsisting judgment of the High Court, the Court of Appeal or the Supreme Court.

Both parties at the trial Area Customary Court relied on the customary law of the area of jurisdiction of Orhionmwon Area Customary Court relating to the procedure for succession to the stool of Ugo-Niyike Ikpoba when Obamwonyi the last Enogie died without a male child surviving him. By Order 10 rule 6(3) of the Customary Courts Rules, any party relying on the appropriate customary law of the area need not prove the customary law before the Area Customary Court having jurisdiction over the matter.

The Area Customary Court granted the reliefs sought by the plaintiff. By Order 10 6(5), any customary law which the Customary Court in its judgment states to be the customary law shall be presumed to be correct until the contrary is proved except where the stated customary law is repugnant to natural justice, equity and good conscience or in conflict with any previous decision of the High Court, the Court of Appeal or the Supreme Court.

The Area Customary Court made the following findings as to

the appropriate customary law in its judgment:

"According to the D.W.2, he said as a traditional Bini Chief that a duke in Bini custom is born and not made. We agreed entirely with him. Thus the situation as it affects the "Ogiugo" today at Ugoneki is slightly different because there is no surviving male child who automatically ascends the royal throne any Ogiugo for this moment has to be made or elected. The family having chosen the Emuzes and those who should produce the next Ogiugo is of necessity bound to produce one. The stool becomes an open contest among the children of Emuzes. Before we proceed further in this judgment, we would like to state clearly the necessary customary rituals or rites a prospective Ogiugo has to perform before he could be made one..... Thus it would appear that the Omo N'Oba's position in the appointment of Ogiugo is the approval of a validly elected or appointed Ogiugo i.e. in the case of Ogiugo who is not a direct child of the last Ogiugo.

It is a finding of fact that while the Omo N'Oba can single handedly appoint Enogie for so many villages within the Benin area, he cannot do so in the case of Ogiugo. The evidence from both sides shows that the Ogiugo family is solely responsible for the selection of an Ogiugo for Oba's approval. The situation is slightly different in some other areas where the Omo N'Oba is solely responsible for such appointment.

..... It should therefore be clear to all concerned in this action that contrary to the popular view held, it is not the prerogative of the Oba of Benin to appoint Ogiugo. On the whole Ogiugo is said to have been duly elected if he performs the burial of the last Ogiugo, supported by the Ogiugo family and of course forms the necessary traditional rites at Urhomehe. Presentation to the Oba is merely for blessing..... While the defendant told the court that he was appointed by the Oba of Benin so he came back home to be installed. According to him all the Odionweres were present at the Oba's palace (sic) yet none was fielded as a witness. He is older than the plaintiff, however age is not the determining factor for such appointment most importantly when they, the plaintiff and the defendant are not the direct children of the last Ogiugo

.....
The defendant and his witnesses were not consistent on who appoints Ogiugo in a peculiar situation such as this. It was their evidence that it is solely the duty of the Oba to appoint an Ogiugo.

B *It is our view that the Oba's approval is a later incident. It is done after the candidate for the stool has cross (sic) all the necessary customary hurdles associated with the stool. The Oba's approval we make bold to say cannot be placed over and above the traditions in question.*

C *It was the contention of the counsel to the defendant that it is contrary to the provisions of (sic) 39 of the 1979 Nigerian constitution to discriminate against a child born out of wed-lock. We agreed entirely with the counsel's submission but we are saying that disregarding that condition, he defendant has not performed the necessary traditional rites that would*

D *enable him step into the stool. The choice of Ogiugo is the choice of the entire Ogiugo family and not the Oba of Benin nor a group of Osula family as was done in the case of the defendant. The plaintiff's evidence and those of his witnesses are still*

E *more probable and represents the truth about this action even without Exhibit (sic) "A", "B", and "C".*

The Customary Court of Appeal reversed the decision of the Area Customary Court and held as follows:-

F *" It must be observed and it is significant that once the family made the selection or nomination, the selected candidate must be presented to the Oba whose approval is a sine-qua-non to that selected person's ascension to the throne. Even where there is no dispute as to the heir apparent, he must still get the Oba's approval to ascend to his father's*

G *throne all that the elders were doing was to select Ogiugo-elect for presentation to the Oba of Benin. The presentation is not for the fun of it - Oba had a duty to ensure that the right person was on the throne The procedure adopted by the Ogiugo family*

H *in preferring the respondent to his senior brother the appellant was condemned by the Oba as contrary to Bini customary law The trial court found on the concurrence of evidence on both sides that the appellant is older than the respondent but because he was born out of*

wedlock he was thus disqualified from being nominated as Ogiugo-elect. This we must say, was a wrong application of the Bini Customary law on the nomination of Ogiugo-elect. The appellant both in his natural and customary position in the Ogiugo family suffered no customary taboo whatsoever to deprive him of his customary right to the throne of Ugoneki In the light of our observations above, we are of the settled view that the trial court was wrong in holding that age was not the criterion for the selection of an Ogiugo-elect in the circumstance. The procedure applied by the Ogiugo family in selecting the Ogiugo elect and accepted by the trial court was a violent distortion and manipulation of the applicable Bini custom and was aimed at and resulted in choosing the wrong person instead of the right candidate....."

The Court of Appeal dismissed the plaintiff's appeal against the decision of the Customary Court of Appeal. It relied on the evidence of the Oba at the trial Customary Court.

Order 10 rule 6 (6) of the Customary Courts Rules, 1978 provides for what a person aggrieved by the decision of the Customary Court should do in respect of the decision of the Customary Court on the appropriate customary law. The record of appeal did not show that the defendant applied to the Customary Court of Appeal for leave to adduce evidence in rebuttal. No leave was granted and no contrary evidence was adduced in the Customary Court of Appeal. In the absence of such leave as well as evidence in rebuttal of the customary law in the Customary Court of Appeal, the latter should not have reversed the decision of the Area Customary Court on appropriate customary law.

Had the courts below considered the scope and implications of section 69(2) of Edict No.2 of 1984 and Order 10 Rule 6(3),(5) and (6) of the Customary Courts Rules, 1978, it would have realized that the Customary Court for the area is Orhionmwon Area Customary Court. The decision of that court as to the appropriate customary law, subject to the exceptions set out earlier in this judgment, is paramount. See the case of Ogbero Egri v. Edeaho Uperi (1973)9-12 S.C. 299 at 305-309.

The only exception which was raised in the trial court by the learned defendant's counsel is in relation to section 39 of the Constitution of the Federal Republic of Nigeria, 1979. The trial court agreed with counsel's submission as a correct statement of the constitutional provision. The court went on to hold that the defendant did not perform the necessary traditional rites that would enable him ascend the throne coupled with the fact that he was selected by the Osula family, which is a branch of Ogiugo family instead of the entire Ogiugo family.

Both the Customary Court of Appeal and the Court of Appeal erroneously treated the evidence of the Oba of Benin at the trial court as evidence in rebuttal of the appropriate customary law envisaged in Order 10 Rule 6(6) of the Customary Courts Rules. Section 39 of the 1979 Constitution which made provision for the right to freedom from discrimination by reason of circumstances of birth was considered by the trial court. The court did not nullify the installation of the defendant as a result of his being born out of wed-lock, rather that court found that the defendant did not perform the necessary customary rites to entitle him to the stool.

The court below emphasized that the principle of primogeniture did not strictly apply in the peculiar situation of Ogiugo stool. The Orhionmwon Area Customary Court is presumed to know what the law is and to state it even without requiring that any evidence should be led before it to that effect. See Order 10 Rule 6(3) of the Customary Court Rules 1978 set out above. The rule notwithstanding, the plaintiff led evidence as to the customary law which the trial Area Customary Court accepted. See Haav v. Kundu (1997)5 N.W.L.R (Pt. 505) 313,

In my view, the two appellate courts were unfair to the trial court in treating its decision as perverse. There was clearly no basis for that conclusion having regard to the state of the law, the rules of court and the evidence adduced before it.

I am of the view that the cases of Ogiamien & Or. v. Ogiamien (supra) and Idehen & Ors. v Idehen & Ors. (supra) cited by the learned defendant's counsel do not fully apply. In view of the Area Customary Court, the principle of primogeniture as it affects the Ogiugo at Ugoneki

is slightly different because there was no surviving male child who should have automatically ascended the royal throne and any Ogiugo for that moment had to be made or elected.

I am therefore in no doubt that both the Customary Court of Appeal and the Court of Appeal were wrong in reversing the decision of the Area Customary Court as to the appropriate customary law applicable in the area. I am satisfied that the Orhionmwon Area Customary Court was right in its conclusion as to the customary procedure for the selection or election of the Ogiugo. The Oba of Benin under cross-examination stated thus:

"Where the title is hereditary, it devolves on the eldest child except where there is no male child."

This statement agrees with the case of the plaintiff which was accepted by the Area Customary Court that the situation as it affected Ogiugo at Ugoneki is slightly different where there is no surviving male child of the last Enogie of Ugo-Niyeke Ikpoba. The principle of primogeniture is therefore not strictly applied in such a situation.

The Area Customary Court stated that in many villages within the Bini Kingdom, the Oba of Benin can single-handedly appoint Enogie and that he cannot do so in the case of Ogiugo. The Ogiugo family is solely responsible for the election/selection of the Ogiugo for the Oba's approval. The trial court held as follows:

"It should therefore be clear to all concerned in this action that contrary to the popular view held, it is not the prerogative of the Oba of Benin to appoint Ogiugo. On the whole Ogiugo is said to have been duly elected if he performs the burial of the last Ogiugo, supported by the Ogiugo family and performs the necessary traditional rites at Urhomehe. Presentation to the Oba is merely for blessing." (Underlining is for emphasis.)

I agree with the Area Customary Court that the appointment or selection of the Ogiugo is the responsibility of Ogiugo family and he is duly appointed or elected after he performs the burial of the last Ogiugo and other necessary traditional rites. The

Oba gives his formal approval. In the case of the defendant, only Osula branch of Ogiugo family selected and presented him to the Oba who gave his approval when his selection was not done by the entire Ogiugo family and he did not perform the traditional rites.

B The Area Customary Court was right in nullifying his installation based on that approval.

In conclusion, the Customary Court of Appeal went out of its way and brought its presumed personal knowledge of Bini customary law into its judgment when there was no contrary evidence before it as provided by the rules of that court. It was only the members of the trial customary court that can state the appropriate customary law from their personal knowledge. Neither the Customary Court of Appeal nor the Court of Appeal can do so.

D I will therefore allow the appeal of the plaintiff and set aside the judgment of the court below. I hereby restore the judgment of the Orhionmwon Area Customary Court. The appellant is entitled to costs which I assess at N10,000.00.

E CROSS APPEAL

The respondent was granted leave by this court on 7-1-98 to cross-appeal. Both the appellant and the respondent are substituted for the original parties who died during the pendency of this appeal. They are the first sons of the original parties. The cross-appellant was granted leave to appeal on one ground of appeal which without its particulars reads:-

G *"The present appellant whose father was never an Enogie of Ugo-Niyeke Ikpoba has no locus standi to prosecute this appeal as he has no sufficient interest in the hereditary title."*

H The motion for substitution of the present parties in this appeal in place of the original parties was on notice. The application was opposed by Eghobamien, Esq., learned counsel for the respondent. The court granted the application on 28-10-96 after hearing arguments from counsel. There was no appeal against the order. The respondent in the cross-appeal is indirectly questioning the order of this court. He cannot do it through the back door.

Learned counsel for the cross-appellant is confusing the law on survival of causes of action with the appellant's standing to prosecute the appeal commenced by his late father. Both the appellant and the respondent are first sons of the original parties to the appeal. Each stands to gain or lose by the outcome of the main appeal. The Administration of B Estates Law, Cap. 2, Laws of Bendel State, 1976 is relevant to the cross-appeal. By virtue of section 15(1) thereof, the cause of action survived the dead parties. See Eyesan v. Sanusi (1984) 4 S.C.115.

Section 15(1) of the Administration of Estates Law provides:

"15(1) Subject to the provisions of this section, on the death of C any person after the commencement of this Law all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of the estate: Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing D one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery." (Underlining is for emphasis)

Ogiugo stool is hereditary by virtue of the Administration of Estates Law of Bendel State. Having regard to the state of the E law and the facts, the action survived the dead parties. The cross-appeal lacks merit and I hereby dismiss it.

BELGORE JSC

The customary court is presumed to know the customary law of the area of its jurisdiction. That is the purport of Order 10 rule 6(3) and (5) of Customary Court Rules of Edo State. Whoever asserts that the customary law as enunciated by customary court is not correct must G evidence cogent enough to disprove the stand of customary court. Thus the Customary Court of Appeal must be moved by the appellant who will adduce evidence to prove the correct customary law in contradiction to the law enunciated by the customary court of trial. The Customary H Court of Appeal erred when it reversed the decision of the trial customary court on customary law of Orhinmwon on succession to Onogie without receiving evidence of it. The Court of Appeal erred in overlook-

ing this important provision of the law.

It is also clear that the respondent was nominated by Osula section of Ogiugo family whereas only the entire Ogiugo family must nominate.

B The unusual happened in this case and the principle of primogeniture did not apply because the last Onogie died without male child and did not have brothers either. The appellant and the respondent were the uncles of the last Onogie. Thus the principles in Ogiamien v. Ogiamien (1967) NMLR 245 and Idehen v. Idehen (1991) 6 NWLR (Part 198) 382
C will not apply as they are irrelevant.

I therefore find great merit in this appeal and I allow it. I set aside the decision of the Court of Appeal. I therefore agree with the fuller reasons in the judgment of my learned brother Ogwuegbu, JSC.,
D and restore judgment of the trial customary court.

As for the cross-appeal, I also find no merit in it and I adopt the reasoning in the judgment of Ogwuegbu, JSC., as mine in dismissing it.

I award N10,000.00 costs in the main appeal against the respondent.
E

KATSINA-ALU JSC

F I agree with my learned brother Ogwuegbu, JSC that this appeal should be allowed, and the cross-appeal dismissed. The customary court is presumed to know the appropriate customary law of the area within its jurisdiction. This is the purport of order 10 Rule 6(5) of the Customary Court Rules, of Bendel State 1978 which provides:

G "6(5) Any customary law which the court in its judgment states to be the appropriate customary law shall be subject to the provision of section 22(a) of the Edict, be presumed to be correct until the contrary is proved except where the customary law conflicts with any previous
H sisting judgment of the High Court, Federal Court of Appeal or the Supreme Court."

This presumption can only be rebutted by either contrary evidence in the customary Court of Appeal or that it is in conflict with the judgment

of the High Court, Court of Appeal or the Supreme Court.

It must be emphasized here that no fresh evidence was adduced in the Customary Court of Appeal to establish the contrary. The Customary Court of Appeal simply reversed the judgment of the trial customary court by relying on the Oba of Benin. The Oba, at p.74 of the record B testified thus under cross-examination:

"Where the title is hereditary, it devolves on the eldest child except where there is no male child."

The evidence, at best, only restated the position of the Bini customary C law generally with regard to inheritance of the Enogie title. That was never in contention. The peculiar nature of this case is that the deceased Enogie had no surviving male child. It will be seen clearly from the testimony of the Oba of Benin that he did not say what the custom was where the deceased Enogie is not survived by a male child. I find it D particularly plain that in such a situation, the Customary Court of Appeal was in grave error when it reversed the decision of the trial customary court. Similarly the Court below was also in error when it affirmed the decision of the Customary Court of Appeal. E

For this reason and for the fuller reasons given by Ogwuegbu, JSC I also allow the appeal of the plaintiff and set aside the judgment of the court below. Accordingly I restore the judgment of the trial Orhionmwon Area Customary Court, Abudu. I award N10,000.00 cost F to the plaintiff.

With respect to the cross-appeal, I find no merit whatsoever in it. For the reasons given by my learned brother Ogwuegbu, JSC which I adopt as mine, I too dismiss the cross-appeal. G

ACHIKE JSC

I have had the opportunity of perusing the leading judgment of my learned brother, Ogwuegbu, JSC. I am in total agreement with the said judgment that the appeal is meritorious and deserves to succeed while there is no iota of merit in the cross-appeal which deserved to be dismissed. I would however wish to put in a word or two only way of

emphasis.

The facts of the case leading to this appeal have been painstakingly set out in the leading judgment of my learned brother, Ogwuegbu, J.S.C. I cannot improve on this and accordingly, I respectfully seek leave to adopt them as mine. I would, however, where necessary, make further reference to the facts if only to elucidate the point being made.

Suffice it to say that in the face of the assertions and counter-assertions by the parties as to the rightfulness to selection of their candidate as the Enogie of Ugo-Niyeke Ikpoba Orhionmwon Local Government Area, after an elaborate appraisal of the evidence of the parties' witnesses, which included the testimony of the Oba of Benin, the trial Area customary Court summarized its findings and decision as follows:-

"After a careful review of the evidence of the plaintiff and the defendant, it is reasonably clear that while the plaintiff gave detail (sic) account of all the ceremonies and rites he performed after his nomination, the defendant presented his own version hap-hazardly, in an unimpressive manner....."

Again that the defendant is the most senior son as submitted by his counsel does not give him automatic right to the title, after all he is not a direct child of the last Enogie. Before the plaintiff went on performing or fulfilling the various conditions precedent for the stool, the plaintiff and the defendant were equally entitled to the stool (but from available evidence plaintiff is better entitled). The choice of Ogiugo is the choice of the entire Ogiugo family, community and not that of Oba of Benin nor a group of Osula family as was done in the case of the defendant

Exhibits "A" and "B" are authentic there is no reason why we will not consider them. in Exhibit "A" it was manifestly clear that a large member (sic) of the various families making up the Ogiugo family were present at the meeting where plaintiff was elected including the defendant in this case

We believe as of fact that it is the plaintiff who performed the burial of the last Enogie purposely for the throne in which he became a prospec-

tive Enogie in view of his selection by the family, it is our finding of fact also that he was the person duly and validly elected by the family. That the defendant was hand picked by a group of the Osula family who consequently presented him to the Oba for approval, this we have said, they lack the power and authority to do. We also find as a fact as a result of the plaintiff's election or appointment by his family he functioned in the capacity of the Ogiugo until this action.

It would be noted that the trial Area Customary Court had earlier set out in its judgment the necessary customary rites that an aspirant for the Ogiugo throne would have to perform as a condition precedent for his success in that contest. In the view of the trial court, these are:

"(1) *He must bury the last Ogiugo;*

(2) *He must be from the Royal family;*

(3) *He must perform the various rituals at Urhomehe;*

(4) *He proceeds to Ugonoba for the final installation and in the case of an Ogiugo who is not a direct son of the last Enogie of Ogiugo, then he must be validly elected or appointed by Ogiugo royal family and must also have the support of the various sub-villages or community. The final lab (sic) being the blessing of the Oba of Benin."*

On appeal, the Customary Court of Appeal, Edo State reversed the findings and decision of the trial Area Customary Court. Inter alia, it held:

" We agree that it is not part of Bini custom, as was rightly stated by some of the defence witnesses that a child born out of wedlock does not succeed to the throne.The summary of all this is that, the appellant, not being a first-born son of Emuze, does not suffer any customary inhibition or taboo in succeeding his father Emuze if that was the succession in question. If he could not be disqualified from succeeding his father Emuze, it is far fetched and most contrary to Bini customary law of succession to rely on his being purportedly born out of wedlock to Emuze to deny him of his undisputed right to the throne of Ugo-Neki - he being the naturally acknowledged eldest surviving person on the Ogiugo royal line."

On a further appeal to the Court of Appeal, Benin Division, that court

concluded its judgment as follows:

"The Customary Court of appeal also reviewed the evidence as the grounds of appeal were in essence omnibus and found the findings of the trial court perverse in the face of the evidence of Oba of Benin, the Custodian of Bini custom whose evidence was not shaken, contradicted or otherwise discredited either under cross-examination or otherwise. The Oba's evidence is therefore deemed to be unchallenged and accepted as the fact found by the trial court. And evidence and findings of the trial court to the contrary are deemed perverse. Kodilinye v Odu 2 WACA 335, Akinloye v Eyiola (1968) N.M.L.R. 92, 95; Balogun & Ors. v. Agboola (1974) 10 SC 111, 117 - 119. In the circumstances, this appeal fails and is dismissed"

It may be observed in passing that it is the reference to the evidence of Oba of Benin which, in my view, was erroneously perceived by the Court of Appeal, that detrimentally sowed the ill-fated seed of misapprehension in this appeal. It is on this misapprehension that this appeal will turn and we shall come to it presently.

It is pertinent to observe that it is common ground that succession to the title of Enogie is governed by the principle of primogeniture; this means that the deceased Enogie would be succeeded by his eldest son. Where therefore, as in this case, the last Enogie is not survived by a male issue, it is understandably clear that the principle of primogeniture cannot govern the issue of succession. The question that manifestly exercised the trial Area Court, and to a large extent, both the Customary Court of Appeal and the Court of Appeal, was how would the gap for selection created by the absence of a surviving male child be addressed. As has been shown from the excerpt of the judgment of trial Area Court, that court set out the necessary customary rites which an aspirant to the throne of Enogie would perform in order to qualify for his ascendancy to the throne. The trial court confirmed due compliance to the customary rites in favour of the plaintiff/appellant.

It is now appropriate to examine the issues for determination formulated by the parties. The defendants/appellants' learned counsel, Dr. M. Odje, S.A.N. postulated the following issues:

" 1. Whether the Court of Appeal was right in affirming the judgment of the Customary Court of Appeal which reversed the findings and statement of what is the appropriate customary law in relation to this case having regard to the provisions of S.25(6) of the Customary Court Edict of 1984 as well as the provision of Order X Rule 6(3), (5) and (6) B of the Customary Court Rules, B.S.L.N. 29 of 1978.

2. Whether the evidence given by the Oba settled the issues put in dispute by the parties to wit the customary procedure for the selection or appointment of the Enogie in the peculiar circumstances of this case. C

3. Who has the right under Bini Customary Law to select or elect the Enogie and what is the significance of Oba's approval.

4. Can the Customary Court of appeal as an appellate court set aside the specific findings of fact made by the trial court as affirmed by the Court of Appeal? D

5. Was the Court of Appeal right in affirming the judgment of the Customary Court of Appeal which relied on a book titles "Benin Studies" by R.E. Bradbury?

6. From the evidence tendered by both parties who discharged E the burden of proof on the balance of probability?

For the plaintiffs/respondents their learned counsel S. Egbobamien Esq (as he then was) formulated the following four issues for determination, to wit, F

"1. Whether the lower courts of appeal were right in evaluating the evidence at the trial court which had failed to evaluate or properly evaluate and to have upheld the decision of the Customary Court of Appeal? G

2. What is the relevance of the Oba of Benin's evidence in the appointment of an Enogie and his relevance as the prescribed Authority and in view of the traditional Rulers and Chief's Edict, 1979.

3. Whether the Supreme Court can take judicial notice and act on selection 39 of the 1979 Republican Constitution and sections 41 and H 74 of the Evidence Act in this case suo motu?

4. Is the title in this case one in rem or in personam to allow for substitution?"

Looking at the above two sets of issues for determination, and having regard to the grounds of appeal filed herein in respect of the main appeal, it seems clear to me that appellants' Issue No.1 is identical to respondents' Issue No. 2. In my judgment, these two issues respectively identified by the parties are sufficient to resolve the real bone of contention in this appeal. The gist of these two issues, as more lucidly set out in issue No. 1 in the appellants' brief, is if I may put it tersely:

"were the two appellate courts right in the way they treated Order X Rule 6(3), (5) and (6) of the Customary Court Rules, B.S.L.N. 29 OF 1979?"

It is now appropriate to set out the provisions of the above sub-rules of Rule 6:

- Rule 6 (1).....
- (2).....
- (3) *Where in any cause or matter before a customary court any party wishes to rely on the customary law of the area of jurisdiction of the court there shall be need to prove the customary law before the court.*
- (4)
- (5) *Any customary law which the court in its judgment states to be the customary law shall subject to section 22(a) (sic) of the Edict be presumed to be correct until the contrary is proved except where the stated customary law conflicts with any previous subsisting judgment of the High Court, Federal Court of appeal or the Supreme Court.*
- (6) *Any appellant aggrieved by the decision of the court with respect to the appropriate customary law may, apply to the Appeal Court for leave to adduce evidence of customary law in the appeal court and such application shall be granted."*

Undoubtedly, the appropriate customary law applicable in the circumstances of the case now on appeal from the trial Area Customary Court is that prevalent in Orhionmwon area, the Area Customary Court holden at Abudu. Applying the prevailing customary law of succession where the general rule of primogeniture could not apply because, as earlier noted, the last Enogie was not survived by a male child, the trial court found for the plaintiffs/respondents. Where appellants, such as the appellants herein,

are dissatisfied with the decision of the trial customary court in respect of the prevailing customary law, the only course available to the aggrieved appellants is, with the leave of the Customary Court of Appeal, to adduce evidence in challenge of such customary law. It is in the light of the fresh evidence of the purported custom and the custom pronounced or found by the trial Area Customary Court that the Customary Court of Appeal would be guided in determining what ought to be the correct version of the customary law in question. It does not admit of any argument that no fresh evidence was prayed to be adduced by the appellants at the hearing before the Customary Court of Appeal, and therefore none was adduced. But, glaringly, the respective judgments of the two intermediate appellate courts spoke volumes of the undue reliance placed on the testimony of the Oba of Benin adduced at the trial Area Customary Court. With the greatest respect to the two lower appellate courts, undue reliance was placed on the Oba's testimony as if same would tantamount to compliance with Order X Rule 6(6) (earlier on reproduced in this judgment). I make bold to say that such apparent compliance would be a far cry as regards the unambiguous provisions both of the letters and spirit of Order X Rule 6(6).

The futility and consequence of placing such reliance on the Oba of Benin's testimony is obvious. This point, as it devastatingly affects the outcome of this appeal may be clearly appreciated when it is borne in mind that by sub-rule (5) of Rule 6 of Order X any customary law so pronounced by the trial customary court to be the customary law remain so and the same is presumed to be correct until the contrary is established unless the stated customary law conflicts with any previous subsisting judgments of the High Court, Court of Appeal or the Supreme Court. And one may add, unless the stated customary law is repugnant to natural justice, equity and good conscience. See the decision of this Court in Ogbero Egiri v. Edeaho Uperi (1973) 9-12 SC. 299 at pp 305-309 which is reasonably close to the circumstances of this case. In my judgment, the authorities of Ogiamien & ors v Ogitimien (1867) NMLR 245 and Idehen v Idehen (1991) 6 NWLR (Pt. 198) 382 are in applicable.

Finally, it is pertinent not to miss the crucial point made by the

trial customary court that the defendant/appellant failed to perform the prescribed traditional rites that would have accorded him success in the contest; it further stressed that the appellant was selected only by the Osula family instead of the entire Ogiugo family.

B It may be asked, what is the conclusion of the issue in contro-
versy in this appeal? It is common ground that the principle of primo-
geniture in its unadulterated form could not operate in the circumstances
of this case as the last Ogiugo, now deceased, was not survived by any
male issue, a condition precedent to the application of the principle of
C primogeniture. Respondents adduced evidence at the trial which was
accepted by the trial customary court as sufficient to give them victory
in the contest against the appellants. The trial court having held that the
respondents had performed the necessary rites in the circumstances-that
D holding-unless successfully challenged at the Customary Court of Ap-
peal by fresh evidence in that court remains the prevailing customary rule
in force for the time being. Of course, it would be remembered that no
such fresh evidence was led by the appellant at the Customary Court of
E Appeal. Thus by the express provisions of Order X Rule 6 (3) the deci-
sion handed down by the trial court first, that the selection or appoint-
ment of the Ogiugo is the preserve of the entire family of Ogiugo and
second that a person so elected or appointed would have additionally
F performed such prescribed traditional rites as had earlier been stated in
this judgment, remains the customary law rule for appointment of an
Ogiugo where for any reason the principle of primogeniture would not
strictly apply in the given situation.

G Thus in the final analysis, the decision of the trial court which
accepted the selection or appointment of the respondents' candidate as
having performed the necessary rite in respect of the contested Ogiugo
throne must be restored. Clearly, the respective concurrent judgments
of the two lower courts showed a complete misunderstanding of the
H import of the provision of Order X Rule 6(6) as it relates to the necessity
to field fresh evidence at the Customary Court of Appeal by a party who
contests the correctness of a customary law rule that had been pro-
nounced upon by the Area Customary Court of a locality. Notwithstand-

ing the concurrency of the posture of these two appellate lower courts, their respective of the decision would be insupportable and must be set aside because they were positively rendered in violation of Rule 6(6).

In the result, the main appeal succeeds and the same is allowed with N10,000,00 costs to the appellant.

B

CROSS-APPEAL

The cross-appellant also appealed on a sole ground of appeal which, shorn of its particulars runs thus:

"The present appellant whose father was never an Enogie of Ugo-Niyeke Ikpoba has no lus standi to prosecute this appeal as he has no sufficient interest in the hereditary title."

C

But it may be recalled that the original parties to this suit and this appeal, died while the appeal was pending and were substituted respectively by the appellant and respondent by a motion on notice. The motion, even though it was opposed by the respondent, was granted. The order for substitution was not appealed against yet the cross-appellant by this appeal is, as it were, surreptitiously questioning the order for substitution. Surely, this is unacceptable; having failed to appeal against the order made by this Court for substitution it cannot denounce same by appeal. This is enough to contain the cross-appeal.

D

E

Be that as it may, the cause of action leading to this appeal survives the original deceased parties by reason of section 15(1) of the Administration of Estate Law which, inter alia, stipulates that subject to the provisions of section 15(1), on the death of any person after the commencement of this law, all causes of action subsisting against or vested in him, shall survive against or, vested in him shall survive against or as the case may be, for the benefit of the estate: provided that this subsection does not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery. Clearly, the action survived the deceased parties.

F

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The result is that the cross-appeal fails and the same is dismissed.

KALGO JSC

I have had a preview of the judgment just delivered by my learned brother Ogwuegbu JSC and I entirely agree with him that there is merit in the appeal and it should be allowed. I adopt his conclusions and reasoning in the judgment as mine. I however wish to add the following by way of emphasis.

This appeal concerned the dispute on who between the parties is entitled to inherit the stool of Enogie of Ugonoki otherwise known as the Oguigo title of Ugo-Niyeke-Ikpoba according to Bini Custom of Edo State. It is common ground that the last holder of the title Oguigo Obamwonyi died in 1978 without any male child leaving only three daughters and without any immediate brother to succeed him. He left only three uncles who were sons of his grandfather called Emuze who was Enogie himself. It is not in dispute that under normal circumstances, the inheritance to the stool of Ogiugo is by primogeniture i.e. the eldest male child takes over from his deceased father as Oguigo. Unfortunately this was not to be here since the deceased Oguigo left no male children. The Area Customary Court in its majority judgment summed up the problems thus:-

"The crux of this matter is the customary procedure to be followed before Oguigo can be appointed or elected, who does the appointment. At what stage can Oguigo be said to have been elected validly and lastly the role of the Oba of Benin in the appointment and approval of an Oguigo.

It was clear from the evidence of the parties that the last Oguigo died without a surviving male child. In normal situation where an Oguigo has a male child, the ascension to the throne is indisputably for the male child. In the case in hand, the last Oguigo had no male child, he died leaving three daughters, who according to Bini Custom cannot claim any right to the stool." (underlining mine).

The question posed by the Area Customary Court from the above extract is what is the Customary procedures to be followed before an Oguigo can be appointed in the circumstances of this case. The Court held that since there were no male children to inherit, the stool becomes an open contest among the children of Emuzes, the uncles of the last

Ogiugo. The Court then proceeded thus:-

".....we would like to state clearly the necessary customary rituals or rites a prospective Ogiugo has to perform before he could be made one. 1. He must bury the last Ogiugo; 2. He must be from Ogiugo royal family; 3. He must perform the various rituals at Urhomehe; 4. He proceeds to Ugonoba for the final Installation and in the case of an Ogiugo who is not a direct son of the last Enogie of Ogiugo, then he must be validly elected or appointed by the Ogiugo royal family and must have the support of the various villages or community.

The final lab being the blessing of the Oba of Benin."

The Area Customary Court then examined closely the evidence adduced by both parties in proving their claims. In respect of the defendant now respondent, the court found that he has not performed the necessary traditional rites that would entitle him to step into the stool of Ogiugo. It also found, relying on evidence of D.W.2, that only the Osula family and not all the Ogiugo family elected the defendant/respondent. But in respect of the plaintiff/appellant, the court said on page 108 of the record that:-

".....we believe and accepted plaintiff as the person who performed the burial rites of the last Enogie and the various Urhomehe ceremonies. Plaintiff did all and he maintained it consistently and impressively before us. We therefore believe him and his witnesses."

In addition, the court also found that the plaintiff was elected or selected as the Ogiugo at a meeting of the whole Ogiugo royal family at which the defendant himself was present. The Area Customary Court finally found that the plaintiff/appellant has fully complied with the conditions it set out for ascension to the throne of Ogiugo in the circumstances of this case and declared the plaintiff/appellant as rightfully and properly selected as the Ogiugo

The defendant/respondent's appeal to the Customary Court of Appeal was successful and a further appeal to the Court of Appeal by the plaintiff/appellant was dismissed. Hence the appeal to this Court by the plaintiff.

According to the applicable law in Edo State, the Area Custom-

ary Court has the power to declare the customary law of the area within its jurisdiction in any particular case before it. If it did so, as in this case, then the customary law so declared, is presumed to be correct unless the contrary can be proved in either of the following two ways:-

B (i) *If the declared custom is shown to be in conflict with any previous subsisting judgment of the High Court, Court of Appeal or the Supreme Court; or*

C (ii) *If additional evidence is called on appeal in the Customary Court of Appeal and the evidence contradicts the custom so declared.*

If neither (i) nor (ii) is available, the declaration by the Area Customary Court of the appropriate custom of the area concerned, is presumed to be correct and final. See OGBERO EGIRI V EDEDHO UPERI (1973) 11 SC 299 at 305-308. See also Section 25(6) of the Customary Court Edict 1984 of Edo State and 0.10 r. 6 (3), (5) and (6) of the Customary Court Rules of Bendel State 1978 applicable to Edo State.

It is clear from the record that there was no application to call additional evidence of custom in the Customary Court of Appeal and no such evidence was given to challenge the declaration of the custom appointing Ogiugo as contained in the judgment of the Area Customary Court. Therefore the presumption of correctness of the declared custom was not defeated. This means that the Customary Court of Appeal had no reason to interfere with the decision of the Area Customary Court. It was therefore wrong to reverse that decision.

The Court Appeal relied heavily on the evidence of the Oba of Benin. The Oba is no doubt the custodian of the Bini custom and his evidence would be treated with great weight in any case concerning the native law and custom of the Bini people. In this case, it is clear that the evidence of the Oba was only on the general hereditary principle of primogeniture where a deceased Chief was survived by a male child. The Oba's evidence will therefore not apply in the special case such as this one, where the principle of primogeniture could not apply as there are no male children left by the deceased chief. Therefore, the defendant/respondent though older than the plaintiff/appellant will not according to

the Oba's evidence, be taken as Ogiugo in the circumstances of this case to displace the decision of the Customary Area Court. In any case, the Customary Area Court found that while the Oba can appoint an Enogie single handedly within the Benin area, he cannot do so in the case of an Ogiugo. His position is only to proof a person who is validly selected or appointed as Ogiugo. B

It is also abundantly clear that the findings of the Area Customary Court which constituted the Customary law to be followed in this situation was not shown to conflict with any subsisting judgment of the High Court, Court of Appeal or the Supreme Court. Therefore in my view, the court of Appeal was wrong in affirming the decision of the Customary Court of Appeal and I find that there are good reasons to interfere with the concurrent findings in this case. See CHINWENDU V MBAMALI (1980) 3-4 SC. 31, KALE V COKER (1982) 12 SC 252; AKEREDOLU V AKINREMI (1989) 2 NWLR (Pt.108) 164. C D

For the above reasons and the more detailed reasons given by my learned brother Ogwuegbu JSC in the lead judgment, I also allow the appeal, and dismiss the cross-appeal. I accordingly set aside the decision of the Court of Appeal affirming that of the Customary Court of Appeal and restore the majority decision of the Area Customary Court. I award the costs of N10,000,00 in favour of the plaintiff/appellant against the defendant/respondent F

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