

SUPREME COURT OF NIGERIA
12TH MARCH 1999, SC.160/1991
CORAM:- A. B. WALI, I. L. KUTIGI, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.

FABIAN ONYEJEKWE & 2 ORS. APPELLANTS
(For themselves and on behalf of Orowa family
of Ogbeoza Village, Onitsha excluding the plaintiffs)

AND

OBIORA ONYEJEKWE & 3 ORS. RESPONDENTS

APPEALS - Evidence - Evaluation of - Where the trial court has properly evaluated evidence - It is not the business of the Court of Appeal to substitute its own view - For the views of the trial court.

CUSTOMARY LAW - Custom - Burden of proof - Is on the party who seeks to rely on it - And who will fail - Where such evidence is not adduced.

CUSTOMARY LAW - Estate - Distribution of - Onitsha customary law of "Usokwu" - Its meaning and application.

CUSTOMARY LAW - Onitsha customary law - Of "usokwu" - Is a recognized mode of distribution of property on intestacy - But it is inapplicable to the present case.

EVIDENCE - Custom - Burden of proof - Is on the party who seeks to rely on it - And who will fail - Where such evidence is not adduced.

EVIDENCE - Evaluation - Of evidence - Where the trial court has properly evaluated evidence - It is not the business of the Court of Appeal to substitute its own view - For the views of the trial court.

EVIDENCE - Pleadings - Issues - Joining of issues - The judgment of

the court - Must be based both on the facts and the law - On issues joined by the parties.

JUDGMENTS - *Evaluation of evidence - Where the trial court has properly evaluated evidence - It is not the business of the Court of Appeal to substitute its own view - For the views of the trial court.*

JUDGMENTS - *Pleadings - Issues - Joining of issues - The judgment of the court - Must be based both on the facts and the law - On issues joined by the parties.*

PLEADINGS - *Issues - Joining of issues - The judgment of the court - Must be based both on the facts and the law - On issues joined by the parties.*

SUCCESSION - *Distribution of estate - Onitsha customary law - "Usokwu" - Its meaning and application.*

SUCCESSION - *Onitsha Customary Law - Of "usokwu" - Is a recognized mode of distribution of property on intestacy - But it is inapplicable to the present case.*

FACTS

The plaintiffs/respondents at the Onitsha High Court instituted this action and claimed against the defendants/appellants for equitable distribution or sharing of 18 plots of family land known as "Owelebo" which plots of land were allocated to Orowa family by the Umueze Aroli Community. The 18 plots which were granted to Orowa family were part of the Owelebo land which the Umueze Aroli community won in a land dispute with Isiokwe village. The 1st, 2nd and 3rd respondents, had contributed to the levy imposed on all members of Umueze Aroli families for the Owelebo land litigation. It was after the final litigation which went in favour of Umueze Aroli families that the 18 plots from the disputed land were allocated to the Orowa family. The appellants were

committee members of Orowa family union and where charged with the sharing of the 18 plots allocated to the family. The disagreement leading to this action arose from the mode of sharing adopted by the committee members. The respondents claim that in Onitsha custom landed property is shared according to the number of Kitchens or "Usokwu" a man has provided that the kitchen has a male issue. But that in their family the late elders in order to maintain equity in the family during their time had shared things including levies by sub-families.

That the appellants had abandoned this customary method of distribution and have allocated two or three plots to some sub-families while others do not have any. The appellants on the other hand denied the claim and averred that properties, in accordance with Onitsha Native Law and custom, are shared amongst the living. That the sharing by "Usokwu" or per stripes would apply where an individual with wives own the property. The property in this case is a communal one and was allotted to the Orowa family by virtue of their singular spiritual headship. The Orowa family agreed that the sharing of the 18 plots would be among the present married members of the family. To arrive at the best utility and equitable sharing the family took as their basis the spiritual head and age in order of priority.

At the conclusion of trial, the learned trial judge considered the pleadings and evidence adduced and resolved in his judgment that the plaintiffs/respondents have failed to prove that the sharing of the plots must be made through "Usokwu" system. Secondly the plaintiffs/respondents have failed to prove that the method used in sharing the plots was inequitable. He therefore dismissed the claim. Dissatisfied, the respondents appealed to the Court of Appeal, Enugu Division which allowed the appeal. The appellants aggrieved have now appealed to the Supreme Court raising seven issues.

ISSUES FOR DETERMINATION

1. Did the Court of Appeal substitute its views in place of the trial court's decision with respect to the sharing of 18 plots of Owelebo Land, and if they did was it proper?

2. Did the learned Justices of the Court of Appeal award the

Plaintiffs/Respondent more than they sought for?

3. Did the learned Justices of the Court of Appeal came to a wrong conclusion when they stated that " *stricto sensu*, it can not be fairly said that appellants contended that the " *Usokwu*" system was applicable in the case in hand because in the first relief sought by them they simply prayed the court to decree an equitable mode of sharing?

4. Did the learned Justices of the Court of Appeal misdirect themselves when they found that members of Orowa family were dissatisfied with the method of sharing adopted by the Defendants and laid emphasis on Exhibit "A" in deciding that the method of sharing of the defendants was inequitable? Etc. p. 623

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

Customary law - Distribution of estate

1. I agree that the Court of Appeal is blowing hot and cold on the issue of sharing of the plots according to sub-family system. "Usokwu" has been defined by the respondents that under the system the man's landed property is shared among several "Usokwus" that each "usokwu" has a living male issue. Usokwu in this context may be literally interpreted to mean a "wife's kitchen" and comprises all the children of each wife. In other words, "Usokwu", in so far as it includes a male child, is the recognized unit for sharing a deceased male's landed property in onitsha. (p. 624 F)

Custom - Burden of proof

2. It is part of respondent's Statement of Claim that according to Onitsha custom if the 18 plots are shared each of 10 sub-families or kitchen as of right must be given a plot . In other words, it is the case of respondents before the court that the system of sharing landed property in onitsha is by "Usokwu" or kitchen or sub-families all these methods of sharing were used interchangeably in the proceedings. It is for the respondents to call evidence and establish their custom. They failed to do so. Their case stands or falls on what they asserted and proved. It is trite that the burden of proving particular fact is on the party who seeks to rely on it

and who will fail where such evidence is not adduced. See Madam I. Arase v. Peter U. Arase (1981) 5 SC. 33. (p. 625 E)

Evidence - Evaluation

3. I therefore agree with learned counsel for the appellants the Court of Appeal and erred when it re-evaluated the evidence and came up with a sharing system which the respondents did not ask for. It is not the business of the Court of Appeal to substitute its own view for the views of the trial court. If there has been proper appraisal of evidence by a trial court, a Court of Appeal ought not to embark on a fresh appraisal of the same evidence in order to arrive at a different conclusion from that reached by the trial court. See Obisanya v. Nwoko (1974) 5 SC. 69 at 80 and Victor Woluchem & Ors. v. Chief Gudi & Ors. (1981) 5 S.C. 291 at 326. (p. 625 H)

Pleadings - Issues

4. The distribution of plots embarked by the learned justice of the Court of Appeal is not supported by pleadings and evidence. Where pleadings have been joined by the parties in a case the judgment of the court must be based both on the facts and the law on issues joined by the parties on their pleadings. A court should not embark on dealing with issues not raised in the pleadings nor should it give judgment on issues on which either counsel had not been called upon to address the court. See Aseimo & ors. v. Amos & Ors. (1975) N.S.C.C. 43 and African Continental Seaways Ltd. v. Nigeria Dredging Roads and General Works Ltd. (1977) 5 S.C. 235 at 248. (p. 627 A)

Customary Law - Onitsha Customary law

5. It is my view that the Onitsha Customary Law of "Usokwu" or kitchen has won recognition as a mode of distribution of property on intestacy. The customary law is not unfair and inequitable. It is quite plain however that the custom does not apply to the case of the respondents. Be that as it may, the method which the appellants adopted in sharing the 18 plots i.e. through spiritual headship, marital status and age has been held

by the trial High Court equitable and the respondents had failed to find fault in the system during trial. (p. 627 G)

NOTABLE POINTS OF INTEREST

B WALI JSC

1. Evaluation of evidence by the Court of Appeal

Once the Court of Appeal has accepted the evaluation of the evidence by the trial court and its resultant conclusions, it cannot resile from such acceptance and embark on a fresh re-assessment and evaluation of the same evidence in order to substitute its own views for that of the trial court. (p. 630 E)

IGUH JSC

D *2. Proof of Customary Law*

I agree entirely with the above observations of the trial court and fully endorse them as well founded. Without doubt, native law and custom are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof. See Giwa v. Erinmilokun (1961) N.S.C.C. 157 at 159. The status of the plots of land in issue under customary law was neither pleaded by the respondents nor was evidence in respect thereof given at the trial with a view to ascertaining the applicability or otherwise of the "kitchen" or "usokwu" system of sharing the said plots of land. As has always been said, it is not the function of a court of law by its own exercise or ingenuity to supply or imagine evidence or arrive at an answer which only evidence tested under cross-examination could supply. See George Ikenye and Anor v. Akpala Ofune and ors (1985) 2 N.W.L.R 1. I think the learned trial Judge was right when he held that the "kitchen" or "usokwu" system of sharing was not proved to be applicable in the present case. (p. 644 D)

REPRESENTATION

Nnamdi Ibegbu Esq. for the appellants

M. I. Onochie, for the respondents

CASES REFERRED TO

Arase v. Arase (1981) 5 SC. 33.

Obisanya v. Nwoko (1974) 5 SC. 69 at 80

Woluchem v. Gudi (1981) 5 S.C. 291 at 326.

Aseimo v. Amos (1975) N.S.C.C. 43

African Continental Seaways Ltd. v. Nigeria Dredging Roads and General Works Ltd. (1977) 5 S.C. 235 at 248.

Giwa v. Erinmilokun (1961) N.S.C.C. 157 at 159

Ikenye v. Ofune (1985) 2 N.W.L.R 1.

LEAD JUDGMENT BY MOHAMMED JSC

The appellants were defendants before the Onitsha High Court. The respondents who were the plaintiffs at the trial court instituted this action and claimed against the appellants for equitable distribution or sharing of 18 plots of family land known as "Owelebo" which plots of land were allocated to Orowa family by the Umueze Aroli Community.

The 18 plots which were granted to Orowa family were part of the Owelebo land which the Umueze Aroli Community won in a land dispute with Isiokwe village. The 1st, 2nd and 3rd respondents, in this appeal, had contributed to the levy imposed on all members of Umueze Aroli families for the Owelebo land litigation. It was after the final litigation which went in favour of Umueze Aroli families that the 18 plots from the disputed land were allocated to the Orowa family.

The appellants were committee members of Orowa family union and were charged with the sharing of the 18 plots allocated to the family. In the statement of claim the respondents pleaded further as follows:

"6, There are principally 10 sub-families in Orowa family. And they are:

(a) The family of Late Michael Agbakoba

(b) The family of late Joseph Agbakoba

- (c) *The family of late George Irekwu*
- (d) *The family of late Akunne Akosa*
- (e) *The family of late Nnaka Onyejekwe*
- (f) *The family of late Tigbilo Onyejekwe*
- B (g) *The family of Omekasi Onyejekwe*
- (h) *The family of late Akunwafor Onyejekwe*
- (i) *The family of late Igwe Onyejekwe*
- (j) *The family of late James Ugbuche*

C Each sub-family has more than one male member living. In some sub-families there are two or three married men and in others one married man. There are 24 married men living in Orowa family as of now.

7. *There are 18 plots and 10 sub-families.*

D According to Onitsha custom if these plots are to be shared, each sub-family or kitchen as of right must be given a plot each, provided there is a male issue in the said family. The remaining plots will be sold and the money shared amongst the sub-families.

E 8. *The Onitsha custom is that you share landed property according to the number of kitchens or "Usokwu" a man has provided that the kitchen has a male issue.*

There are three main sections, in Orowa family.

F *Orowa had three sons namely:*

(a) Ozoma Chima (b) Alana and (c) Ume

(a) *Ozoma Chima had two sons: Agbakoba and Akosa.*

G While Agbakoba begot Ogbanje and Okani. Ogbanje had a son Chima and Okani had four sons. And Akosa sub-family has two of his sons living, the 4th defendant and his brother. (sic)

(b) *Alana Section - Alana had a son Irekwu. And the only surviving descendant of Irekwu is John Irekwu.*

H (c) *Ume had two sons namely Okosi and Okenwa. Okosi begot Egbuche Ezekamba who begot James Egbuche and who begot the 3rd defendant; Herbert Egbuche. Okenwa begot Onyejekwe Osisani. Onyejekwe had three wives who had five sons for him, namely (1) Ojinaka (2) Tigbilo (3) Umekasia (4) Akunwafor and (5) Igwe Joseph Onyejekwe.*

Ojinaka, Tigbilo and Umakasia were brothers of full blood and came from one kitchen or Usokwu. While Akunwafor was only son of her mother. Likewise Igwe Joseph Onyejekwe the only son of his own kitchen. The plaintiffs state that if the 18 plots were to be shared according to the 3 main sections of Orowa family each section would get six plots. The Ozoma Chima section would sub-divide and Agbakoba sub-family would take three plots. And the Akasa sub-family three plots. The Alani/Irekwu section will take six plots. The Ume section will sub-divide three going to Egbuche and the other three to Onyejekwe section. Onyejekwe who had three wives would again sub-divide their three plots. One plot will go to Ojinaka and his two brothers. One plot to Akunwafor and one plot to Igwe Onyejekwe sub-family according to Onitsha custom. But the late Elders in order to maintain equity in the family during their time had shared things including levies by sub-families.

9. *The plots to be shared are well known to the plaintiffs and defendants and do not require a plan. The said Owelebo land was made into a layout which has defined plots with numbers.*

10. *The defendants had abandoned this customary method of distribution and have allocated two or three plots to some sub-families while others have not a plot each.*

11. *On the 3rd December, 1983, the Defendants purported to have allotted three plots to seven persons from different sub-families contrary to any known basis or custom and which allotment was most inequitable. The plaintiffs will rely on the letter addressed to the 1st plaintiff by the Secretary of Orowa Union dated 3rd December, 1983. His reply dated 7th December, 1983 was also a letter dated 8th December, 1983 addressed to the President, Secretary - Mr. Chike Akosa."*

The appellants denied the claim. In their Statement of Defence the appellants averred that properties, in accordance with Onitsha Native Law and Custom, are shared amongst the living. The sharing of landed property to wives who bore at least a male living issue applies where properties belong to one individual. Any remaining plots will be dealt with as the family deems fit. The appellants further averred that the sharing by "Usokwu" or per stripes would apply where an individual with

wives own the property. The property in this case is a communal one and was allotted to the Orowa family by virtue of their singular spiritual headship. The Orowa family agreed that the sharing of the 18 plots would be among the present married members of the family. To arrive at the best utility and equitable sharing the family took as their basis the spiritual head and age in order of priority. The spiritual head took one plot and the remaining 17 plots were shared in accordance with the procedure disclosed in paragraph 9 of the Statement of Defence.

The trial opened and four witnesses testified for the plaintiffs/respondents. The appellants did not call evidence for the defence but relied on the evidence adduced by the plaintiffs/respondents. The learned trial judge considered the pleadings and evidence adduced and resolved in his judgment that the plaintiffs/respondents have failed to prove that the sharing of the plots must be made through "Usokwu" system. Secondly, the plaintiffs/respondents have failed to prove that the method used in sharing of the plots was inequitable. He therefore dismissed the claim.

Dissatisfied with the judgment the appellant appealed to the Court of Appeal, Enugu Division. The lower court, per the judgment of Achike JCA (as he then was) with which Nasir, President of the Court of Appeal and Ogundare JCA concurred, allowed the appeal and shared the 18 plots in the following manner :

"(1) Each of the ten sub-families of Orowa family already mentioned and included in the list set out above in this judgment should first be allocated a plot.

(2) The said sub-families will be paired and each pair should also be allocated a plot wherein each sub-family will be entitled to either half a plot or half the proceeds from disposition of the said plot.

(3) The remaining three plots should be disposed of and the proceeds therefrom divided equally among the ten."

The defendants who are now appellants in this appeal were aggrieved by the decision of the Court of Appeal. Armed with eight grounds of appeal they filed this appeal contesting the decision of the Court of Appeal. Learned counsel for the respective parties formulated issues from the grounds of appeal. The issues of both parties although couched

in different terminologies are basically the same. I therefore intend to consider this appeal from the issues identified by the learned counsel for the appellants. They read as follows:

"ISSUES AND QUESTIONS FOR DETERMINATION AS RAISED IN THIS APPEAL

1. *Did the Court of Appeal substitute its views in place of the trial court's decision with respect to the sharing of 18 plots of Owelebo Land, and if they did was it proper?* B

2. *Did the learned Justices of the Court of Appeal award the Plaintiffs/Respondent more than they sought for?* C

3. *Did the learned Justices of the Court of Appeal come to a wrong conclusion when they stated that "stricto sensu, it can not be fairly said that appellants contended that the "Usokwu" system was applicable in the case in hand because in the first relief sought by them they simply prayed the court to decree an equitable mode of sharing?* D

4. *Did the learned Justices of the Court of Appeal misdirect themselves when they found that members of Orowa family were dissatisfied with the method of sharing adopted by the Defendants and laid emphasis on Exhibit "A" in deciding that the method of sharing of the defendants was inequitable?* E

5. *Did the Court of Appeal misdirected itself when it found as a fact that:- "Thus the applicability of Usokwu system even to the 10 sub-families of Orowa family could not be insisted on as it was not borne out by evidence led in support of this contention nor was it in fact pleaded but turned around to order for a sharing on the basis of the discarded 10 sub-families which was the kernel of the Usokwu (or kitchen) system pleaded by the plaintiff now respondents?* F

6. *Did the Learned Justices of the Court of Appeal formulate an issue which was not an issue contested by the parties?* G

7. *Were the Learned Justices of the Court of Appeal right when they decided that apart from the Usokwu system the Learned Trial Judge did not evaluate all other credible evidence produced at the trial?"* H

The main plank of the appellants' appeal is the decision of the Court of Appeal resorting to another mode of sharing of the 18 plots after

accepting that the principle of customary Law of "Usokwu" pleaded by the respondents had not been proved by them. Learned counsel for the appellants submitted that after the lower court rejected the "Usokwu", kitchen or sub-family system it turned round and adopted the sub-families as the basis for sharing. This is what the lower court held as follows:

"In this premises, it seems to me that the principle of the maxim, equity is equality, (sic) can be reasonably and conveniently applied to the circumstances of this case to the satisfaction of all concerned. It is in evidence that the 10 principal sub-families that comprise the Orowa family are made up as follows:-

..... Now, if one plot is allocated to each sub-family and thereafter two sub-families are paired together and allocated a plot, there will remain three plots. These three plots should be sold and the proceeds equally divided among the ten sub-families. The Orowa family is already familiar with pairing two males to share a plot; the same principle should conveniently be applied to sub-families. Again, the sale of the three remaining plots and sharing of the proceeds resulting therefrom is easily the simplest arithmetical exercise. It seems to me clearly the rationale of sharing on the principle of "equality is equity" along the lines set out above, would meet the justice of the competing interests of the appellants, the respondents and all the other members of the ten sub-families from whom dues or varying amounts have been exacted."

I agree that the Court of Appeal is blowing hot and cold on the issue of sharing of the plots according to sub-family system. "Usokwu" has been defined by the respondents that under the system the man's landed property is shared among several "Usokwus" that each "usokwu" has a living male issue. Usokwu in this context may be literally interpreted to mean a "wife's kitchen" and comprises all the children of each wife. In other words, "Usokwu", in so far as it includes a male child, is the recognised unit for sharing a deceased male's landed property in onitsha.

It is quite plain that Awogu J (as he then was) evaluated the evidence adduced by the respondents through their four witnesses. The learned trial judge referred to both pleadings and evidence adduced and

held as follows:

"In principle, once communal land is divided among the families that make up the community, it ceases to be communal land and becomes family land, but the plaintiffs neither pleaded nor led evidence in support of this aspect of custom. A custom must not only be pleaded but must be proved by evidence, unless it has acquired notoriety (see Kareem & ors. v. Ogunde & Anor. (1972) 1 All N.L.R. 73 at 80).

The plaintiffs led evidence in support of their contention that the plots should be shared among the Orowa family "Usokwu" by "Usokwu". This evidence is however contradicted by some of the witnesses of the plaintiffs. PW4, Patrick Anyaorah Okpala of Ozomike, limited the "Usokwu" system to a man and his nuclear family and said it said it did not apply to family lands. PW3, Chike Akosa, President of the Customary Court, Onitsha, said that the Orowa family tried to evolve a formula for the sharing of the 18 plots but failed. In other words, there was no agreement even among the Orowa family that the "Usokwu" system was the only formula applicable to the sharing. Although he protested about the manner of the sharing, he still retained the plot which he got as a share."

It is part of respondent's Statement of Claim that according to Onitsha custom if the 18 plots are shared each of 10 sub-families or kitchen as of right must be given a plot . In other words, it is the case of respondents before the court that the system of sharing landed property in onitsha is by "Usokwu" or kitchen or sub-families all these methods of sharing were used interchangeably in the proceedings. It is for the respondents to call evidence and establish their custom. They failed to do so. Their case stands or falls on what they asserted and proved. It is trite that the burden of proving particular fact is on the party who seeks to rely on it and who will fail where such evidence is not adduced. See Madam I. Arase v. Peter U. Arase (1981) 5 SC. 33.

I therefore agree with learned counsel for the appellants the Court of Appeal and erred when it re-evaluated the evidence and came up with a sharing system which the respondents did not

ask for. It is not the business of the Court of Appeal to substitute its own view for the views of the trial court. If there has been proper appraisal of evidence by a trial court, a Court of Appeal ought not to embark on a fresh appraisal of the same evidence in order to arrive at a different conclusion from that reached by the trial court. See Obisanya v. Nwoko (1974) 5 SC. 69 at 80 and Victor Woluchem & Ors. v. Chief Gudi & Ors. (1981) 5 S.C. 291 at 326.

The question whether the learned Justices of the Court of Appeal awarded the plaintiffs/respondents more than what they sought for can be answered straight away in the affirmative. The Court of Appeal in its judgment held as follows:

"Now if one plot is allocated to each sub-family and thereafter two sub-families are paired together and allocated a plot, there will remain three plots. These three plots should be sold and the proceeds equally divided among the ten sub-families. The Orowa family is already familiar with pairing two males to share a plot; the same principle should conveniently be applied to sub-families. Again, the sale of the three remaining plots and sharing of the proceeds resulting therefrom is easily the simplest of arithmetical exercise."

This arithmetical exercise is uncalled for. There is no pleading or evidence to support it. The Northern Nigerian High Court considering an appeal from a criminal trial conducted by a Magistrate in the case of Mohammadu Durumin Iya v. Commissioner of Police (1961) N.R.N.L.R. 70 held:

"The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at this trial failed to support the prosecution case, and the magistrate should have dismissed the case. It was no part of his duty to do cloistered justice by making an inquiry into the case outside court - not even by the examination of documents which were in evidence, when the documents had not been examined in court and the magistrate's examination disclosed things that had not been brought out and exposed to test in court, or were not things that, at least, must have been noticed in court. We will not do it ourselves; neither will we allow the respondent to

demonstrate now in this court what as prosecutor he had the opportunity of demonstrating at the trial. The appeal will be allowed."

The distribution of plots embarked by the learned justice of the Court of Appeal is not supported by pleadings and evidence. Where pleadings have been joined by the parties in a case the judgment of the court must be based both on the facts and the law on issues joined by the parties on their pleadings. A court should not embark on dealing with issues not raised in the pleadings nor should it give judgment on issues on which either counsel had not been called upon to address the court. See Aseimo & ors. v. Amos & Ors. (1975) N.S.C.C. 43 and African Continental Seaways Ltd. v. Nigeria Dredging Roads and General Works Ltd. (1977) 5 S.C. 235 at 248.

The claim of the respondents is for an equitable sharing of the 18 plots according to sub-families that make up Umuorow family and the right to receive one plot of land in Owelebo Communal land. The 4th plaintiff stated in evidence thus:

"I am familiar with the "Usokwu system of land sharing in Onitsha. It applies when a man with many wives dies intestate and his properties have to be shared among the wives with male issues surviving."

The witness later said that "Usokwu" system applies only to a man and his family and does not apply to lands owned by a family or communal land. This is the custom as described by the witness of the plaintiff/respondents. This explanatic has gone contrary to the pleadings of the respondents. The learned justice of the Court of Appeal found that the "Usokwu" custom which the respondents' pleaded was not proved and not relevant to their claim. However, instead of agreeing with the learned trial judge to dismiss respondents' claim he took shelter under the principle of English law of Equity. That, with respect, is erroneous. **It is my view that the Onitsha Customary Law of "Usokwu" or kitchen has won recognition as a mode of distribution of property on intestacy. The customary law is not unfair and inequitable. It is quite plain however that the custom does not apply to the case of the**

respondents.

Be that as it may, the method which the appellants adopted in sharing the 18 plots i.e. through spiritual headship, marital status and age has been held by the trial High Court equitable and the respondents had failed to find fault in the system during trial.

In consequence, this appeal succeeds and it is allowed.

The judgment of the Court of Appeal is set aside. The judgment of Onitsha High Court dismissing the claim of the respondents is hereby restored. I award N10,000.00 in favour of the appellants.

WALI JSC

I am privilege to have read before now, the lead judgment of my learned brother Uthman Mohammed, JSC and I agree with his reasoning and conclusion for allowing the appeal.

I will only like to comment on issue 1 formulated in the appellants' brief of argument. It has been decided by this court several times that where the trial court evaluated and assessed the evidence and made findings of fact and of law as a result thereof an appellate court has no business in upsetting these findings to substitute them with its own, unless such findings are found to be perverse. The appellate court has no business in substituting its own views for those of the trial court. See Akinloye & Anor. v. Eyiola & Ors. (1968) NMLR 29, Woluchem v. Gudi (1981) 5 SC 291.

From the pleadings and the evidence adduced, the method of sharing the property in dispute in accordance with Onitsha customary law is "Usokwu system". The learned trial judge after a thorough and painstaking examination of the evidence adduced rejected the contention of sharing of the said property on the basis of "sub-families" system. He also found that the Usokwu system was not proved. He found in respect of the two systems as follows:-

"I do not find the "Usokwu" system claimed by the plaintiffs proved in-so-far as family land is concerned. The other contention of the plaintiffs that the sharing should be done among the 10 sub-families of

Orowa Family stems from the same "Usokwu" system, which the plaintiffs have failed to prove. I believe P.W. 4 that the "Usokwu" system applies to the estate of a man with more than a wife each of whom had a male issue surviving him on his death, if intestate. The 4th plaintiff also said so under cross-examination. The plaintiffs have also failed to prove that the method used in the sharing of the 18 plots was inequitable and, even if it appears to be, have not proved that it could have been better done by any other method. This being so, I am unwilling to disturb the method of distribution used by the Defendants."

The Court of Appeal also agreed with the learned trial judge that the plaintiff failed to prove the applicability of "Usokwu" to the land in dispute as the system applies only to a man's nuclear on intestacy. The Court of Appeal went on to state as follows in the lead judgment of Achike JCA as he then was -

"In principle, it is trite that communal land when shared among the component property (sic) but becomes family land. There is evidence that Orowa family is under a single spiritual headship, with Chima Agbakoba as the spiritual head. But there is no evidence whatsoever nor was it pleaded that Orowa family is a family in the nuclear sense; rather there is evidence that it comprises component families or sub-families. Now, even if the appellants case is considered from the view-point most favourable to them in the sense that Orowa family is one spiritual entity but consisting of 10 sub-families as pleaded and led in evidence by them, the question still remains whether the appellants have successfully established their chief contention that "Usokwu" system is applicable to sharing of landed property among the sub-families comprised in a monolithic spiritual headship."

The learned Justice said further-

"It follows that even though the "Usokwu" system as accepted by the trial court, applied to one's nuclear family and with regard to landed property of the said nuclear family, there is no warrant whatsoever to extend its application to other parcels of land not comprised as landed property of a deceased's nuclear family."

He then concluded-

"After all, as we had earlier noted, there was not even any averment or shred of evidence relative to the number of wives Orowa had in order to justify the application of sharing his land on the basis of "Usokwu" by "Usokwu."

B As regards the evaluation of the evidence by the learned trial judge the learned justice of the Court of Appeal opined thus-

"In conclusion, it may be emphasised that learned appellants' counsel has failed to make any impressionable dent on the quality of evaluation of evidence with particular reference to the "Usokwu" system."

It was after all the fore-going that the learned justice of the Court of Appeal disgraced and went into re-evaluation of the evidence and stated-

D *"It seems to me that having levied male sons of Orowa family with or without reference to their age or material status, any sharing of the Orowa family land which excludes such contributions by reason only of their age or marital status will be manifestly inequitable."*

E He then applied the principle of "equality is equity" as the reasonable and convenient way of distributing the land in dispute in the given circumstances and re-distributed it.

F Once the Court of Appeal has accepted the evaluation of the evidence by the trial court and its resultant conclusions, it cannot resile from such acceptance and embark on a fresh re-assessment and evaluation of the same evidence in order to substitute its own views for that of the trial court.

G The plaintiffs were not able to prove that the Usokwu system is applicable to sub-families in the distribution of the landed property in dispute. That would have been the end of the matter as they must rely on the strength of their own case and not on the weakness of that of the defendants. See Kodilinye v. Odu 2 WACA 336.

H It is for this and the fuller reasons contained in the lead judgment of my learned brother Uthman Mohammed, JSC and the reasons in the concurring judgment of my learned brother Iguh, JSC that I also hereby allow the appeal, set aside the decision of the Court of Appeal and restore the judgment of the trial court. I award N10,000.00 costs in favour

of the appellants against the respondents.

KUTIGI JSC

The facts of the case as I understand them, are that the Plaintiffs and the Defendants are all members of the same Orowa Family of Ogbezo B Village in Umuezeoroli Quarter of Onitsha. The Umuezeoroli Quarter (including Orowa Family) had a dispute with the Isiokwe Village over a large parcel of land situate at Owelebo in Onitsha. At the end of litigation, the Umuezeoroli Quarter won. Thereafter, the land was distributed amongst the different families who took part in the successful legal battle against C the Isiokwe village. Eighteen (18) Plots of land were allocated to the Orowa family as its own share of the Owelebo Communal land. The Orowa family on its own set up a Committee charged with responsibility of sharing the eighteen (18) Plots amongst its members. The Defendants D herein are members of that Committee. The Defendants shared out the eighteen (18) plots as follows -

- "(i) *Spiritual head of Orowa family - 1 plot (1);*
- (ii) *Eleven (11) Elders of the family - 1 plot each (11);* E
- (iii) *Twelve (12) Young married members of the family - 2 to share one (1) plot (6)."*

The Defendants said that was the only customary method of sharing the plots known to Orowa family which was based on (1) spiri- F tual head, (2) marriage, and (3) age, as above.

The Plaintiffs who were opposed to and dissatisfied with the mode of distribution adopted by the Defendants, then instituted these proceedings in Court claiming as follows -

"1. *An equitable sharing of the Owelebo land according to sub- G families that make up Umuorowa Family. And the right to receive one plot of land in Owelebo Communal land.*

2. *An injunction to retrain the Defendants, their servants or agents from dealing or partitioning the said land until the final determination H of this Court."*

It is clear from Plaintiffs' claim (1) above that they wanted the sharing of the land to be done not only equitably but also according to the

sub-families that make up the entire Orowa family.

It is in evidence that the ten (10) principal sub-families that comprise the Orowa Family are made up as follows -

- | | | | | |
|---|-------------------------------------------------|---|---|---------------------------------|
| | <i>"(1) The family of late Michael Agbakoba</i> | | | |
| B | (2) | " | " | <i>Joseph Agbakoba</i> |
| | (3) | " | " | <i>George Irekwu</i> |
| | (4) | " | " | <i>Akunne Akosa</i> |
| | (5) | " | " | <i>Nnaka Onyejekwe</i> |
| | (6) | " | " | <i>Tigbilo Onyejekwe</i> |
| C | (7) | " | " | <i>Omekasia Onyejekwe</i> |
| | (8) | " | " | <i>Late Akunwafor Onyejekwe</i> |
| | (9) | " | " | <i>Igwe Onyejekwe</i> |
| | (10) | " | " | <i>James Egbuche</i> |

D The plaintiffs contended that under Onitsha custom, apart from the formula or method adopted by the Defendants in sharing the plots above, there were two other methods, thus -

"1. Each sub-family of the 10 sub-families is entitled to a plot
E *provided there is a male issued in the sub-family. The remaining plots*
will then be sold and money shared amongst the sub-families.

2. The "Usokwu" system. Here a man's landed property is
F *shared amongst the several "Usokwu" or "Kitchens" comprised in the*
Family provided that each "Usokwu" or "Kitchen" has a living male
issue. Orowa has three male children constituting the three sections of
Orowa family. If the eighteen (18) plots were divided amongst the three
sections, then each section would have six plots."

G The learned trial judge had this to say on page 73 of his judgment-

"The "Usokwu" system has won recognition as a mode of distribution of property on intestacy. Its application on intestacy to a man and his nuclear family has never been in doubt. What is in issue here is its
H *application to the sharing of land acquired by a family of many sub-units, such as the Orowa family."*

On page 75, the judgment continued thus-

"I do not find the "Usokwu" system claimed by the plaintiffs

proved in-so-far as family land is concerned. The other contention of the plaintiffs that the sharing should be done among the 10 sub-families of Orowa family stems from the same "Usokwu" system applies to the estate of a man with more than a wife each of whom had a male issue surviving him on his death, if intestate. The plaintiffs have also failed to prove that the method used in the sharing of the 18 plots was inequitable and, even if it appear to be, have not proved that it could have been better done by any other method. This being so, I am unwilling to disturb the method of distribution used by the Defendants. Accordingly, the claim fails and is hereby dismissed."

Dissatisfied with the judgment of the trial High Court, the Plaintiffs appealed to the Court of Appeal holden at Enugu.

The Court of Appeal had no difficulty in agreeing with the High Court that the principle of customary law of "Usokwu" was certainly not established by evidence. I must add that even if it had been established, it would not have been applicable to the facts of this case. But the Court of Appeal went on to hold that the rationale proposed by the defendants based on spiritual headship, marital status and age had produced substantial inequity or unfairness to the plaintiffs and that the final question that fell to be answered was - what should be the most reasonable rationale for sharing the 18 plots of land in this case? The Court of Appeal found no enacted law which covered the circumstance of this case but found that section 15(1) of the High Court Law cap. 61 Laws of Eastern Nigeria, 1963 applicable to Anambra State, enjoins the trial High Court to apply the doctrines of equity. Reference was made to Snell's Principles of Equity (27th Edition) by Megarry and Baker particularly at pages 1-13 and to the case of JONES VS MAYNARD (1951) 1 CH. 572. And applying one of the maxims of equity, "equality is equity" to the case, the Court of Appeal shared or distributed the 18 plots of land allocated to the Orowa family as follows:-

"1. Each of the ten (10) sub-families of Orowa family already mentioned and included in the list set out above in this judgment should first be allocated a plot.

2. The said sub-families will be paired and each pair should also

be allocated a plot wherein each sub-family will be entitled to either half a plot or half the proceeds from disposition of the said plot.

3. The remaining three plots should be disposed of and the proceeds there-from divided equally among the ten sub-families."

B I agree entirely.

The claim of the Plaintiffs is based on equitable principles and not strictly on any custom and at any rate the "Osukwu" system did not apply although it was not even proved. The method of distribution or sharing used by Defendants was never proved to be the custom at the trial. There was no dispute that when the court-case for the land was being fought, all adults whether married or unmarried, were levied, and that women even paid on behalf of their children. The land was clearly therefore not family land in its origin but it came to Orowa family for the first time after victory in the court case. I think the Court of Appeal was right.

The appeal must therefore fail. It is accordingly dismissed. I make no order as to costs.

E _____

ONU JSC

Having read in advance the judgment of my learned brother Mohammed, JSC just delivered, I am in entire agreement therewith that the appeal is meritorious and ought therefore to be allowed.

In expatiation thereto, I wish to add a few words of mine as follows:-

As can be recalled, this is an appeal in which the maxim "equality is equity" was purportedly used in respect of communal land sharing in onitsha by a family among its members as adopted by the Court of Appeal thereafter referred to shortly as the court below) sitting in Enugu (Coram: Nasir P, Ogundare, J.C.A. and Achike, J.C.A., as he then was) that set aside the decision of Awogu, J. (as he then was). The plaintiffs, the present appellants, brought the action giving rise to the appeal herein, in which they claimed the following reliefs from the defendants, now respondents, in the High Court holden at Onitsha as follows:-

"(a) An equitable sharing of Owelebo Land according to sub-families that make up Umuorowa family. And the right to receive one plot of land in Owelebo Communal land.

(b) An injunction restraining the defendants, their servants or agents from dealing or partitioning the said land until the final determination of this Suit."

After pleading were ordered, filed and duly exchanged by the parties, the case went to trial in which evidence having been led before Awogu, J., (as he then was) as to how the then sub-families had the eighteen plots shared to the recognised groups known as 'Usokwu' or 'Kitchen' (as there were mothers of male children), the learned trial Judge in a well considered judgment, found the case of the respondents not proved and so proceeded to dismiss it. Said he towards the tail end of the concluding portion of his judgment:-

In principle, once communal land is divided among the families that make up the community, it ceases to be communal land and becomes family land, but the plaintiffs neither pleaded nor led evidence in support of this aspect of custom. A custom must not only be pleaded but must be proved by evidence, unless it has acquired notoriety (See Kareem v. Ogunde & Anor. (1972) 1 All NLR 73 at 80).

The plaintiffs led evidence in support of their contention that the plots should be shared among the Orowa family "Usokwu". This evidence is however contradicted by some of the witnesses of the plaintiffs. PW4, Patrick Anyaorah, Okpala of Ozomike, limited, the "Usokwu" system to a man and his nuclear family and said it did not apply to family lands. PW3, Chike Akosa, President of the Customary Court, Onitsha said that the Orowa family tried to evolve a formula for the sharing of the 18 plots but failed. In other words, there was no agreement even among the Orowa family that the "Usokwu" system was the only formula applicable to the sharing. Although he protested about the manner of the sharing, he still retained the plot which he got as a share. In point of fact, PW3 was previously a defendant in this suit

..... "
"I do not find the Usokwu" system claimed by the plaintiffs proved in so

far as family land is concerned. The other contention of the plaintiffs that the sharing should be done among the 10 sub-families of Orowa Family stems from the same "Usokwu" which the plaintiffs have failed to prove. I believe PW4 that the "Usokwu" system applies to the estate of a man with more than a wife each of whom had a male issue surviving him on his death, if intestate. The 4th plaintiff also said so under cross-examination. The plaintiffs have also failed to prove that the method used in the sharing of the 18 plots was inequitable and, even if it appears to be, have not proved that it could have been better done by any other method. This being so, I am unwilling to disturb the method of distribution used by Defendants. Accordingly, the claim fails and is hereby dismissed."

Being dissatisfied with the said decision, the appellants appealed to the Court of Appeal sitting in Enugu which in a unanimous decision, allowed the appeal and set aside the decision of the trial court and made the following orders which should be applied by the respondents in sharing the 18 plots situate at Owelebo allocated to the Orowa family:-

"1. Each of the ten sub-families of Orowa family already mentioned and included in the list set out above in this judgment should first be allocated a plot.

2. The said sub-families will be paired and each pair should also be allocated a plot wherein each sub-family will be entitled to either half the proceeds from disposition of the said plot.

3. The remaining three plots should be disposed of and the proceeds therefrom divided equally among the ten sub-families.

4. Having regard to the relationship of both parties, and since there was also no order as to costs in the court below., for the same reason, I order that each party should bear its own costs."

It is from this decision that the appellants herein have appealed to this court upon eight grounds out of which the following seven questions have been identified for our determination.

They are:-

1. Did the Court of Appeal substitute its view in place of the trial court's decision with respect to the sharing of 18 plots of Owelebo land,

and if they did was it proper?

2. Did the Learned Justices of the Court of Appeal award the plaintiffs/Respondents more than they sought for?

3. Did the Learned Justices of the Court of Appeal come to a wrong conclusion when they stated that "stricto sensu" it cannot be fairly B said that the Appellants contended that the "Usokwu" system was applicable in the case in hand because in the first relief sought by them they simply prayed the court to decree an equitable mode of sharing?

4. Did the Learned Justices of the Court of Appeal misdirect C themselves when they found that members of Orowa family were dissatisfied with the method of sharing adopted by the Defendants and laid emphasis on Exhibit "A" in deciding that the method of sharing of the Defendants was inequitable?

5. Did the Court of Appeal misdirect itself when it found as a D fact that :- "Thus, the applicability of Usokwu system even to the 10 sub-families of Orowa family could not be insisted on as it was not borne out by evidence led in support of this contention nor was it in fact pleaded but turned around to order for a snaring on the basis of the discarded 10 E sub-families which was the Kernel of the Usokwu (or Kitchen) system pleaded by the Plaintiffs now Respondents?

6. Did the Learned Justices of the Court of Appeal formulate an issue which was not an issue contested by the parties? F

7. Were the Learned Justices of the Court of Appeal right when they decided that apart from the Usokwu system the Learned Trial Judge did not evaluate all other credible evidence produced at the trial?

Based upon a careful study and appraisal of the pleadings and evidence adduced at the trial vis- a-vis a careful consideration of the judgment of G the Court of Appeal (hereinafter referred to as the court below) from which the appeal herein emanates, my answer to Issue 1 above is in the affirmative and to add that what the learned Justices did was not proper. To exemplify this stand, my learned brother in his lead judgment quoted H in extenso from the judgment of the court below at pages 170-171, 173 and 174 respectively of the trial court's Record from which I see no reason to derogate. The court below, contrary to the pleadings of the

appellants in paragraphs 6-9 of the Statement of Claim declined or rather failed to abide by the pleading therewith regarding Usokwu or Kitchen system. For instance, 4th plaintiff (Grace Onyejekwe - a widow) had the following to say on the custom in Onitsha relating to Usokwu :-

B "..... According to Onitsha custom, the sharing must be shared among all Orowa family. Orowa begat Chima, Alana and Ume. Each of the 3 sons would get 6 of the 18 plots. My husband belonged to Ume section. Ume begat Okenwa, which would have got 3 plots. Okenwa begat Onyejekwe, Ozizina who had 3 wives (Ojennaka, Akwunne, Tagbuilo, Omekasia) ; the 2nd wife begat Akunwafor; the 3rd begat my husband, Igwe Onyejekwe. The 3 plots Onyejekwe Ozizini should have been shared among his 3 Kitchens (Usokwu) 1, 2, 3 plaintiffs' claim the share (i.e. 1 share) of their father."

C D 4 PW, Akunne Patrick Nnaemeka Anyaora, when examined in chief testified as follows:-

E "When family land is to be shared, those who contribute dues levied by the family are entitled to a share. Marriage may also be a factor. Age may also be a factor."

F The learned trial Judge considered the entire case most dispassionately and the reliefs therein sought before dismissing respondents' claim since they failed to prove their case. As earlier pointed out, the relief the respondents sought was with respect to 18 plots. The court considered the futility of the relief sought using the usokwu or Kitchen system as a basis.

G It also considered the communal nature of the land and how the usokwu system has no application to communal land. It also went further to consider how important it is for evidence of custom to be pleaded (vide Abiodun v. Erinmilokun (1961) 1 All NLR (part 11) 294) and evidence led as to the application of the Usokwu system to family land as opposed to land of an individual to his nuclear family and wives who bore male H issues for him. The trial court, it was further demonstrated considered the sharing in accordance with 10 sub-families, how they stem from the Usokwu system but how inapplicable it is to the sharing of the land. Thus, the court below for its part held inter alia, (1) that:-

"From the appellants' pleadings and the evidence of PW 1 (sic) was quite clear that the appellants' reference to the Owelebo land, freely used the words family land and communal land interchangeable. This cannot be right. In principle, it is trite that communal land when shared among the compenent families that make-up the community ceases to be communal property but becomes family land. There is evidence that Orowa family is under a single spiritual headship, with Chima Agbakoba as the spiritual head. But there is no evidence whatsoever nor was it pleaded that Orowa family is a family in the nuclear sense; rather there is evidence that it comprises component families or sub-families" B C

(2) *"It is trite law that a custom or customary law must not only be pleaded as a fact but must be proved in evidence unless it has gained notoriety entitling it to be judicially noticed. See Kareem & Ors. v. Ogunde & Anor (1972) 1 All NLR 73 at 80. The appellants did not plead that the "Usokwu" applied to the landed property that fell to be divided ; rather they pleaded in paragraph 8 of their statement of claim that:* D

"The Onitsha custom is that you share landed property according to the number of Kitchen or "Usokwu" a man has provided that the Kitchen has a male issue." E

3." The above averment was restrictive because it clearly limited the application to a man's nuclear family. The evidence of PW4, believed and accepted by the principle of Usokwu" system. Now, if the appellants contend , as they hotly did, that the "Usokwu" system applied generally to land - whether communal land or land to be shared by sub-families or land enjoyed by a family in the nuclear sense - it is imperative for them to expressly aver same in their pleadings and lead evidence to that effect, unless of course, as we had earlier noticed, the custom had acquired such notoriety as to be judicially noticed." F G

For the court below to turn round to hold otherwise as exemplified in the extracts set out below, is for it to blow hot and cold at the same time. See Ezomo v. Attorney-General Bendel State (1986) 4 NWLR (part 36) 448 at 462 following Watson v. Cave (No.2) 1881 17 Ch. D. 23. For instance, that court said as follows, to wit:

1. "No doubt, and in fairness to the learned trial Judge, the "Usokwu" system pervaded the appellants' case. That according to the learned trial Judge and rightly in my view was not satisfactorily proved. As may be easily discerned from the totality of appellants' case, they put up the custom of sharing based on "Usokwu" by "Usokwu as time honoured mode of sharing of a male instestate landed property and sought to use the same, by analogy, to sharing of Orowa family land, but not using the term family in the nuclear sense. They therefore, prayed (sic) in paragraph 14(1) of the Statement of Claim for an equitable sharing of Owelebo plot allotted to the Orowa family accordingly to sub-families that make up Orowa family and accordingly the right to receive one plot of land in Owelebo stricto sensu, it cannot be fairly said that the appellants contended that the "usokwu" system was applicable in the case in hand because in the first relief sought by simply prayed the court to decree an equitable sharing"

2. "It is clearly my view, that the credible evidence was duly admitted but same, for unexplained reason, was not given due consideration alongside other credible pieces of evidence - as appears to be the fate of Exhibit A in the instant case - it cannot be said that all the evidence produced at the trial was placed on the imaginary scale within the import and spirit of the leading Supreme Court decisions in either Mogaji v. Odojin (supra) or Woluchem v. Gudi (supra). In these premises, it cannot be said, therefore, that the learned trial Judge in an otherwise lucidly written judgment, properly evaluated all the evidence produced at that trial."

3."..... The appellants further submitted that the principle underlining the "Usokwu" system should be analogously employed to the sharing of the 18 plots allotted to the Orowa family among its ten major sub-families because that would equitably guarantee a minimum of one plot to each sub-family in contrast to the rationale advanced by the respondents wherein some sub-families had two or three plots while the appellants' sub-family had half a plot. This as an equitable and fair mode of sharing." (Underlining is mine).

Finally, the lead judgment of Achike, J.C.A. as he then was,

which was concurred in by Nasir, P and Ogundare J.C.A., allowed the appeal by applying the English equitable maxim of equality is equity - a mode of division diametrically opposed to that sought under Onitsha Customary Law by the respondents.

Where, as in the case in hand, the court of trial unquestionably evaluated the evidence and appraised the facts, it is not the business of an appellate court to substitute its view for those of the trial court. See Akinloye & Anor. v. Eyiola & ors. (1968) NMLR 92 at 93; Awoyale v. Ogunbiyi (1986) 2 NWLR (part 24) 626 at 627; Abisanya v. Nwoko (1974) 5 SC.69 at 80; Adeyeri 11 v. Atanda (1995) NWLR (part 402) 383 and Nwankpu v. Ewulu (1995) 7 NWLR (part 407) 269. See also Victor Woluchem v. Chief Gudi & ors. (1981) 5 SC. 291 at 326. The court below was therefore wrong in the conclusion arrived at in the distribution of the 18 plots which was other than in accordance with Onitsha native law and custom.

From the foregoing, issues 2, 3, 4, 5, 6, and 7 are accordingly resolved against the respondents.

It is for the above reasons proffered in my judgment and those more fully set out in the lead judgment of my learned brother Mohammed, JSC, with which I am in full agreement, that I too allow this appeal and make similar consequential orders inclusive of costs as contained in that judgment.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Mohammed, J.S.C. and I agree entirely with the reasoning and conclusions therein reached.

The facts of the case have been fully set out in the leading judgment and it is unnecessary to recount them all over again. It suffices to state that what is in dispute in this action is the equitable sharing of 18 plots of "Owelebo" communal land in accordance with Onitsha customary law by members of the Orowa family of Ogbeoza village in Umueze Aroli community. The appellants who are described as committee mem-

bers of Orowa family union charged with the sharing of their communal or family plots of land in issue were said to have completed their assignment on the 3rd December, 1993. The respondents, as plaintiffs, being dissatisfied with the manner the said plots were shared instituted the present action against the appellants.

The respondents' case as pleaded in parts in paragraphs 6, 7 and 8 of their Statement of Claim was that there were principally 10 sub-families that constituted the Orowa family. They asserted that in the interest of the maintenance of equity, their late elders, as a rule, and in accordance with the Onitsha customary law had always shared their property in their life time in line with the number of existing "sub-families" or "kitchens". They explained that this Onitsha custom entailed that landed property was shared according to the number of "kitchens" or "usokwu" that existed. Thus in paragraph 7 of their Statement of claim, the respondents averred as follows -

"7. There are 18 plots and 10 sub-families. According to Onitsha custom, if these plots are to be shared, each sub-family or kitchen as of right must be given a plot each, provided there is a male issue in the said family. The remaining plots will be sold and the money shared amongst the sub-families."

(Underlining supplied for emphasis)

There is next paragraph 8 of the Statement of Claim by which the respondents inter alia averred thus -

"8. The Onitsha custom is that you share landed property according to the number of kitchens or "usokwu" a man has, provided that the kitchen has a male issue"

(underlining supplied for emphasis)

The appellants in answer to paragraph 7 of the respondents' Statement of Claim replied as follows -

"7. The Defendants deny paragraph 7 of the statement of claim save and except that there ere are 18 plots and will put the plaintiffs to the strictest proof thereof. In answer thereto the defendants state that in accordance with Onitsha native Law and custom the sharing of landed property according to wives who bore at least a male living issue applies

where properties belong to one individual. Any remaining plots will be dealt with as the family deems fit. The defendants state that a sub-family is not the same as an "usokwu" or kitchen. The said 18 plots of land was allotted to Orowa family in view of their singular spiritual headship. Families agreed on the method of sharing where this is the case." B

There can be no doubt that reference by the respondents to "sub-family" as "kitchen" in paragraph 7 of their Statement of Claim and to "kitchen" as "usokwu" in paragraph 8 thereof appears to equate all three terms as involving and/or amounting to the same system of property sharing. This is because, as it is appropriately said, things equal to each other must be equal to one another. The impression created from the respondents' said averments seems to me irresistible to the effect that those terms, having been freely used inter-changeably, refer to the same system of sharing property. The appellants have so submitted in their brief of argument. Indeed the respondents, to some extent, conceded that there was a mix-up in their pleading in that regard when at page 13 of their brief of argument they stated thus - D

"The mix up would appear to have arisen by reason of the fact that the plaintiffs in their pleadings used the words "usokwu" and sub-families" interchangeably." E

They did however argue that two distinct methods of sharing were canvassed by them. These, they submitted, were the "kitchen" or "usokwu" system as against sharing based on "sub-families." F

The learned trial Judge in dealing with the said methods of land sharing stated as follows -

"The "Usokwu" system has won recognition as a mode of distribution of property on intestacy. Its application on intestacy to a man and his nuclear family has never been in doubt. What is in issue here is its application to the sharing of land acquired by a family of many sub-units, such as the Orowa family. Land, as Balonwu for the plaintiffs rightly submitted, may be owned by the individual, a family or a community. What, then, is the position of Owelebo land in issue? It is not disputed that Owelebo was communal land of Umueze-Aroli. Following the successful litigation over it, portions of it were allocated to the 3 G H

components of Umueze-Aroli, namely, Umuaroli, Ogbeoza and Ogbendida villages. Orowa is a family in Ogbeoza. Although Balonwu contends that the communal land became divested of this character upon sharing and became family land and so subject to the "usokwu" system, the pleading does not support this. In the claim, the plaintiffs claim the right "to receive one plot of land in Owelebo communal Land." This is repeated in paragraph 14(1) of the Statement of Claim. The Defendants, on the other hand, joined issue with the plaintiffs on whether or not the land was "communal" or "family" land. In paragraph 9 of the Statement of Defence they pleaded as follows:

The property in this case is a communal one and was allotted to the Orowa family by virtue of their singular spiritual headship.

In principle, once communal land is divided among the families that make up the community, it ceases to be communal land and becomes family land, but the plaintiffs neither pleaded nor led evidence in support of this aspect of custom."

I agree entirely with the above observations of the trial court and fully endorse them as well founded. Without doubt, native law and custom are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof. See Giwa v. Erinmilokun (1961) N.S.C.C. 157 at 159. The status of the plots of land in issue under customary law was neither pleaded by the respondents nor was evidence in respect thereof given at the trial with a view to ascertaining the applicability or otherwise of the "kitchen" or "usokwu" system of sharing the said plots of land. As has always been said, it is not the function of a court of law by its own exercise or ingenuity to supply or imagine evidence or arrive at an answer which only evidence tested under cross-examination could supply. See George Ikenye and Anor v. Akpala Ofune and ors (1985) 2 N.W.L.R 1. I think the learned trial Judge was right when he held that the "kitchen" or "usokwu" system of sharing was not proved to be applicable in the present case. Said he-

"The plaintiffs led evidence in support of their contention that

the he plots should be shared among the Orowa family "usokwu" by "Usokwu". This evidence is however contradicted by some of the witnesses of the plaintiffs. PW4, Patrick Anyaorah, Okpala of Ozomike, limited the "Usokwu" system to a man and his nuclear family and said it did not apply to family lands. PW3, Chike Akosa, President of the Customary Court, Onitsha, said that the Orowa family tried to evolve a formula for the sharing of the 18 plots but failed. In other words, there was no agreement even among the Orowa family that the "usokwu" system was the only formula applicable to the sharing. Although he protested about the manner of the sharing, he still retained the plot which he got as a share

..... The evidence of PW3 has not helped however the plaintiffs; on the contrary, it has weakened the case of the plaintiffs. I do not find the "usokwu" system claimed by the plaintiffs proved in-so-far as family land is concerned."

Turning to the alternative claim of the respondents that the plots of land in issue should be shared among the 10 sub-families of Orowa family, the learned trial Judge stated thus -

"The other contention of the plaintiffs that the sharing should be done among the 10 sub-families of Orowa Family stems from the same "usokwu" system, which the plaintiffs have failed to prove. I believe PW4 that the "Usokwu" system applies to the estate of a man with more than a wife, each of whom had a male issue surviving him on his death, if intestate. The 4th plaintiff also said so under cross-examination." He concluded -

"The plaintiffs have also failed to prove that the method used in the sharing of the 18 plots was inequitable and, even if it appears to be, have not proved that it could have been better done by any other method. This being so, I am unwilling to disturb the method of distribution used by the Defendants. Accordingly, the claim fails and is hereby dismissed. In view of the relationship of the parties, I make no order as to costs." Resolving the main issue posed in this appeal, the court below questioned thus -

"Now, even if the appellants case is considered from the view-

point most favourable to them in the sense that Orowa family is one spiritual entity but consisting of 10 sub-families as pleaded and led in evidence by them, the question still remains whether the appellants have successfully established their chief contention that "usokwu" system is applicable to sharing of landed property among the sub-families comprised in a monolithic spiritual headship."

It then proceeded to answer the above question and, quite rightly in my view, arrived at the same conclusion as the trial court to the effect that sharing the plots of land in issue under the "usokwu" or "kitchen" system was not established and was therefore inapplicable in the circumstances of the present case. Said the court below-

"In sum, the appellants have failed to show that the "usokwu" system relied on as the principle governing sharing of land among "usokwus" of one's nuclear family, is applicable to the circumstances of sharing of land among sub-families. Considered from the best favourable angle to the appellants, the principle of sharing under "usokwu" by "usokwu" custom, would only come into play analogously in this case, but not otherwise."

A little later, in its judgment, the Court of Appeal added -

"After all, as we had earlier noted, there was not even any averment or shred of evidence relative to the number or wives Orowa had in order to justify the application of sharing his land on the basis of "usokwu" by "usokwu". Thus the applicability of "usokwu" system even to the 10 sub-families of Orowa family could not be insisted on as it was not borne out by evidence led in support of this contention nor was it in fact pleaded. "Usokwu" system was expressly pleaded as Onitsha custom and was supported by ample evidence as a mode of sharing landed property within the nuclear family of an intestate and not otherwise."

It concluded -

"No doubt, and in fairness to the learned trial judge, the "usokwu" system pervaded the appellants' case. That, according to the learned trial judge, and rightly in my view, was not satisfactorily proved."

It seems to me appropriate at this stage to make further reference to paragraphs 7 and 8 of the respondents' Statement of Claim al-

ready set out above. The respondents therein referred to each "sub-family" as "kitchen" or "usokwu". Both the trial court and the Court of Appeal in no mistaken terms rejected this customary system of sharing communal land as inapplicable in the circumstances of the present case. The Court of Appeal, none - the -less, proceeded to share the 18 plots of land in issue the way it thought was most equitable. This it did when it ordered their division as follows -

"(1) Each of the ten sub-families of Orowa family already mentioned and included in the list set out above this judgment should first be allocated a plot.

(2) The said sub-families will be paired and each pair should also be allocated a plot wherein each sub-family will be entitled to either half a plot or half the proceeds from disposition of the said plot.

(3) The remaining three plots should be disposed of and the proceed therefrom divided equally among the ten sub-families."

With profound respect, the claim before the court was the equitable sharing of the Owelebo land in accordance with onitsha customary law which had nothing to do with the English law of Equity. It seems to me that the division of the plots among the 10 sub-families having regard to the averments in paragraphs 7 and 8 of the respondents Statement of Claim tantamount to sharing them under the "kitchen" or "usokwu" customary system which both courts below found inapplicable in this case. Parties are bound by their pleadings and in my view the only option that was open to the court below was to uphold the decision of the trial court and to dismiss the respondents ' claims.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Mohammed J.S.C that I, too, allow this appeal, set aside the decision of the Court of Appeal and restore the judgment of the trial court. I abide by the consequential orders including those as to costs therein made.