

SUPREME COURT OF NIGERIA
13TH JULY, 2001. SC. 131/1996
CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU, S. O. UWAIFO,
E. O. AYOOLA, JJSC.

SUNDAY OBASOHAN DEFENDANT/APPELLANT
AND
THOMAS OMORODION & ANOR. PLAINTIFFS/RESPONDENTS

INJUNCTIONS - Consequential order - Main claim - Where the main claim was not granted - The order of injunction which was consequential cannot stand (H12)

JUDGMENTS - Issue - Principles applicable in a case - Are determined by the basic issues in the case (H2)

LAND LAW - Co-ownership of land - Succession - Partition - Rights of Occupancy - When land has been held in co-ownership - Partitioning is an essential prerequisite - To a claim to any separate right (H9)

LAND LAW - Joint acquisition of property - Succession - Rights of successors - Where the fathers of the parties have jointly acquired the property in which they lived until their death - What the rights of their successors are (H8)

LAND LAW - Joint ownership - Proof - A party claiming to be joint owners of a property - Need not prove root of title of the joint ownership - If he can prove a joint acquisition of the property (H1)

LAND LAW - Joint tenancy - Joint acquisition of property - Subject to customary law - Does not create joint tenancy in the meaning in which the term is known at common law (H4)

LAND LAW - Joint title - Statutory right of occupancy - Where joint title of land remained unreserved - Until partition has taken place - Separate entitlement of parties - Cannot be declared (H7)

LAND LAW - Land subject to customary law - S. 63(2) of the Property and Conveyancing Law - And s. 5 (3) of the Administration of Estate Law - Do not apply to land subject to customary law (H3)

LAND LAW - Land Use Act - Succession - Right of Occupancy - Deemed holders - Where parties' fathers died before commencement of the Act - And the parties succeeded to the interest of their fathers - They become deemed holders of statutory right of occupancy (H6)

LAND LAW - Proprietary right - Co-ownership - Identification of the rooms occupied by the co-owner - Will not be sufficient for creating absolute proprietary right - Over portions of the entire property (H11)

LAND LAW - Right of occupancy - Rooms - There cannot be a statutory right of occupancy in relation to rooms in a building (H10)

LAND USE ACT - Interpretation of s. 48 - The Act does not set aside existing laws - Including customary law and common law (H5)

FACTS

In the High Court of former Bendel State (now Edo State) holden in Benin City the plaintiffs/respondents instituted an action against the defendant/appellant claiming (1) a declaration that prior to the Land Use Act, 1978 they and the appellant having succeeded their respective fathers in accordance with Benin Native Law and custom were joint owners of the premises, (2) a declaration that they were entitled to a grant of statutory right of occupancy to their respective portions of the premises, (3) Partitioning of the premises, (4) accounts, (5) damages for trespass, and, (6) injunctions. The action was brought in respect of premises situate at 41 Akpakpava Street, Benin City. It is common ground that the

respective fathers of the parties were three brothers of full blood and that those three brothers were all dead.

The respondents claimed that the property was rightly acquired by their several fathers sometime in 1917 by grant from one Obazuaye on his marriage to one Madam Obazuaye, a sister of full blood of their fathers. Their case was that their fathers contributed money and built the premises. On the completion of the building they moved in and settled there. Thomas Omorodion, the 1st respondent, claimed that his father, one of the three brothers, lived in part of the house until his death in 1957. On his performance of the funeral ceremony in the house in 1959 in accordance with Benin Native Law and custom he, as his father's eldest son, inherited the portion occupied by his father and was in possession until the appellant entered that portion and converted it into rooms and shops which he let out to tenants. Sometimes in July 1980 the matter was reported to the Oba of Benin who ruled that the house belonged to the three deceased whereon the 1st respondent instituted an action Suit No. B/233/80, against him in the High court. Judgment was entered for the 1st respondent for damages for trespass. The judgment was confirmed by the Court of Appeal in appeal No. CA/B/22/85 on 26th September, 1985.

The 2nd respondent, Peter A. B. Ezelasogie, for his part claimed that his father, of whom he was the eldest surviving son, lived in the house as co-owner from 1921 until his death in 1945. Forty years later, in 1985, he too performed the funeral ceremonies that qualified him to inherit his father's portion. The appellant's case, in summary is that his deceased father solely acquire the premises and built there. He claimed that his father only allowed the respondent's fathers to live there by virtue of their being his brothers. He denied that respondents were entitled to inherit any portion of the premises. Hence, the respondents instituted the action claiming as aforesaid.

After due trial, the learned trial judge found for the respondents and entered judgment for them in respect of some of their claims, specifically claims 1, 2, and 6. The appellant's appeal to the Court of Appeal, was dismissed. He has now further appealed to the Supreme Court

raising several issues but the appeal was determined on one basic issue.

ISSUE FOR DETERMINATION

Whether, as claimed by the respondents, the three brothers who were the several fathers of the parties jointly acquired the property; or, as claimed by the appellant, "the said land and house in dispute was singularly acquired by his late father."

HELD (Unanimously allowing the appeal in part per lead judgment of **AYOOLA JSC**)

Land law - Joint Ownership

1. A party claiming to be joint owners of a property does not necessarily by such claim set out to prove the root of title of the joint ownership. If he can prove a joint acquisition of the property the root of their joint ownership becomes inconsequential to the declaration of the joint ownership he seeks. (p. 3027 B)

Judgments - Issue

2. It must be emphasised that the principles applicable in a case are determined by the basic issues in the case and not the other way round. The appellant misconceived the basic issue when it was submitted by counsel on his behalf that the respondent traced their title to an unestablished owner while the appellant proved a better title. The attack mounted by counsel for the appellant on the declaration by the trial judge of joint ownership of the land by the parties on the ground of lack of proof of title was properly rejected. (p. 3028 C)

Land subject to customary law

3. Appellants relied on section 63(2) of the Property and Conveyancing Law (Cap 129 Laws of the Bendel State as applicable in Edo State) and section 5(3) of the Administration of Estate law (Cap 2 Laws of the Bendel State). These statutes do not apply to land subject to customary law and their provisions are therefore not applicable to this case. (p. 3028 F)

Land law - Joint tenancy

4. It is misconceived to assume that a joint acquisition of property subject to customary law creates joint tenancy in the meaning in which the term is known at common law. In my opinion, what is created is co-ownership to be attended by its own incidents as developed in customary law and not common law. Such incidents of co-ownership have been developed in regard to family property and there is no reason why such incidents should not apply by analogy to joint acquisition of property as in this case. It may well be noted that the feudal origins that fashioned the rule of *jus accrescendi* in English law has no place in customary law. (p. 3028 H)

Section 48 of the Land Use Act

5. The Land Use Act, 1978 ("the Act"), does not set aside existing laws. Section 48 of the Act provides that:

"All existing laws relating to the registration of title to, or interest in and or the transfer of title to or any interest in land shall have effect subject to such modifications (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intentment."

Such existing laws envisaged in section 48 will include unwritten laws such as customary law and the common law. (p. 3030 C)

Land Use Act - Succession

6. The respondents' fathers and the appellant's father having died before the commencement of the Act, it is clear that the parties succeeded to the interests of their fathers on the land in the same joint capacity, as their respective fathers before them, before the commencement of the Act. In that capacity they became deemed holders of a statutory right of occupancy of the property in terms of section 34(1) and (2) of the Act. (p. 3031 C)

Joint title - Statutory right of Occupancy

7. It is, however, because their joint title remained unreserved that it was

necessary to have a partition. Until such partition has taken place it is erroneous to declare a separate entitlement of any of the parties to a statutory right of occupancy in respect of any portion of the land.
(p. 3031 E)

B

Joint acquisition of property

8. By analogy of the rights of members of a family with regard to a family house, I venture to think that where, as in this case, the fathers of the parties have jointly acquired the property in which they lived until their death with their families, the rights of their successors are (a) of residence in the property; (b) of reasonable ingress and egress; (c) to have a voice in its management; (d) to share in any surplus income derived from it; and, (e) to apply for partition or sale of the property. (See, generally, Elias, Nigerian Land Law and Custom, 1951, pp 146-153, and the cases discussed therein.) (p. 3031 F)

Co-ownership of land

9. By virtue of section 34 the parties became deemed holders of statutory right of occupancy to the same land by devolution of the rights of the original occupiers upon their death. Opinion is divided, and I need not decide the matter here, whether or not the way to proceed in case where the devolution has taken place before the commencement of the Act, is to partition the land according to the appropriate customary law and have the statutory rights of occupancy divided subject to proviso (b) to section 24 of the Act. Whichever way one looks at it, when land has been held in co-ownership, partitioning, whether by agreement of the co-owners or by order of court, is an essential prerequisite to a claim to any separate right or interest in the land. (p. 3032 G)

Right of occupancy

10. In so far as the learned judge purported to declare a statutory right of occupancy in regard to rooms, he was clearly in error. Several provisions of the Act, some of which have been highlighted, and the general intendment of the Act makes it clear that the Act relates to land. The

building on the land merely makes it a 'developed land' in terms of section 51(1). There cannot be a statutory right of occupancy in relation to rooms in a building. (p. 3033 G)

Proprietary right

11. Although for the purpose of right of residence of a successor to a co-owner of a building in joint ownership an identification of the apartments or rooms occupied by the co-owner may be sufficient, when however, it comes to the creation of absolute proprietary right over portions of the entire property, which includes the building and land appurtenant thereto, description of the several portions in terms of rooms is inapt and inadequate. A claim to acquire absolute right to a portion of property in co-ownership by partition, which is the claim in this case, is not the same as a claim to preserve a mere right of residence by succession, in the property. The learned trial judge seemed not to have adverted to the difference. Had he done so he would not have granted a declaration that the parties are entitled to statutory rights of occupancy of rooms. In my judgment, that part of the decision of the court below confirming the second declaration granted by the trial judge should not stand. (p. 3034 B)

Injunctions - Consequential order

12. The relief of injunction sought by the respondents was predicated on and intended to be consequential to a partition being ordered as sought by them. The learned judge instead granted injunction restraining the appellant from interfering with "*the portions granted to the plaintiffs by order of this court.*" Although one co-owner can be restrained from interfering with the enjoyment of the rights of co-ownership of another co-owner, injunction to restrain one co-owner in terms in which such an order was made in this case can only be proper if a partition had taken place as envisaged by the respondents' claim. The main claims to which the order of injunction was consequential not having been granted the order of injunction should not stand. (p. 3034 F)

REPRESENTATION

Mrs. Ndidi Edewor for Appellant

A. O. Eghobamien (Jnr) for the Respondent.

CASES REFERRED TO

Agbonifo v. Aiweroba (1988) 1 NWLR (Pt. 70) 325, 321

Alao v. Akano (1988) 1 NWLR (PT. 71) 431.

STATUTES REFERRED TO

C Administration of Estate law (Cap 2 Laws of the Bendel State), Section 5(3)

Land Use Act, 1978, Section 48, 34(1) & (2), 51, 15, 14

D Property and Conveyance Law (Cap 129 Laws of the Bendel State as applicable in Edo State) Section 63(2)

BOOK REFERRED TO

Elias, Nigerian Land Law and Custom, 1951, pp 146-153

E

LEAD JUDGMENT BY AYoola JSC

F The Court of Appeal (Musdapher, JCA, Ejnawumi JCA(as he then was) and Edozie, JCA) dismissed the appellant's appeal from the decision of the High Court of what was then the Bendel State whereby judgment was entered for the respondents in the following terms:

G *"(1) It is hereby declared that prior to the Land Use Act 1979, the plaintiffs and the defendant having succeeded their respective fathers in accordance with Bini Native law and Custom were initial owners of all that piece or parcel of Land with the building thereon situate lying at No. 41 Akpakpava Street, Benin city within the jurisdiction of this Honourable Court.*

H *"(2) It is hereby declared that the plaintiffs and the defendant are each entitled to a grant of Statutory Right of occupancy for their respective portions of No 41 Akpakpava Street. That is, the 1st plaintiff is entitled to the fourteen rooms occupied by his father and inherited by him towards the left side of the building, the 2nd plaintiff is entitled to*

six rooms occupied by his father and inherited by him towards the right side of the said building and the defendant the remaining portion also occupied by his father and inherited by him.

(3) The defendant is hereby restrained perpetually with his agents servants or privies from interfering with the portions granted to the plaintiffs by order of this Honourable Court."

The appellant was the defendant in an action brought against him by the respondents (then plaintiffs) in respect of premises situate at 41 Akpakpava Street, Benin City. The respondents claimed that the property was rightly acquired by their several fathers who were brothers of the full blood sometime in 1919 by grant from one Obazuaye on his marriage to one Madam Obazuaye, a sister of the full blood of their fathers. Their case was that their fathers contributed money and built the premises. On the completion of the building they moved in and settled there. Thomas Omorodion, the first respondent, claimed that his father, one of the three brother, lived in part of the house until his death in 1957 wherein on his performance of the funeral ceremony in the house in 1959 in accordance with Benin Native Law and Custom he, as his father's eldest son, inherited the portion occupied by his father and was in possession until the appellant entered that portion and converted it into rooms and shops which he let out to tenants. Sometime in July 1980 the matter was reported to the Oba of Benin who ruled that the house belonged to the three deceased brothers. The appellant did not heed the ruling, wherein the 1st respondent instituted an action, suit No. B/233/80, against him in the High Court. Judgment was entered for the 1st respondent for damages for trespass. The judgment was confirmed by the Court of Appeal in appeal No. CA/B/22/85 on 36th September, 1985.

The 2nd respondent, Peter A. B. Ezelasogie, for his part claimed that his father, of whom he was the eldest surviving son, lived in the house as co-owner from 1921 until his death in 1945. Forty years later, in 1985, he too performed the funeral ceremonies that qualified him to inherit his father's portion. The appellant's (Sunday Obasohan's) case, in a nutshell is that his deceased father solely acquired the premises and built there. He claimed that his father only allowed the respondents'

fathers to live there by virtue of their being his brothers. He denied that respondents were entitled to inherit any portion of the premises.

It is common ground that the respective fathers of the parties were three brothers of the full blood and that those three brothers were all dead. On a dispute having arisen as to the interest of the respondents in the premises the respondents initiated the action which gave rise to this appeal claiming,

(1) a declaration that prior to the Land Use Act, 1978 they and the appellant having succeeded their respective fathers in accordance with Benin Native Law and Custom were joint owners of the premises,

(2) a declaration that they were each entitled to a grant of statutory right of occupancy to their respective portions of the premises,

(3) partitioning of the premises,

(4) accounts

(5) damages for trespass, and,

(6) injunction.

It is evident that from the terms of the judgment of the trial High Court the learned judge did not grant all these reliefs and that some of the reliefs he granted were in modified terms.

The trial judge being satisfied that the respondents have established their entitlement to the premises and that the appellant had prevented them from entering their portion of the premises, gave judgment in terms which earlier have been set out in this judgment. He entered judgment for the respondents after considering the evidence adduced by the parties including the previous judgment in suit B/233/80.

On the appellant's appeal to the court below from the decision of the High Court, several issues were raised, the salient of which were:

(i) *whether the trial judge had properly found title of the respondents proved without resolving the issue of competing title raised by the appellant's defence;*

(ii) *whether in terms of the Land Use Act, 1978, the 2nd declaration made by the judge could properly be made,*

(iii) *whether the judge made a proper use of the judgment in suit B/233/80 and*

(iv) *whether there was evidence of partitioning in accordance with Bini Native Law and Custom.*

Musdapher, JCA, who delivered the leading judgment of the court below addressed these issues. I state, briefly, his conclusions on some of them. On the first, he held that:

"The respondents pleaded and led evidence as to how their predecessor in title acquired the larger land including the land in dispute. The learned trial judge also examined the competing claims of both parties and rightly, too, in my view, accepted that of the respondent. Furthermore, there is the evidence led by the respondents that the Oba of Benin ruled that the land in dispute was possessed by the three brothers jointly and they all lived in the portions occupied by their late fathers."

In regard to the second question, he said:

"The pith and substance of their claims were not that the rooms that had been structurally altered, but the land upon which their fathers had erected the rooms in question."

"In any event, what the respondents claimed were merely declaration under the 1st and 2nd arms of their amended claim and clearly it is not the function of the Court to order the governor civilian or military to issue the respondents with Statutory Rights of Occupancy. Having made the declarations sought in the clear terms as contained in the writ, the court becomes functus officio. It is left to the discretion of the governor whether to issue the certificates or not."

The learned Justice of the Court of Appeal disposed of the third of these questions by holding that the 2nd respondent was bound by the decisions in suit B/233/80 *"because he was or should have been privy to the case in the first place."* For this view he relied on the case of Alao v. Akano (1988) 1 NWLR (PT. 71) 431. Finally, on the question whether the respondents pleaded or led evidence of partition, the learned Justice was of the view that the trial judge having found clear evidence on the portions or parts of the house built and occupied by each of the three brother, *'the conclusion reached by the learned trial Judge granting the declarations sought under the provisions of Land Use Act was proper under the circumstance.'* He referred to passages in the judgment of the trial Judge including that

portion where he said:

" *The parties knew their respective portions in the premises at 41 Akpakpava Street, and I hold that the parties are entitled to their respective portions as disclosed by the evidence, that is the first plaintiff is entitled to the fourteen rooms occupied by his father the second plaintiff six rooms and the rest to the defendant xxx*"

The learned Justice concluded that these were findings of fact based on the evidence pleaded and led before the trial Court.

Having thus disposed of the questions raised in the appeal, the Court of Appeal dismissed the appellant's appeal. On this appeal from the decision of the court below the appellant put his case in several ways. First, that the "*2nd Order*" declaring that the plaintiffs and the defendant are each entitled to a grant of Statutory Right of Occupancy for their respective portions of 41 Akpakpava Street is unenforceable because: it "*cannot be realised individually*"; the portions awarded to all the parties are imprecise and vague and undefined; and, awarding number of rooms not pleaded and established by evidence instead of the part of the land claimed by the respondents is contrary to their claim. Secondly, that the Court of Appeal was in error in affirming a declaration of title to the plaintiffs in the absence of evidence of the root of their title under the Bini Customary Law, in that the respondents traced their title to an "*unestablished owner*" namely, Igbinosun Obasuaye; and, that the judgment in suit B/233/80 should not have been held to avail the plaintiffs because the trial of that suit, part of which they claimed had ended in a non-suit proved abortive and, the parties were not the same. Thirdly, that the order of injunction is unenforceable because the respondents were out of possession; the area claimed by the respondents were uncertain; the respondents could not establish their various claim without a survey plan. Finally that there was non-direction by the trial judge in regard to several aspects of the case.

By the time this appeal was heard the 2nd respondent had died. However, the learned counsel for the 1st respondent, responded to the point raised by the appellant. He was content to repeat most of the points already made by the court below. He argued further that; "since both the

High Court and the Court of Appeal have held that respondent inherited the apartment their fathers were occupying, each of them can apply for Certificate of Occupancy since they are deemed to have Certificate of Occupancy by S 34(2) of the Land Use Act 1978". He argued that this court should neither disturb concurrent findings of fact made by the trial court and the Court of Appeal nor reopen the issues which have been determined in the previous action suit B/233/80. B

It is evident that much issue than is necessary has been made of the question of competing titles. **A party claiming to be joint owners of a property does not necessarily by such claim set out to prove the root of title of the joint ownership. If he can prove a joint acquisition of the property the root of their joint ownership becomes inconsequential to the declaration of the joint ownership he seeks.** In this case, therefore, the basic issue was whether, as claimed by the respondents, the three brothers who were the several fathers of the parties jointly acquired the property; or, as claimed by the appellant, *"the said land and house in dispute was singularly acquired by his late father."* The trial Judge quite clearly appreciated that issue, and he resolved it as follows: D

"The plaintiff showed through their witness PW5 that his father Igbinosun Bazuaye gave the land to plaintiffs' fathers and defendant's father who were his in laws and the defendant stated that his father told him that he acquired the land single-handedly and built up the samebut I prefer the evidence of PW5 in this regard, as against that of the defendant." F

Later, he went on to say:

"The defendant did not impress me when he maintained that it was only his father who single-handedly acquired 41, Akpakpava Street and built the same up and allowed his brothers to stay with him as an act of grace between 1921 to 1957 in this case of 1st plaintiff's father and it only dawned on him in 1980 to eject remnants of Omorodion, the 1st plaintiff's father." G

The Court of Appeal confirmed those findings which clearly established that the three brothers who were the parties' fathers acquired a joint title. H

There was no question, as among the three brothers, of a competing title. The unity of their joint acquisition of title made their title rise or fall together. If the trial court had found that there was no joint acquisition of title by the three brothers that would have been the end of the matter and
B it would not have been necessary to inquire further whether the appellant's father acquired a good title or not.

For these reasons, reference to the principle of cases, such as Agbonifo v. Aiweroba (1988) 1 NWLR (Pt. 70) 325, 321, which relate to
C cases of competing titles would not arise. The basic and critical issue in the case was whether the parties' fathers were co-owners or not, and not whether they were separate owners with rival titles. **It must be emphasised that the principles applicable in a case are determined by the basic issues in the case and not the other way round. The**
D **appellant misconceived the basic issue when it was submitted by counsel on his behalf that the respondent traced their title to an unestablished owner while the appellant proved a better title. The attack mounted by counsel for the appellant on the declaration by**
E **the trial judge of joint ownership of the land by the parties on the ground of lack of proof of title was properly rejected.**

However, learned counsel for the appellant raised yet another argument which can be quickly disposed of. She argued that the parties' fathers became joint tenants and that, therefore, the rule of survivorship
F applied. Put briefly, the rule is that where a joint tenant dies without having a separate share in the joint property, his interest passes to the remaining joint tenants and not to his successors or personal representatives. Mrs. Edewor, for the appellants relied on section 63(2) of the
G Property and Conveyancing Law (Cap 129 Laws of the Bendel State as applicable in Edo State) and section 5(3) of the Administration of Estate law (Cap 2 Laws of the Bendel State). These statutes do not apply to land subject to customary law and their provisions are there-
H fore not applicable to this case. Besides, it is misconceived to assume that a joint acquisition of property subject to customary law creates joint tenancy in the meaning in which the term is known at common law. In my opinion, what is created is co-ownership to be

attended by its own incidents as developed in customary law and not common law. Such incidents of co-ownership have been developed in regard to family property and there is no reason why such incidents should not apply by analogy to joint acquisition of property as in this case. It may well be noted that the feudal origins that fashioned the rule of *jus accrescendi* in English law has no place in customary law.

On the evidence accepted by him, the trial judge was entitled to made the findings on which he made the declaration in the first relief. The Court of Appeal, after due consideration of the evidence, confirmed the findings. There is no good reason why this court should interfere with the concurrent findings of the two courts. In the result, there is no substance in the appeal against the declaration of co-ownership granted by the trial judge.

The parties having been found to be co-owners of the premises, the main question in this appeal is really in relation to the propriety of the reliefs granted. Before I consider these questions, merely for the sake of completeness, I do say that the question whether or not, or to what extent, the judgment in suit B/233/80 raised an estoppel is hardly of paramount importance. It is clear that even without the judgment, the evidence believed by the trial judge was sufficient to support the finding of joint acquisition. Besides, it seemed clear from the pleadings that both parties relied on issue estoppel, and the question was what was the finding in the previous action. Significantly, the finding was one of joint ownership. It was on that basis that the appellant was adjudged liable to pay damages for interfering with his rights of co-ownership.

The remaining question is in regard to the propriety of the 2nd and 3rd reliefs granted by the trial judge. As for the 1st relief, a declaration that prior to the Land Use Act, 1978 the plaintiffs and defendants having succeeded their respective fathers in accordance with Bini Native Law Custom naturally follows the finding that their fathers jointly acquired the property and that they succeeded to their deceased fathers' respective interest. However, the declaration granted (in the 2nd relief) that the defendants are each entitled to a grant of Statutory Right of

Occupancy for their respective portions of the property appears to me to be problematic in the light of the failure of the trial judge to make an order of partition of the land as claimed by the respondents, and shown on their plan, and to declare an entitlement to statutory right of occupancy in relation to land.

Mrs. Edewor, learned counsel for the appellant approached this aspect of the matter in the several ways which have been earlier mentioned. The focus of her objection to the 2nd declaration made by the judge was its propriety, or, perhaps more accurately, lack of it, in terms of the Land Use Act. In view of the relevance of the Land Use Act to her submissions, it is appropriate at the outset, to highlight certain provisions of that Act.

The Land Use Act, 1978 ("the Act"), does not set aside existing laws. Section 48 of the Act provides that:

"All existing laws relating to the registration of title to, or interest in and or the transfer of title to or any interest in land shall have effect subject to such modifications (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment."

Such existing laws envisaged in section 48 will include unwritten laws such as customary law and the common law.

By virtue of section 34(1) and (2) any person in whom land was immediately vested before the commencement of the Act, shall where the land is developed, be deemed to be the holder of a statutory right of occupancy issued by the Governor under the Act. *"Developed land"* in section 51 of the Act is defined as meaning *"land where there exists any physical improvement. . . . that may enhance the value of the land for industrial, agricultural or residential purposes."* Such improvement includes buildings.

The rights of the holder of a statutory right of occupancy include a *"sole right to and absolute possession of all the improvement on the land"*, and a right, subject to the prior consent of the Governor, to transfer, assign or mortgage any improvement on the land which have been effected pursuant to the terms and conditions of the certificate of

occupancy relating to the land: section 15. By virtue of section 14, subject to certain qualifications which are not relevant to this case, the occupier shall have exclusive right to the land, subject of a statutory right of occupancy, against all persons other than the Governor. It may well be noted that section 13(1) imposes on the occupier of a statutory right of occupancy a duty to *"maintain in good and substantial repair.....all beacons or other land marks by which the boundaries of the land comprised in the statutory right of occupancy are defined...."* In default of his doing so the Governor or such officer as he may appoint may by notice in writing require the occupier *"to define the boundaries"*.

It is in the light of these provisions that the submission made by learned counsel for the appellant should be considered. **The respondents' fathers and the appellant's father having died before the commencement of the Act, it is clear that the parties succeeded to the interests of their fathers on the land in the same joint capacity, as their respective fathers before them, before the commencement of the Act. In that capacity they became deemed holders of a statutory right of occupancy of the property in terms of section 34(1) and (2) of the Act. It is, however, because their joint title remained unreserved that it was necessary to have a partition. Until such partition has taken place it is erroneous to declare a separate entitlement of any of the parties to a statutory right of occupancy in respect of any portion of the land. By analogy of the rights of members of a family with regard to a family house, I venture to think that where, as in this case, the fathers of the parties have jointly acquired the property in which they lived until their death with their families, the rights of their successors are (a) of residence in the property; (b) of reasonable ingress and egress; (c) to have a voice in its management; (d) to share in any surplus income derived from it; and, (e) to apply for partition or sale of the property. (See, generally, Elias, Nigerian Land Law and Custom, 1951, H pp 146-153, and the cases discussed therein.)**

The respondents, notwithstanding the order in which their claims were put on their amended statement of claim where they claimed parti-

tion after a claim for entitlement to statutory right of occupancy, did realise that they needed to have a partition of the property first before they could claim any individual rights in the property. They, therefore, claimed, as in their claim (iii), a partitioning of the property. The learned trial judge found that the respondents have made out a case for partitioning of the property. He was emphatic that, *"it becomes imperative that an order for the partition of the property be made."* However, he did not do so at all. He felt he could not order a partition in terms of what the respondents sought which would have tied it to the plan of the respondents who sought a partitioning of the property *"into three parts among the parties in this suit as it is properly delineated in Survey plan No. ISO/BD/158/85 dated 14/11/85 filed herewith."* Because, as he put it, the plans of the two parties did not *"reflect the true positions of what each of the parties is entitled to at 41 Akpakpava Street,"*. The learned judge proceeded to confirm the occupation of rooms in the buildings by the parties' fathers and declared entitlement of the parties to a statutory right of occupancy of the rooms which he found were occupied by their respective fathers.

In my judgment, the approach of the learned judge to this aspect of the matter was misconceived and wrong. The Court of Appeal was equally in error in confirming that approach. There is force and substance in the submission of the learned counsel for the appellant that, *"since the learned trial judge did not partition the various portion he purportedly awarded to each of the parties, no one of them can apply for a Statutory Right of occupancy to his undefined area."* None of the parties could claim individually to be a deemed holder of statutory right of occupancy in respect of the property in terms of section 34(1) and 34(2) of the Act since the land was not at the time of the commencement of the Act vested in any of them individually. **By virtue of section 34 the parties became deemed holders of statutory right of occupancy to the same land by devolution of the rights of the original occupiers upon their death. Opinion is divided, and I need not decide the matter here, whether or not the way to proceed in case where the devolution has taken place before the commencement of the Act,**

is to partition the land according to the appropriate customary law and have the statutory rights of occupancy divided subject to proviso (b) to section 24 of the Act. Whichever way one looks at it, when land has been held in co-ownership, partitioning, whether by agreement of the co-owners or by order of court, is an essential prerequisite to a claim to any separate right or interest in the land. B

Learned counsel for the appellant further argued that the 2nd relief granted by the trial court and confirmed by the court below should not stand because, as she put it, *"The provisions of the Land Use Act 1978 envisages the grant of Statutory right of Occupancy over precise parcel of land with building or without building."* The learned trial judge having declared the parties each entitled to a grant of Statutory Right of Occupancy *"for their respective portions of No 41 Akpakpava Street."*, proceeded to describe those *"respective portions"* in terms of rooms severally occupied by their several fathers. The question is: Can there be a statutory right of occupancy to rooms in a building? The learned counsel for the appellant raised this question in the court below when she submitted that: *"The subject matter of the appellant (sic) claims relate (sic) to portions of buildings at 41 Akpakpava Street and the Land Use Act was only concerned with land and is not pertinent to buildings or rooms."* The Court of Appeal, I imply, agreed that the Act did not apply to buildings *simpliciter* when it said in the leading judgment: *"The pith of their claims were not the rooms that had been structurally altered, but the land upon which their fathers had erected the rooms in question."* D E F

It is clear that the claim of the respondents was not to statutory right of occupancy to rooms but to property on which a building has been erected. It is also clear that the declaration granted by the trial judge was in regard to rooms. **In so far as the learned judge purported to declare a statutory right of occupancy in regard to rooms, he was clearly in error. Several provisions of the Act, some of which have been highlighted, and the general intendment of the Act makes it clear that the Act relates to land. The building on the land merely makes it a 'developed land' in terms of section 51(1). There cannot be a statutory right of occupancy in relation to rooms in a building.** G H

The Court of Appeal having found that the claim was in regard to land, should have noted that the second declaration granted by the trial judge was not in relation to land and was, consequently, bad. If the learned trial judge had been minded to grant the relief in regard to land on which rooms have been erected, he would, surely, have also noted the impreciseness of the description or definition of such land upon a rejection of the respondents' plan.

Although for the purpose of right of residence of a successor to a co-owner of a building in joint ownership an identification of the apartments or rooms occupied by the co-owner may be sufficient, when however, it comes to the creation of absolute proprietary right over portions of the entire property, which includes the building and land appurtenant thereto, description of the several portions in terms of rooms is inapt and inadequate. A claim to acquire absolute right to a portion of property in co-ownership by partition, which is the claim in this case, is not the same as a claim to preserve a mere right of residence by succession, in the property. The learned trial judge seemed not to have adverted to the difference. Had he done so he would not have granted a declaration that the parties are entitled to statutory rights of occupancy of rooms. In my judgment, that part of the decision of the court below confirming the second declaration granted by the trial judge should not stand.

The relief of injunction sought by the respondents was predicated on and intended to be consequential to a partition being ordered as sought by them. The learned judge instead granted injunction restraining the appellant from interfering with "the portions granted to the plaintiffs by order of this court." Although one co-owner can be restrained from interfering with the enjoyment of the rights of co-ownership of another co-owner, injunction to restrain one co-owner in terms in which such an order was made in this case can only be proper if a partition had taken place as envisaged by the respondents' claim. The main claims to which the order of injunction was consequential not having been granted the

order of injunction should not stand.

In my judgment, the declaration granted by the trial judge to the effect that the parties are each entitled to statutory rights of occupancy *to rooms in the building* situate at No. 41 Akpakpava Street, Benin, and the order of injunction made by him should not stand and must be set aside. It is recalled that after stating that an order of partition was imperative, the learned trial judge, nevertheless, failed to make such an order because he was not satisfied with the plan produced by the respondents. There is no cross-appeal by the respondents, even though they got less than they asked for. In the circumstances, since the parties have been declared joint owners of the property and circumstances exist which justify a partition of the property, any of them can now seek partition or, perhaps, sale of the property, in a fresh action, should the parties be unable to achieve a partition by agreement.

In the result, this appeal is allowed in so far only as the 2nd declaration and the order of injunction will be set aside. Otherwise, the appeal is dismissed. The parties should now be at liberty to effect a partition by agreement or failing which any of them may apply to the High Court for a partition upon production of a plan acceptable to the High Court.

For the reasons which I have given, I allow the appeal in part. I set aside the judgment of the court below confirming in its entirety the judgment of the High Court. I confirm the judgment of the High Court in so far only as it declared that prior to the Land Use Act 1978, the plaintiffs and the defendant having succeeded their respective fathers in accordance with Bini Law and Custom were jointly owners of all that piece or parcel or Land with building situate thereon lying at No 41 Akpakpava Street, Benin City. In regard to that declaration the appeal is dismissed. I set aside the second declaration and the order of injunction made by the High Court. I make no order as to costs.

H

WALI JSC

I am privileged to have read before now the lead judgment of my learned brother Ayoola JSC and I agree with his reasoning and conclusion for allowing the appeal in part. I adopt the reasoning and conclusion as mine.

For these same reasons ably stated in the lead judgment, I also hereby allow the appeal in part. I adopt the consequential orders in the lead judgment.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Ayoola, JSC. I agree with his reasoning and conclusions. I will also allow the appeal in part and endorse the consequential order contained therein. I also make no order as to costs.

ONU JSC

I had the advantage of reading in draft the judgment of my learned brother, Ayoola, JSC just delivered. I am in complete agreement with him that the appeal lacks substance and must perforce fail.

Accordingly, I too dismiss the appeal and make the same consequential orders inclusive of costs as contained in the leading judgment.

UWAIFO JSC

I agree.

H