

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2003. SC. 120/1997
CORAM:- I. L. KUTIGI, U. A. KALGO, U. MOHAMMED,
S. O. UWAIFO, E. O. AYOOLA JJSC

DR. T.E.A. SALUBI

(As Administrator of Late Chief Salubi's

Estate in Benin City

and self appointed Administrator of

Chief Salubi's Estate outside Benin City) APPELLANT

AND

1. MRS. BENEDICTA E. NWARIAKU

(Nee Salubi), for herself as beneficiary of

the Estate of the late Chief T.E.A. Salubi)

2. THE PROBATE REGISTRAR RESPONDENTS

3. MRS. ANGELA ALICE SALUBI

(Joined by Order of the Court of Appeal)

CONFLICT OF LAWS - Administration of estates - Applicable law -
Where common law is abrogated by passage of statute - The former
must give way - And the latter must prevail (H1)

ADMINISTRATION OF ESTATES - Residuary estate - Extent of -
Residuary estate in cases of total intestacy - Includes the entire estate
of the intestate - After payment of funeral and other liabilities (H2)

PROPERTY LAW - Party - Reliefs - Grant of - Where a party makes
averment not related to relief sought - Court will not grant relief that
would have followed the averment - Without amendment of the
claim (H3)

FACTS

Dr. T. E. Salubi 1st defendant/appellant was the first son of the deceased. Upon the death intestate of the deceased, letters of administration were granted to his widow and appellant. However the former declined to be an administrator of the estate. Dissatisfied with the manner in which appellant had been managing the estate of the deceased, plaintiff/1st respondent commenced this action at the High

Court of Delta (then Bendel) State against appellant claiming inter alia, for an order setting aside the letters of administration granted to appellant and that estate of the deceased be distributed to all the beneficiaries of the estate. At the trial, 1st respondent contended that the deceased having contracted a marriage under the Marriage Ordinance was not a person to whom native law and custom applied with the consequence that his widow was entitled to two-thirds share of his estate.

Appellant's case, on the other hand, was that the deceased having lived as an Urhobo Chief and having died intestate, his estate devolved to be distributed in accordance with Urhobo native law and custom under which appellant as the deceased's eldest son inherited the deceased's estate which he could distribute at his discretion. In his judgment, the learned trial Judge found that the deceased's estate should be governed as provided for in section 36(1) of the Marriage Act. Applying the said section, the court found that the deceased's widow was entitled to one-third of the estate and his children to the remaining two-thirds. In the event, the trial Judge set aside the letters of administration granted to appellant and ordered 2nd respondent to give effect to the quantum of distribution. Being dissatisfied, appellant appealed to the Court of Appeal, Benin City, while 1st respondent cross-appealed. The court held that the applicable law was the aforementioned section of the Act. The court went ahead to hold outside the claim of respondents, that a valuation of the whole estate be made by a qualified estate valuer under the supervision of 2nd respondent who should then take charge of the estate. Aggrieved by this, appellant filed appeal in Supreme Court.

ISSUE FOR DETERMINATION

The main issue in the case was as to the applicable law for the distribution of the estate.

HELD (Unanimously allowing the appeal per **AYOOLA JSC**)

Administration of estates - Applicable law

1. By section 3 of the Law of England (Application) Laws, Western Region of Nigeria expressly received as part of its

laws the common law of England and the doctrines of equity only. Where a statute of the then Western Region had fully provided for a matter, the intendment was that the provisions of the statute were the applicable law. It is a well known principle that: "If it is clear that it was the intention of the legislature in passing a new statute to abrogate the previous common law on the subject, the common law must give way and the statute must prevail." It follows that if there was a conflict between the English common law on the distribution of intestate estate and the provisions of the Administration of Estates Law, the latter must prevail. It has not been suggested in this case that recourse should be had to the common law. The Regional legislature having enacted a law on the subject on which it had full competence, recourse to the legislation of the previous unitary government, albeit on the same subject, or to English law is misconceived. Where there is a conflict between such previous enactment and the later one, the former should be deemed impliedly repealed and the later one should prevail.

In the present case, I am of the opinion that the court below was in error when it held that the applicable law governing the distribution of the estate is as prescribed in section 36 of the Marriage Act even though that error was not of significant consequence to the method of distribution of the estate. The applicable enactment is section 49(1) of the Administration of Estates Law, Laws of Bendel State. The court below should have made an order in terms that the estate of the deceased stood to be distributed to all the beneficiaries of the estate in accordance with that Law. (pp. 665 H / 669 A)

ADMINISTRATION OF ESTATES - Residuary estate - Extent of

2. Akintan, JCA, who delivered the leading judgment of the Court of Appeal proceeded on a mistaken footing when he held that section 49 of the Administration of Estates Law did not provide for succession by widows to real property on the erroneous interpretation of residual estate as not including real property.

It is evident that the above opinion was not correct. Residuary

estate in cases of total intestacy includes the entire estate of the intestate after payment of funeral, testamentary and administration expenses, debts and other liabilities of the estate. The term ‘residuary estate’ is not used to indicate a distinction between real and personal property. (p. 666 H)

Party - Reliefs - Grant
3. The aspect of the order of the court below which is open to criticism is in regard to the property given to the widow and the excision of two properties from the estate. Although the plaintiff by her amended statement of claim averred that certain properties were not part of the estate and enumerated properties comprising the estate, with which enumeration the 1st defendant did not entirely agree, at the end of the day there was no relief sought by the plaintiff concerning entitlement to any specific property. No remedy was sought as to who was entitled to what property. The decision of the court below excluding specific properties from the estate or declaring entitlement of beneficiaries to specific property was inappropriate. It is trite law that the court normally should not grant a relief not sought by the parties. Where a party makes averments but such averments do not relate to any relief sought in the case, the court will not grant a relief which would have followed the averments without an amendment of the claim.
 (p. 670 D)

REPRESENTATION

C.A. Ajuyah, Esq., for the Appellant
 Chief A. O. Ogbodu with Marcel Eriofoloh, Esq., for the 1st and 3rd Respondents
 2nd Respondent unrepresented

CASES REFERRED TO

Obusez v. Obusez (2001) 15 NWLR (Pt. 736) 377
 Opeola v. Falade (1991) 2 NWLR (Pt. 173) 303
 Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392

STATUTES REFERRED TO

Marriage Act, s. 36(1)

Constitution of Federal Republic of Nigeria 1979, s. 39(2)

Administration of Estates Law, s. 49(5)

BOOK REFERRED TO

Craies on Statute Law 7th Ed.

B

LEAD JUDGMENT BY AYOOLA JSC

The action to which this appeal relates concerned the estate of Chief T.E.A. Salubi (“the deceased”) who died intestate on 19th September, 1982 survived by his widow who he married under the then Marriage Ordinance, two children born of him by the said widow and two other children born of him out of wedlock but whose paternity he acknowledged and who were in his life time raised in the matrimonial home with the consent of his lawful wife who accepted them as children of the family. The deceased had a successful career in the civil service and was a minister in the then Midwest State. He died leaving a rather substantial estate comprising, inter alia, of landed property in Ovu, his hometown, Lagos, Sapele, Warri and Benin.

Dr. T. E. Salubi (“the 1st defendant”) was the first son of the deceased. Upon the death intestate of the deceased, letters of administration were on 14th June, 1985 granted to his widow and the 1st defendant. However the former declined to be an administrator of the estate. Dissatisfied with the manner in which the 1st defendant had been managing the estate of the deceased the eldest surviving child of the deceased, Mrs. Benedicta Nwariaku (“the plaintiff”) for herself as beneficiary of the estate of the deceased sued the 1st defendant claiming:

“1. Orders to set aside the letters of administration granted to Dr. Salubi and that the estate of the deceased be distributed to all the beneficiaries of his estate “in accordance with Administration of Estates Law and the Marriage Ordinance Law which governs the estate of person whose marriage is governed by the Ordinance law; and other relevant applicable laws,” and

“2. An order compelling the Probate Registrar (“the 2nd defendant”) “to effect the distribution of the estate of the late Chief T.E.A. Salubi to all beneficiaries under his estate as ordered by court.”

The particulars of the landed properties comprised in the estate were set out in the amended statement of claim with averments that the widow of the deceased was entitled to the matrimonial home and some properties of the deceased at Victoria Island, Lagos and at Airport Road, Benin City. The plaintiff averred that the properties be
 B given to her mother, the deceased's widow, *"as part of the two third share of the estate of her father and on the ground that these were properties jointly financed by her mother and her late father."* She proffered suggestion as to the distribution of the rest of the estate.

C The plaintiff's case was that the deceased having contracted a marriage under the Marriage Ordinance was not a person to whom native law and custom applied with the consequence that his widow was entitled to two-thirds share of his estate. The 1st defendant's
 D case, on the other hand, was that the deceased being and having lived as an Urhobo Chief and having died intestate as a matter of deliberate choice as an Urhobo chief, his estate devolved to be distributed in accordance with Urhobo native law and custom under which the 1st defendant as the deceased's eldest son inherited the deceased's estate which he could distribute at his discretion.

E The trial Judge found that the estate was not to be administered in accordance with either the Administration of Estates Law or native law and custom but as provided for in section 36(1) of the Marriage Ordinance, referred to in the judgments of the lower courts
 F as Act. He preferred the enactment to native law and custom because the deceased and his widow had married in 1932 under the Marriage Ordinance and the deceased was thereby "no longer a person to whom native law and custom is applicable, because by his conscious volition, he has Anglicanised himself and obviously opted
 G out of native law and custom of Ovu people." He preferred section 36(1) of the Marriage Act (Ordinance) to the Administration of Estates Law because, as he put it, "the Marriage Act as Federal Law is superior and overrides the State law dealing with Administration of Estate of persons dying intestate." Applying section 36(1) of the
 H Marriage Act, he found that the deceased's widow was entitled to one-third of the estate and his children to the remaining two-thirds. The learned trial Judge identified the properties comprised in the estate and proceeded to distribute same, allocating properties in Victoria Island, Lagos and one in Benin City to the widow "as form-

ing roughly, one-third of the said estate” and sharing the rest among the deceased’s children. In the event, the trial Judge set aside the letters of administration granted to the 1st defendant and ordered the 2nd defendant, the Probate Registrar, to “give effect to the quantum of distribution” which he had stated.

The 1st defendant appealed to the Court of Appeal while the widow of the deceased after duly obtaining leave of the court cross-appealed. Akintan, JCA, who delivered the leading judgment of the Court of Appeal held that the applicable law for the administration of the deceased’s estate was “English Law as stated in section 36(1) of the Marriage Act, Cap. 115.” He reasoned that:

“... since there was no express provision repealing the provisions of section 36 of the Marriage Act in the Administration of Estates Law of Bendel State, 1976 and the fact that the principle of law set out in the aforementioned section 36 of the Marriage Act has long been in force in Nigeria for many years as already shown by decided cases on the subject-matter, it is improbable that the legislature had the intention of replacing the age long principle of law set out in the said section 36 of the Marriage Act without express and unequivocal provision to the effect in the Administration of Estates Law, of Bendel State, 1976.”

Applying section 39(2) of the 1979 Constitution, he held that the two issues of the deceased born out of wedlock during the subsistence of the marriage, were entitled to share in the estate of the deceased equally with the two issues of the lawful marriage. Some of the other issues pronounced upon by the court below were that the jurisdiction of the High Court of Bendel State (as it then was) was properly exercised to try the action, notwithstanding that the letters of administration was in respect of properties within the State while the estate included landed properties outside the State and, that the action was properly constituted even though some of the beneficiaries were not made parties. There is no reasonable ground to disagree with any of those conclusions. It is evident that the main issue in the case was as to the applicable law for the distribution of the estate. As has been noted, the plaintiff claimed a declaration that the estate was to be distributed “in accordance with Administration of Estates Law and the Marriage Ordinance Law (sic) which governs the estate of person whose marriage is governed by the Ordinance Law;

and other relevant applicable laws” while the 1st defendant had contended that the estate was governed by Urhobo Native Law and Custom or in the alternative the Administration of Estates Law but not English Law. The main point of disagreement was thus whether the estate was to be distributed in accordance with English Law or
B Urhobo native law and custom, both parties having accepted a common alternative position that if neither English law nor customary law was applicable, the estate fell to be distributed in accordance with the Administration of Estates Law of the Bendel State of Nigeria. It
C was because the trial Judge and the court below had ignored this common alternative position that unnecessary appearance of complexity had been introduced into an otherwise straight forward matter when the trial court and the court below proceeded to emphasize at undue length the question whether section 36(1) of the Marriage
D Ordinance or Act was applicable and whether section 49(5) of the Administration of Estates Law was inapplicable.

The Marriage Ordinance was enacted in 1914 and by its long title was an Act to make provisions for the celebration of marriages. It was one of the statutes included in the Laws of Nigeria 1948 where it
E was Chapter 128 and the Laws of the Federation and Lagos 1958 where it was Chapter 115. The Marriage Act as retained as Cap. 218 of the 1990 Laws of the Federation of Nigeria (“LFN”) did not contain the provisions quoted and referred to as section 36(1) of the
F Marriage Act in the judgments of the trial court and of the Court of Appeal because that volume of LFN contained federal statutes only in consonance with the legislative list in the Constitution. Between
1914 and 1958 Nigeria passed through several constitutional phases, progressing from a unitary to a federal system of government with
G consequential apportionment of legislative powers between the Federal legislature and State legislatures. In the Exclusive Legislative List were matters which only the federal legislature is competent to legislate upon and in the Concurrent Legislative List were matters within the legislative competence of both the federal and state legislature,
H while residual matters were within the legislative competence of the state legislature alone. Thus was the emergence of ‘regional’, [now ‘State’] laws. While the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto were by item 23 of the

Schedule to the 1960 Constitution and Item 60 of the Second Schedule to the 1979 Constitution within the Exclusive Legislative List to be dealt with in Federal laws, succession was neither in the exclusive nor in the Concurrent Legislative List in the Schedule but was a residual matter in the exclusive legislative competence of the States to be dealt with in State laws. B

It is a matter of common knowledge that Western Region of Nigeria out of which the then Mid-West State (which was later named Bendel State of Nigeria) was carved enacted its Administration of Estates Law in 1959 and that, that Region by a deliberate and forward looking policy of modernizing its statute laws and making it easily accessible to the people ceased to apply statutes of general application in force in England on 1st January, 1900 but, rather, received the provisions of several enactments of England into its legal system by transplanting and domesticating such provisions by its own enactment. The policy of substitution of Regional Laws for statutes of general application in force in England on 1st January, 1900 was best described in the preface to the Laws of Western Region of Nigeria, 1959 as follows: C D

“This policy included the substitution of Regional Laws for such of those statutes of general application in force in England on 1st January, 1900, and as such in force in the Region, as were deemed appropriate to the present circumstances of the Region and dealt with as matters within the competence of its legislature. Bills to give effect to this policy were prepared by the Commissioner and were enacted for inclusion in the present edition of the Laws of the Region.” E F

In substituting Regional Laws for those of such English statutes a lot was borrowed from English statutes more recent than 1900. In several cases the substituted Regional Laws were, indeed, wholesale transplantation of the then current English statutes with minor modifications. The sources of several of the provisions of the Administration of Estates Law, both of the former Western Region of Nigeria and of the former Bendel State were the provisions of the English Administration of Estates Act, 1925 and of English statutes later than 1925 amending or adding to them. G H

By section 3 of the Law of England (Application) Laws, Western Region of Nigeria expressly received as part of its

laws the common law of England and the doctrines of equity only. Where a statute of the then Western Region had fully provided for a matter, the intendment was that the provisions of the statute were the applicable law. It is a well known principle that: “If it is clear that it was the intention of the legislature in passing a new statute to abrogate the previous common law on the subject, the common law must give way and the statute must prevail.” (See Craies on Statute Law, 7th Edition). **It follows that if there was a conflict between the English common law on the distribution of intestate estate and the provisions of the Administration of Estates Law, the latter must prevail. It has not been suggested in this case that recourse should be had to the common law. The Regional legislature having enacted a law on the subject on which it had full competence, recourse to the legislation of the previous unitary government, albeit on the same subject, or to English law is misconceived. Where there is a conflict between such previous enactment and the later one, the former should be deemed impliedly repealed and the later one should prevail.**

Section 49(1) of the Administration of Estates Law (Cap. 2, Laws of the Bendel State of Nigeria), as its predecessor of the same title (Cap 1 Laws of the Western Region of Nigeria, 1959), provides in regard to the distribution of the estate of an intestate who died leaving a husband or wife and issue as follows:

“The surviving husband or wife shall take the personal chattels absolutely and, in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of money equivalent to the value of one-third of the residuary estate, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of two and a half pounds per cent per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held-

(a) as to one-third upon trust for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate, and

(b) as to the other two thirds for the issue of the intestate.”

Akintan, JCA, who delivered the leading judgment of

the Court of Appeal proceeded on a mistaken footing when he held that section 49 of the Administration of Estates Law did not provide for succession by widows to real property on the erroneous interpretation of residual estate as not including real property. He held:

“... section 49 of the Administration of Estates Law of Bendel State, which learned counsel for the appellant claimed in the appellant’s brief that constitutes the applicable law in the instant case, comes under Part 6 of the Law which deals with “Distribution of Residuary Estate” and not real estate as are involved in the instant case. No provision is made therein i.e. in section 49 for widows of a marriage under the Marriage Act whose husband died intestate.”

It is evident that the above opinion was not correct. Residuary estate in cases of total intestacy includes the entire estate of the intestate after payment of funeral, testamentary and administration expenses, debts and other liabilities of the estate. The term ‘residuary estate’ is not used to indicate a distinction between real and personal property. Presumably, because he proceeded on this erroneous footing, the learned justice thought he should ascertain the English law on the issue and, doing so, found that:

“The provision of the applicable English law is that on the death intestate of a married man, his widow would take one third of his estate if there were issues of the marriage alive; in other case, she would take a half. The remainder of the estate would be divided among the issues per stirpes or, in default of issue, amongst the deceased’s next-of-kin as defined in the statute. (See Halsbury’s Laws of England 3rd Ed. Vol. 16, paragraphs 800 - 801 on pages 414 to 416, and Bromley, Family Law 5th Ed, page 615.”

Notwithstanding that recourse to English law was unnecessary, a careful comparison of what the court below stated to be the English law on the distribution of intestate estate and the provisions of section 49(1) of the Administration of Estates Law shows that there is no substantial difference between the two. Indeed the marginal note to section 49(1) shows that the sources of the provisions of section 49(1) were the English statutes stated therein. What was received into section 49 of the Administration of Estates Law in the Western Region Laws and, subsequently, into the Laws of the Bendel State were,

largely, the provisions of English statutes from which the statement of the law in the quotation above was drawn by the authors referred to therein.

Enough has been said to show that recourse to section 36(1) of the Marriage Act was neither justified nor necessary, nor was the strained and rather tedious reasoning by which the court below came to the conclusion that, that enactment was applicable. It needs to be observed that by section 36(3) of the Marriage Ordinance the whole of section 36 was applicable to the Colony only. Besides, section 49(5) of the Administration of Estates Law (Cap. 2) provides in substantially identical terms as section 36(1) of the Marriage Act as follows:

“Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law to the contrary notwithstanding.”

The only difference in the two provisions is that while section 36(1) of the Marriage Act incorporated English law (fixed at the date of the enactment 1914) into our laws of intestate succession by reference, the later statute has directly and not by reference substantially incorporated the contents of the then current English law on the subject in its provisions with the consequence that it was not necessary to search for what the English law on the matter was. The source of section 49(5) was itself Cap. 115 of the Laws of the Federation and Lagos, 1958 modified to signify the end of incorporation of English law by reference. The provisions of section 49(5) of the Administration of Estates Law, particularly in the portion rendered in italics in the quotation above, leave no room for any doubt that the estate in this case fell to be distributed in accordance with the “provisions of this Law”, that is, the Administration of Estates Law and not English law or customary law.

It is not necessary to embark on any further analysis of the reasoning of the court below that led to the conclusion that section 39(1) of the Marriage Ordinance applied. It suffices to say that it proceeded on erroneous premises in material respects. In the later case of *Obusez v. Obusez* (2001) 15 NWLR (Pt. 736) 377; (2001)

FWLR (Pt. 73) 25 the court of Appeal [Oguntade, Aderemi and Chukwuma-Eneh JJ.C.A.] departed from the decision of the Court [Akpabio, Akintan and Ige, JJ.C.A.]

In the present case, I am of the opinion that the court below was in error when it held that the applicable law governing the distribution of the estate is as prescribed in section 36 of the Marriage Act even though that error was not of significant consequence to the method of distribution of the estate. The applicable enactment is section 49(1) of the Administration of Estates Law, Laws of Bendel State. The court below should have made an order in terms that the estate of the deceased stood to be distributed to all the beneficiaries of the estate in accordance with that Law.

Having determined the manner of distribution, should the court below have proceeded as it did (i) to order that properties comprising the estate be valued, and (ii) to distribute the properties? These issues, raised by the 1st defendant, arose because after the trial Judge had found that the best approach was the distribution of properties in specie, and proceeded to state that “The main problem however, is how to quantify the estate for (the purpose of distribution)”, without attempting to value the assets for the purpose of distribution, nevertheless, proceeded to share the properties in specie. The court below rightly held that the trial Judge was wrong but, it itself, proceeded to share the property in specie, albeit in a modified form, by specifying properties to be given to the widow. While rightly acknowledging the right of the widow to one-third of the total value of the estate, that court erroneously purported to state the properties which should be comprised in that one-third share without a valuation of those properties which were stated to be 69 Brickfield Street, Ebute Metta, Lagos and 39A and 39B, Airport Road, Benin City and described as matrimonial home and residence of the widow.

Learned counsel for the 1st defendant in this appeal put the criticism of the approach of the court below in three ways first, that the Marriage Act neither contemplated nor recognized distribution of intestate estate in specie to the deceased spouse; secondly, that the court below was wrong in proceeding with the manner of distribution without first determining the value of the estate and, thirdly, that neither the Act nor the Law provided that the spouse be given spe-

cific properties such as matrimonial home or the residence of a spouse.

Learned counsel for the 1st defendant and the deceased's widow sought to justify the approach of the court below by arguing that the court below had power to appoint a valuer to value the estate for the purpose of distribution among the beneficiaries. He referred to Sackeyfio v. Tagoe (1945) XI WACA 73 and Re the Estate of Ogunro (1960) 5 FSC 137. It was further argued that the valuation order was ancillary to the claim of the plaintiff. For my part, I do not see what reasonable objection can be raised to an order that assets of the estate be valued for the purpose of facilitating distribution. Such order in all appropriate case cannot be open to any valid objection provided the parties are at liberty to challenge any valuation made. However, the plaintiff's claim does not leave room for any consequential order of valuation of the assets.

The aspect of the order of the court below which is open to criticism is in regard to the property given to the widow and the excision of two properties from the estate. Although the plaintiff by her amended statement of claim averred that certain properties were not part of the estate and enumerated properties comprising the estate, with which enumeration the 1st defendant did not entirely agree, at the end of the day there was no relief sought by the plaintiff concerning entitlement to any specific property. No remedy was sought as to who was entitled to what property. The decision of the court below excluding specific properties from the estate or declaring entitlement of beneficiaries to specific property was inappropriate. It is trite law that the court normally should not grant a relief not sought by the parties. Where a party makes averments but such averments do not relate to any relief sought in the case, the court will not grant a relief which would have followed the averments without an amendment of the claim. In this regard the opinion of Ige, JCA, in the case represents the correct view when she said:

"The trial court was asked to set aside the Letters of Administration earlier granted to 1st defendant and their mother PWI. This was rightly granted by the learned trial Judge in his judgment. He also ordered the Probate Registrar to give effect to the quantum of distribution above stated. Upon a close examination of the quantum

of the distribution, it is very clear that the learned trial Judge proceeded to distribute the estate himself thereby giving the plaintiff what she did not ask for. This is wrong hence his distribution of what he regarded as the properties of the deceased must be set aside as a nullity. See the cases of Opeola v. Falade (1991) 2 NWLR (Pt. 173) 303; Ayanboye v. Balogun (1990) 5 NWLR (Pt.151) 392.” B

The court below should have confined itself to the terms of the relief sought. The letters of administration granted to the 1st defendant has been set aside and there has been no appeal from that decision. The applicable law for the distribution of the estate having been ascertained and stated, that should have been the end of the matter having regard to the plaintiff's claim. The orders made by the court below that the probate registrar should supervise the valuation of the assets of the estate and take charge of the estate were not claimed and cannot be consequential to a declaration of the applicable law. C D

I am of the opinion that the letter of administration granted to the 1st defendant having been set aside it is left to the beneficiaries to take appropriate steps for the due administration of the estate. To proceed to proffer suggestions as to what steps may be available to them may be interpreted as a directive of this court and may lead to further confusion. If an advice were to be proffered, it is that consensual approach to the administration of the estate and the distribution of the assets is always a preferred option, if achievable. A consequence of adopting that option may well lead to transfer of the estate by consent of the beneficiaries and the Administrator-General to the Administrator-General, adapting section 32(1) of the Administration of Estates Law to meet the special circumstances of the case. E F

Having regard to the view I hold that the relief properly granted G in the case should be confined to the relief sought, it is not expedient to deal with the other issues in the appeal which relate to matters beyond and outside the relief claimed in the case. It suffices to hold that the court below was right in holding that the trial court had jurisdiction to entertain the claim before it and that the two issues born out of wedlock are entitled in equal shares with the two other issues H of the marriage of the deceased and the widow.

For the reasons I have given, the appeal succeeds. The orders made by the court below excluding certain properties from the es-

tate, giving certain properties to the deceased's widow, directing valuation of the estate and all orders consequential thereto, are set aside. For avoidance of doubt, the order setting aside the letter of administration granted to the 1st defendant remains and it is hereby declared that the estate falls to be distributed, in due time, in accordance with the provisions of the Administration of Estates Law, Laws of Bendel State of Nigeria. There is no order as to costs.

KUTIGI JSC

I have had a preview of the judgment just rendered by my learned brother, Ayoola, JSC. I agree with his reasoning and conclusion to allow the appeal. The appeal is accordingly allowed. I endorse the consequential orders made in the said judgment.

MOHAMMED JSC

I have had the privilege of reading the opinion of my learned brother, Ayoola, JSC, in the judgment which he had written concerning this appeal. I agree with him and adopt his opinion as my own. It is quite clear that the relevant law for the determination of the distribution of the estate of late Chief Salubi is Administration of Estates Law, Laws of Bendel State. The Court of Appeal was in error to apply Section 36 of the Marriage Act in its determination of the dispute over the distribution of the estate. The trial court and the Court of Appeal were both in error to embark on the distribution of the estate before establishing the proper value of the properties which formed the estate.

I therefore agree that there is merit in this appeal. For the reasons given in the lead judgment of my learned brother, Ayoola, I allow the appeal. I abide by all the consequential orders made in the lead judgment.

KALGO JSC

I have been privileged to read in advance the judgment just delivered by my learned brother Ayoola, JSC in this appeal. I agree with him that there is merit in the appeal and it ought to be allowed.

The issues which arose for determination in the appeal were very well considered together in my respectful view, and I adopt the reasoning and conclusions reached in the said judgment as mine.

According to paragraph 36 of the statement of claim the 1st respondent as plaintiff at the trial prays the court -

“(a) to set aside the letter of administration granted to the 1st defendant and order the estate of late Chief T.E.A. Salubi who died intestate and who married according to the ordinance law to be distributed to all the beneficiaries of his estate in accordance with Administration of Estates Law and the Marriage Ordinance Law which governs the estate of persons whose marriage is governed by the ordinance law and other relevant applicable laws:

(b) to compel the 2nd defendant (the Probate Registrar) to effect the distribution of the estate of the late Chief T.E.A. Salubi to all the beneficiaries under his estate as ordered by the court”.

At the end of the trial, the learned trial Judge, Obi, J., ordered in respect of relief (a) above that:

“The letter of administration granted in respect of the estate of late Chief T. E. A. Salubi exhibit ‘3’ is hereby set aside or cancelled and both the 1st defendant and PW1 cease forthwith to be administrator and administratrix thereof’.

Relief (b) was also granted as prayed by the learned trial Judge and he proceeded to distribute the estate to the heirs of the deceased except the 2 children of the deceased who were born out of wedlock whom he said are not entitled to inherit. The respondent appealed to the Court of Appeal against the decision of the trial court in respect of relief (b) only. And the Court of Appeal after hearing the appeal held:-

“Upon a close examination of the quantum of the distribution, it is very clear that the learned trial Judge proceeded to distribute the estate himself thereby giving the plaintiff what she did not ask for. This is wrong hence his distribution of what he regarded as the properties of the deceased must be set aside as a nullity. See the cases of Opeola v. Falade (1991) 2 NWLR (Pt. 173) 303; Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392.”

The Court of Appeal also found that the two children born out of wedlock are entitled to share in the estate of their late father in conformity with the provisions of Section 39 of the 1979 Constitu-

tion. I entirely agree with these findings. But the Court of Appeal went ahead to order that a valuation of the whole estate be made by a qualified estate valuer under the supervision of the Probate Registrar who should then take charge of the estate. This was wrong because it was not claimed by the respondents and did not arise from any of the issues before the court. The Court of Appeal was only to declare the applicable law in this matter which is the Administration of Estates Law, Laws of Bendel State of Nigeria, 1989.

In the circumstances, and for the more detailed reasons given in the leading judgment of my learned brother, Ayoola, JSC, I find that there is merit in this appeal and I allow it. I set aside the orders made by the Court of Appeal on the properties in the estate, including the purported distribution thereof and all orders consequential thereto. I make no order as to cost.

D _____

UWAIFO JSC

I read in advance the judgment of my learned brother, Ayoola, JSC and I agree with it. Appeal allowed.

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H _____