

SUPREME COURT OF NIGERIA
16TH JULY, 2004. SC. 205/1999
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, U. A. KALGO,
A. O. EJIWUNMI, N. TOBI, JJSC

1. ALHAJI SAIBU YEKINI OTUN
2. JELILI LAMIDI OTUN
3. ALHAJA SARATU OTUN APPELLANTS
4. ALHAJASHEFIU OTUN
(For themselves and on behalf of
Ashimi Otun family)

AND

1. SINDIKU ASHIMI OTUN
2. PROBATE REGISTRAR, OYO RESPONDENTS
STATE HIGH COURT

CUSTOMARY LAW - Succession - Yoruba Custom - Evidence in this case - Show that 1st respondent - Is the person to succeed his deceased father - Not a grandson (H1)

CUSTOMARY LAW - Succession - Yoruba custom - Apart from Lewis v. Bankole case precedent - Historical facts of practice of succession - Support 1st respondent's succession to the family headship (H2)

JUDICIAL PRECEDENTS - Yoruba custom - Succession to family headship - Obiter of Nnaemeka-Agu JSC in Adesanya v. Otuewu - Is not binding on the lower courts (H3)

ADMINISTRATION OF ESTATES - Letters of administration - Revocation of - Will not be granted - Where it was not fraudulently obtained - And there is no evidence of mismanagement (H4)

APPEALS - Concurrent findings - Special circumstances - To warrant interference - Were not shown in this case (H5)

FACTS

The 1st defendant/respondent is the only surviving son of late Ashimi Otun who died in June, 1937. The plaintiffs/appellants are the grand children of the late Otun. After his death, Sunmola, the then eldest son became the family head (Dawodu), responsible for management of the deceased's estate according to Yoruba native law and custom. In 1972, Sunmola died and Lamidi succeeded as the family Dawodu. Lamidi died in 1979, leaving the 1st respondent as the only surviving male son, who as the Dawodu resumed management of his late father's estate. He applied for letters of Administration which was granted by the 2nd respondent after due publicity, on 22-11-1982, as there was no caveat. On 10th April 1984, the appellants filed this action challenging the right of 1st respondent to manage his late father's estate.

Appellants sought a declaration that the letters of Administration granted to the 1st respondent is null and void. They also prayed for revocation of the said letters of Administration. They sought to establish that the 1st appellant, a grandson was elected as the Dawodu, placing reliance on Nnaemeka-Agu JSC's Obiter in *Adesanya v. Otuewu*'s case. They claimed that 1st respondent was a dishonest person. The trial court relying on *Lewis v. Bankole*, found in favour of the 1st respondent and dismissed the appellants' claim. Their appeal to the Court of Appeal was also dismissed. Appellants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the appeal of the appellants received the treatment it deserved in the Court of Appeal with regard to the treatment of the grounds of appeal and the issues formulated therefrom and thereby wrongly confirmed the judgment of the learned trial Judge.

*2. Whether the failure of the Court of Appeal to consider the case of *Adesanya v. Otuewu* (1993) 1 NWLR (Pt. 270) 414 relied upon by the*

appellants has prejudiced the appeal of the appellants and occasioned a miscarriage of justice which led the Court of Appeal to wrongly confirm the judgment of the learned trial court. Or what is the correct Native Law and Custom applicable to this case in the light of evidence before the court?

3. Whether the Court of Appeal has not misconceived the appellant's grounds for revocation of Letters of Administration with grounds for removal of head of a family in failing to hold that a case for revocation has been made out?

4. Whether on a proper consideration of the appeal, on merits, the appellants are entitled to succeed in this case?"

HELD (Unanimously dismissing the appeal per **KALGO JSC**)

Yoruba Custom - Evidence in this case

1. It is abundantly clear from this evidence that the 1st respondent is the only surviving son of the late Ashimi Otun and that according to native law and custom applicable to the area concerned, a direct son of a deceased father, not a grandson, succeeds him.

From the totality of the evidence at the trial, it is very clear that the 1st respondent is the only surviving male child of the late Ashimi Otun after the death of the last Mogaji of the family Alhaji Yekini in 1979. And by the native law and custom of the area, the 1st respondent succeeds his father and deceased Mogaji of the family. (p. 2239 A)

Yoruba custom - Historical facts of practice of succession

2. I have carefully considered the relevant decision in *Lewis v. Bankole* (supra) and the overwhelming evidence in favour of the 1st respondent in this case, and find myself in complete agreement with the above findings of the Court of Appeal. I understand the Court of Appeal to be saying that apart from the fact that the 1st respondent is the only surviving direct son of Ashimi Otun, and the natural Dawodu of Ashimi Otun's family, as per *Lewis v. Bankole* (Supra), the historical fact that his two immediate senior brothers of the same father, Sunmola Otun and Lamidi Otun, succeeded themselves, one after the other as Dawodu of that family, had established

a custom which must be followed in his own case. I entirely agree as this was a practice which has been followed from 1937 when the founder of the family, Ashimi Otun died to 1979 when Lamidi Otun also died - a period of 42 years. (p. 2241 E)

B

Succession to family headship

3. I have carefully gone through the decision in Adesanya v. Otuewu (Supra), and I am satisfied that what Nnameka-Agu, JSC, said at p.458 of the report upon which the learned SAN for the appellants relied on the appointment of head of the family, was not an issue for the determination of the court in that case. It is only obiter and not binding on the lower courts. It is also pertinent to observe that no other Justice of the court in that case said in his judgment, anything on the point except Nnameka-Agu, JSC. I therefore, find that what Nnameka-Agu, JSC., said on this issue in the Adesanya v. Otuewu case (supra) cannot be the correct application of the Yoruba native law and custom on the appointment of 'Dawodu' as in this case. In my respectful view therefore the failure by the Court of Appeal to consider the case of Adesanya v. Otuewu, supra, has not prejudiced the appellants' appeal nor occasioned any miscarriage of Justice. I am also satisfied that the decision in Lewis v. Bankole (Supra), relied upon by the trial court and the Court of Appeal on the issue under consideration, is the well established and settled authority on it and was indeed followed by other decisions of this court such as Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372 at 387. (p. 2242 E)

Letters of administration - Revocation of

4. There was also no evidence on the record to prove that the 1st respondent was fraudulent in applying and or obtaining the letters of administration. Neither was there any conclusive evidence that he was dishonest or mismanaged the family's properties. In any case, if the relief is to revoke the letters of administration, it is only relevant, in my view, to consider the acts of the 1st respondent after the issue of the letter of administration and not before. This was not clear from the evidence of 1st appellant, the only witness who testified on this matter. I therefore entirely agree with the Court

of Appeal confirming the decision of the trial court that the application of the 1st respondent for the letters of administration was normal and proper and that in the absence of any objection to it or caveat, it was properly and validly granted to him. It cannot therefore be revoked without proving any dishonesty or fraud on his part or after grant was made. There was none proved here and so the Court of Appeal was right in refusing to revoke it. (p. 2243 H)

APPEALS - Concurrent findings

5. This appeal is on concurrent findings of the trial court and the Court of Appeal. Ordinarily this court will not interfere with the decisions of these courts except where there are special circumstances to do so. This principle has been well established over the years and needs no authority in support. No such special circumstances were shown in this appeal to disturb those findings.

From all what I have been saying above, I find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal confirming that of the trial court. (p. 2244 E)

REPRESENTATION

Y. A. Agbaje, SAN, (with him, Kola Majaro), for the Appellants.

Olalekan Ojo, Esq., for the 1st Respondent.

2nd Respondent absent, not represented.

CASES REFERRED TO

Agbai v. Okogbue (1991) 7 NWLR (Pt.204) 391

Agbabiaka v. Saibu (1998) 7 S.C. (Pt. 11) 167; (1998) 10 NWLR (Pt. 571) 534

Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372 at 387

Adesanya v. Taiwo (1956) FSC 84

Eyesin v. Sanusi (1984) 4 S.C. 115

Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414

Lewis v. Bankole (1908) 1 NLR 81

Salako v. Salako (1965) LLR 136

Nwafia v. Ububa (1966) NMLR 219

B

LEAD JUDGMENT BY KALGO JSC

By a writ of Summons dated 10th of April, 1984, issued out of the High Court of Justice, Ibadan, Oyo State, the appellants, as plaintiffs, claimed against the respondents, the following reliefs:-

C

“1. A declaration that the letters of administration granted the first defendant to administer the estate of late Ashimi Otun on 22nd November, 1982, is null and void and is of no effect and all actions taken by and dealings made by the first defendant in pursuance of the said grant be

D

declared null and void and of no effect.

2. An order of Revocation of the letters of administration granted the first defendant at Ibadan on 22nd November, 1982, to administer the estate of late Ashimi Otun on the ground that the first defendant is not

E

entitled to the grant and that the grant was obtained on false suggestion by the first defendant.

3. An injunction restraining the 1st defendant from acting on the said Letters of Administration or otherwise deal with the plaintiffs’ family property.”

F

The appellants also filed an affidavit sworn to by the 2nd appellant containing 21 paragraphs and titled “*Affidavit Proceeding Writ of Summons*”. Thereafter, the parties filed their respective pleadings and exchanged them between themselves. At the trial, the appellants called 4 witnesses and the respondents called 3, and their respective counsel summed up their cases at the end of the trial. The learned trial Judge, Adeyemi, J., delivered his judgment on 12th July 1985, dismissing the entire claims of the appellants. The appellants appealed to the Court of Appeal against the dismissal

G

H

and the Court of Appeal dismissed their appeal. They now appealed to this court.

In this court only the appellants and the 1st respondent filed and exchanged their briefs of argument as required by the rules of court. The

appellants raised 4 issues for the determination of the court which read:-

“1. Whether the appeal of the appellants received the treatment it deserved in the Court of Appeal with regard to the treatment of the grounds of appeal and the issues formulated there from and thereby wrongly confirmed the judgment of the learned trial Judge.

B

2. Whether the failure of the Court of Appeal to consider the case of Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414 relied upon by the appellants has prejudiced the appeal of the appellants and occasioned a miscarriage of justice which led the Court of Appeal to wrongly confirm the judgment of the learned trial court. Or what is the correct Native Law and Custom applicable to this case in the light of evidence before the court?

C

3. Whether the Court of Appeal has not misconceived the appellant's grounds for revocation of Letters of Administration with grounds for removal of head of a family in failing to hold that a case for revocation has been made out?

D

4. Whether on a proper consideration of the appeal, on merits, the appellants are entitled to succeed in this case?”

For the 1st respondent, the following 3 issues are set out in the brief:-

“1. Was the Court of Appeal right in affirming the decision of the trial court that as between the 1st defendant/respondent and the 1st plaintiff/appellant, the 1st defendant/respondent is the proper person to be appointed the head of the Ashimi Otun family having regard to the established applicable native law and custom.

F

2. Whether or not the Court of Appeal was right in affirming the judgment of the trial court refusing to nullify and or revoke the Letter of Administration granted to the 1st defendant/ respondent to administer the estate of late Ashimi Otun.

G

3. Whether or not the Court of Appeal considered the issue submitted for its determination before affirming the judgment of the trial court”.

The facts of this case are simple and straight-forward. The late Ashimi Otun, the parties' ancestor died in June, 1937, leaving 7 wives, four male children and a daughter. The appellants are the grandchildren of the late Ashimi Otun. After his death the then eldest son, Sunmola Otun became

H

the “*Dawodu*” of the family and responsible for the management of the deceased’s estate according to the Yoruba native law and custom. Sunmola Otun died in April, 1972, and upon his death the next eldest son of late Ashimi Otun Alhaji Lamidi Otun succeeded him as the Dawodu of the said family. Alhaji Lamidi Otun also died in December, 1979, leaving the 1st respondent as the only surviving male son of the late Ashimi Otun. The 1st respondent thereafter assumed the responsibility of managing his late father’s estate as the Dawodu of the family and applied to the High Court Ibadan for Letters of Administration for this purpose on 8th June, 1981. His application was gazetted and advertised as required by law but no objection or caveat was received from anyone in respect thereof. The 2nd respondent, as Probate Registrar, issued the Letters of Administration to the 1st respondent on 22nd November, 1982. On 10th April, 1984, the appellants filed this action challenging the right of the 1st respondent to manage his father’s estate and asking the court to revoke the said letters of administration on the grounds that the 1st respondent was a dishonest person, not on good terms with the members of the Ashimi Otun family and was fraudulent in obtaining the grant of the letters of administration to feather his own nest.

The learned trial Judge heard all the evidence in the case and at the end dismissed the claims of the appellants. Their appeal to the Court of Appeal was also dismissed as being without merit and they appealed here.

I have carefully examined the issues formulated by the parties for the determination of this court in this appeal and it appears to me that from the grounds of appeal Issues 1,2 and 3 of the appellants are substantially saying the same thing as Issues 1, 2 and 3 of the 1st respondent. Issue 4 of the appellants is merely the result or outcome of the consideration of the earlier 3 issues and can be argued together therein. I will therefore adopt the appellants’ issues as being germane for consideration in this appeal.

I am taking issue 2 first. This issue is in two parts - one or the other. I will take the 2nd part first which may involve the consideration of the first part. The 2nd part asked: What is the correct Native Law and Custom applicable to this case in the light of the evidence before the court?

Paragraphs 11 and 12 of the appellants’ statement of claim read:-

“11. After the death of Alhaji Lamidi Otun in December the headship of Ashimi Otun became vacant and the vacancy was contested for by the 1st plaintiff (1st appellant) and the 1st defendant (1st respondent) the family at a family meeting held on 22nd February, 1980 appointed the 1st plaintiff Alhaji Saibu Yekini as head of Ashimi Otun family. The plain- B
tiffs will rely on the minutes of the said meeting in this case.

12. Under native law and custom the head of the family is the person in whom the management of the family property is entrusted and with power to deal with family properties with the consent of the family”. C

And in paragraphs 5, 7 and 13 of the statement of defence the 1st respondent averred thus:-

5. “Still further on paragraph 1 of the statement of claim, the 1st defendant shall contend at the trial that after the death of Alhaji Lamidi Otun who was the last head of the Ashimi Otun family in 1979, no family D
head had been appointed since then by the Ashimi Otun family. The 1st defendant shall contend at the trial that in accordance with the Yoruba native law and custom and in accordance with the practice within the family he is the one next in rank entitled to become the Head of Ashimi E
Otun after the death of Alhaji Lamidi Otun in 1979.

7. The 1st defendant shall contend further at the trial that the 1st plaintiff is not a direct son of his late father (Ashimi Otun) and that as a grandson he cannot under native law and custom become the Head of Ashimi F
Otun family while he (1st defendant) as a direct surviving son (Dawodu) of Ashimi Otun (deceased) is still alive.....

13. The only surviving direct children of the late Ashimi Otun today are Sindiku Otun (1st defendant) and Madam Wulematu”. G

Now to the evidence, P.W. 1 was Wulemotu Ashimi Otun. She testified that she is the eldest daughter of the late Ashimi Otun and that the 1st respondent is the only surviving male child of the late Ashimi Otun. She also confirmed that the 1st appellant is the son of her junior brother, Alhaji Yekini.

P.W.2 was the 1st appellant. He testified that on 22/2/80 at a meeting of the family he was appointed as the Head of Ashimi Otun family to administer the deceased’s estate under native law and custom. He also confirmed that the 1st respondent is a junior brother of his own father and that the 1st H

respondent is his “*little uncle*”.

P.W.3 was the High Registrar from the High Court Ibadan who only tendered the letters of Administration granted to the 1st respondent on 22/11/82 by the court, (Exhibit 2), and the court file on the matter (Exhibit 3).

B P.W.4 was the 2nd appellant who testified that the 1st appellant was appointed the Mogaji and Head of the family at a family meeting at which he was the Secretary on 22/2/80. He said in cross-examination that:

“Those who used to succeed previous heads in the Otun family were the direct sons of Ashimi Otun.”

C He also confirmed that the 1st respondent is the only surviving direct son of late Ashimi Otun.

From the evidence of the appellants’ witnesses in support of their case, none of them testified on the native law and custom applicable to the D situation at hand. Three out of the four witnesses however confirmed that the 1st respondent is the only surviving male child of the late Ashimi after 1979, but that the 1st appellant was selected as Mogaji and head of the family at the meeting on 22/2/80.

E 1st respondent called 3 witnesses including himself at the trial. His first witness, Idowu Bakari, testified inter alia that:-

“when a father dies, according to native law and custom of Ibadan, his own son succeeds himThe 1st defendant is the only surviving son of the late Ashimi Otun.”

F The 2nd witness who agreed that he is not an authority on Yoruba law and custom testified that:-

“A direct son, according to custom, inherits his father, not otherwise. In my opinion it is the direct son of a man who should succeed him G after his death, not a grandson.”

The 1st respondent was the 3rd witness for the defence. He testified that the 1st appellant is the son of his senior brother, Alhaji Yekini Otun and that Madam Wulemotu is his eldest sister. He said in his evidence:-

H *“According to our family tradition, the oldest surviving son of Ashimi Otun, succeeds a deceased Mogaji.”*

He also denied that there was any meeting of the family at which the 1st appellant was selected as the Mogaji or head of the family.

It is abundantly clear from this evidence that the 1st respondent is the only surviving son of the late Ashimi Otun and that according to native law and custom applicable to the area concerned, a direct son of a deceased father, not a grandson, succeeds him.

From the totality of the evidence at the trial, it is very clear that the 1st respondent is the only surviving male child of the late Ashirni Otun after the death of the last Mogaji of the family Alhaji Yekini in 1979. And by the native law and custom of the area, the 1st respondent succeeds his father and deceased Mogaji of the family.

The learned trial Judge who had taken a very extensive review of the pleadings and evidence of the parties at the trial made the following findings:-

“All sides are agreed that the 1st defendant is the only surviving male of Ashimi Otun and that all the plaintiffs are related to the 1st defendant through their respective fathers. They are consequently either his nephews or his nieces. None of them, however, stands in the position of Dawodu, it seems”.

The learned trial Judge then examined the decision in the case of Lewis v. Bankole 1 NLR 81 at page 102 and in the book titled *“Family Property Among the Yorubas”* 1958 Edition at page 148 by Hon, Justice (Dr.) G. B. A. Coker, and concluded thus:-

“If I apply the evidence adduced by both sides to the above pronouncements then certainly the only person qualified to be the present Dawodu of Ashimi Otun family under recognized native law and custom, is the oldest surviving male of Ashimi Otun who incidentally happens to be the 1st defendant in this case.”

On the question of the election or selection of the 1st appellant as Mogaji or Dawodu at the family meeting of 22/2/80, the 2nd appellant as Secretary of the meeting said there was record of the minutes of the meeting but he only produced a copy (Exhibit 4). He said the minutes book was stolen together with all his documents before he came to court. The obvious question which may arise is: where and how did he get a copy of the minutes which he tendered in court as (Exhibit 4). The 1st respondent testified that he was in fact the Secretary of the family meeting and that

there was no meeting as stated by the 2nd appellant. The learned trial Judge who saw him and heard the evidence of 2nd appellant at the trial, did not attach any weight to the copy of the minutes (Exhibit 4). He said:

B *“Exhibit 4 is not worth the paper on which it is written. In the name of all that is just, glorious and honest, I cannot attach any importance to it. It is my judgment, a useless and valueless piece of paper which I find, from all the circumstances of this case, to have been prepared to mislead this honourable court from coming to a just decision.”*

C And he finally concluded this by saying :-

“It is my judgment that the purported election held on 22nd February 1980 to appoint the 1st plaintiff as head of Ashimi Otun family, he being no Dawodu of Ashimi Otun and the 1st defendant being the only surviving son of Ashimi Otun and therefore its Dawodu, is contrary to native law and
D *custom and is null and void and I so find and hold.”*

The learned trial Judge finally found that the 1st respondent is the only person qualified on the present state of the law, to be the head of Ashimi Otun family as long as he is alive as the direct son of Ashimi Otun. He relied
E strongly on what Osborne, CJ., said in *Lewis v. Bankole* (supra) at p. 106 of the report that:-

“There is practically a consensus of opinion that on the death of a founder of a family the proper person to be head of the family is the
F *“Dawodu” or eldest surviving son. This seems to be a well established rule both in Lagos and other parts of Yoruba land.”*

This pronouncement according to the learned trial Judge was supplemented and further explained by the case of *Salako v. Salako* (1965) LLR 136 where the status and responsibility of Dawodu as head of a family
G was defined.

The Court of Appeal, after examining the evidence on record, and the legal authorities cited and relied upon the learned trial Judge in coming to his decision had this to say:-

H The law as stated by the leading authorities on the matter, particularly by *Lewis v. Bankole* (supra), is that the right to administer the family estate is vested in ‘Dawodu’ as the surviving eldest son of the founder of a family. On the appellants’ own showing, on the death of the founder of the

family in 1937 he was succeeded by his eldest son, Sunmola Otun, who in turn was succeeded by Lamidi Otun who was the eldest surviving son of Ashimi Otun when Sunmola Otun died in 1972. Lamidi Otun died in 1979 leaving the 1st respondent as the only surviving son of the founder of the family. By Yoruba customary law the 1st respondent was at the time of Lamidi Otun's death the Dawodu heir to the estate of Late Ashimi Otun. That both Sunmola Otun and Lamidi Otun became Dawodu and succeeded each other with the former earlier in time succeeding the father, the founder of the family, is an eloquent testimony that the customary law of the family of the appellants and the 1st respondent accords with the principle of law enunciated in *Lewis v. Bankole*. (Supra).

The Court of Appeal then concluded by saying:-

That being the case, it is incontrovertible that the 1st respondent as the direct son of Ashimi Otun is the current Dawodu of Ashimi Otun family and heir to the family estate who is, ipso facto, vested with the right to administer and manage the estate of that family. To argue against that is to fly in the face of overwhelming evidence and to pervert the customary law of the Yoruba that has been used to regulate the devolution of Ashimi Otun family estate since the demise of the founder in 1937.

I have carefully considered the relevant decision in *Lewis v. Bankole* (supra) and the overwhelming evidence in favour of the 1st respondent in this case, and find myself in complete agreement with the above findings of the Court of Appeal. I understand the Court of Appeal to be saying that apart from the fact that the 1st respondent is the only surviving direct son of Ashimi Otun, and the natural Dawodu of Ashimi Otun's family, as per *Lewis v. Bankole* (Supra), the historical fact that his two immediate senior brothers of the same father, Sunmola Otun and Lamidi Otun, succeeded themselves, one after the other as Dawodu of that family, had established a custom which must be followed in his own case. I entirely agree as this was a practice which has been followed from 1937 when the founder of the family, Ashimi Otun died to 1979 when Lamidi Otun also died - a period of 42 years. See *Agbai v. Okogbue* (1991) 7 NWLR (Pt.204) 391, *Agbabiaka v. Saibu* (1998) 7 S.C. (Pt. 11) 167; (1998) 10 NWLR (Pt. 571)

534.

The learned Senior Advocate of Nigeria for the appellants in arguing this issue both in his brief of argument and in court referred to the decision of this court in *Adesanya v. Otuewu* (1993) 1 NWLR (Pt.270) 414 in connection with the appointment of head of the family. He contended that according to that decision the family has a discretion to appoint any one of them, not necessarily the eldest member of that family, to be the head of the family once they are dissatisfied with the eldest child, and this, according to him, was what happened in this case. Learned counsel further argued that the 1st respondent was dishonest and mismanaged the family properties even before he took over the post of the Dawodu of the family. Therefore, he submitted, the family had discretion according to the decision in *Adesanya v. Otuewu* (Supra), to reject him and appoint any other member of the family to administer the estate, hence the appointment of the 1st appellant.

For the 1st respondent, it was submitted that the issue on the Yoruba native law and custom of succession to the headship of a family was not the ratio decidendi in the *Adesanya v. Otuewu* case and that what Nnameka-Agu, JSC, has said on it in his judgment there, must be obiter only. Learned counsel for the 1st respondent asked the court to discountenance it as inapplicable to the facts and circumstances of this case.

I have carefully gone through the decision in *Adesanya v. Otuewu* (Supra), and I am satisfied that what Nnameka-Agu, JSC, said at p.458 of the report upon which the learned SAN for the appellants relied on the appointment of head of the family, was not an issue for the determination of the court in that case. It is only obiter and not binding on the lower courts. It is also pertinent to observe that no other Justice of the court in that case said in his judgment, anything on the point except Nnameka-Agu, JSC. I therefore, find that what Nnameka-Agu, JSC., said on this issue in the *Adesanya v. Otuewu* case (supra) cannot be the correct application of the Yoruba native law and custom on the appointment of ‘Dawodu’ as in this case. In my respectful view therefore the failure by the Court of Appeal to consider the case of *Adesanya v. Otuewu*, supra, has not prejudiced the

appellants' appeal nor occasioned any miscarriage of Justice. I am also satisfied that the decision in *Lewis v. Bankole* (Supra), relied upon by the trial court and the Court of Appeal on the issue under consideration, is the well established and settled authority on it and was indeed followed by other decisions of this court such as *Olowu v. Olowu* (1985) 3 NWLR (Pt.13) 372 at 387; *Adesanya v. Taiwo* (1956) FSC 84; *Yusuf v. Dada* (1990) 4 NWLR (Pt. 146) 657. *Eyesin v. Sanusi* (1984) 4 S.C. 115. I therefore resolve this issue in favour of the 1st respondent.

I now consider the appellants' issue 3. This issue deals with revocation of the letters of Administration (Exhibit 2) granted to the 1st respondent by the 2nd respondent. The learned SAN for the appellants contended that the Court of Appeal misconstrued the right to revoke the Letters of Administration in this case with the right to remove the head of the family. As a result, counsel argued, the court did not consider the grounds for the revocation proffered by the appellants. These grounds as contained in the brief of the appellants are mainly that the 1st respondent obtained the Letter of Administration by fraud; that he is dishonest and not a person of good character and that he obtained it in order to feather his own nest.

Learned counsel for the 1st respondent submitted in his brief that none of the above grounds was substantiated at the trial and that therefore the Court of Appeal was not under any misconception when it refused to grant the appellants' relief for revocation. He further submitted that since the Court of Appeal agreed with the trial court that the 1st respondent is fully entitled to be the Dawodu and head of the Ashimi Otun family, nothing stopped him from obtaining Letters of Administration to administer the estate.

P.W.2 Ebenezer Taiwo, a Higher Registrar in the Probate Division of the High Court of Ibadan where Exhibit 2 was issued confirmed that after the 1st respondent applied for the Letters of Administration; the application was advertised in the government gazette and a newspaper and that no objection to the application was received from anybody before the grant was made. This evidence was not challenged. **There was also no evidence on the record to prove that the 1st respondent was fraudulent**

in applying and or obtaining the letters of administration. Neither was there any conclusive evidence that he was dishonest or mismanaged the family's properties. In any case, if the relief is to revoke the letters of administration, it is only relevant, in my view, to consider the acts of the 1st respondent after the issue of the letter of administration and not before. This was not clear from the evidence of 1st appellant, the only witness who testified on this matter. I therefore entirely agree with the Court of Appeal confirming the decision of the trial court that the application of the 1st respondent for the letters of administration was normal and proper and that in the absence of any objection to it or caveat, it was properly and validly granted to him. It cannot therefore be revoked without proving any dishonesty or fraud on his part or after grant was made. There was none proved here and so the Court of Appeal was right in refusing to revoke it. I answer issue 2 in the affirmative.

What remain now are issues 1 and 4 of the appellants. As I said earlier in this judgment issue 4 follows the consideration and findings of issues 2 and 3. I do not intend to repeat them here as they are very clear, issue 1 appears to me to be a mere academic exercise at this stage and I do not intend to consider it either in this appeal as it will not affect my findings in issues 2 and 3.

This appeal is on concurrent findings of the trial court and the Court of Appeal. Ordinarily this court will not interfere with the decisions of these courts except where there are special circumstances to do so. This principle has been well established over the years and needs no authority in support. No such special circumstances were shown in this appeal to disturb those findings.

From all what I have been saying above, I find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal confirming that of the trial court. I award N10,000.00 costs to the 1st respondent against the appellants.

BELGORE JSC

This appeal is against the concurrent findings on facts before the two courts below. Unless it is shown that the findings are not based on the evidence or based on pleadings before the trial court, Court of Appeal's decision cannot be interfered with by this court. I find no merit in this appeal and adopting the reasoning in the lead judgment of my learned brother, Kalgo, JSC., I also dismiss it with N10,000.00 costs to first respondent against the appellants.

C

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Kalgo, JSC. I agree with him that there is no merit in this appeal. Authorities galore to the effect that among the Yoruba on the death of a founder of a family, the proper person to be head of the family is the "*Dawodu*" or the eldest son, who in this case happens to be the 1st defendant/respondent (see for example the cases of *Lewis v. Bankole* 1 NLR 81; *Olowu v. Olowu* (1985) 3 NWLR (Pt.13) 372, *Eseyin v. Sanusi* (1984) 4 S.C. 15; *Yusufu v. Dada* (1990) 4 NWLR (Pt.146). The appeal therefore fails and it is hereby dismissed. The decisions of the lower courts are confirmed. I endorse the order for costs.

F

EJIWUNMI JSC

I have had the advantage of a preview of the judgment just read by my learned brother, Kalgo, JSC. As I am in complete agreement with the reasoning and conclusion therein, I do not deem it necessary to say anything further except to dismiss the appeal for the reasons given in the said judgment. I therefore dismiss the appeal and affirm the judgment of the Court of Appeal. Costs in the sum of N 10,000 is awarded in favour of the 1st respondent against the appellants.

G

H

TOBI JSC

The fulcrum of this appeal is succession under Yoruba customary law. The basic case law in terms of historical origin of the custom is Lewis v. Bankole (1908) 1 NLR 81, a case the learned trial judge, Adeyemi, J., used. the court held that at the death of a founder of a family the “Dawodu” or eldest surviving son, is the proper person by native law of Lagos to succeed to the headship of the family. The court also held that on the death of the Dawodu, the eldest surviving child of the founder, whether male or female, is next in succession. See also Salako v. Salako (1965) LLR 136; Nwafia v. Ububa (1966) NMLR 219; Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372.

In this case, the 1st respondent, who was the 1st defendant in the trial court was granted letters of administration in his capacity as the only male surviving son of late Ashimi Otun. It is the law that upon a notice that letters of administration will be issued to a person, a party is free to raise objection by way of caveat. Although failure to enter a caveat cannot be justification for obtaining letters of administration by fraud the appellants did not make out any case of dishonesty on the part of the 1st respondent.

Let me take the issue of alleged dishonesty a bit further. The appellant made an application in the Court of Appeal for leave to adduce further evidence to show that the 1st respondent cannot be trusted with the administration of the estate. The Court of Appeal refused to grant the application. The court said:

“Even if it is pre-conceded to the plaintiffs that the 1st defendant/respondent had indeed collected N60,000.00 from the African Petroleum Ltd., how can the judgment of this court be affected by that fact when there was no claim before the lower court concerning mal-administration of the estate by the 1st defendant/respondent? This was not a case where the plaintiffs/applicants had asked for the removal of the 1st defendant/respondent as an administrator of the estate for dishonesty or wastage of the estate. A finding by this court that the 1st defendant/respondent had collected N60,000.00 from African Petroleum Ltd. will be irrelevant to the issue properly coming up for resolution in this appeal.

“If I allow the plaintiffs’ application to lead evidence before us in this court to the effect that the 1st defendant/respondent has indeed been collecting rents from the properties comprised in the estate and that he is unfriendly with other family members and I am satisfied at the end of the day that the 1st defendant/respondent has indeed been guilty of these allegations, it will still prove irrelevant to the issues I have to determine in the appeal since these matters have no bearing on whether it was the 1st plaintiff as against the 1st defendant respondent who should have been appointed to administer the estate.”

I cannot fault the above conclusion of the Court of Appeal. A case is fought on the relief or reliefs sought. A case is not fought outside the relief or reliefs sought. The appellants sought 3 reliefs in the High Court and they are:-

- (i) declaration that the letters of administration granted the 1st respondent to administer the estate of Late Ashimi Otun is null and void.
- (ii) an order of revocation of the letters of administration granted to the 1st respondent on the ground that he is not entitled to the grant and that the grant was obtained on false suggestion by him, and
- (iii) an injunction to restrain the 1st respondent from acting on the said letters of administration.

The above reliefs having nothing to do with evidence in respect of whether the 1st respondent can be trusted with the administration of his father’s estate or not. And so the evidence given by P.W. 1 to the effect that the 1st respondent does not regard her as the “*senior sister and does not show love*” to her and that she does not think much of him, is neither here nor there, as the evidence does not affect the live issues in the case. The most important evidence given under cross-examination was that the 1st respondent “*is the only surviving son of our late father*”. It is this evidence which invoked the decision in the case of *Lewis v. Bankole* (supra).

I should take briefly the case of *Adesanya v. Otuewu* (1993) 1 NWLR (Pt. 270) 414, which learned counsel for the appellant heavily relied upon. Learned counsel for the 1st respondent submitted, inter alia, that the pronouncement of Nnaemeka-Agu, JSC., in the case is no more than an obiter. I think counsel is right. The issue involved was title to land and not headship

of family under Yoruba customary law. In the circumstances, the pronouncement of Nnaemeka-Agu, JSC., on the nomination or appointment of a head of a family by a deceased father is clearly an obiter dictum, which cannot bind this court.

B This is a case where the two courts made concurrent findings of fact and I do not see my way clear in disturbing the findings which are not perverse. I hold that the concurrent findings of fact are correct.

C It is for the above reasons and the more detailed reasons given by my learned brother, Kalgo, JSC., in the leading judgment that I also dismiss the appeal as it lacks merit. I abide the orders as to costs.

D

E

F

G

H