

**SUPREME COURT OF NIGERIA**

23RD APRIL, 2004. SC. 11/2000

**CORAM:- U. MOHAMMED, A.I. KATSINA-ALU, S.O. UWAIFO,  
D. MUSDAPHER, I.C. PATS-ACHOLONU, JJSC**

AUGUSTINE NWAFOR MOJEKWU ..... APPELLANT  
AND

MRS. THERESA IWUCHUKWU ..... RESPONDENT

(By substitution for Caroline

Mgbafor O. Mojekwu - deceased)

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EVIDENCE - Land law - Exhibits - Ignorance - Document witnessed  
against one's interest - In ignorance of his entitlement - Is not valid (H1)

LAND LAW - Inheritance - Female children - Where entitled to inherit  
land in the absence of male children - Their deceased father's brother  
cannot inherit (H2)

CUSTOMARY LAW - Repugnancy - Courts - Custom declared repug-  
nant - Is wrong - As the pronouncement - Is not derived from principles  
of the rule of law (H3)

COURTS - Pleadings - Fair hearing - Court to limit itself - To issues  
raised in the pleadings - As to go outside them is denial of fair hearing  
(H4)

CUSTOMARY LAW - Repugnancy - A custom is not repugnant - Just  
because it is inconsistent with English law - Or some principle of indi-  
vidual rights (H5)

CUSTOMARY LAW - Repugnancy - Courts - Nnewi "Oli-Ekpe" custom  
- Pronounced repugnant by Court of Appeal - Is not justified - As the  
issue was raised suo motu by that court (H6)

CUSTOMARY LAW - Repugnancy - Custom that is discriminating against women - May not be repugnant in all cases (H7)

APPEALS - Merit - Pronouncement of lower court - On repugnancy of custom - Does not affect the merit of this case (H8)

APPEALS - Findings of trial court - That are worse than perverse - Confirmed by lower court - Cannot be defended from available evidence (H9)

### **FACTS**

Before the Onitsha High Court, the plaintiff/appellant filed an action against the defendant/respondent, Mrs. Caroline Mgbafor Mojekwu (deceased) and now substituted by her daughter. Appellant claimed, inter alia, ownership of the property, No. 61 Venn Road South Onitsha in accordance with Nnewi Native Law and Custom and that he is the recognized kola tenant of the Mgbelekeke family of Onitsha. Appellant's case is that his only uncle, late Okechukwu Mojekwu acquired the property from the Mgbelekeke family of Onitsha. As Okechukwu and his only son died, appellant who is now head of the Mojekwu family inherited the property in dispute under the "oli ekpe" custom of Nnewi people. He even got a document from the Mgbelekeke family (Exhibit 1), witnessed by the two surviving daughters of Okechukwu purporting to recognize him as their succeeding kola tenant.

Respondent denied the claim and sought to establish that her husband late Okechukwu is succeeded by a grandson of his only late son. She claimed that appellant misrepresented facts to the Mgbelekeke family to recognize him as the person entitled to continue the kola tenancy. The trial court dismissed the suit in its judgment. Appellant's appeal to the Court of Appeal was also dismissed. The Court of Appeal found the *lex situs* to be the applicable law, not the Nnewi customary law. Applying that law, it held that late Okechukwu Mojekwu's daughters are the ones that succeeded to his kola tenancy in respect of the land in dispute. Being dissatisfied, the appellant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Did the Court of Appeal formulate an issue by declaring the ‘Oli-ekpe’ Custom of Nnewi repugnant to natural justice equity and good conscience? 2. Is it correct that Exhibit 1 is not of much assistance to the plaintiff, and were the step daughters of the respondent not aware of what they did when they signed it but only vouched to the authenticity of the signature of the appellant in that document? 3. Did Patrick, the son of the respondent, marry and bore (sic) a son in 1973 named Emeka? 4. Is it correct that there is no averment in paragraph 8 of the amended statement of claim that under kola system of tenancy, the plaintiff is entitled to the land in dispute and is it true that the relief sought in paragraph 14(a)(i) does not assist the appellant since there is no averment in the statement of claim to support it.”*

**HELD** (Unanimously dismissing the appeal though disagreeing with aspect of the lower court’s pronouncement per lead judgment of **UWAIFO, JSC**)

***Land law - Exhibits - Ignorance***

1. I agree with the court below that by witnessing exhibit 1 in ignorance of their entitlement under the lex situs, the said two daughters of Okechukwu Mojekwu did not thereby validate the appellant’s claim to the Mgbelekeke kola tenancy in question. (p. 1110 C)

***LAND LAW - Inheritance - Female children***

2. There is the evidence in this case also that female children are entitled to inherit the Mgbelekeke kola tenancy held by a deceased kola tenant. It is clear from the law that so long as a deceased kola tenant is survived by children, male or female, the question of the deceased’s brother or any such ‘stranger’ inheriting would not arise. That clearly rules out the appellant in this case. I would therefore answer issue 2 against the appellant in the affirmative. In my opinion, Mrs. Basilia Nwokwu and Mrs. Theresa Iwuchukwu are the only known surviving children of the body of Okechukwu Mojekwu. They are women and by the Mgbelekeke family kola tenancy system, because they are alive, the appellant cannot aspire

to inherit the kola tenancy possessed by Okechukwu Mojekwu. This appeal accordingly fails and is dismissed. I affirm the dismissal of the suit by the two courts below. The appellant utterly failed to prove his case and it was right that it was dismissed by the trial court.

B (p. 1112 B & 1117 H)

***Repugnancy - Courts - Custom declared repugnant - Is wrong***

C 3. I do not think it was right for the court below to declare the said ‘oli-  
 C ekepe’ custom repugnant to natural justice, equity and good conscience in the circumstances of this case. A binding judicial declaration or pronouncement must derive from relevant established principles of the rule of law. There must be a cause upon which such a declaration or pronouncement is founded. There ought to be a relief tied to that cause which must be  
 D reasonably necessary or relevant for reaching a decision in the cause; see Nzekwu v. Nzekwu (1989) 3 S.C. (Pt II) 76; (1989) 2 N.W.L.R. (pt. 104) 373. Issues must be joined by the parties and they should be heard upon those issues by the court; or when the issue is raised suo motu, the  
 E parties should be invited by the court to address on it: see Kuti v. Jibowu [1972] 6 S.C. 147. (p. 1113 D)

***COURTS - Pleadings - Fair hearing***

F 4. The court should limit itself to issues joined by the parties on their pleadings. This is essential because to go outside those pleadings is an aspect of a denial of fair hearing which may lead to a miscarriage of justice; see Atoyebi v. Odudu [1990] 6 N.W.L.R. (pt. 157) 384. These  
 G principles apply mutates mutandis in every situation where a court is faced with a custom of a people and it conceives that such a custom may have some element of repugnancy. (p. 1113 G)

***Custom is not repugnant - Because it is inconsistent with English law***

H 5. It must be remembered that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept or some principle of individual right as understood in any other legal system: see Rufai v. Igbirra Native author-

ity [1957] N.R.N.L.R. 178. So the court must hear the parties and act with solemn deliberation over all the circumstances before declaring or pronouncing a custom repugnant. Admittedly, there may be no difficulty in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy. That is where the repugnancy principle should be dispassionately considered and applied. (p. 1114 A) B

***Repugnancy - Courts - Nnewi “Oli-Ekpe” custom***

6. In the present case, because of the circumstances in which it was done, I cannot see any justification for the court below to pronounce that the Nnewi native custom of ‘oli-ekpe’ was repugnant to natural justice, equity and good conscience. First, the issue that ‘oli-ekpe’ in question was repugnant was not joined by the parties. Second, the court below having felt strongly about its repugnancy, as can be seen from the emotive and highly homilized pronouncement, was obliged to draw the attention of the parties to it, raise it suo motu and invite them to address the court on the point. (p. 1114 D) D E

***Repugnancy - Custom that is discriminating against women***

7. The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi ‘oli-ekpe’ custom and that is quite understandable. But the language used made the pronouncement so general and far reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities. It would appear, for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet’s nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the F G H

circumstances, and accordingly I disapprove of it as unwarranted.  
(p. 1114 G)

***APPEALS - Merit - Pronouncement of lower court***

B 8. But I disagree with learned counsel for the appellant that the pronouncement led to a miscarriage of justice. It had nothing to do with the merit of the case. (p. 1115 C)

***APPEALS - Findings of trial court***

C 9. These are worse, in my view, than perverse findings of fact in respect of the circumstances of Patrick and Emeka. The findings were based partly on assumptions, partly on forlorn evidence, partly on presumption as to time of death of Patrick, partly on probability of the birth of Emeka  
D and partly on alternative possibility of paternity by Ibo customary practice. What a package of findings - none of which can bear legal scrutiny!

Tobi, J.C.A., considered the evidence relied on by the learned trial judge and the findings he made. At the end of it he said:

E “The learned trial judge held that Patrick was married to Jemimah in 1968 and that Emeka is his lawful son. The appellant does not agree with the above conclusion. It is his case that Patrick died in August, 1969 and that Emeka, who was born in 1973, is not the son of Patrick.  
F I have examined the findings and conclusions of the learned trial judge and I am in difficulty to disagree with them.”

This is also perverse and both findings of the two courts below cannot in clear conscience constitute concurrent findings of fact which the learned Senior Advocate for the respondent had argued they did. In  
G order that concurrent findings of fact may stand the test and enjoy respect, they must be such that can justifiably be defended primarily from the available evidence. Such findings notably foster a miscarriage of justice and this court will not be inhibited from entertaining an appeal from  
H them and setting them aside. (p. 1116 H)

**NOTABLE POINT OF INTEREST**

**PATS-ACHOLONU**

*1. Documents - Hiding the facts - Is a fraud against the witnesses*

To harp as the appellant seeks to do on the issue of the respondent and her sister appending their signatures to the agreement he had with Mgbelekeke family is to ignore the fraud he committed on them by being clever by half in that he persuaded them to support him without explaining to them their rights. It is the duty of this court to protect the weak and not to support an invidious and odious act surreptitiously done to have benefits procured by hiding the true nature of the facts which they ought to know. (p. 1120 A)

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**REPRESENTATION**

Philip Umeadi, ESQ., JNR., for the appellant.

DR. Onyechi Ikpeazu, S.A.N., with him is, Ogbogu, ESQ. for the respondent.

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**CASES REFERRED TO**

Mojekwu v. Mojekwu [1997] 7 N.W.L.R. (pt. 512) 283

Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (pt. 104) 373

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Kuti v. Jibowu [1972] 6 S.C. 147

Odiase v. Agho [1972] 1 AII N.L.R. (pt. 1) 170

Adimora v. Ajufo [1988] 3 N.W.L.R. (pt. 80) 1

Usman v. Umaru [1992] 7 N.W.L.R. (pt. 627) 493

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Atoyebi v. Odudu [1990] 6 N.W.L.R. (pt. 157) 384

Ude v. Chubo [1998] 12 N.W.L.R. (pt. 577) 169

Oyekanmi v. N.E.P.A. [2000] 15 N.W.L.R. (pt. 690) 414

Udensi v. Mogbo [1976] 10 N.S.C.C. 375

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**LEAD JUDGMENT BY UWAIFO JSC**

This is an appeal from a decision of the Court of Appeal, Enugu division given on 10 April, 1997 and reported as Mojekwu v. Mojekwu [1997] 7 N.W.L.R. (pt. 512) 283. It touches on the peculiar system of Kola tenancy in Ibo land. In this particular case, it is what is known as the Mgbelekeke family kola tenancy system of Onitsha. The plaintiff, now appellant, brought an action in June, 1983 in the High Court of

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Onitsha Judicial Division in respect of property subject of the said kola tenancy against Mrs. Caroline Mgbafor Mojekwu (who having died, has now been substituted in this appeal by Mrs. Theresa Iwuchukwu) claiming as follows: (a) A declaration that the plaintiff is entitled to the statutory right of occupancy of the property situate at and known as No. 61 Venn Road south Onitsha in accordance with Nnewi Native Law and Custom; (a)(i) A declaration that the plaintiff being the recognized kola tenant of the Mgbelekeke family of Onitsha is entitled to the statutory right of occupancy of the property situate at and known as No. 61 Venn road South Onitsha in accordance with the Mgbelekeke family of Onitsha kola tenancy. (b) N5,000.00 (five thousand Naira) being general damages for trespass. (c) Perpetual injunction restraining the defendant, her servants, agents and privies from committing further act of trespass. (d) An account of rents collected by the defendant from No. 61 Venn Road South Onitsha, from the month of April, 1982 until the delivery of judgment in this suit.

The case presented by the plaintiff is that his only uncle Okechukwu Mojekwu acquired a parcel of land from the Mgbelekeke family of Onitsha under their kola tenancy and built a house on it which is known as No. 61 Venn Road south Onitsha. The man died in 1944 and was survived by two daughters and a son called Patrick Adina Okechukwu Mojekwu (hereinafter referred to as Patrick). He said his own father, the only brother of Okechukwu Mojekwu, died in 1963 while Patrick, the only son of his said uncle, died during the Nigerian Civil war without any child. He claimed that by virtue of Nnewi native law and custom, he has succeeded to the estate of his late uncle, Okechukwu Mojekwu, and is now the head of the Mojekwu family. He lays claim to the property by virtue of a document (exhibit 1) he got from the Mgbelekeke family.

The mother of late Patrick was Caroline Mgbafor Mojekwu. The two daughters of Okechukwu Mojekwu are Mrs. Basilia Nwokwu and Mrs. Theresa Iwuchukwu who has been substituted for Caroline Mgbafor Mojekwu as the present respondent.

The defendant (Caroline) on the other hand had claimed that the property in question had passed to late Patrick, the only son of Okechukwu

Mojekwu and that later it passed to Patrick Chukwuemeka Okechukwu (hereinafter referred to as Emeka), the alleged infant son of Patrick. She claimed that when the house built by her husband went into ruins during the Nigerian Civil War, she rebuilt it, without any reference to the plaintiff, with her own money. She put in all the fee-paying tenants including one Clement Udezue, at first a difficult tenant who later agreed to pay rent to her; but he has been ejected ever since. She said that the plaintiff misrepresented facts to the Mgbelekeke family to recognize him as the person entitled to continue the kola tenancy. It was averred “*that recognition of the plaintiff, a stranger under the facts and circumstances of this case and where the male and female issues of the deceased kola tenant are living, is contrary to the Onitsha customary kola tenancy system of devolution of property on death.*”

The learned trial judge (Amaizu, J.) painstakingly considered the case and on 17 September, 1993, dismissed the suit. By a unanimous decision, the Court of Appeal dismissed the appeal against that judgment on 10 April, 1997. Let me remark here that in the Court of appeal, the appellant formulated nine issues for determination. With all due respect; six of the issues were largely peripheral to what was expected to be of concern for decision. Those six issues dealt with matters of adjectival law. They were not in any way relevant to the substance of the case, which I state as three vital aspects necessary for consideration in this case, namely, (a) What law governs Mgbelekeke kola tenancy; (b) to which class of persons does that tenancy primarily descend; and (c) can the present plaintiff claim to be within that class if the deceased tenant was survived by children, male or female. In the present case that ought to be the focus. But because that was lost on the appellant’s counsel, the court below found itself dealing a length with unnecessary issues.

The remaining fairly relevant three issues, though raised rather clumsily by the appellant before the court below out of the nine issues canvassed, are issues 5, 7 and 9. They were stated thus: “5. Did the learned trial judge not evaluate the evidence before him when he held as follows: -

*‘There is no averment in support of the relief sought by the plain-*

tiff that under the Onitsha kola system of tenancy he is entitled to the land in dispute'. (Formulated from ground 10). 7. Did the trial judge fail to evaluate evidence before him with respect to the issue whether the plaintiff is the surviving eldest male issue in the Mojekwu family who is entitled to inherit the property in dispute in accordance with Nnewi Native Law and Custom? (Formulated from ground 12). 9. Did the learned trial judge err in law by dismissing the plaintiff's claim and believing the testimony of the defendant's witnesses despite the fact that the defendant in her pleadings and the evidence of her witness d.w. 1 in one breath stated that Patrick Adina is alive therefore should inherit and in another breath asserted that Emeka, Patrick's alleged son and herself should inherit the land in dispute (formulated from ground 14).” It is significant that the court below did reach a conclusion which I consider touched on the three vital aspects I adumbrated above when it observed in *Mojekwu v. Mojekwu* (supra) per Tobî, J.C.A., at page 303:

“I have come to the conclusion that the applicable law is the *lex situs*. The *lex situs* is the kola tenancy law. In Exhibit 5, Akume Augustine Chike Peter Abomeli, now dead, gave evidence as p.w. 6 on 7<sup>th</sup> May, 1986 before His Lordship, Onwuamaegbu, J. On the incident of a kola tenancy, the witness said under cross-examination:

‘I know the custom of succession to land held under the Onitsha kola tenancy, especially that of the Mgbelekeke family. The children of a kola tenant inherit the kola tenancy. The children includes girls so that even if the deceased had no male issues the female issues would inherit the kola tenancy .... I have been a member of the Mgbelekeke Committee since the end of the Nigerian Civil War.’

Under re-examination, witness said:

‘Within the Mgbelekeke family a woman can inherit the kola tenancy of their deceased father (but not a widow only the offspring of the man)....’

The above evidence is vindicated by the decision of the Supreme Court in *Udensi v. Mogbo*, supra, a case which is very instructive.”

Later on in the judgment, the learned Justice of Appeal in refer-

ence to the said case Udensi v. Mogbo, observed at page 304:

*“There are two significant decisions of the court. The first one is that kola tenancy under the Mgbelekeke family customary law is inheritable by the children of the deceased kola tenant – no matter the sex – but only upon production by the succeeding child, and accepted by the Mgbelekeke family, of further kola. The second is that the ‘Oli-Ekpe’ custom did not apply to the property.”*

Still later, he said at page 305:

*“Happily, I have come to the conclusion, that the applicable law is the lex situs, which is the kola tenancy law of 1935 and not the personal law of the parties, which is the Nnewi custom of ‘Oli-ekpe’....”*

The appellant has further appealed to this court and formulated four issues for determination as follows: *“1. Did the Court of Appeal formulate an issue by declaring the ‘Oli-ekpe’ Custom of Nnewi repugnant to natural justice equity and good conscience? 2. Is it correct that Exhibit 1 is not of much assistance to the plaintiff, and were the step daughters of the respondent not aware of what they did when they signed it but only vouched to the authenticity of the signature of the appellant in that document? 3. Did Patrick, the son of the respondent, marry and bore (sic) a son in 1973 named Emeka? 4. Is it correct that there is no averment in paragraph 8 of the amended statement of claim that under kola system of tenancy, the plaintiff is entitled to the land in dispute and is it true that the relief sought in paragraph 14(a)(i) does not assist the appellant since there is no averment in the statement of claim to support it.”*

The respondent also set down four issues for determination. They are similar to those of the appellant though worded differently.

Going through the arguments of the appellant in his brief, it seems to me that it is in issues 2 and 4 that that he argued the question of the incidents of kola tenancy of Mgbelekeke family of Onitsha and the effect of the decision in Udensi v. Mogbo [1976] 10 N.S.C.C. 375. Learned counsel for the appellant submits that exhibit 1 by which the appellant got the approval of Mgbelekeke family to take over the kola tenancy of his uncle, Okechukwu Mojekwu, was not in conflict with the incidents of kola tenancy as decided by this court in Udensi v. Mogbo (supra). He

contends further thus:

“The only surviving daughters of the respondent’s husband who were her husband’s only surviving children signed exhibit 1,. The two daughters are Mrs. Basillia Nwokwu and Mrs. Theresa Iwuchukwu. There is nothing to the contrary to show that when the two daughters of Okechukwu Mojekwu took or accompanied the plaintiff/appellant to the Mgbelekeke family for him to be recognized as their kola tenant that they did not know what they were doing. From exhibit ‘1’ it was clear to them that their only brother, Patrick, had died without a surviving issue and that the appellant was the rightful person to be recognized as the new kola tenant.”

He adds in submission that the two daughters did not come forward to testify that they did not know their rights when they attested the document.

Learned Senior Advocate for the respondent, Dr. Ikpeazu, submits that the appellant based his claim on Nnewi custom of ‘oli-ekpe’ which would allow him to inherit the estate of his late uncle to the exclusion of the wife and female children of the deceased. He says that if exhibit 1 relied on by the appellant is to be of any assistance to his cause, it must of necessity accord with the Mgbelekeke kola tenancy system. The learned senior advocate also submits that the appellant did not show, nor even contend, that both courts below were wrong in their decision that the custom applicable to the said tenancy is the *lex situs*.

Now, the first thing to note is that property at No. 61 Venn Road South Onitsha is under the Mgbelekeke family kola tenancy. This is the property the appellant claims he is entitled to. He based this claim on the assertion that Okechukwu Mojekwu, his uncle, died without a male child. The entire tenor of that assertion is founded on Nnewi native law and custom of succession. In the amended statement of claim, paras. 6, 8, 9 and 12, he averred as follows:

“6. By Nnewi native law and custom, Charles Nwofor Mojekwu should have succeeded to the estate of his brother late Okechukwu Mojekwu after the death of his only son Patrick Okechukwu Mojekwu, but the said Charles Mojekwu died in 1963. 8. The plaintiff being the owner of No.

61 Venn Road South in accordance with Nnewi native law and custom went to the Mgbelekeke family and informed them of the death of the only surviving son of Okechukwu Mojekwu. The plaintiff paid the sum of N600.00 (six hundred Naira) to the said Mgbelekeke family who had earlier on recognized him as their present kola tenant for which he was given a document dated 20/7/78. The said document will be founded upon at the trial. 9. The plaintiff who is now the head of the Mojekwu family inherited the farm land of Okechukwu Mojekwu on which he has been exercising maximum acts of ownership. The plaintiff in 1981 took Okechukwu Mojekwu's share of land in Nnewi. The plaintiff pays all contributions payable 'Obi' (sic) by 'Obi' due to Okechukwu Mojekwu's family having stepped into the shoes of Okechukwu Mojekwu. 12. The plaintiff is the owner of No. 61 Venn road South Onitsha in accordance with Nnewi Native Law and Custom of succession."

The argument of learned counsel for the appellant recognizes that the said appellant's uncle, Okechukwu Mojekwu, was survived by two daughters. If, as argued, the two daughters witnessed the document, exhibit 1, by which Mgbelekeke family accepted him as their kola tenant, it must be that they did so on the understanding that the Nnewi native law and custom relied on by the appellant applied. The appellant does not pretend to say that the Mgbelekeke kola tenancy, i.e. the *lex situs*, applied nor can he contend that the two daughters in question knew that the *lex situs* was applicable but yet witnessed exhibit 1. That raises the question, what information did the appellant give those two women?

To be able to so contend that the said women are bound by exhibit 1 because they signed as witnesses, the appellant would have had to rely on waiver. But he did not dare to do so since (1) it would contradict his reliance on Nnewi custom and (2) it would impliedly implicate him that he misrepresented the true facts and circumstances to the said women. It is, therefore, a patently misconceived argument, which learned counsel for the appellant has raised, that: "There is nothing to the contrary to show that when the two daughters of Okechukwu Mojekwu took or accompanied the plaintiff/appellant to the Mgbelekeke family for him to be recognized as their kola tenant that they did not know what they were

doing.” This cannot arise at all once it is established that their minds were not directed to the applicable custom, namely the *lex situs*; but that they were led to believe that the Nnewi custom applied. Hence the argument of appellant’s counsel that, “*From exhibit ‘I’ it was clear to them* B *that their only brother, Patrick, had died without a surviving issue and that the appellant was the rightful person to be recognized as the new kola tenant,*” would be evidence of non-disclosure bordering on fraud as pleaded in para. 22(a) of the amended statement of defence. This is an argument that may only be proffered in reliance on the Nnewi custom C pleaded by the appellant. **I agree with the court below that by witnessing exhibit 1 in ignorance of their entitlement under the *lex situs*, the said two daughters of Okechukwu Mojekwu did not thereby validate the appellant’s claim to the Mgbelekeke kola tenancy in** D **question.**

There is the evidence of one Akune Augustine Chike Peter Abomeli who testified as p.w. 6 on behalf of the appellant on 7 May, 1986 when this same suit was earlier heard by late Onwuamaegbu, J. In fact the E record of proceedings, exhibit 5, in that earlier hearing was tendered by the appellant in support of his case in these proceedings. On the incident of Mgbelekeke kola tenancy, that witness, now deceased, when cross-examined, said:

F “*I know the custom of succession to land held under the Onitsha kola tenancy, especially that of the Mgbelekeke family. The children of a kola tenant inherit the kola tenancy. The children include girls so that even if the deceased had no male issues the female issues would inherit the kola tenancy.... I have been a member of the Mgbelekeke Committee* G *since the end of the Nigerian Civil War.*”

When re-examined, the witness said:

H “*Within the Mgbelekeke family a woman can inherit the kola tenancy of their deceased father (but not a widow only the offspring of the man)....*”

This is evidence coming from the appellant. It tends to support para. 22(e) of the amended statement of defence to the extent that it avers that “*The native law and custom of inheritance of Onitsha applies*

to this case where the land in dispute is situate and not the native law and custom of Nnewi.” That raises the law of the *lex situs*.

A similar situation arose in *Udensi v. Mogbo* (supra) where the “Ili-Ekpe” custom of Ezinifite (spelt differently from that of Nnewi) and the custom of Onitsha in respect of kola tenancy of land in Onitsha came into contention in grounds 5 and 8 raised by the appellant therein. This court, per Idigbe, J.S.C., observed *inter alia* at page 380 as follows:

“[T]he pith and substance of the submissions of learned counsel for the appellant in respect of those grounds was that the ‘Ili-Ekpe’ custom of the people of Ezinifite, not the ‘law of Onitsha’, applied to the property in dispute on the death of the kola tenant. Learned counsel for the appellant submitted that ‘the personal law’ of the parties in this case applied to the property in dispute and not the ‘*lex situs*’.....

We are satisfied that, on the whole, the submissions of learned counsel for the appellant were based on a gross misconception of the nature of kola tenancy and the law applicable to that tenancy. Kola tenancy in the main has the features of most customary tenancies .... Like most customary tenancies, kola tenancy confers to the grantee full rights of possession but it confers no more than a mere possessory right i.e. a right of occupancy of the tenant. This is borne out in the definition of this type of tenancy as set out in section 2 of the Kola tenancies Act No. 25 (now appearing as the Kola Tenancies Law Cap. 69 in the 1963 edition of the Laws of Eastern Nigeria) which reads: -

‘a right to the use and occupation of any land which is enjoyed by any native in virtue of a kola or other token payment made by such native or any predecessor-in-title in virtue of a grant for which no payment in money or in kind was exacted.

Obviously, from the above definition .... the position is that once it is admitted the property ... is held under a kola tenancy, the one thing which the holder cannot do under customary law is absolute or entire alienation of the same .... There is, however, the other question whether the nature of interest conferred on a kola tenant is an ‘interest of inheritance... However, in the case in hand the evidence which the learned trial judge accepted (and rightly so, in our view) is that kola tenancy under the

Mgbelekeke family customary law is inheritable by the children of a deceased (kola) tenant – no matter the sex – but only upon production by the succeeding child and acceptance by the Mgbelekeke family, of further ‘kola’.”

**B There is the evidence in this case also that female children are entitled to inherit the Mgbelekeke kola tenancy held by a deceased kola tenant. It is clear from the law that so long as a deceased kola tenant is survived by children, male or female, the question of the deceased’s brother or any such ‘stranger’ inheriting would not arise. That clearly rules out the appellant in this case. I would therefore answer issue 2 against the appellant in the affirmative.** As regards issue 4, the two questions asked therein are immaterial since; in any event, the appellant is disentitled in the circumstances of this case from inheriting the kola tenancy in question.

Issue 1 raises the question whether the Court of appeal was right in declaring the “*Oli-ekpe*” custom of Nnewi to be repugnant to natural justice, equity and good conscience? The evidence led on behalf of the appellant is that under Nnewi custom a male child inherit property; and if no male child, the brother of the deceased owner of property inherits even where the man was survived by female children. In either case, the person who so inherits, whether the son or brother of the deceased is known as the ‘Oli-ekpe’. He inherits the assets and liabilities of the deceased. Learned counsel for the appellant has argued that no where and at no instance did the parties join issue on the repugnancy of the ‘Oli-ekpe’ custom of Nnewi. He contends that it was the court below which raised it suo motu and, without hearing from the parties, observed in *Mojekwu v. Mojekwu* (supra) as follows per Tobi, J.C.A., at page 304-305

*“Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the women folk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings – male and female – are*

*born into a free world, and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis (sic) to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way B to Beijing to know that some of our customs, including the appellant. In my humble view, it is monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the Creator of human being, is also the C final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-ekpe' D custom of Nnewi, is repugnant to natural justice, equity and good conscience."*

**I do not think it was right for the court below to declare the said 'oli-ekpe' custom repugnant to natural justice, equity and good conscience in the circumstances of this case. A binding judicial declaration or pronouncement must derive from relevant established principles of the rule of law. There must be a cause upon which such a declaration or pronouncement is founded. There ought to be a relief tied to that cause which must be reasonably necessary or relevant for reaching a decision in the cause; see Nzekwu (1989) 2 F N.W.L.R. (pt. 104) 373. Issues must be joined by the parties and they should be heard upon those issues by the court; or when the issue is raise suo motu, the parties should be invited by the court to address on it: see Kuti v. Jibowu [1972] 6 S.C. 147; Odiase v. Agho G [1972] 1 AII N.L.R. (pt. 1) 170; Adimora v. Ajufo [1988] 3 N.W.L.R. (pt. 80) 1; Usman v. Umaru [1992] 7 N.W.L.R. (pt. 627) 493. The court should limit itself to issues joined by the parties on their pleadings. This is essential because to go outside those pleadings is an aspect H of a denial of fair hearing which may lead to a miscarriage of justice; see Atoyebe v. Odudu [1990] 6 N.W.L.R. (pt. 157) 384; Ude v. Chubo [1998] 12 N.W.L.R. (pt. 577) 169; Oyekanmi v. N.E.P.A. [2000]**

15 N.W.L.R. (pt. 690) 414. These principles apply *mutates mutandis* in every situation where a court is faced with a custom of a people and it conceives that such a custom may have some element of repugnancy. It must be remembered that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept or some principle of individual right as understood in any other legal system: see *Rufai v. Igbirra* Native authority [1957] N.R.N.L.R. 178. So the court must hear the parties and act with solemn deliberation over all the circumstances before declaring or pronouncing a custom repugnant. Admittedly, there may be no difficult in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy. That is where the repugnancy principle should be dispassionately considered and applied.

In the present case, because of the circumstances in which it was done, I cannot see any justification for the court below to pronounce that thee Nnewi native custom of ‘oli-ekpe’ was repugnant to natural justice, equity and good conscience. First, the issue that ‘oli-ekpe’ in question was repugnant was not joined by the parties. Second, the court below having felt strongly about its repugnancy, as can be seen from the emotive and highly homilized pronouncement, was obliged to draw the attention of the parties to it, raise it *suo motu* and invite them to address the court on the point. Third, the court below itself had reached a conclusion that the applicable custom was that of the kola tenancy of *lex situs*. This was said twice in the leading judgment, as recorded: once before the pronouncement in question and once after. The pronouncement which was not necessary for deciding the suit can thus be assessed upon the scenario in which it was made. Fourth, the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi ‘oli-ekpe’ custom and that is quite understandable. But the language used made the pronouncement so general and far reaching that it seems to cavil at, and is capable of causing strong

feelings against, all customs, which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities. It would appear, for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted. But I disagree with learned counsel for the appellant that the pronouncement led to a miscarriage of justice. It had nothing to do with the merit of the case.

In issue 3, the appellant asks whether Patrick was ever married, and that he bore a son in 1973. The case of the appellant is that he died during the Nigerian Civil War. One James Okoronkwo, now dead, had testified before Onwuamaegbu, J. that Patrick who was in the Biafran Army died during the war on 25 August 1969 at Ikot Ekpene sector and was buried at the Military cemetery, Nnewi. James Okoronkwo said he was his batsman and witnessed the burial. This was evidence of an eyewitness. Unfortunately the matter of Patrick, as stated by the respondent right from the trial, sounds like a fairy story. One Mrs. Esther Okakpu testified for the defendant as d.w. 1. She claimed that Patrick had a son called Emeka who was born on 26 August 1973. But she also said that she saw Patrick last in 1970. How did this happen? It appears from her evidence it would be a chance meeting because she said when she met him, *"he told me he was going to collect his things. That was the last time I saw him."* Is this really credible? How did this witness then know that Patrick had a child in 1973? She did not say in her evidence. At the time this witness testified on 6 November 1992 and 23 April 1993, she maintained that Patrick had not died. That was some 22 years after the Nigerian Civil War. Why did she maintain that Patrick was still alive? Where was he still? How could anyone continue to maintain that he was

alive?

The trial court's findings on the matter were very illogical. First, the learned trial judge held that he did not believe that Patrick died in August 1969. He found that he was married to one Jemimah in 1968 when the woman was not produced to testify. As to how the learned trial judge came to the conclusion that Patrick was the father of Emeka who was allegedly born in 1973, he said:

*"The civil war ended in January, 1970. We are in 1993. The evidence before me does not disclose of any circumstances to account for Patrick not being heard of without assuming his death. I therefore hold that there is not convincing evidence to fix the time of death between 1970 when he was last seen and 1977. Having arrived at this conclusion, it follows that Emeka is the lawful son of Patrick."*

The learned trial judge then went on to say that another reason why Emeka should be treated as the lawful son of Patrick was the Ibo custom that once a woman was married all her children are those of her husband during the subsistence of the marriage and if the husband died all the children born by the woman before she remarried belonged to the family of the deceased.

It is my view, that the findings made by the learned trial judge was based on fatuous evidence and very disturbing assumptions in preference to the direct evidence of a witness who was with Patrick in the war front as his batsman. The premise is accepted that because someone alleged that she saw Patrick last in 1970, it should be presumed he died after 7 years viz in 1977. The woman (d.w. 1) who said she saw Patrick in 1970 did not indicate where this took place and whether she was the only one who saw him. She said he told her he was going to *"take his things"* and that was the last time she saw him. How does a court of law give credence to this evidence as the learned trial judge seemed to have done. The learned trial judge went on to say that but before Patrick died, he got a child called Emeka in 1973. Well, he seemed satisfied that if that evidence that Patrick father of Emeka was not strong enough, then the Ibo custom that claims ownership of a child born after the husband of a woman died should account for Emeka being the child of Patrick. These

**are worse, in my view, than perverse findings of fact in respect of the circumstances of Patrick and Emeka. The findings were based partly on assumptions, partly on forlorn evidence, partly on presumption as to time of death of Patrick, partly on probability of the birth of Emeka and partly on alternative possibility of paternity by Ibo customary practice. What a package of findings none of which can bear legal scrutiny!**

It is highly difficult for me to understand why all that effort to make such positive findings, as he learned trial judge did, when it was all too obvious that Caroline Mgbafor Mojekwu appeared to have been desperate to keep her interest alive through the cock-and-bull story of Patrick surviving the war, but simply disappearing thereafter, leaving behind an improbable story that he was able to have a son in 1973 from a woman he allegedly married in 1968. The court below should not have affirmed such findings.

**Tobi, J.C.A., considered the evidence relied on by the learned trial judge and the findings he made. At the end of it he said:**

*“The learned trial judge held that Patrick was married to Jemimah in 1968 and that Emeka is his lawful son. The appellant does not agree with the above conclusion. It is his case that Patrick died in August, 1969 and that Emeka, who was born in 1973, is not the son of Patrick. I have examined the findings and conclusions of the learned trial judge and I am in difficulty to disagree with them.”*

This is also perverse and both findings of the two courts below cannot in clear conscience constitute concurrent findings of fact which the learned Senior Advocate for the respondent had argued they did. In order that concurrent findings of fact may stand the test and enjoy respect, they must be such that can justifiably be defended primarily from the available evidence. Such findings notably foster a miscarriage of justice and this court will not be inhibited from entertaining an appeal from them and setting them aside.

**In my opinion, Mrs. Basilia Nwokwu and Mrs. Theresa Iwuchukwu are the only known surviving children of the body of Okechukwu Mojekwu. They are women and by the Mgbelekeke**

**family kola tenancy system, because they are alive, the appellant cannot aspire to inherit the kola tenancy possessed by Okechukwu Mojekwu. This appeal accordingly fails and is dismissed. I affirm the dismissal of the suit by the two courts below. The appellant utterly failed to prove his case and it was right that it was dismissed by the trial court. I award N10,000.00 costs in favour of the respondent against the appellant.**

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C

**MOHAMMED JSC**

I have had a preview of the judgment of my learned brother, Uwaifo, J.S.C., in draft, concerning this appeal and I agree entirely with him that the appeal has no merit and deserves to be dismissed.

D

The property involved in this dispute is located in Onitsha and therefore the law governing any right to the succession of the estate is *lex situs*, which is the kola tenancy of Mgbalekeke family. Under that kola tenancy all children of the decease, both male and female, have a right to inherit any property left behind by their decease father. The Oli-Ekpe custom of Nnewi which recognizes only the male descendants of the deceased is inapplicable to the matter concerning the devolution of this property which is situated in Onitsha. See *Augustine Udensi v. Alice Mogbo (Nee Udensi)* [1976] 10 N.S.S.C. 375 at 380.

F

I agree with my learned brother, in the lead judgment, that the court below was in error to raise, deal and decide the issue concerning the repugnancy of Oli-ekpe custom of Nnewi *suo motu* without hearing from the parties. This court has warned in several decisions against the practice by courts in raising a point *suo motu* and deciding on it without inviting parties to address it on the matter. See *Oshodi and Ors. V. Eyifunmi and Ors.* [2000] 13 N.W.L.R. (pt. 684) 298 at 332. In the case in hand the question whether Oli-ekpe custom of Nnewi was repugnant to natural justice, equity and good conscience was not canvassed by any of the parties at Court of appeal. The Court of Appeal is not therefore competent to decide on the issue and declare the custom repugnant to natural justice.

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That notwithstanding, this appeal has failed and it is dismissed. The decision of the Court of Appeal on the main issue is hereby affirmed. I abide by the assessment and award of costs made in the lead judgment.

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B

**KATSINA-ALU JSC**

I was privileged to read in draft the judgment delivered by my learned brother, Uwaifo, J.S.C., in this appeal. I entirely agree with it and for the reasons he gives. I also dismiss this appeal =N=10,000.00 costs to the respondent.

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C

**MUSDAPHER JSC**

I have had the privilege to read in advance the judgment of my Lord, Uwaifo, J.S.C. just delivered with which I respectfully agree. For the same reasons contained in the judgment which I adopt as mine, I, too, dismiss the appeal. I affirm the order of dismissal of the appellant's claims by the courts below. The appellant simply failed to prove his case. I award N10,000.00 costs in favour of the respondent against the appellant.

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**PATS-ACHOLONU JSC**

I have read the judgment of my learned and noble Lord, Uwaifo, J.S.C., and I agree with him. The case as the true facts reveal is indeed a simple one, which is on the ramification or purport of Mgbelekeke family kola tenancy. The butt of the argument is whether the appellant could be allowed to inherit the property of his late brother who had surviving children albeit women. The appellant's case is that on the death of his brother, by Nnewi Native Law and Custom on devolution of property, the property of his late brother would pass to him. Unfortunately he failed to reckon with the peculiar kola tenancy of Mgbelekeke family, which admits of the female daughters equally inheriting the tenancy of their father in absence of any son.

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To harp as the appellant seeks to do on the issue of the respondent and her sister appending their signatures to the agreement he had with Mgbelekeke family is to ignore the fraud he committed on them by being clever by half in that he persuaded them to support him without explaining to them their rights. It is the duty of this court to protect the weak and not to support an invidious and odious act surreptitiously done to have benefits procured by hiding the true nature of the facts which they ought to know.

I am well aware of how the Court of Appeal imported into this case the Beijing Conference declarations on discrimination against women, which sought to establish and protect the rights of women by an avowal of fighting discrimination against women. This case has really nothing to do with the discrimination against women but rather on the avarice displayed by the appellant to deprive the respondent and her sister of their due rights. The issue or principle of Repugnancy test is of no relevance in this case as the matter before the court is as to whom should devolve the kola tenancy of the property. Of course the answer to that is that the respondent and her sister are the obvious beneficiaries in the absence of any male issue surviving.

I dismiss the appeal, and affirm the judgment of the court below, abide by the consequential orders made in the lead judgment.

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