

SUPREME COURT OF NIGERIA

27TH APRIL, 2007 SC. 405/2001

**CORAM:- A. I. KATSINA-ALU, U. A. KALGO, N. TOBI,
M. A. MUKHTAR, M. MOHAMMED,
W. S. N. ONNOGHEN, F. F. TABAI, JJSC**

1. CYPRIAN PETER OBUSEZ APPELLANTS

2. EDWARD OBUSEZ

AND

1. MRS. SILVA TECKLA OBUSEZ RESPONDENTS

2. ADEMOLA GIWA

SUCCESSION - Statutes - Administration of Estate Law, Lagos - S. 49(5) thereof does not legislate on matters - Preserved for the National Assembly exclusively under items 60 & 67 1979 Constitution - While it deals with intestate succession - Items 60 & 67 pertain to formation of marriage (H1)

STATUTES - Interpretation - Salubi case - Where the provisions are clear and unambiguous - They will be accorded their ordinary meaning - And construction of the statutes in issue - Does not necessitate a departure from the decision in Salubi case (H2)

ADMINISTRATION OF ESTATES - Succession - Administration of Estate Law - Purport of - Is to exclude customary law - In relation to estate of persons to whom that law applies (H3)

SUCCESSION - Intestate - Appointment of administrators - Wife's insensitivity to husband's death - Trial court's discretion in appointing friend of deceased - As co-administrator with the widow - May not be interfered with (H4)

FACTS

Before the Ikeja High Court, Lagos State, the plaintiffs/respon-

dents filed an action against the defendants/appellants. They claimed that: (i) the 1st plaintiff and her five children are the only persons entitled to the estate of late Cornelius Paul Obusez (ii) that grant of letters of Administration in solemn form for the administration of the said estate be issued to the plaintiffs. The 1st defendant/appellant filed a 27 paragraph statement of defence and counter claim that is similar to plaintiffs' claim. 1st respondent is the widow of the deceased, 2nd respondent is his friend, while the appellants are his brothers, 1st appellant being his twin brother. While respondents' case is grounded on intestacy under English Law, as the marriage was under the Marriage Act, appellants' case is based on Agbor native law and custom, as the deceased is from that area.

It was at the 1st appellant's residence that the body of late Paul Obusez was buried and he was also named as a co-beneficiary in late Obusez's life policy that did not include his wife's (i.e.. 1st respondent's) name. Appellants' sought to prove 1st respondent's insensitivity to her husband's death. Though trial court failed to consider that evidence, Court of appeal considered it and found that the misconduct was not sufficiently grave to make 1st respondent unfit to administer the estate of her intestate husband. The trial court found in favour of the respondents. Appellants' appeal to the Court of Appeal was dismissed. Being dissatisfied appellants have further appealed to the Supreme Court.

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

Administration of Estate Law, Lagos - S. 49(5) thereof

1. I am of the view that section 49(5) of the Administration of Estate Law Lagos State does not purport to legislate on matters preserved for the National Assembly in items 60 and 67 of the Exclusive Legislative List in the 1979 Constitution. Section 49(5) of the Administration of Estate Law deals specifically with "succession to real and personal estate on intestacy" as clearly shown in the caption or head note. While item 60 on the Exclusive Legislative List also speaks specifically of the formation, annulment and dissolution of marriage other than marriages under Islamic law and/or customary law. The Constitutional provisions in item 60 of the Exclusive Legislative List, in my view, pertain to and is limited to the

formation, annulment and dissolution of marriage and cannot be expanded to cover cases of succession to, distribution and administration of the estate of an intestate. Similarly I do not think that item 67 of the Exclusive Legislative List of the 1999 Constitution cannot be construed to include matters beyond those specifically mentioned in item 60.

(p. 1980 C)

STATUTES - Interpretation - Salubi case

2. These specific clear and unambiguous provisions both of the Constitution and the Administration of Estate Law of Lagos must be accorded their ordinary grammatical meaning which alone speaks and discloses the intention of the law makers. In my view the construction of the Constitutional and statutory provisions does not affect the decision in *Salubi v. Nwariaku* and there is therefore no basis for any departure therefrom. (p. 1980 G)

Administration of Estate Law - Purport of

3. The substance of the appellants' argument is that the Agbor native law and custom and not the Administration of Estates Law should apply.

At page 165 of the record the court below restated the purport of section 49(5) of the Administration of Estate Law when it said: -

"I am satisfied that the clear intention of the law maker as manifested in the passage underlined above is that customary law should be excluded in relation to the estate of persons to which the provision applies."

The court after restating a portion of the judgment of the trial court, and *Salubi v. Nwariaku* said:

"It would have sufficed to appreciate that the Bendel State. Legislature meant to and did legislate to exclude the applicability of customary law on the intestacy of a person who married under the Marriage Act."

I agree entirely with the reasoning of the court below on the non-applicability of the Agbor native law and custom in the administration of the estate of the deceased. (p. 1981 F)

SUCCESSION - Intestate - Appointment of administrators

4. Although the appellants were at the trial at pains to prove the 1st respondent's insensitivity to the death of her husband, they appear to have conceded her right to Letters of Administration. Their grouse mainly is the appointment of the 2nd respondent whom they describe as a complete stranger. According to them, his appointment to their exclusion was wrong exercise of discretion that has occasioned a miscarriage of justice. On this question of the 2nd respondent the trial court at page 61 of the record held to the effect that the Rules do not prescribe that a person so nominated must be a relation of the deceased. In addition, at page 31 of the record, the 1st appellant, testifying as D.W.1 said of the 2nd respondent thus:

D “The said plaintiff Ademola Giwa I know. He had been a friend of my twin brother, the deceased, just like any other friend. He is not related to us. He is not even from our state.”

Having regard to the uncontested fact that the 2nd respondent had been a friend of the deceased there is good cause for his appointment as the 2nd administrator to the estate of the deceased. On the whole I do not see any strong reason for interfering with the judgment of the court below. (p. 1982 C)

F **NOTABLE POINT OF INTEREST**

TOBIJSC

1. Intestate succession is not determined by place of burial

G I realize that two of the appellants' claims of succession to the estate were based on the fact that the deceased was buried in the personal residence of the 1st appellant and the life policy of the deceased where he made his first and second children and the 1st appellant as beneficiaries.

H I know of no law, which says that, succession to property is determined by the place of burial of the deceased intestate or by a life policy made inter vivos. The fact that the deceased did not make the 1st respondent a beneficiary of his life policy does not mean that she cannot benefit under section 36(a) of the Act. Conversely, the fact that 1st appel-

lant is a beneficiary of the life policy does not ipso facto make him a beneficiary of the estate of his twin brother. (p. 1986 E)

REPRESENTATION

A. J. Owonikoko with Felix Eki for the Appellants. B
George Etomi with Sampson Ebomihee and Mohammed Salau for the Respondents.

CASES REFERRED TO

Udoh v. O.H.M.B. [1993] 7 N.W.L.R. (pt. 304) 139 C
7-UP Bottling Co. Ltd. v. Abiola & Sons (Nig.) Ltd. [1995] 3 N.W.L.R. (pt.383) 257
Cole v. Cole (1898) 1 NLR 15
Salubi v. Nwariaku [2003] 20 W.R.N. S.C. 53 D

LEAD JUDGMENT BY TABAI JSC

The action giving rise to this appeal was filed at the Ikeja Judicial Division of the High Court of Lagos State on or about the 24/5/91. The plaintiffs are the respondents in this appeal and the defendants, the appellants herein. The reliefs endorsed in the writ of summons and repeated in the statement of claim are:

(i) A declaration that the 1st plaintiff and her five children are the only persons entitled to the estate of late Cornelius Paul Obusez; F

(ii) An order that Grant of Letters of Administration in solemn form for the administration of the said estate be issued to Mrs. Silvia Teckia Obusez and Ademola Giwa Esq.

The 1st defendant/appellant filed a 27 paragraph statement of defence and counter-claim. The 1st defendant/appellant counter-claimed the following reliefs: G

1. A declaration that the defendants are the only persons entitled to administer the Estate of the late Cornelius Paul Obusez. H

2. An order that a grant of Letters of Administration in solemn form for the Administration of the said estate be issued to the defendants herein.

Only the 1st plaintiff/respondent testified in support of the plaintiffs' case. The 1st defendant/appellant and two other witnesses testified in support of the defence and counter-claim. After the address of counsel for the parties the learned trial judge R. A. Omotoso J. delivered judgment on the 17/3/93. In the concluding paragraph of the learned trial judge held.

"Under Nigeria's Law of succession touching on succession to the estate of Nigerians who contract marriages under the Marriage Act, the 1st plaintiff and her children are the only persons entitled to the estate of their husband and father. The 1st plaintiff is certainly not a chattel under that law. Further, as beneficiaries of that estate, the 1st plaintiff and children are entitled to a grant of Letters of Administration to administer the estate but because all the children are minor it is lawful and proper that the 2nd plaintiff be appointed a Co-Administrator with the 1st plaintiff."

Accordingly, I make a declaration that the 1st plaintiff and her five children are the only persons entitled to the estate of the late Cornelius Obusez. I further order that a Grant of Letters of Administration of the said estate be issued to the 1st and 2nd plaintiffs, Mrs. Sylvia Teckia Obusez and Ademola Giwa Esq.

In the event, the counter-claim of the defendants fails and is accordingly dismissed."

Aggrieved by the foregoing decision, the appellants herein appealed to the court below. In its judgment on the 7/6/2001 the court below dismissed the appeal. The concluding part of the judgment states, in substance, the reasons for the dismissal. The court per Oguntade, J.C.A. (as he then was) stated thus:

"It is not the law that the surviving widow of a deceased person is automatically entitled to the grant of Letters of Administration in respect of the estate of the intestate. See Okon v. Administrator Cross River State [1992] N.W.L.R. (pt. 248) 473. The court has a discretion in the matter. It is a correct statement of the law that a widow who has been guilty of moral misconduct may be passed over. A widow who since her husband's death has led an immoral life may also be passed over."

Although there was evidence from the 1st defendant that the 1st plaintiff had conducted herself in a manner considered unacceptable, the trial court did not consider the unchallenged evidence. I have considered the evidence. At the highest, it shows the 1st plaintiff as insensitive and may be unwilling to the rival claims of the larger family of the intestate to share in the intestate's properties. But I do not see that the conduct or misconduct ascribed to her was sufficiently grave to lead to the conclusion that she was unfit to administer the estate of the intestate. The lower court however should have considered the evidence and make a finding of fact thereon. In the final conclusion, this appeal fails. It is dismissed. I affirm the judgment of the lower court given on the 17/3/93....."

Still dissatisfied the appellants have come on further appeal to this court. The parties have, through their counsel filed and exchanged their briefs of argument. The appellant's brief dated and filed on the 1/6/04 was prepared by A. J. Owonikoko. The respondents brief dated the 7th of March 2006 was prepared by E. O. Akpata-Etomi (Mrs).

In the appellants' brief of argument Mr. Owonikoko formulated the following three issues for the determination of this appeal.

ONE

"Whether section 36 subsections (1)(2) and (3) of the Marriage Act, and section 49(5) of the Administration of Estates Law, Laws of Lagos State which both confer a right on surviving spouse married under the Marriage Act, to one third of the Estate of the spouse who died intestate as in this case are concurrent statutory provisions on incidence of non-customary or Islamic marriage."

TWO

"If yes, whether section 36 subsections (1)(2) and (3) of the Marriage Act falls within items 60 and 67 of the Exclusive Legislative List under the Constitution of the Federal Republic of Nigeria 1979 as to render a similar provision under section 49(5) of the Administration of Estates Law, Laws of Lagos State inconsistent with the Marriage Act as impliedly repealed, and therefore null and void by virtue of section 4(3) and (5) of the Constitution."

THREE

“Whether the judgment of the lower court which affirmed exclusion of appellants as persons entitled to administer the estate of the deceased Cornelius Obusez occasioned a miscarriage of justice.”

In the respondents’ brief Mrs. Akpata-Etomi also formulated three issues which are a reproduction of the three issues of the appellant. Both counsel argued issues one and two together.

The intestate, Mr. Cornelius Obusez was from Ute-Ukpo near Agbor in Delta State. His wife and widow Mrs. Sylvia Teckia Obusez is from Koko, also in Delta State. They got married on the 8th of July 1972. It was a marriage under the Marriage Act. There are five children of the marriage. The first child was born on the 30/8/73 and the last on the 6/6/82. Mr. Cornelius Obusez died on the 29/5/88. At the time of his death his first child was 15 years old and the last, 6 years. The evidence shows that although, they lived together, the relationship between the couple was, sometime before and up to the 29/5/88, not quite smooth sailing. Among those who survived the intestate was the 1st defendant/appellant his twin brother. In his lifetime the deceased took out Life Insurance Policy with American International Insurance Company Ltd. in 1977. The 1st appellant and the only two children at that time were named the beneficiaries.

Firstly, learned counsel for the appellant invited this court to depart from the principle in *Salubi v. Nwariaku* [2003] 20 W.R.N. S.C. 53, submitting that the incidence of marriage under the Marriage Act on a surviving spouse upon which the decision was based is a matter which fall within items 60 and 67 of the Exclusive Legislative List in the 1979 Constitution of the Federal Republic of Nigeria and in respect of which a State House of Assembly had no legislative competence. He contended that the legislative competence of the State House of Assembly was limited to matters in respect of Islamic and customary law marriages. According to counsel, the call for departure from *Salubi v. Nwariaku* is necessitated by the fact that the point being raised here was not canvassed before this court in that case. It was further argued that section 49(5) of the Administration of Estate Law of Lagos State which is the equivalent of section 36 of the Marriage Act, is by virtue of the aforesaid

constitutional provisions, null and void. It was contended therefore that only the customary law of Agbor that applies in the administration of the deceased's estate and that by virtue thereof the appellants who are the brother of the deceased ought to have priority for appointment as administrators of the estate. B

Learned counsel for the respondents on the other hand opposed the invitation for a departure from *Salubi v. Nwariaku* (supra). This, she submitted, was because the issue as to the incidence of marriage under the Marriage Act falling within the Exclusive Legislative List in Items 60 and 67 of the 1979 Constitution did not arise, the applicable law at all times material to the case being section 49(5) of the Administration of Estate Law of Lagos State. Section 49(5) of the Administration of Estate Law, it was argued, is not a nullity as it never purported to legislate in a matter beyond the legislative competence of the Lagos State House of Assembly. Learned counsel, Mrs Akpata-Etomi, further submitted that there was no basis for the application of Agbor customary law in the administration of the estate of the intestate since, at all times material to this case, the deceased was married under the Marriage Act and resident in Lagos State and the administration of whose property therefore comes within section 49(5) of the Administration of Estates Law of Lagos State. She finally submitted that since Letters of Administration were granted to the respondents in compliance with section 49(5) of the Administration of Estates Law of Lagos State and under the Non-Contentions Probate Rules, the grant was in order. She urged in conclusion that the appeal be dismissed and the judgment of the lower court affirmed. C D E F

Let me first of all dispose of appellant's request for this court to depart from *Salubi v. Nwariaku* (supra). G

The Head Note of section 49 reads:

"Succession to real and personal estate on intestacy"

And section 49(5) reads: -

"Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Act 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 H

intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding.”

Items 60 and 67 of the Exclusive Legislative List in the 1979 Constitution (which are items 61 and 68 of the 1999 Constitution) provide: -

60 *“The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto.”*

67 *“Any matter incidental or supplementary to any matter mentioned elsewhere in this list.”*

I have examined the above provisions carefully and **I am of the view that section 49(5) of the Administration of Estate Law Lagos State does not purport to legislate on matters preserved for the National Assembly in items 60 and 67 of the Exclusive Legislative List in the 1979 Constitution. Section 49(5) of the Administration of Estate Law deals specifically with “succession to real and personal estate on intestacy” as clearly shown in the caption or head note. While item 60 on the Exclusive Legislative List also speaks specifically of the formation, annulment and dissolution of marriage other than marriages under Islamic law and/or customary law. The Constitutional provisions in item 60 of the Exclusive Legislative List, in my view, pertain to and is limited to the formation, annulment and dissolution of marriage and cannot be expanded to cover cases of succession to, distribution and administration of the estate of an intestate. Similarly I do not think that item 67 of the Exclusive Legislative List of the 1999 Constitution cannot be construed to include matters beyond those specifically mentioned in item 60.**

These specific clear and unambiguous provisions both of the Constitution and the Administration of Estate Law of Lagos must be accorded their ordinary grammatical meaning which alone speaks and discloses the intention of the law makers. See Udoh v. O.H.M.B. [1993] 7 N.W.L.R. (pt. 304) 139; 7-UP Bottling Co. Ltd. v. Abiola & Sons (Nig.) Ltd. [1995] 3 N.W.L.R. (pt.383) 257. In my view the con-

struction of the Constitutional and statutory provisions does not affect the decision in Salubi v. Nwariaku and there is therefore no basis for any departure therefrom.

In paragraph 4.20 page 14 of the appellants brief learned counsel submitted as follows: -

“The judgment of the lower court was that a wife has a right to exclude relations of his (sic deceased spouse from being co-administrator at his estate simply as a matter of law. And that the spouse can be aided by the court in excluding his (sic) husband’s immediate relations who are willing, and bringing in complete stranger. In this case, the twin brother in whose personal house the husband was buried was held disentitled to be a co-administrator of the estate.”

He submitted that the decision of the lower court affirming that of the trial court totally ignored what constitutes a family or extended family within the Nigerian context and urged this court not to endorse it. He relied on the works of Family Law in Nigeria by Prof. E. I. Nwogugu page 1. He submitted that in view of the unchallenged evidence in support of their pleading in the statement of defence and counter-claim to the effect that the deceased during his life time embraced his Agbor Native Law and Custom and naming of the 1st appellant and his 1st and 2nd children as the beneficiaries in his Life Insurance Policy, the decision of the court below excluding the appellants as co-administrators should be set aside. **The substance of the appellants’ argument is that the Agbor native law and custom and not the Administration of Estates Law should apply.**

At page 165 of the record the court below restated the purport of section 49(5) of the Administration of Estate Law when it said: -

“I am satisfied that the clear intention of the law maker as manifested in the passage underlined above is that customary law should be excluded in relation to the estate of persons to which the provision applies.”

The court after restating a portion of the judgment of the trial court, and Salubi v. Nwariaku said:

“It would have sufficed to appreciate that the Bendel State. Legislature meant to and did legislate to exclude the applicability of customary law on the intestacy of a person who married under the Marriage Act.”

B I agree entirely with the reasoning of the court below on the non-applicability of the Agbor native law and custom in the administration of the estate of the deceased. I have earlier in this judgment restated the concluding part of the judgment of the trial court at page 61 of the record to the same effect.

C Although the appellants were at the trial at pains to prove the 1st respondent’s insensitivity to the death of her husband, they appear to have conceded her right to Letters of Administration. Their grouse mainly is the appointment of the 2nd respondent whom D they describe as a complete stranger. According to them, his appointment to their exclusion was wrong exercise of discretion that has occasioned a miscarriage of justice. On this question of the 2nd respondent the trial court at page 61 of the record held to the effect E that the Rules do not prescribe that a person so nominated must be a relation of the deceased. In addition, at page 31 of the record, the 1st appellant, testifying as D.W.1 said of the 2nd respondent thus:

F *“The said plaintiff Ademola Giwa I know. He had been a friend of my twin brother, the deceased, just like any other friend. He is not related to us. He is not even from our state.”*

Having regard to the uncontested fact that the 2nd respondent had been a friend of the deceased there is good cause for his appointment as the 2nd administrator to the estate of the deceased. G On the whole I do not see any strong reason for interfering with the judgment of the court below. I hold in conclusion therefore that the appeal fails and is accordingly dismissed. I make no orders as to costs.

H

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Tabai JSC in this appeal. I agree entirely with it and, for

the reasons he has given I too, dismiss the appeal. I also abide by the order as to costs.

KALGO JSC

B

I have had the opportunity of reading before now, the judgment just delivered by my learned brother Tabai JSC in this appeal. I am of the view that he has carefully and painstakingly considered all the issues raised by the appellant and I agree with the conclusions reached therein. I therefore find no merit in the appeal. I accordingly dismiss it with costs as ordered in the said judgment.

C

TOBI JSC

D

I have read the judgment of my learned brother Tabai, JSC and I agree with him that the appeal should be dismissed. Cornelius Paul Obusez was assassinated on 29th May, 1988. The appellants were his full brothers. As a matter of fact, the 1st appellant was his twin brother. The 1st respondent was the wife of Obusez. She was charged along with other persons for the murder of her husband. She was discharged.

Obusez died intestate leaving behind the 1st respondent, his five children and the appellants. Obusez and 1st respondent were married in accordance with the provisions of the Marriage Act, 1958 on 8th July, 1972.

F

The 1st respondent as plaintiff filed an action for a declaration that the 1st respondent and her children are the only persons entitled to the estate of Obusez. They also asked for a grant of Letters of Administration in solemn form for the administration of the estate by the 1st respondent. In the suit, the appellants counter claimed for an order authorizing them to apply for letters of administration of the estate of their late brother to the exclusion of the 1st respondent.

G

H

The learned trial Judge granted the reliefs of the respondents and refused the counter claim. An appeal to the Court of Appeal was dismissed. They have come to this court. They formulated three issues for

determination. So too the respondents.

The fulcrum of the case of the appellants is that section 36 of the Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 did not apply in the case. On the contrary, the case of the respondents is that section 36 is applicable. Both parties have argued in respect of the section as well as section 49(5) of the Administration of Estate Law of Lagos State (Cap.2) vis-à-vis the Constitution of the Federal Republic of Nigeria, 1979.

For ease of reference and understanding, I should produce here the ipsissima verba of section 36(a) of the Marriage Act, section 49(5) of the Administration of Estate Law of Lagos State and items 60 and 67 of the Exclusive List in the 1979 Constitution.

Section 36(a) provides in part:

“(1) Where any person who is subject to customary law contract a marriage in accordance with the provisions of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance: The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any customary law to the contrary notwithstanding...”

Section 49(5) which is similarly worded, also provides in part:

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

In *Salubi v. Nwariaku* (2003) 20 WRN SC. 53, Ayoola, JSC succinctly brought out the difference between the two statutes:

“The only difference in the two provisions is that while section 36(1) of the Marriage Act incorporated the English law (fixed at the date of commencement 1914) into our laws of intestate succession by reference, the later statute has directly and not by reference substantially incorporated the contents of the 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 portions underlined clearly show the difference as indicated by Ayoola, JSC.

The two items in the Exclusive Legislative List in the 1979 Constitution read:

60. *The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto.”*

67. *Any matter incidental or supplementary to any matter mentioned elsewhere in this list”*

It is the argument of learned counsel for the appellants that as section 36 deals with a matter falling within the exclusive legislative list in the 1979 Constitution no state has the legislative competence to enact a law to the same effect. He submitted that any legislation on incidence of marriage other than marriage under Islamic or customary law fails within the matters covered by items 60 and 67 thereof. Counsel for the respondents did not see the matter in the same way. He submitted that section 49(5) provides essentially for succession to intestate property and does not purport to legislate on incidence of marriage which falls within matters covered by item 60 and 67 of the Exclusive Legislative List of the 1979 Constitution.

I am with counsel for the respondents. I go along with him because the submission is clearly borne out from the provisions of the statutes vis-à-vis the Constitution. I entirely agree with learned counsel that section 49(5) does not legislate on incidence of marriage but on succession to property of a person who dies intestate. There is a world of difference between the two and they cannot be put together.

The function of a court of law is to interpret the provisions of the

Constitution in the clear tenor of the words contained in it. A court of law has no jurisdiction to import into the Constitution or impute into the Constitution words which are not used therein. That will not bring out the intention of the makers of the Constitution and it is the duty of the court to interpret the Constitution in line with the words used and the intention of the makers of the Constitution.

In the light of the foregoing, I entirely disagree with learned counsel for the appellants that by items 60 and 67 of the Exclusive Legislative List of the 1979 Constitution, the issue before the court is expressly reserved for the National Assembly to the exclusion of the State House of Assembly. Accordingly, I hold that the cases cited by counsel on pages 10 and 11 of the brief are not relevant.

I should now consider whether section 36(a) anticipates the appellants. It does not. The subsection provides for the application of English law and that was the decision in *Cole v. Cole* (1898) 1 NLR 15 which the Court of Appeal correctly referred to. The second part is whether customary law applies in the distribution of the estate of Obusez. The answer is, No. By contracting the marriage under the Marriage Act, the deceased intended the succession to his estate under English law and not under customary law. I realize that two of the appellants' claims of succession to the estate were based on the fact that the deceased was buried in the personal residence of the 1st appellant and the life policy of the deceased where he made his first and second children and the 1st appellant as beneficiaries.

I know of no law, which says that, succession to property is determined by the place of burial of the deceased intestate or by a life policy made inter vivos. The fact that the deceased did not make the 1st respondent a beneficiary of his life policy does not mean that she cannot benefit under section 36(a) of the Act. Conversely, the fact that 1st appellant is a beneficiary of the life policy does not ipso facto make him a beneficiary of the estate of his twin brother.

I think I can stop here. It is in the light of the above and the more detailed reasons given by my learned brother, Tabai JSC that I too dismiss the appeal. I abide by the order as to costs in the judgment of my

learned brother.

MUKHTAR JSC

This is an appeal from the decision of the Court of Appeal, Lagos B division, an appeal having gone there from the decision of the High Court of Lagos State, holden at Ikeja. The reliefs sought by the plaintiffs, who are the respondents in this appeal are as follows:-

“(i) A declaration that the 1st plaintiff and her five children are C the only persons entitled to the estate of the late Cornelius Paul Obusez and

(ii) An order that a Grant of Letters of Administration of the said estate be issued to Mrs. Sylvia Techla Obusez and Ademola Giwa.”

The defendants who are the appellants in this court counter-claimed D as follows in their joint statement of defence:-

“1. A declaration that the defendants are the only persons entitled to, administer the Estate of the late Cornelius Paul Obusez.

2. An order that a grant of Letters of Administration in solemn E form for the Administration of the said estate be issued to Defendants herein.”

The plaintiffs succeeded in their claim, but the claim of the defendants was dismissed, and they appealed and failed in the Court of Appeal, F after which they have appealed to this court on eight grounds of appeal, from which the appellants distilled three issues for determination. Two of the three issues revolve around the provision of Section 36 of the Marriage Act and Section 49 (5) of the Administration of Estates Laws of Lagos State, and indeed the administration of the 1st plaintiffs deceased husband estate was the bone of contention in the lower courts. I will G illustrate this fact by reproducing the relevant paragraph of the appellants/plaintiffs Statement of Claim which reads as follows:-

‘2. The intestate was survived by his widow the 1st plaintiff to H whom he was married in his life time in accordance with the provisions of the Marriage Act on the 8th day of July, 1972. In addition, the intestate was also survived by five children of the said marriage.....

4. The plaintiffs admit that the Defendants are brothers of the intestate but deny that either of the said defendants has any interest whatsoever in his (the intestate's) estate.

Issues were joined with the averments of the 1st defendant/appellant in the Statement of Defence. The relevant averments read thus:-

"2. The 1st Defendant is not in a position to deny or to admit paragraphs 2 and 3 of the Statement of Claim but puts the plaintiffs on the strictest proof of the fact averred therein.

5. The 1st Defendant admits paragraph 4 of the Statement of Claim only to the EXTENT that the 1st Defendant is a twin brother of the deceased but denies that the 1st Defendant did not have any interest whatsoever in the intestate of the deceased.

6. The 1st defendant avers that the Management administration and distribution of the estate of the deceased who died intestate are regulated and governed by Agbor Law and Custom irrespective of whether or not the intestate married under the Marriage Act.

7. The 1st Defendant avers that under the Agbor Native Law and Custom non of the plaintiffs is entitled to the benefit, enjoyment and administration of the estate of the deceased intestate."

The 1st plaintiff/respondent proved that she was married to her deceased husband under the Marriage Act, for she did produce a Certified True Copy of the Marriage certificate which was admitted in evidence as Exhibit 1. Having so proved, it became clear that her marriage was subject and governed by the provision of the Marriage Act.

In the case of *Salubi v. Nwariaku* 2003 20 WRN SC. 53 the provision of Section 36 of the Marriage Ordinance vis-à-vis that of Section 49 (5) of the Administration of Estate Law (Cap 2) was considered at length, and Ayoola JSC in the course of the Judgment stated thus:-

"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 Estate 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 intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding". B

The only difference in the two provision is that while Section 36 (1) of the Marriage Act, incorporated the 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 content 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". C

The above case is the authority on the interpretation of the supra D sections and the mode of the distribution of the estate of a person who is married under the marriage Act and who dies intestate, and it has remained so, and the need to depart from the authority has not arisen in this case. In this wise the appeal lacks merit and should be dismissed. The E lead judgment delivered by my learned brother Tabai JSC has thoroughly dealt with the issues raised. I am in full agreement with the lead judgment, and also dismiss the appeal. I abide by the consequential order made therein. F

MOHAMMED JSC

This appeal is against only part of the decision of the Court of G Appeal Lagos Division delivered on 7th June, 2001.

The dispute between the parties relates to the estate of the deceased Cornelius Paul Obusez of No. 17 Obokun Street Ilupeju Lagos who died intestate at Lagos on 29th May, 1988. The deceased was survived by his widow, the 1st plaintiff/respondent to whom the deceased H was married under the Marriage Act on 8th July, 1972 and five children of the marriage. The defendants/appellants are brothers of the deceased. The plaintiffs/appellants were at the Lagos State High Court in their ac-

tion against the defendants/appellants claiming -

i. A declaration that the 1st plaintiff and her five children are the only persons entitled to the estate of the late Cornelius Paul Obusez; and

ii. An order that a Grant of Letters of Administration in solemn
B form for the administration of the said estate be issued to Mrs. Sylvia Teckia Obusez and Ademola Giwa Esq.

The defendants/appellants in their defence to the claims against them, not only put up their defence thereto but also put up a counter-
C claim for an order authorising them as brothers to the deceased to apply for grant of Letters of Administration authorising them to administer the estate of their deceased brother to the exclusion of the plaintiffs/respondents. The trial court after hearing the claims and counterclaims of the parties, granted the reliefs sought by the plaintiffs/respondents and dis-
D missed the counter-claim of the defendants/appellants. The appeal of the defendants/appellants to the Court of Appeal against the refusal of the trial High Court to grant them Letters of Administration to administer the estate of their deceased brother, was again dismissed giving rise to their
E present final appeal to this court.

In the determination of this appeal, the three issues identified in the appellants' brief of argument were adopted by the respondents in their respondents' brief of argument. Arising from these issues, is the question
F of whether or not the learned counsel to the appellants had succeeded in his arguments in persuading this court sitting as a full court, to depart from its decision in the case of Solubi v. Nwariaku [2003] 7 N.W.L.R. (pt. 819) 426 as it affects the applicability of Native Law and Custom to the administration of estate of the deceased in the present case who while
G married to the 1st respondent under the Marriage Act, died intestate. The answer to the question in my view is in the negative. In other words both the trial court and the court below were right in refusing to accommodate the defendants/appellants in their counter-claim seeking for the grant
H of Letters of Administration of the estate of their deceased brother. Although the 1st defendant/appellant is a beneficiary under the Life Policy Insurance of his deceased brother forming part of the estate of the deceased, that alone does not give him 36 of the Marriage Act and section

49(5) of the Lagos State Administration of Estate Law, over the spouse and children of the deceased who while married under Marriage Act, died intestate.

In the result, I entirely agree with my learned brother, Tabai, J.S.C., in his leading judgment that this appeal is without merit. Accordingly the appeal is also dismissed by me. B

There shall be no order as to costs.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal No. CA/L/109/97 delivered on the 7th day of June, 2001 in which it affirmed the decision of the trial court delivered on the 17th day of March, 1992 in favour of the respondents then plaintiffs. D

The respondents, as plaintiffs, instituted suit No.ID/1064/91 in the High Court of Lagos State holden at Ikeja Judicial Division in which they claimed the following reliefs:-

“(i) A declaration that the 1st plaintiff and her five children are the only persons entitled, to the estate of the late Cornelius Paul Obusez, and

(ii) An order that a Grant of Letters of Administration in solemn form for the administration of the said estate be issued to MR. SILVIA TECKLA OBUSEZ and ADEMOLA GIWA ESQ.” F

On the other hand, the appellants, as defendants, counter claimed against the plaintiffs/respondents in the following terms:

“1. A declaration that the defendants are the only persons entitled to administer the estate of the late Cornelius Paul Obusez.” G

2. An order that a grant of Letters of Administration in solemn form for the administration of the said estate be issued to the Defendants herein.”

The facts of the case include, the following: One Cornelius Paul Obusez, now late got married to the 1st respondent under the Marriage Act sometime in 1972. He, however, died intestate on the 29th day of May, 1988 while residing at No 17 Obokun Street, Ilupeju, Lagos State H

survived by his widow, the 1st respondent. Late Cornelius Paul Obusez was also survived by five children of the marriage. The appellants are brothers of the late Cornelius Paul Obusez with the 1st appellant as his twin brother in whose residence the body of the late Cornelius Paul Obusez was buried and who was also named a beneficiary in the life policy of the said late Obusez.

While the case of the respondents is grounded on Intestacy under English law, that of the appellants is based on Agbor native law and custom said to be applicable to the deceased on his death intestate, particularly as the deceased and the appellants are natives of Agbor.

Learned Counsel for the appellants has submitted the following issues for determination in the appellants' brief filed by A. ONONIKOKO Esq:-

“1. Whether section 36 subsections (1), (2), & (3) of the Marriage Act, and section 49(5) of the Administration of Estates Law, Laws of Lagos State which both confer a right on surviving spouse married under the Marriage Act, to one third of the estate of the spouse who died intestate in this case, are concurrent statutory provisions on incidence of non customary or Islamic marriage (Grounds 2, 3 & 4). If yes,

2. Whether section 36 subsection (1) and (3) of the Marriage Act, falls within items 60 and 67 of the Exclusive Legislative List under the Constitution of the Federal Republic of Nigeria, 1979 as to render a similar provision under section 49(5) of the Administration of Estate Law, Laws of Lagos State inconsistent with the Marriage Act, as impliedly repealed, and therefore null and void by virtue of section 4(3) and (5) of the Constitution; (Ground 5)

3. Whether the judgment of the lower court which affirmed exclusion of appellants as persons entitled to administer the estate of the deceased Cornelius Obusez occasioned a miscarriage of justice (Grounds 6, 7 and 8).”

It is the submission of learned counsel for the appellants that the decision of this Court in SALUBI VS NWARIAKU (2003) 20 WRN S.C 53 should be departed from in this appeal because the incidence of marriage under the Marriage Act upon a surviving spouse is a matter falling

within the exclusive legislative list under items 60 and 67 of the 1979 Constitution applicable to the facts of this case; that this argument was not canvassed in Salubi's case; that it is only in respect of marriage under Islamic Law and Customary law that a legislative power has been conferred upon states as against the federal government to provide for incidence of such marriage. B

Learned Counsel further submitted that section 36(1) of the Marriage Ordinance (now Act) which hitherto dealt with such incidence of marriage under the Act was expressly limited in its application to residents of the colony of Lagos who married under the Marriage Act, section 36(3) of the Marriage Ordinance; that the equivalent provision to section 36 of the Marriage Act, is section 49(5) of the Administration of Estates Law, Laws of Lagos State which is a nullity being a legislation which is ultra vires the legislative competence of Lagos State House of Assembly by virtue of section 4(3) and (5) of the 1979 Constitution; that it is only the National Assembly can re-introduce or extend the provision of section 36 of the Marriage Ordinance to the whole federation, and until it is so legislated the provision is deemed impliedly repealed, particularly as the Colony of Lagos to which it was hitherto made applicable has ceased to exist with the creation of Lagos State in 1967. C D E

Learned Counsel then submitted that the position being as above stated, it follows that the Customary Law of Agbor, which was the law to which the intestate was subject in his life time, applies to the facts of this case by virtue of section 1(3) of the Administration of Estates Law, Laws of Lagos State; that under the said Customary Law the brothers of the deceased have priority of appointment as administrators of his estate; that if the lower court had properly directed itself the grant of letters of administration to the 1st respondent along with the 2nd respondent, who is a total stranger to the deceased family to the exclusion of the appellants would not have been made and that the grant was a wrong exercise of discretion resulting in a miscarriage of justice and a derogation from the appellants' Constitutionally guaranteed right to family life; that the lower courts in refusing the counter claim of the appellants, erroneously guided themselves by the English concept of (nuclear) family as against African F G H

concept of family and urged the court to allow the appeal.

On her part, learned counsel for the respondents, E. O. ETOMI (MRS) in the Respondent's brief of argument deemed filed on 1/2/07 submitted that the decision of this Court in Salubi vs Nwariaku's case should not be departed from because the issue as to the incidence of Marriage under the Marriage Act falling within the Exclusive Legislative List under items 60 and 67 of the 1999 Constitution does not arise in this case; that the applicable law in the instant case is the succession to inter-state properly which at all times material to this case was section 49(5) of the Administration of Estates Law duly enacted by the competent legislature; that although section 36(1) of the then Marriage Ordinance which hitherto dealt with Marriage under the Act, was expressly limited in its application to residents of the Colony of Lagos who married under the Act; section 49(5) of the Administration of Estates Law of Lagos State which is the applicable law to the deceased had no such limitation as the Colony of Lagos no longer exists; that the said section 49(5) of the Administration of Estates Law of Lagos State is not a nullity as it never purported to legislate on a matter outside its competence and deals only with succession to intestate properly applicable to the whole of Lagos State; that there is no basis for the application of the customary law of Agbor to the deceased since he was at all times material to this case married under the Marriage Act and resident within Lagos State where section 49(5) of the Administration of Estates Law is applicable in determining succession to his property; that it is under section 49(5) of the Administration of Estate Law and the non-contentious Probate Rules that the 1st and 2nd respondents were granted Letters of Administration of the deceased's estate and urged the court to dismiss the appeal.

Now section 49(5) of the Administration of Estates Laws, Cap. 2 Laws of Lagos State provides thus:-

“(5) Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Act 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 of by will shall, be distributed in accor-

dance with the provisions of this law, any customary law to the contrary notwithstanding.....”

It is not disputed that the deceased and the 1st respondent were married under the Marriage Act in 1972 but that prior to that marriage both parties were subject to customary law with the deceased being particularly subject to Agbor customary law. It follows, therefore, that by virtue of the said marriage and upon the death of the deceased intestate the provisions of the Administration of Estates Law Laws of Lagos State becomes applicable particularly as the deceased and 1st respondent together with the children of the marriage resided in Lagos State at the time of the death of the deceased intestate. It is very clear from subsection 5 of section 49 of the said law that the intention of the law maker is that customary law be excluded in relation to the estate of persons to which the subsection applies. It is also very clear that the above provision deals with succession to intestate property of a person married under the Marriage Act who died intestate while residing within Lagos State and is consequently within the legislative competence of the enacting authority.

To me it does not matter whether section 36(1) of the Marriage Act (Cap. 115) Laws of the Federation of Nigeria 1958 which was applicable to the former Colony of Lagos had been repealed or not as section 49(5) of the Administration of Estates Law of Lagos State is the applicable law and both of them, as submitted by learned counsel for the appellants in his brief of argument, “*enact that in the event of a spouse married under the Act, dying intestate and being survived by his spouse and children, the surviving spouse shall succeed to two thirds thereof and that this automatically makes the spouse a beneficiary of the estate and a qualified person to apply for letters of administration of the estate of the deceased spouse.*” See paragraph 4.3 of the said brief. The position of the law as regards the application of section 49(5) of the Administration of Estates Law of Lagos State is clearly stated in the judgment of AYOOLA, JSC in the case of Salubi vs Nwariaku (2003) 20 WRN S.C 53 at 69 as H follows:-

“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 incorpora-

tion of English Law by reference. The provisions of section 49(5) of the Administration of Estate 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 a provisions of this Law that is the Administration of Estate Law and not English Law or Customary Law.”

I hold the view that both sections 36(1) of the Marriage Act and 49(5) of the Administration of Estates Law of Lagos State deal with succession to intestate property and have nothing to do with any form of marriage settlement or incidence of marriage and that section 49(5) in particular has nothing to do with matters falling within the exclusive legislative list under the 1979 Constitution particularly items 60 and 67 thereof. The facts of this case being as they are, there is no basis for the invitation by learned counsel for the appellants for this Court to revisit its decision in the case of SALUBI VS NWARIAKU supra as the facts and principles of law stated therein are applicable to the facts and principles of law relevant to the determination of the instant case. The deceased by contracting marriage under the Act opted out of the system of Customary Law of succession in case of intestacy.

In conclusion I agree with the lead judgment of my learned brother TABAI, JSC that the appeal is without merit and should be dismissed. I order accordingly. I abide by the consequential orders contained in the said lead judgment including the order as to costs.

Appeal dismissed.

G

H