

SUPREME COURT OF NIGERIA
FRIDAY 19TH APRIL, 2013. SC. 135/2004
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC

EDWARD OMORODION UWAIFO APPELLANT
AND
1. STANLEY UYINMWEN UWAIFO
2. MRS ELIZABETH EHEZOGHE
IGBINOVIA
3. MRS GRACE EBENOVBEVBE
KASIM
4. MRS LOVETH AIZE EMOKPAE
5. MRS AGHATISE UWAIFO RESPONDENTS
6. MISS JOY AGHAMUOKU UWAIFO
7. GREGORY SAMUEL O. IZEBUHE
8. ATEWE O. UWAIFO
9. BENJAMIN O. EHENUWA
10. THE PROBATE REGISTRY
EDO STATE
11. DAVID UWAIFO

CUSTOMARY LAW - Bini native law - Igiogbe - Ogbanon's case - By this custom an eldest son of a deceased is entitled - To inherit without question - The house in which deceased lived and died (H1)

JUDICIAL PRECEDENTS - Stare decisis - Application - Appellant should not expect CA to prefer dictum of HC judge - Over that of a judge in an appellate court - As the doctrine does not operate in such a manner (H2)

ADMINISTRATION OF ESTATES - Wills - Bini native law - Deceased's will is voided only to the extent - That Igiogbe was not bequeathed to appellant as eldest son - But other parts of the will are valid (H3)

FACTS

The deceased (Daniel Ediagbonya Uwaifo) lived and died in his house i.e. Igiogbe at No. 4 Ohuoba Street, Benin City as a Bini

man subject to Bini Customary Laws. In his life time he built another house within the same compound of which he gave out to tenants and personally collected rents. After the final burial rites of the deceased, plaintiff/appellant (deceased's eldest son) was informed for the first time that his late father made a will which was later read at the Probate Registry of the Benin City High Court. The deceased had in the said will, shared the two houses to his other children excluding appellant.

Appellant considered this as an unfair treatment. Hence, he filed this action at the High Court of Edo State Benin City, challenging the validity of the will having regard to the provision of Section 3(1) of the Wills Law of Bendel State of Nigeria 1976. Appellant inter alia claimed further that under the Bini native law, Igiogbe can never be shared to any person other than deceased's eldest son. At the end of hearing, the court in its judgment granted some of appellant's claims. The Igiogbe was awarded to appellant. Appellant appealed to the Court of Appeal Benin City against parts of the judgment that did not favour him. The court dismissed appellant's appeal and affirmed the trial court's judgment. Aggrieved, appellant further filed appeal to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in affirming the Judgment of the trial High Court to the effect that vacant land under Benin Customary Law cannot constitute Igiogbe and thereby failed to follow its earlier decision in IGBINOBA VS. IGBINOBA (1995) 1 NWLR (PART 317) 375."

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

CUSTOMARY LAW - Bini native law - Igiogbe

1. In Bini Native Law and Custom, an Igiogbe is a custom of a general application and it is judicially noticed as such.

Notably, the most recent of all cases on the vexed question of Igiogbe is OGBANON V. REGISTERED TRUSTEES CCC. CA (2002) 1 NWLR (Pt. 749) 675; though a decision of the Court of Appeal, it has helped further to throw light on the point.

The court held at page 713 thus:

“Under Benin Native Law and Custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as “Igiogbe” in which the deceased/testator lived and died...”

These plethora of authorities have left no one in doubt that Igiogbe in Benin Customary Law is a principal house where a deceased Benin man lived and died. This is an ancestral home. It is not vacant land whether or not adjacent.

(p. 1748 E)

JUDICIAL PRECEDENTS - Stare decisis - Application

2. It was a very grave error for the Appellant to have taken Justice Obi’s dictum in Igbinoibia’s case and ascribe it as the view of the Court of Appeal, on which the panel which heard the instant appeal at the Court of Appeal would have relied. The doctrine of stare decisis does not operate in this manner. It would be invidious for the Appellant to expect the Court of Appeal to rely and follow what a Judge in the High Court said in preference to what another Judge said yet in the appellate court. The Appellant cannot expect the Court of Appeal in this case to have followed a non existent dictum and/or ratio in another Court of Appeal case (i.e. IGBINOBA’s case).

(p. 1748 H)

ADMINISTRATION OF ESTATES - Wills - Bini native law

3. It is my firm view, therefore that the entire will of the Appellant’s late father. Pa Daniel Ediagbonya Uwaifo, who lived and died and was buried as a Bini man, cannot be voided simply because the “Igiogbe” was bequeathed to someone else’ In this case, the deceased had bequeathed his property including the “Igiogbe” to other beneficiaries in his will (Exhibit A.). As the learned trial judge had rightly observed, and I agree, there is no customary law against devising the Igiogbe by Will to the rightful beneficiary, that is, the first surviving son, but it is against Bini Customary Law to disinherit the eldest son of the Igiogbe as was done in this case or to share it to others. In view of this the learned trial Judge rightly held that the Will is

invalid only to the extent that House No. 4 Ohuoba Street, declared as the Igiogbe was devised to persons other than the Appellant; and the entire Will cannot be voided on the sole ground that the Igiogbe was so devised. As long as the Custom of Bini people prevent a Testator from devising his Igiogbe to any other person other than his eldest son, to that extent the Will of Pa Daniel Ediabonya is invalid. However, the deceased's Will is not invalid in its entirety. The other parts of the Will could be "saved" which is what the learned trial Chief Judge did in this case. (p. 1749 C)

REPRESENTATION

S. Iredia Osifo Esq., for the Appellant
 Chief Osaheni Uzamere Esq., for 1st - 9th Respondents.
 D F. I. Monyei (Mrs.) Deputy Director, Ministry of Justice Edo State)
 with F. N. Edokpolor (Mrs.) (Principal State Counsel Ministry of Justice Edo State), for 10th Respondent

CASES REFERRED TO

E Igbinobia v. Igbinobia (1995) 1 NWLR (pt. 317) 375
 Arase v. Arase (1981) NSC 101
 Egharevba v. Okunghae (2001) 11 NWLR (pt. 724) 318
 Osula v. Osula (1995) 1 NWLR (pt. 544) 20
 Agidigbi v. Agidigbi (1996) 6 NWLR (pt. 454) 30
 F Imade v. Otabor (1998) 4 NWLR (pt. 544) 20
 Ogbanon v. Rgd. Trustees CCC. CA (2002) 1 NWLR (pt. 749) 675
 Idehen v. Idehen (1991) LRCN 1590
 Oke v. Oke (1947) 3 SC 1
 G Arase v. Arase (1981) 5 SC 33

STATUTES REFERRED TO

Wills Law Cap 172 of Bendel State 1976, s. 3(1)

LEAD JUDGMENT BY GALADIMA JSC

This case arose from what the Appellant as Plaintiff considered unfair treatment meted out to him by his late father (Pa Daniel Ediabonya Uwaifo) in his will by which he shared his estate to his children but disinherited the Appellant thereby denying him his right

to inherit his father's "IGIOGBE" as his first son. Late Daniel Ediagbonya Uwaifo lived and died on 2918185 in his house at No. 4 Ohuoba street, Benin city as a Bini man subject to Bini Customary Laws. In his life time he built another house in the same compound at No. 4 Ohuoba Street, Benin city and gave this No.2 out to tenants and personally collected rents. However in June 1975 these two houses were shared to other children which excluded the Appellant.

After the completion of his father's final burial ceremony, Appellant was informed for the first time that his father made a will which was later read at the Probate Registry of the Benin City High Court. It now dawned on the Appellant that he had been completely disinherited by his late father. It is against this background that the Appellant went to the High Court and filed this action challenging the validity of the will having regard to the provision of Section 3(1) of the Wills Law of Bendel State of Nigeria 1976 which is still applicable in Edo State. Pleadings were ordered and exchanged and subsequently amended. By paragraph 17 of the Amended statement of claim, the Appellant as Plaintiff claimed against the Respondents as Defendants jointly and severally as follows:

"a. A declaration that the Will of the Plaintiffs late father Pa Daniel Ediagbonya Uwaifo dated the 26th of June 1975 is invalid, null and void and of no legal effect whatsoever by reason of non-compliance with the Bini Customary Law of succession and section 3(1) of the Wills Law, Cap.172.

b. A declaration that any purported bequest under the said Will of the property at Nos. 2 and 4 Ohuoba Street, Benin City where the Plaintiffs father lived, died was buried (otherwise known as his "Igiogbe") to the defendants is contrary to Bini Native Law and Custom and is therefore null and void.

c. A declaration that under Bini Customary Law, the Igiogbe can never be shared to any person other than deceased's eldest surviving son (in this instance, the plaintiff) and consequently the purported devise of the compound at No. 2 & 4 Ohuoba Street, Benin City by the deceased in his said Will to the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants is null and void and of no effect whatsoever.

N37,385.00 (thirty seven thousand, three hundred and eighty five Naira only) being the rents the Defendants have collected from the twenty-three rooms/stores and one big shop in the "Igiogbe" at

Nos. 2 and 4 Oluoba Street, Benin City for 58 months that is September 1986 to May 1991 at the rate of N655.00 per month.

e. Mense profits of N655.00 (six hundred and fifty five Naira) per month from the said rooms/stores and shop from June 1991 until the date of Judgment.

B *f. An order of perpetual injunction to restrain the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants, their children, servants, agents and or privies from their continued occupation of the compound at Nos. 2 and 4 Oluoba Street, Benin City or any part thereof or any further acts of trespass therein."*

C The case went on to full trial from 22/5/95 to October 2000. On 9/11/2000, the then Learned Trial Chief Judge of Edo State High Court, Hon. Justice C.A.R. Momoh in a well considered Judgment granted some of the Plaintiffs reliefs in paragraph 17 (a) (b) and (c) D of the Amended Statement of Claim with relevant modifications on the following terms:

"(i) That the Plaintiff as the eldest son of the deceased is entitled under Bini Customary Law of inheritance to inherit the house at No. 4 Oluoba Street where the deceased lived and died (other- E wise known as the Igiogbe).

(ii) That the devise in the Will of the deceased dated 26th June 1975 as it relates to the house at No. 4 Oluoba Street, Benin City declared in this Judgment as the Igiogbe, is null and void having F contravened the Bini Customary Law of inheritance and Section 3(1) of the Wills Law Cap. 172 Laws of Bendel State Applicable in Edo State.

(iii) That under Bini Customary Law, the Igiogbe cannot be shared to any person other than the deceased's eldest surviving son G (in this instance, the Plaintiff) and consequently the purported devise of the house No. 4 Oluoba Street, Benin City by the deceased in his said Will to Henry N. S. Uwaifo, Ayenbueze E. Uwaifo. Egbenodenden E. Uwaifo and Nobunse S. Uwaifo are null and void and of no effect whatsoever"

H The Appellant appealed to the Court of Appeal Benin, against the parts of the Judgment of the trial High Court that did not favour him. The sole issue that arose for determination in the Court below from the totality of all the issues considered by the learned trial Chief Judge and arising from the issue joined and canvassed was that:

“Whether the Houses No. 2 and No. 4 Ohuoba Street, Benin City does not form part of the Idiogbe” of Appellant’s late father Pa Daniel Ediabonya Uwaifo who lived as a Bini Man.”

In its reserved Judgment delivered on 21/1/2004, the Court below dismissed the Appellant’s appeal. Dissatisfied, the Appellant further appealed to this Court. The Appellant first filed in his Notice of Appeal three Grounds. However when his Brief of Argument was settled, Appellant dropped two grounds of appeal. From the sole ground one issue as set out in his brief for determination reads thus:

“Whether the Court of Appeal was right in affirming the Judgment of the trial High Court to the effect that vacant land under Benin Customary Law cannot constitute Igiogbe and thereby failed to follow its earlier decision in IGBINOBA VS. IGBINOBA (1995) 1 NWLR (PART 317) 375.”

The 1st to 9th Respondents have adopted the sole issue the Appellant formulated for determination of the appeal. The 10th Respondent only issue formulated for determination is:

“Whether a vacant portion of land constitutes an Igiogbe under Bini Customary Law”.

It would appear that no legal representation has been made on behalf of the 11th Respondent, hence no brief was filed on his behalf. Arguing this issue, Learned Counsel for the Appellant has contended that this issue has never arisen for determination. In other words that this Court has not in his case decided that vacant plot which stands side by side with the house, which constitutes *“Igiogbe cannot form part of the said Igiogbe”*

It is urged on this Court to allow the appeal on this lone issue canvassed in this brief. The learned counsel for the Appellant, however, has conceded in respect of Grounds 2 and 3 of the Appellant’s Grounds of Appeal that since no argument was proffered in support of the said grounds they should be deemed abandoned. On this point learned counsel for the 1st to 9th Respondents has alluded and made the same observations. The said Grounds of Appeal are therefore deemed abandoned and accordingly struck out.

Learned Counsel for the 1st -9th Respondents having adopted the lone issue as formulated by the Appellant, submitted that this is a non-issue because, like the ground of appeal from which it was distilled, is unrelated to the appeal in hand. It was observed that the

Appellant's sole issue in this case is based on the legal principle of stare decisis, which enjoins the lower court to follow the decision of the higher court, was not followed by the two courts below. Learned counsel has however submitted that the court below in *IGBINOBA v. IGBINOBA* (supra) did not decide that vacant land also forms part of Igiogbe under Benin customary Law. That what that case decided is that neither testamentary disposition nor family arrangement can deprive the eldest surviving son of the Igiogbe. In other words, *IGBINOBA V. IGBINOBA* (supra) did not decide the question of vacant land vis-a-vis, the "Igiogbe" concept under Bini Law and Custom. That Ogundere JCA stated in the court below categorically that the vacant land adjacent to the principal or main house in that case was not in issue and therefore did not pronounce on it. It beats the imagination of the Learned Counsel, how the Appellant in his brief, came to the conclusion that the court below decided that an adjoining land to Idigbe is inclusive of Igiogbe in Bini Custom. This Court is urged to uphold and affirm the decisions of the two courts below.

On behalf of the 10th Respondent its counsel canvassed arguments similar to those of the counsel to the 1st to 9th Respondents. He submitted that a vacant portion of the land cannot constitute an Igiogbe under the Bini Native Law and Custom. The learned trial judge therefore had the opportunity of evaluating the evidence led before him and the various authorities cited by the respective counsel and rightly came to that conclusion. It is urged on this Court to dismiss this appeal because the Appellant misapplied the principle of stare decisis in this appeal, bearing in mind the evaluation of the evidence led at the trial High Court.

I have carefully considered and examined some of the authorities cited in reliance and in support of the various submissions made by the respective counsel. The sole issue raised by the Appellant in this appeal is based on the doctrine of stare decisis, which in essence, enjoins the lower court to follow the decisions of the Higher Courts. Appellant's main grouse in this appeal is on the ground that the court below failed to follow its decision in *IGBINOBA V. IGBINOBA* (1995) 1 NWLR (Pt.371) 375 at 381. I shall come to the case law later in the course of this Judgment. However, the Appellant's claim against the Respondents at the trial High Court Benin City wherein he was the Plaintiff as has been elaborately set out earlier, was for a

declaration, among other things, that the will of his father is invalid null and void and of no effect whatsoever because it failed to comply with the Bini Customary Law of succession and Section 3(1) of the will Law Cap 172 and that the purported bequest under the said will is contrary to Bini Native Law and Custom and it is therefore null and void. It is also worthy to note that the learned trial judge in a considered Judgment granted some of the important reliefs sought in the following terms.

“The Plaintiff is entitled to the orders sought in paragraph 17(a), (b) and (c) of the Amended Statement of Claim with relevant modifications and it is hereby declared as follows:

That the Plaintiff as the eldest son of the deceased is entitled under BINI Customary Law of inheritance to inherit the house at No. 4 Oluoba Street where the deceased lived and died (otherwise known as the Igiogbe).

(i) That the devices in the will of the deceased dated 26th June 1975 as it relates to the house at No. 4 Oluoba Street, Benin City declared in this Judgment as the Igiogbe, is null and void having contravened the Bini Customary Law of inheritance and Section 3 (1) of the Wills Law Cap. 172 Laws of Bendel State applicable in Edo State.

(ii) That under Bini Customary Law the Igiogbe cannot be shared to any person other than the deceased’s eldest surviving son (in this case, the Plaintiff) and consequently the purported devise of the house No. 4 Oluoba Street, Benin City by the deceased in his said Will to Henry N. E. Uwaifo, Ayanbueze E. Uwaifo, Egbenodenden E. Uwaifo and Nobunse E. Uwaifo are null and void and of no effect whatsoever.”

Again the lower court (Court of Appeal Benin) affirmed the entire decision of the lower trial court. I am obliged to set out the conclusion reached in that decision on pp. 238 - 239 of the Records thus:

“The entire Will cannot therefore be voided simply because the Igiogbe was bequeathed to someone else. In this case, the deceased had bequeathed his property, including the Igiogbe to other beneficiaries in his Will (Exhibit A).

As the learned trial judge rightly observed, there is no customary law against devising the Igiogbe by WILL to the rightful ben-

efficient viz. the first surviving son but it is against Bini Customary Law to disinherit the eldest son of the Igiogbe as was done in this case or to share it to others. Consequently, she held and I agree with her that the Appellant was entitled to the Declaration she made that the WILL is invalid only to the extent that house No. 4 Ohuoba Street, declared as the Igiogbe, was devised to persons other than him; and that the entire WILL cannot be voided on the sole ground that the Igiogbe was so devised. That is the correct statement of the law on this issue. Since the custom of the Bini people prevent a Testator from devising his Igiogbe to any other person other than his eldest son, to that extent, Pa Daniel Ediagbonya Uwaifo's WILL is invalid. As Belgore JSC pointed out in Idehen V. Idehen (supra), at his death, the Igiogbe was no longer his to give away. However, the WILL is not invalid in its entirety - See: Lawal - Osula v. Lawal - Osula (supra), where he, Belgore JSC, also held that the other parts of the WILL could be saved, which is what the learned trial judge so ably did in this case. I agree with the Respondents that she arrived at a correct decision in this case. I must commend her for the deft manner in which she applied the numerous authorities cited to the case at hand."

As earlier stated the Judgment of the lower court set out above is being faulted on the ground that that court failed to follow its earlier decision in IGBINOBA V. IGBINOBA (supra). Learned Counsel for the 1st -9th Respondents in their brief has set out two subsidiary issues which will conveniently determine the sole issue raised in the appeal. These subsidiary questions are:

- (a) Did the Court of Appeal in IGBINOBA V. IGBINOBA (supra) decide that under Bini Customary Law, vacant land can also constitute Igiogbe?
- (b) Can the Court of Appeal still follow its earlier decision on a point which had been overruled by the Supreme Court under the doctrine of stare decisis?

Considering the first leg of the sub issue, I must straight-away say that the Court of Appeal did not decide in IGBINOBA V. IGBINOBA (supra) that vacant land also constitutes Igiogbe under Benin Customary Law. The court decided that neither testamentary disposition nor family arrangement can deprive the eldest surviving son of Igiogbe. It would appear (and I agree with the learned counsel for the Respondents) that the Appellant herein at the trial court, in his address

at page 150 of the Record had erroneously ascribed to the Court of Appeal in the case of (IGBINOBA V. IGBINOBA) what the trial Judge (Obi J.) said. In other words he sought to substitute what Obi J. said for what the Court of Appeal per Joseph D. Ogundare JCA actually said. Since the Appellant has placed great reliance on this case there is need to put the Records straight, and resist the temptation of quoting the learned Justice, who read the leading Judgment in that case, out of context. Appellant quoted copiously in his brief at pages 5 - 6, what the trial Justice Obi said in Igbinoba's case. The findings made by the said trial Judge which Ogundare JCA reproduced at pages 377-378 of the report read as follows:

"It is acknowledged that as the eldest surviving son of his father the Plaintiff is entitled under Bini Native Law and Custom, to inheritance of the said house or Igiogbe, but the sharing carried out by the family seemed to have circumscribed his ownership of it, but two important qualifications which had the effect of derogating from his absolute ownership of it and this has resulted in the trouble between the parties..."

The "derogations" Obi J. referred to were the two rooms in the Igiogbe shared to the second son and the adjoining vacant land also shared to the second son. At page 9 of his brief of argument, the Appellant reproduced the final order of the trial Court, in IGBINOBA V. IGBINOBA (supra). However it is observed that when the Appellant wanted to quote OGUNDARE JCA's reaction to Obi J's observations; he stopped short of what the said OGUNDARE actually said. At page 380 F this is what he said:

"In short the whole appeal is on the relevant Bini Customary Law of succession and the right of first surviving male child thereunder."

At page 381 C - D he continued:

"I have deeply thought and consideration to the Record of Proceedings in the court below as well as the briefs of the parties. The two parties talked about one address, the defendant/appellant and his witnesses did not say that there was any empty land of the deceased outside No.139, Lagos Street. The argument therefore goes to no issue."

My task has been simplified by the Supreme Court decision in Idehen V. Idehen which established beyond peradventure that

neither testamentary deposition, much less family elders arrangement, can deprive the eldest surviving son of the Igiogbe, the house in which his deceased father lived and died. The Supreme Court cited with approval its earlier decision in Arase V. Arase (1981) 5 SC. 33; Oke V. Oke (1974) 3 SC 1; Olowu V. Olowu (1985) 3 NWLR (pt.13) 372."

It is to be noted that from the above passage, it is quite clear that "vacant land" was not an issue considered by the Court of Appeal, Benin in IGBINOBA case (supra). Since it was not an issue before that court, it did not pronounce on the point. I agree with the learned counsel for the Appellant that the subsequent Court of Appeal decisions could not be expected to rely on its past decisions on a point not earlier pronounced upon. What the Court of Appeal did in the case was simply to follow the earlier well established decisions beginning from Arase v. Arase (1981) NSC 101; 5 SC 33; Idehen V. Idehen (1991). The Court of Appeal in IGBINOBA V. IGBINOBA (supra) did not go beyond the established law that no one can derogate from the eldest son's exclusive title to his father's Igiogbe upon final rites of "UKONWEN".

In Bini Native Law and Custom, an Igiogbe is a custom of a general application and it is judicially noticed as such. See EGHAREVBA V. OKUNGHAE (2001) 11 NWLR (Pt.724) 318; Lawal - Osula V Lawal - Osula (1995) 1 NWLR (Pt. 544) 20, AGIDIGBI V. AGIDIGBI (1996) 6 NWLR (Pt.454) 30 and IMADE V. OTABOR (1998) 4 NWLR (Pt. 544) 20. ***Notably, the most recent of all cases on the vexed question of Igiogbe is OGBANON V. REGISTERED TRUSTEES CCC. CA (2002) 1 NWLR (Pt. 749) 675; though a decision of the Court of Appeal, it has helped further to throw light on the point. The court held at page 713 thus:***

"Under Benin Native Law and Custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as "Igiogbe" in which the deceased/testator lived and died..."

These plethora of authorities have left no one in doubt that Igiogbe in Benin Customary Law is a principal house where a deceased Benin man lived and died. This is an ancestral home. It is not vacant land whether or not adjacent.

It was a very grave error for the Appellant to have

taken Justice Obi's dictum in Igbinoibia's case and ascribe it as the view of the Court of Appeal, on which the panel which heard the instant appeal at the Court of Appeal would have relied. The doctrine of stare decisis does not operate in this manner. It would be invidious for the Appellant to expect the Court of Appeal to rely and follow what a Judge in the High Court said in preference to what another Judge said yet in the appellate court. The Appellant cannot expect the Court of Appeal in this case to have followed a non existent dictum and/or ratio in another Court of Appeal case (i.e. IGBINOBA's case).

It is my firm view, therefore that the entire will of the Appellant's late father. Pa Daniel Ediabonya Uwaifo, who lived and died and was buried as a Bini man, cannot be voided simply because the "Igiogbe" was bequeathed to someone else' In this case, the deceased had bequeathed his property including the "Igiogbe" to other beneficiaries in his will (Exhibit A.). As the learned trial judge had rightly observed, and I agree, there is no customary law against devising the Igiogbe by Will to the rightful beneficiary, that is, the first surviving son, but it is against Bini Customary Law to disinherit the eldest son of the Idiogbe as was done in this case or to share it to others. In view of this the learned trial Judge rightly held that the Will is invalid only to the extent that House No. 4 Oluoba Street, declared as the Igiogbe was devised to persons other than the Appellant; and the entire Will cannot be voided on the sole ground that the Igiogbe was so devised. As long as the Custom of Bini people prevent a Testator from devising his Igiogbe to any other person other than his eldest son, to that extent the Will of Pa Daniel Ediabonya is invalid. However, the deceased's Will is not invalid in its entirety. The other parts of the Will could be "saved" which is what the learned trial Chief Judge did in this case. See: IDEHEN V. IDEHEN (supra) and LAWAL-OSULA V. LAWAL OSULA (supra).

In conclusion, I am of the firm view that this appeal is lacking in merit and I therefore dismiss it. I accordingly affirm the decision of the Court below which upheld the decision of the trial court. I make no order as to costs in the circumstance of this case.

MUHAMMAD JSC

I have read before now the judgment just delivered by my learned brother Galadima, JSC. I agree with his reasoning and conclusion that the appeal lacks merit. I, too, dismiss the appeal. I abide by all consequential orders made in the lead judgment.

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Galadima, JSC and I agree that the appeal at hand is devoid of any merit; I also dismiss some in like terms of the lead judgment. Just to put in a few words of mine, I wish to odd that the attempt in this case is to vary the course of on existing and long standing custom which had passed down from generation to generation and as a result had been accorded statutory recognition. In otherwords, the practice of a Bini customary law which gives the eldest son the prerogative to inherit the ‘Igiogbe’ has not changed from time immemorial.

Under Benin Native Law and Custom, Igiogbe meant a principal house where a deceased Benin man lived and died; the right to inherit and possess such property vests only in the eldest son. The tradition takes precedent over and above the wishes of a deceased father no matter how strong he feels against his son as the prospective heir. It is a right vested in the eldest son and which cannot be divested by means of disinheritance.

The entire claim revolves around section 3(1) of the Wills Law of Bendel State of Nigeria 1976 which is still applicable in Edo State. By the use of the phrase “*subject to any customary law relating thereto*,” in the section, is a confirmation of a statutory backing and recognition which is given to the prevailing custom to operate within its area of application.

For all intents and purposes and on a composite reading of the Wills Law in conjunction with the Benin customary law, the contested will is only void to the extent of the deceased father disinheriting the appellant to the Igiogbe; ii is his right and he therefore must be allowed to inherit and enjoy same. The deceased father in bequeathing the Igiogbe along with his other properties for purpose of disinheriting the appellant is in violation of the Bini Customary Law.

The will as rightly herd by the trial court and affirmed by the lower court is invalid to the extent of its affecting the Igiogbe only and not the totality of the properties.

In the result, I am in complete agreement with my learned brother Galadima JSC that the appeal lacks merit and is hereby also dismissed by me. I further abide by other orders mode in the lead judgment inclusive of costs.

ALAGOA JSC

I read before now in draft the lead judgment of my learned brother Suleiman Galadima, JSC which has just been delivered and I agree with the reasoning and the conclusion arrived at.

I however wish to chip in this little bit of mine by way of contribution. There appeared to have been no love lost between the Appellant who was Plaintiff in the High court and his late father Pa Daniel Ediagbonya Uwaifo as a result of which the Appellant was disinherited in his father's Will which was tendered in the High court as exhibit "A". This disinheritance was total and included the house at No.4 Ohuoba Street, Benin City where the deceased testator had lived and died.

Applicant instituted action in the High Court seeking the nullification of the will under Bini Native Law and custom, the house where a deceased lived and died is referred to as the "IGIOGBE." No. 4 Ohuoba Street, Benin City was held by the learned trial judge to be such "IGIOGBE" and by Bini (Benin) Native Law and Custom and Section 3(1) of the Wills Law Cap. 172, Laws of Bendel State 1976 applicable in Edo State and therefore to Benin, the Appellant, as the surviving first son of the deceased was entitled to inherit No. 4 Ohuoba Street irrespective of any testamentary disposition to the contrary to Section 3 (1) of the wills Law which is quite explicit on this point reads thus,

"subject to any customary law relating thereto it shall be lawful for every person to devise, bequeath or dispose of by his will executed in manner hereinafter required all real estate and all personal estate which he shall been titled to either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him or if he be-

came entitled by decent of his ancestor or upon his executor or administrator.”

By this provision of the Wills Law, it is clear that the Wills Law is not against disposition of property by will provided that with respect to the “IGIOGBE” such disposition inures to the benefit of the first surviving son of the deceased testator. See *IDEHEN v. IDEHEN* (1991) LRCN 1590; *OKE v. OKE* (1947) 3 SC 1; *ARASE v. ARASE* (1981) 5 SC 33.

The learned trial judge’s refusal to declare the will invalid and to have held that the Appellant is entitled to a declaration that the will is invalid only to the extent that No. 4 Ohuoba street where the deceased Pa uwaifo lived and died otherwise known as his “IGIOGBE” which was devised to other persons than the Appellant and which position found favour with the Court below is sound and represents the law.

The Appellant’s contention that the “IGIOGBE” consisted also of other vacant adjoining land does not represent the position of the law and was certainly not the Pronouncement of the court in *IGBINOBA V. IGBINOBA* (1995) 1 NWLR PART 317 at 375. That case if properly read, did not decide the issue of vacant land as it pertains to “IGIOGBE” in Benin Customary Law’

It is for these reasons and the fuller reasons given in the lead judgment of my brother that I too find no merit in the appeal and dismiss same. Parties are to bear their own costs.

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