

SUPREME COURT OF NIGERIA
FRIDAY 5TH JULY, 2013. SC. 150/2008
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC**

1. MRS. PAULINA ASIKA
2. MRS. CATHERINE OSEMEKA APPELLANTS
3. MISS CORDELIA ATUANYA
4. MRS. FELICIA EDEMANY
AND
CHARLES CHUKWUMA ATUANYA RESPONDENT

CUSTOMARY LAW - Administration of estate - Right of women - It is unfair to deny appellants' entitlement to benefit from their father's properties - By virtue of a customary law of their birth place (H1)

ADMINISTRATION OF ESTATES - Wills - Equity - It is injustice to alter the 3rd position of respondent's father in the hierarchy of the will - And appellants who want equity are expected to do equity (H2)

APPEALS - Judgment - Court of Appeal - Power - By CA Rules O. 18 r. 11 - The court can give any judgment or order as the case may require - Including any order as to costs (H3)

RULES OF COURT - Compliance - Solanke v. Somefun - Rules of court are meant to be complied with - As they regulate matters in court - And help parties to present their cases - For fair and quick trial (H4)

ADMINISTRATION OF ESTATES - Wills - Court of Appeal - Findings - Correctness of - The court did not act in excess of its jurisdiction - As it only directed that disposition of the property - Be guided by intention of the testator in exhibit P1 (H5)

ADMINISTRATION OF ESTATES - Will - Beneficiaries - Hierarchy - Justice demands that respondent takes his father's place in the will -

As one who succeeds to another's right - Ought to use that person's right (H6)

ADMINISTRATION OF ESTATES - Wills - Beneficiaries - Equity - Justice demands that appellants who shared the property - Should not be the first to take by choice - As he who comes to equity must come with clean hands (H7)

FACTS

Plaintiffs/appellants commenced this action against defendant/respondent at the High Court of Anambra State Onitsha, seeking for a declaration that under the will made by their father late Michael Amanchukwu Atuanya, appellants are beneficiaries in equal shares of the property situate at No. 25 New American Road, Onitsha, an order directing the portioning of the said property into six nearly equal parts, an order compelling the beneficiaries to make their choices and for a perpetual injunction restraining any interference with each beneficiary's chosen portion. The late Michael Atuanya was the owner of a land measuring 100ft by 200ft situate at Awka Road, Onitsha and the property in dispute situate at the aforementioned address. Appellants are female children of the late Michael Atuanya who died sometime in 1954. The deceased was survived by six children i.e. appellants and two male children (Michael and Fidelis). Fidelis who was the 2nd son died in 1984 and was survived by respondent. The 1st son - Michael later died in 1985 though childless but left a will. Respondent then became the only surviving male descendant of the late Michael Amanchukwu Atuanya.

The late Michael Amanchukwu Atuanya made a will wherein the children are to have equal share of the property at No. 25 New American Road, while the land at Awka are for the exclusive preserve of the deceased two male children. Appellants' contention is that by the will of their late father, they are beneficiaries of the property in dispute together with the estate of their late brothers. Appellants thus proposed exhibit P7 being the mode of sharing the property. Respondent's position is however that as the sole surviving male child of the late Atuanya, he is the head of the family of his paternal grandfather and testator. As such, the property in dispute belonged to him alone. He contended that under the Onitsha customary law

and tradition, appellants being female children cannot inherit their father's land. At the end of hearing, the court held that appellants are beneficiaries in the property at No. 25 New American Road jointly with their deceased brothers. The court however rejected appellants' proposed mode of sharing (exhibit P7). Not satisfied, appellants appealed to the Court of Appeal, Enugu Division. The court rejected exhibit P7 and held that the property be shared in accordance with the will of the testator (exhibit P1). Aggrieved further, appellants lodged appeal in Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal had the competence and jurisdiction to discard the method of sharing and making choices, prayed for by the appellants in their prayer 27(b) of the claim, and in its stead, substitute another method preferred by them, suo motu, without any party asking for it."

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

Administration of estate - Right of women

1. Generally, and as properly and rightly held by the court below, it was unconstitutional and will be discriminatory, unfair and injustice to the appellants, to say that by virtue of a particular customary law of their birth place, being women, are not entitled to share and benefit from the properties of their late father. (p. 3668 E)

ADMINISTRATION OF ESTATES - Will - Equity

2. In the same vein, it will be injustice and unfair, to say the least, to say that even though late Fidelis, the respondent's father was ranked 3rd in hierarchy in the Will of their father to now put his estate last because he is now deceased. The appellants want equity and they are entitled to it, yet they are expected to do equity and that is the justice of the case. (p. 3668 F)

ADMINISTRATION OF ESTATES - Will - Beneficiaries - Hierarchy

3. Indeed, the justice of the case is to let the estate of late

Michael, the 2nd child and first son of the family, who, though died without a child, has a Will and Executors take next to the 1st appellant while the respondent should take next in the position of his father. According to the legal maxim - One who succeeds to another's right or property ought to use that person's right. The respondent succeeds his father, Fidelis. He should take his father's place in hierarchy in the Will. As the saying goes - Seniority takes priority, and I so hold.
(p. 3668 H)

ADMINISTRATION OF ESTATES - Wills - Beneficiaries - Equity
4. What is more, as the trial court rightly noted, supra, the appellants who shared the property should not be the first to take by choice. He who comes to equity must come with clean hands.
Therefore, the sharing of the property should be "in equal shares" as prescribed and intended by the testator in his Will - Exhibit P1, but not "into six nearly equal parts" as proposed by the appellants in Exhibit P7, as that will be contrary to the last Will of the testator. (p. 3669 C)

Judgment - Court of Appeal - Power
5. Furthermore, the action of the court below in the conclusion it reached is granted by the rules of the court. Order 18 rule 11 of the Court of Appeal Rules, 2007 provides as follows:

"18 (11) (1) The court shall have power to give any judgment or make any order that ought to have been made; and to make such further order as the case may require including any order as to costs.

(2) The powers contained in paragraph (1) of the Rule may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision."

There is no doubt that the court below in its judgment

subject of the instant appeal was guided by the above rule of the court. (pp. 3669 G/3670 C)

RULES OF COURT - Compliance

6. It is elementary law that rules of court are meant to be obeyed and complied with by the parties and the court. It is not in the books for fun or window dressing. In Solanke vs. Somefun (1974) 1 SC 141, Sowemimo, JSC (as he then was) opined as follows:

“Rules of court are meant to be complied with... Rules of court are made to be followed. They regulate matters in court and help parties to present their case for purpose of a fair and quick trial. It is the strict compliance with these rules of court that make for quicker administration of justice.”
The court indeed is to apply its rules to the advancement of substantial justice. (p. 3669 H)

Court of Appeal - Findings - Correctness of

7. There is no doubt, the appellants produced and tendered in evidence, the Will and testament of their father for the court to interpret same and rule on it. That is the primary function of the court. Therefore, if all the court did was to interpret the contents of the Will of the testator as spelt out, it cannot be accused of having exceeded its jurisdiction.
The court below had only directed that the intention of the testator in Exhibit P1 should be allowed to guide and control as it should, the sharing and partitioning of the land in dispute. There is therefore nothing done by the court below in excess of its jurisdiction. The decision is unassailable.
 (p. 3670 B/D)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Will – Meaning of

What then is a WILL? *“The word “Will” has two distinct meanings. The first and strict meaning is metaphysical and denotes the sum of what the testator wishes, or wills, to happen on his death. The second and more common meaning is physical and denotes the docu-*

ment or documents in which that intention is expressed.”

In otherwords, a Will is the legal expression of an individual’s wishes about the disposition of his or her property after death.

Similarly, a Will or testament is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect upon or after his death. It must however be noted and appreciated that in the disposition of his property in the Will, it is the intention of the testator in the matter that is the sole guide and control. That is, what disposition did he intend? (p. 3667 A)

REPRESENTATION

Chudi Obieze, Esq. with U. E. Ekwealo Esq., for Appellants
Ben Osaka Esq. with R. Salami (Mrs.), for Respondent

CASES REFERRED TO

- Garuba v. K.I.C. Ltd. (2005) 5 NWLR (pt. 917) 160
- Dada v. Bankole (2008) 5 NWLR (pt. 1079) 26
- Nwadike v. Ibekwe (1987) 12 SC 34
- E Enano v. Ade (1981) 11 - 12 SC 25
- Lokoyi v. Oloja (1983) 8 SC 61
- Ojomu v. Alao (1983) 9 SC 22
- Igboidu v. Igboidu (1999) 1 NWLR (pt. 585) 27
- F Onyejekwe v. Onyejekwe (1999) 3 NWLR (pt. 596) 482
- Kwentoh v. Kwentoh (2010) 5 NWLR (pt. 1188) 543
- Solanke v. Somefun (1974) 1 SC 141
- Ibodo v. Enarofia (1980) 5 - 7 SC 42
- Olusesi v. Oyelusi (1986) 3 NWLR (pt. 31) 634
- G John v. Blakk (1988) 1 NWLR (pt. 72) 648
- Dambam v. Lele (2000) 11 NWLR (pt. 678) 413
- Oforkire v. Maduiké (2003) 5 NWLR (pt. 812) 166

RULES REFERRED TO

- H Court of Appeal Rules, O. 18 r. 11(1)(2)

BOOK REFERRED TO

Black’s Law Dictionary 9th Ed, p. 1735

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division, hereinafter called the Court below, delivered on the 24th day of January, 2008 on the judgment of the High Court of Onitsha, hereinafter referred to as the trial Court, earlier given on the 15th December, 2005. B

The appellants herein who had commenced an action as plaintiffs by a writ of summons sometime in May, 2003 subsequently followed it up with a statement of claim filed on 6th February, 2004. They had claimed against the defendant, hereinafter referred to as respondent in paragraph 27 as follows: C

(a) A declaration that under the Will of Michael Amanchukwu Atuanya (deceased) the plaintiffs inclusive of the Estate of Late Michael Nwabuo Atuanya (represented by his Executors, Victor Olisa Oranye and Nnabuenyi Edmund I. B. Asika) and Fidelis Atuanya (represented by the defendant) are the beneficiaries in equal shares of the property No.25 New American Road, Onitsha. D

(b) An order directing the partitioning of No.25 New American Road, Onitsha into six nearly equal parts, as shown in Survey Plan No.PA/AN/D002/2004 attached to this statement of claim as portions "A", "B", "C", "D", "E", and "F" respectively, and for the beneficiaries aforesaid to make their choices in the following manner: E

- (i) The 1st Plaintiff
- (ii) The 2nd plaintiff
- (iii) The 3rd Plaintiff
- (iv) The 4th plaintiff

(v) Estate of Late Michael Nwabuo Atuanya (represented by his Executors, Victor Olisa Oranye and Nnabuenyi Edmund I. B. Asika)

(vi) The defendant (representing the estate of Late Fidelis Atuanya) G

(c) An order compelling the beneficiaries aforementioned to make their choices as to which portions they want as per prayer (b) above.

(d) An order directing that a document indicating the various choices as per prayers (b) and (c) and signed by the parties, be filed in court and that it should form a part of the judgment in this suit. H

(e) Perpetual injunction restraining the plaintiffs, the defendant and the Estate of Late Michael Nwabuo Atuanya, their agents, priv-

ies, assigns and workmen or anyone whomsoever acting on their behalf from in any way or manner whatsoever trespassing into, or attempting to trespass into each other's respective choices as indicated in the document filed as Per Prayer "d".

B Pleadings were filed and exchanged. Upon completion of plead-
ings, the case proceeded to hearing. The plaintiff's case goes thus:
the plaintiffs are female children of Michael Amanchukwu Atuanya
who died sometime in 1954. On his death, he was survived by six
children - the plaintiffs and two Male children - Michael and Fidelis.
C Fidelis, the 2nd son died sometime in 1984, survived by the respon-
dent who is the only child and a male. The 1st son - Michael later
died also, in 1985 though childless but left a Will. The respondent
then became the only surviving male descendant of the late Michael
Amanchuckwu Atuanya.

D On his death, the late Michael Amanchukwu Atuanya was seized
of the land in dispute. He died testate having made a Will which was
admitted to probate in 1956. The said Will was admitted as Exhibit
P1. In the Will, the testator gave and bequeath in equal shares into
the children, all his possessions except the landed property, 100ft by
E 200ft, situate at Awka Road, which should be commonly used by his
sons Michael and Fidelis. The land in dispute is situate at No. 25, New
American Road, Onitsha (formerly No. 27). It is different from the
land mentioned in the Will.

F It is the appellants' case that by the Will of their father, they are
beneficiaries of the land in dispute together with the estate of their
late brothers. They therefore instituted this action for declaratory or-
der that under the Will of their father they, together with their broth-
ers became beneficiaries of the property situate at No. 25 New Ameri-
G can Road, Onitsha. They also sought an order for partitioning of the
property in dispute into six.

The respondent's case however was that as the sole surviving
male child of Atuanya, he is the head of the family of his paternal
grandfather and testator, the late Michael Amanchukwu Atuanya. As
H such, the property in dispute belonged to him alone. The reason he
gave was that, Will or no Will, the appellants, being women are not
entitled to a share and cannot inherit their father's land.

After the trial, the Court found, as proved inter-alia, that un-
der Onitsha Customary Law, women and that includes the female

children of a deceased person cannot inherit their father's land which is in the inland town. It is only male children that can inherit such land. Where the deceased has no surviving male child, the closest male relation inherits the land to the exclusion of the deceased female children. The trial Court also found that the reasons for the above discrimination, so to speak include, the fact that the land belonged to the family whilst the family members are mere allottees of such land. Hence, such land cannot be inherited by women as the land may end up being inherited by non members of the family upon marriage by the female members of the family. B

However, evidence revealed that the land in dispute is not located within the inland town and it was agreed by the parties that a different consideration apply. The trial court found and accepted it as true, and correct Onitsha Customary law on inheritance, that where the land is situate outside the inland town, the testator can device it under his Will to all or any of his children, irrespective of gender. C D

In the final analysis, the trial court, after reviewing the totality of the evidence adduced by both parties, inter alia, came to the following conclusions -

"It is my view that on a calm reading of the Will - Exhibit P1. it is clear that other than the property, at Awka Road, all the testator's possession including the property in dispute were divided to all his children in equal shares. I therefore hold that the plaintiffs are beneficiaries of the property at No. 25 New American Road, Onitsha, jointly with their deceased brothers as represented by their estates. E F

As much as I am convinced that the property ought to be partitioned in the interest of peace, I am of the view that the proposed mode will not achieve peace and justice. In the circumstances, the claim for partitioning of the estate as proposed by the plaintiffs as well as the other reliefs consequent thereon are hereby struck out." G

The appellants' case was adjudged to have succeeded in part which led the appellants to appeal to the Court below on the portion of the judgment of the trial Court which refused prayers 27(b)(c)(d) and (e) of their Statement of Claim. H

The Court below found *"Exhibit P7 lopsided and tilting very much in favour of the appellants and therefore discountenanced it."* And held that the disputed property be partitioned and shared equally in accordance with the Will of the testator - Exhibit P1. The respon-

dent is to stand and claim in the position of his father through whom he derives his beneficial interest. The appeal was allowed.

However, the instant appeal, as earlier stated, is again by the appellants via their Notice of Appeal filed on 14th February, 2008 on a sole ground of appeal, which without the particulars, reads thus:

B *“Error-in-Law:*

The learned Justices of the Court of Appeal erred in law when they held;

C *“Consequently, it is my humble view that if the sharing of the property could not be done in accordance with the proposed mode prescribed by the appellants, then it should be done in accordance with the order in which the testator in his testament gave out the property to the beneficiaries. In my view, that would constitute fairness and justice in relation to the sharing of the property, which is a gift by the testator to the beneficiaries... Truly I find exhibit P7 lop-sided and tilting very much in favour of the appellants and therefore discountenance it and hold that the disputed property be partitioned and shared equally in accordance with the Will of the Testator Exhibit P1 and therefore proceeded to discard the mode of sharing prayed*
 D *in paragraph 27(b) of the Statement of Claim”*
 E

Upon service of the record of appeal, parties, pursuant to the Rules of this court, filed and exchanged their briefs of argument.

On 8th April, 2013 when the appeal came up for hearing, learned counsel to the appellants identified the appellants’ brief of
 F argument filed on 20th June, 2008. He adopted and relied on same to urge the court to allow the appeal. In the same vein, learned counsel to the respondent identified the brief of argument of the respondent filed on 16th December, 2008. He too adopted and relied on same
 G to urge the court to dismiss the appeal.

In the said appellants’ brief of argument, the appellants distilled the following sole issue for determination.

H *“Whether the Court of Appeal had the competence and jurisdiction to discard the method of sharing and making choices, prayed for by the appellants in their prayer 27(b) of the claim, and in its stead, substitute another method preferred by them, suo motu, without any party asking for it.”*

In proffering argument to the above issue, the appellants referred to their two issues raised in the court below for that court’s

determination. They contended that in the judgment of the court below, the said two issues the appellants had raised were resolved in their favour. They quoted from the said judgment of the court below on the two issues from pages 216 to 223 of the record. Learned counsel to the appellants contended that the view expressed by the Justices of the Court below as quoted in the brief of argument is contrary and against the findings of the court. The appellants contended that having found that the respondent did not join issues with the appellants with respect to their averments in paragraph 27 of the statement of claim and since paragraph 27 of the statement of claim is unchallenged, it was further contended that the respondent was deemed to have accepted the averment. Learned counsel submitted that the court was duty bound to accept and act upon the unchallenged evidence with respect to the mode of sharing and making choices proposed by the appellants. He relied on *Leadway Assurance Company Limited v. Zeco (Nigeria) Limited* (2004) 11 NWLR (pt. 884) 316 at 329.

Learned counsel further submitted that parties are bound by their pleadings and the case made out by them at the trial court and presented for adjudication before the court. They contended that the issues of fairness and justice of the mode of sharing proposed by the appellants were not canvassed by the respondent at the trial court. The appellants contended that the issue of Exhibit P7 being lopsided in favour of the appellants is not supported by the findings of the court below. The appellants contended that the mode of sharing and making choices pleaded in paragraph 27 of their statement of claim is in accordance with the wishes of the testator as manifested in the Will, Exhibit P1 which gave the property in dispute to be shared equally. They contended further that Exhibit P7, as found by the court below was not shown by the respondent, not to be in equal shares.

Learned counsel submitted that making choices as to which portion the parties want, in line with the manner the Will, Exhibit P1, stated the names of the beneficiaries, was not a prayer sought by either the appellants or the respondent. He submitted further that the court does not have the jurisdiction to grant a relief not sought by the parties before the court relying on *Garuba v. K.I.C. Limited* (2005) 5 NWLR (pt. 917) 160 at 180; *Dada v. Bankole* (2008) 5 NWLR

(pt.1079) 26 at 47 - 48.

Learned counsel submitted that the court below exceeded its jurisdiction when it substituted its own method of sharing for the one pleaded and prayed for by the appellants.

The appellants contended that the observation and order made by the court below being complained about did not arise from the pleadings and evidence led by both parties. And the court did not call on counsel to address it on that issue before it gave and made the order, hence, learned counsel submitted that the court below acted in excess of its jurisdiction when it gave the order on the sharing formula.

The appellants finally urged the court to allow the appeal, set aside the order made by the court below and grant prayer 27(b) of the statement of claim.

In his brief of argument, settled by Ben Osaka, Esq. the respondent, from the sole ground of appeal in the Notice of appeal filed by the appellants, distilled the following lone issue for determination of the court.

“Whether the Court of Appeal was justified in altering the mode of making choices proposed by the appellants in the interest of justice and fairness.”

In arguing the issue, learned counsel referred to the issues formulated by both parties for determination of the court below upon the appeal to it from the decision of the trial court and conceded that the two issues were undoubtedly resolved in favour of the appellants except the vital issue of mode of making choice proposed by the appellants which the court below felt was not in consonant with the provisions in the testator’s Will.

The respondent contended that the appellants had in their pleadings proposed a mode which was not only unjust but negates acts of fairness and justice. He further contended that the Will of Michael Amanchukwu Atuanya, deceased, had proposed that the properties be shared into equal parts between the appellants and estate of late Michael Nwabufo Atuanya represented by his executors, Victor Olisa Oranye and Nnabuenyi, Edmund B. Asika, and Fidelis Atuanya, represented by the respondent. The respondent referred to the Will of his grandfather again and contended that in an attempt to carry out the sharing of the properties, the appellants al-

tered the mode of recognition of the children of the testator in accordance with their seniority. He contended further that, in their proposed sharing mode, the appellants had placed Michael and Fidelis, the 2nd and 3rd in rank of children of the testator, to the last position after they (the appellants) would have chosen. He referred to the proposed mode of sharing as claimed by the appellants before the trial court. B

The respondent contended that it is not an issue that the late Michael Nwabuo Atuanya, Fidelis Atuanya, represented by the respondent are older than the 2nd to 4th appellants. Yet the appellants had prayed that these seniors should take last in their proposed mode of sharing. He referred to the appellants' proposed mode of sharing contained in Exhibit P7 - the Plan No. PA/AN/D002/2004 showing that portions A, B, C, D, E are bigger than portion F. And that portion F is only a kitchen attached to the building covered by portions A, B, C, D, E. C D

The respondent referred to the findings of both courts below on the proposed mode of sharing by the appellants and why the court below finally came to the conclusion that the sharing should rather be in accordance with the provisions of the Will of the testator. He contended that in an appeal to this court seeking to upturn the concurrent findings of the two courts below, the appellant is faced with an uphill task of considerable magnitude. He submitted that the appellants must show exceptional circumstance other than that there was miscarriage of justice or a serious violation of some principles of law or procedure. He relied on *Paul Nwadike & Ors. v. Cletus Ibekwe & Ors.* (1987) 12 SC 34, *Enano v. Ade* (1981) 11 - 12 SC 25 at 42; *Lokoyi v. Oloja* (1983) 8 SC 61 at 68, *Ojomu v. Alao* (1983) 9 SC 22 at 53. He urged the court not to disturb the findings of fact of the two courts below on the rejection of the mode of sharing proposed by the appellants in Exhibit P7 as it will work injustice against the respondent and that the appellants had not shown any exceptional circumstance or shown any violation of some principles of law or procedure to warrant the court to disturb the unassailable findings of the two courts below. E F G H

Learned respondent's counsel referred to Order 18 rule 11 of the Court of Appeal Rules, 2007 and contended that the rules gave the Court of Appeal the mandate to make the order that the prop-

erty in dispute be partitioned and shared in accordance with the provisions of the Will instead of the proposed mode of sharing of the appellants.

B He referred to the record and contended that the function of the court is to examine and decide on the case presented before it by the parties. He referred to Exhibit P1 - the Will of the appellants' father produced and tendered by them. As clearly shown in the trial court's judgment and that of the court below, the said Will made provision for the sharing of the testator's properties among the children in equal share as listed in his Will. Learned counsel submitted that the sharing formula provided by the appellants in Exhibit P7 did not conform with the provisions of the Will, hence the concurrent findings of the two courts below which led to the order that the property in dispute be shared in compliance with the provisions of the D Will.

With reference to Order 18 rule 11 (supra) learned counsel submitted that every court is expected to look at its rules and implement it in order to ensure that justice is done to all parties. He cited Nishizawal Ltd. v. Strichan D. N. - Jettiwani (1984) 12 SC 234 at E 286.

On the reliance by the appellants on the case of Onyejekwe v. Onyejekwe (1999) 3 NWLR (Pt.596) 482 at 503, learned counsel submitted that it is not applicable, as each case must be decided on its own peculiar facts and circumstances. The court below acted within F jurisdiction and did not exceed it by the order that the provisions of the Will shall be followed in the sharing of the testator's properties but not by the mode of sharing proposed by the appellants in Exhibit P7. He finally urged the court to resolve the sole issue against the G appellants and dismiss the appeal.

Before I proceed further in this judgment, I like to state that the following facts are not in controversy between the parties-

That the property in dispute is that of late Michael Amanchukwu Atuanya who died sometime in 1954.

H That the said late Michael Amanchukwu Atuanya was survived by six children, two male and four female children.

That the appellants herein are the female children of the deceased - Michael Amanchukwu Atuanya.

The two male children of the deceased were Michael and Fidelis.

That the two male children of the deceased - Michael Amanchukwu Atuanya are now deceased too. That while Michael, the first son of late Amanchukwu Atuanya died sometime in 1985 without any child, the second son Fidelis died earlier in 1984 and was survived by the respondent.

That late Michael Amanchukwu Atuanya died testate having written a Will which was admitted to probate and became operative in 1956. B

The said Will of the appellants' father was produced and tendered by them before the trial court and it was admitted and marked Exhibit P1. C

There is no doubt that neither party had any complaint about the Will - Exhibit P1. In other words, the Will was not challenged in any form.

Similarly, it was not being contested that the respondent is a direct grandson of the deceased, Michael Amanchukwu Atuanya, being the son of the second son of the family - Fidelis Atuanya. He is also the only surviving direct male descendant of late Amanchukwu Atuanya. D

The land in dispute is situate and being at No. 25 New American Road, formerly No.27 Onitsha. And the controversy mainly is the sharing formula. E

It is note worthy that before the trial court, the appellants had proposed a formula for the sharing of the land in dispute.

This is contained in paragraph 27(b) of the Statement of Claim where the appellants had sought an order of the court directing the partitioning of the said property in dispute - "into six nearly equal parts as shown in Survey plan No.PA/N/D002/2004." This plan was tendered by the appellants and was admitted and marked Exhibit P7. F G

Even though the appellants had submitted that not having joined issue with them on their proposed mode of sharing or partitioning of the property in dispute, the respondent should be taken to have accepted the said proposal contained in Exhibit P7, the trial court held differently and disagreed with the appellants that the respondent accepted their proposed mode of sharing. The reason being that respondent's position did not even accommodate sharing of the property, as he claimed to be the sole owner of the said property H

being the only surviving male descendant of the testator - Michael Amanchukwu Atuanya. The trial court had opined as follows -

“I have looked at Exhibit P7 which is the plan prepared by the PW2 showing the partition of the land into 6 portions. As much as I agree that in the interest of peace and harmony, the property ought to be partitioned, I do not consider the proposal as per Exhibit P7 as fair at all. This is because the said document proposed a partition of the property without reference to the features on the land. The result is that one portion marked B, consist of about 80% of the one storey building on the land. On the other extreme is the portion marked F. That is just a bare strip of land with one small kitchen. The plaintiffs have proposed that they make the first choices whilst the defendant picks last. In my view, this can only lead to one thing and that is injustice. It is the plaintiffs that shared the property into six. They want to take first and the defendant last. If they consider their proposed mode of partitioning as fair, they should be willing to take after the defendant would have made his choice.” See page 81 of the record of appeal.

The court below even though it claimed to have resolved the two issues formulated for determination by the appellants in their favour, it inter alia, came to the following conclusion:

“Consequently... if the sharing of the property could not be done in accordance with the proposed mode prescribed by the appellants then it should be done in accordance with the order in which the testator in his testament gave out the property to the beneficiaries. Since the Will is sacrosanct, it must prevail over any other form of mode of sharing and must be in accordance with the wishes manifested in the Will. Part of the judgment of the lower court was given in accordance with the Will and so I hold that instead of there being a lacuna that gives rise to this appeal, the sharing also ought to be in accordance with the Will. I agree with the learned trial Judge that sharing the property in accordance with exhibit P7 cannot adequately reflect the equitable sharing of the disputed property.

I order that there should be a partition of the property in accordance with the Will except and that the respondent should be or stand in the position of his father to take the position his father ought to have taken as his portion as it is stated in the Will, exhibit P1.” See pages 222-223 of the record of appeal.

One point is very clear from the concurring findings of the two courts below. That is, that the Will of the testator is sacrosanct. The partition or sharing formula proposed by the appellants does not conform with the provisions of the Will.

What then is a WILL? *“The word ‘Will’ has two distinct meanings. The first and strict meaning is metaphysical and denotes the sum of what the testator wishes, or wills, to happen on his death. The second and more common meaning is physical and denotes the document or documents in which that intention is expressed.”* ^B

In otherwords, a Will is the legal expression of an individual’s wishes about the disposition of his or her property after death. See Black’s Law Dictionary, Ninth Edition, page 1735; *Kwentoh v. Kwentoh* (2010) 5 NWLR (pt. 1188) 543 at 562. Similarly, a Will or testament is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect upon or after his death. It must however be noted and appreciated that in the disposition of his property in the Will, it is the intention of the testator in the matter that is the sole guide and control. That is, what disposition did he intend? See *Lemage v. Goodban* (1865) LR 1 P and D 57 per Sir J. P. Wilde. ^C ^D ^E

In this appeal, the appellants had raised the issue for determination, *“whether the court below had the competence and jurisdiction to discard the method of sharing and making choices, prayed for by the appellants in their prayer 27(b) of the claim, and in its stead, substitute another method preferred by them, suo motu, without any party asking for it.”* ^F

First and foremost, there is a serious misconception by the appellants to hold that the court below substituted its preferred method of sharing of the property in dispute suo motu, without either party having sought the relief. ^G

In the last Will and Testament of the testator which was produced and tendered by the appellants as Exhibit P1, their Father, the testator clearly states his intention as follows -

“I give and bequeath in equal shares into my children, namely Paulina, Michael, Fidelis, Catherine, Cordelia and Felicia, all my possessions except my landed property 100ft by 200ft situated (sic) at Awka Road, which should be commonly used by my sons Michael and Fidelis.” ^H

From the above, the testator had clearly shown his intention on the sharing formula of his properties. The landed property measuring 100ft by 200ft situate and being at Awka Road, was given in the Will to be commonly used by his sons - Michael and Fidelis, only to the exclusion of the appellants. But all other possessions are to be shared equally and the choice is equally clear, to be in order of seniority, with the most senior child - Paulina taking first and Felicia being the last of the six children taking last.

One does not need a Soothsayer to know that from the claim of the appellants contained in their pleadings and Exhibit P7, they were bound to fail on their proposed formula which in clear terms goes against the provisions of the Will, thereby in violation of the intention of the testator. As shown above in the Will - Exhibit P1, the testator had given the children all the possessions "in equal shares" but in the appellants paragraph 27(b) and their Exhibit P7, they had proposed the partitioning of the property in dispute "into six nearly equal parts", and the respondent standing in the position of the 3rd child in the Will - Fidelis - his father, to take last while Felicia who is the 6th and the last child of the testator to take fourth (4th) position. This, to say the least, is inequitable and amounts to injustice to the estate of Fidelis, the respondent's father.

Generally, and as properly and rightly held by the court below, it was unconstitutional and will be discriminatory, unfair and injustice to the appellants, to say that by virtue of a particular customary law of their birth place, being women, are not entitled to share and benefit from the properties of their late father. In the same vein, it will be injustice and unfair, to say the least, to say that even though late Fidelis, the respondent's father was ranked 3rd in hierarchy in the Will of their father to now put his estate last because he is now deceased. The appellants want equity and they are entitled to it, yet they are expected to do equity and that is the justice of the case.

Furthermore, the action of the court below in the conclusion it reached is granted by the rules of the court. Order 18 rule 11 of the Court of Appeal Rules, 2007 provides as follows:

"18 (11) (1) The court shall have power to give any judg-

ment or make any order that ought to have been made; and to make such further order as the case may require including any order as to costs.

(2)The powers contained in paragraph (1) of the Rule may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.”

There is no doubt that the court below in its judgment subject of the instant appeal was guided by the above rule of the court.

It is elementary law that rules of court are meant to be obeyed and complied with by the parties and the court. It is not in the books for fun or window dressing. In Solanke vs. Somefun (1974) 1 SC 141, Sowemimo, JSC (as he then was) opined as follows:

“Rules of court are meant to be complied with... Rules of court are made to be followed. They regulate matters in court and help parties to present their case for purpose of a fair and quick trial. It is the strict compliance with these rules of court that make for quicker administration of justice.”See also Ibodo v. Enarofia (1980) 5 - 7 SC 42; Ania v. Oba Olorun Kosi (1986) 2 NWLR (pt.22) 316; Olusesi v. Oyelusi (1986) 3 NWLR (Pt.31) 634; John v. Blakk (1988) 1 NWLR (Pt.72) 648; Dambam v. Lele (2000) 11 NWLR (Pt. 678) 413; Oforkire v. Maduikie (2003) 5 NWLR (Pt. 812) 166.

The court indeed is to apply its rules to the advancement of substantial justice. See Russell v. Smyth 9 M & W 810 at 818, per Lord Abinger.

There is no doubt, the appellants produced and tendered in evidence, the Will and testament of their father for the court to interpret same and rule on it. That is the primary function of the court. Therefore, if all the court did was to interpret the contents of the Will of the testator as spelt out, it cannot be accused of having exceeded its jurisdiction.

Indeed, the justice of the case is to let the estate of late

Michael, the 2nd child and first son of the family, who, though died without a child, has a Will and Executors take next to the 1st appellant while the respondent should take next in the position of his father. According to the legal maxim - One who succeeds to another's right or property ought to use that person's right. The respondent succeeds his father, Fidelis. He should take his father's place in hierarchy in the Will. As the saying goes - Seniority takes priority, and I so hold.

What is more, as the trial court rightly noted, supra, the appellants who shared the property should not be the first to take by choice. He who comes to equity must come with clean hands.

The court below had only directed that the intention of the testator in Exhibit P1 should be allowed to guide and control as it should, the sharing and partitioning of the land in dispute. There is therefore nothing done by the court below in excess of its jurisdiction. The decision is unassailable.

Therefore, the sharing of the property should be "in equal shares" as prescribed and intended by the testator in his Will - Exhibit P1, but not "into six nearly equal parts" as proposed by the appellants in Exhibit P7, as that will be contrary to the last Will of the testator.

Accordingly, the sole issue distilled by the appellants is hereby resolved against them. The property in dispute is to be shared in equal shares as clearly stated in Exhibit P1 - the Will of the Testator and as ordered by the court below. In the circumstance, Exhibit P7 and paragraph 27 (b) of the appellants' Statement of Claim were properly rejected for not being in terms with the tenets and provisions of the Will relied upon by the appellants as the basis of their claim.

In the final analysis, the appeal is devoid of any merit and substance, it is liable to dismissal. Accordingly, it is dismissed. The judgment of the court below given on 24th January, 2008, which ordered the partitioning in accordance with the Will is affirmed.

Even though costs ordinarily follow events, in view of the peculiarity of this appeal, I shall make no order as to costs.

MOHAMMED JSC

I have been privileged before today of reading the Judgment of my learned brother Ariwoola, J.S.C. which has just been delivered. I am in total agreement with him that this appeal has no merit at all and deserves to be dismissed. The only dispute in this appeal relates to the order in which the partitioned property in which all the parties in this appeal are beneficiaries in the Will of their deceased father should pick or choose their respective shares. Although the Appellants are saying that the order of picking as proposed in the relief sought in paragraph 27(b) of the Statement of Claim which was not challenged in the statement of defence of the Respondent who was the defendant at the trial Court or evidence should be applied, the trial Court and the Court of Appeal found this to be contrary to the wishes of the Testator in his Will exhibit P1 which listed the names of the deceased children in order of their seniority by age. The position taken by the two Courts below is clearly supported by the evidence contained in the Will of the Appellants and Respondent's deceased father which was put in evidence by the Appellants themselves who were the Plaintiffs at the trial Court.

Furthermore, the order of the Court below in its effort to avert any miscarriage of justice in the distribution of the partitioned property between the Appellants and the Respondent, has the full backing of its rules in Order 18 Rule 11(1) and (2) of the Court of Appeal Rules 2007 which was in force at the time the dispute was resolved at the Court of Appeal.

This appeal is indeed devoid of merit. Accordingly, I also dismiss the appeal and abide by the orders made in the lead Judgment including the order on costs.

MUNTAKA-COOMASSIE JSC

I was privileged to have read in draft the lead judgment rendered by my noble lord Olukayode Ariwoola, J.S.C. I adopt with respects, the reasons and conclusion adumbrated in the lead judgment as mine. I entirely agree that the appeal is devoid of any merit. Same is dismissed by me.

NGWUTA JSC

I read in draft the lead judgment just delivered by My Lord, Ariwoola, JSC. I agree with the reasons given for the conclusion reached.

B This matter was, in my view, motivated by the vice of greed. In his last Will and Testament tendered and received in evidence and marked Exhibit P1, the testator stated his intention with respect to his property in unmistakable terms, thus:

C *“I give and bequeath in equal shares into my children, namely Paulina, Michael, Fidelis, Catherine, Cordelia and Felicia, all my possessions except my landed property 100ft by 200ft situate at Awka Road, which should be commonly used by my sons Michael and Fidelis.”*

D The sharing formula evidenced in Exhibit P7 is a derogation and departure from the expressed intention of the testator. *“Nearly equal parts”* in Exhibit P7 is not the same as *“equal parts”* in the Will, Exhibit P1. The proposed sharing by the use of the very nebulous phrase *“nearly equal parts”* is an attempt to re-write the Will which should never be allowed. A testator has the liberty to dispose of his property in the way and manner he likes and no one can modify the Will. See *Igboidu v. Igboidu* (1999) 1 NWLR (Pt.585) p.27.

E Based on the above and the comprehensive reasoning in the lead judgment, I also dismiss the appeal and affirm the decision of the Court below.

PETER-ODILI JSC

G I am at one with the judgment just delivered by my learned brother, Olukayode Ariwoola, JSC and which has his reasonings well set out. I shall make some comments in support.

H The Appellants as Plaintiffs in the trial court initiated this action against the Respondent as Defendant on the 16th day of May, 2003 through a Writ of Summons claiming the reliefs set out on the writ.

In the Statement of Claim filed on 6th February, 2004, the Appellants/Plaintiffs sought the reliefs which I shall state hereunder, viz:-

a) A declaration that under the will of Michael Amanchukwu

Atuanya (deceased). The Plaintiff inclusive of the Estate of Late Michael Nwabuo Atuanya (represented by his executors - Victor Olisa Oranye and Nnabuenyi, Edmund I. B. Asika and Fidelis Atuanya) represented by the defendant are beneficiaries in equal shares of the property No.25 New American Road, Onitsha.

b) An order directing the partitioning of No. 25 New American Road, Onitsha into six nearly equal parts, as shown in survey Plan No.PA/AN/0002/04 attached to this Statement of Claim as portions A. B. C. D. E and F respectively and for the beneficiaries above said to make their choices in the following manner:-

i. The 1st Plaintiff

ii. The 2nd Plaintiff

iii. The 3rd Plaintiff

iv. The 4th Plaintiff

v. Estate of the Michael Nwabuo Atuanya represented by his Executors, Victor Olisa Oranye and Nnabugwu Edmund I. B. Asika.

vi. The Defendant representing the Estate of Late Fidelis Atuanya.

c) An order compelling the beneficiaries aforementioned to make their choices as to which portions they want as per prayer (b) above.

d) An order directing that a document indicating their various choices as per prayers (b) and (c) and signed by the parties be filed in court and it should form a part of the judgment in this suit.

e) Perpetual injunction restraining the Plaintiffs, the Defendant and the Estate of Late Michael Nwabuo Atuanya of Late Michael Nwabuo Atuanya their agents, privies, assigns and workmen or anyone whomsoever acting on their behalf from in any way or manner whatsoever trespassing into or attempting to trespass into each other respective choices as indicated in the document filed, as Per Prayer "d".

The defendant filed his Statement of Defence while the plaintiffs filed a Reply to their Defence. The matter was fully heard and the trial judge per Nweze J. delivered his judgment on the 15th day of December, 2005.

The Appellants being dissatisfied with the portion of the judgment which refused prayers 27 (b), (c), (d), and (e) filed a Notice and Grounds of Appeal dated 18th day of January, 2006. The par-

ties filed their respective Briefs of Argument and on the 8th day of November, 2007, the appeal was heard and on the 24th day of January, 2008, the Court below allowed the Appeal and granted the remaining prayers sought by the Appellants in their claim but altered the mode of making choices claimed by the Appellant in prayer 27
 B (b) of the claim by allowing the Respondent to make his choice first in the place of his father.

The Appellants not satisfied with the part of the decision of the Court of Appeal altering the mode of making choices by allowing the
 C respondent instead of his father who is the older son of the Testator to make the first choice appealed to this court against the said decision by filing their Notice and Grounds of Appeal on the 14th day of February.

FACTS:

D The Appellants contended at the trial court that they jointly with the estate of late Michael Nwabuo Atuanya represented by the executors, Victor Olisa Oranye and Nnabuenyi Edmund I. B. Asika and Fidelis Atuanya represented by the Defendant are the beneficiaries in equal shares of the property No.25 New American Road,
 E Onitsha by virtue of the will of their father, Micheal Amanchukwu Atuanya (deceased).

The Appellants then prayed the court for the partitioning of the property, No.25 New American Road, Onitsha into six parts as
 F shown in the survey plan No.PA/AN/D002/2004 and for the beneficiaries to make their choices in order of seniority as to which portion they wanted starting with the Plaintiffs/Appellants and ending with the Defendant who is representing the Estate of Fidelis Atuanya. The Respondent representing the estate of Fidelis Atuanya was placed in
 G the last position of making a choice despite that late Fidelis Atuanya was older than some of the Appellants.

The case of the Respondent as defendant is that the property No.25 New American Road, Onitsha belonged to him as the only surviving male child and head of the family of Michael Amanchukwu
 H Atuanya (Deceased). Also that the Appellants having married and located to their husbands premises or houses had limited right over the property as they were all comfortable in their husbands places. In respect of the 3rd Appellant, the Respondent accepted to accommodate her as she was not stable and was unmarried. That the late

Michael Amanchukwu Atuanya lived and died at No.25 New American Road, Onitsha and according to Onitsha custom is his Iba (Ancestral Home) and women are not entitled to inherit the Iba but they can be accommodated therein.

The learned trial judge in the judgment aforesaid held that the Plaintiffs and Defendant representing the estate of Fidelis Atuanya are joint beneficiaries of the property in dispute. He refused the prayers in paragraph 27 (b), (c), (d), (e) and (f) which dealt with the partition of the property as proposed by the Appellants on the ground that it is inequitable and would bring anarchy and chaos in the family.

The Court of Appeal on the other hand allowed the appeal and in altering the mode of choices held that the Respondent as representing the estate of late Fidelis Atuanya would make his choice first in the position of his father, in the interest of equality and fairness.

At the hearing on the 8th of April, 2013, learned counsel for the Appellants adopted their Brief of Argument settled by Chudi Obieze Esq. and filed on 20th June, 2008. In it was distilled a single issue stated as follows:-

Whether the Court of Appeal had the competence and jurisdiction to discard the method of sharing and making choices prayed for by the Appellants in their prayer 27 (b) of the claim, and in its stead, substitute another method preferred by them suo motu without any party asking for it.

The Brief of Argument of the Respondent which was settled by Ben Osaka Esq. was filed on 16th December, 2008. In it was couched a sole issue, which is stated hereunder, viz:-

Whether the Court of Appeal was justified in altering the mode of choices proposed by the Appellants in the interest of justice and fairness?

Perusing the two issues differently couched by the parties, clearly they raise the same questions though, stated from two divergent angles.

Answering the question, learned counsel for the Appellants reminded the Court of what transpired at the Court of Appeal with excerpts of the judgment quoted.

It was submitted for the Appellants that the Respondent did not join issues with the Appellants with respect to the paragraph 27 of the Statement of Claim and since the said paragraph was unchal-

lenged, Respondent is deemed to have accepted it and so it was not open to the Court below to discard the method of sharing proposed by the Appellants and impose the Court's own method. That it is the law that the Court below was duty bound to accept and act upon that unchallenged evidence with regard to the mode of sharing and making of choices. He referred to *Leadway Association Co. Ltd v. Zeco (Nig.) Ltd.* (2004) 11 NWLR (pt. 884) 316 at 329.

For the Appellants was also contended that parties are bound by their pleadings and the case made out by them at the trial Court. That the issue of fairness and justice of the mode of sharing was not canvassed at the trial court which fact was found by the Court of Appeal. That the Court below in changing the mode of sharing forgot their earlier criticism of the trial court in refusing to partition the property because the Appellants would choose first on the ground that the Respondent failed to join issues with the Appellants on that.

Mr. Obieze of counsel stated on that making choices as to which portion, the parties wanted was in line with the manner the Will. Exhibit "P", stated the names of the Beneficiaries and was not a prayer sought by either side of the dispute. He said it was the learned Justices of the Court of Appeal who on their own came up with that decision and the court did not have the jurisdiction to grant a relief not sought by any of the parties and which the trial court could not have granted. He referred to *Garuba v. K.I.C. Ltd.* (2005) 5 NWLR (Pt. 917) 160 at 180; *Dada v. Bankole* (2008) 5 NWLR (Pt. 1079) 26 at 47 - 48; *Onyejekwe v. Onyejekwe* (1999) 3 NWLR (Pt. 596) 482 at 503.

That the Court of Appeal having made the observation and order outside the pleadings and evidence without calling on the parties to address on the point acted in excess of jurisdiction and so the order should be set aside.

In response, learned counsel for the Respondent urged this court not to disturb the concurrent findings of the trial Court and the Court of Appeal in its refusal to implement the mode of sharing proposed by the Appellants in Exhibit "P7" as it will work injustice against the Respondent since Appellants had not shown any exceptional circumstance or any miscarriage of justice or serious violation of some principle of law or procedure to warrant this Court's interference in those unassailable findings. That what the Court of Appeal did was

well covered by Order 18, Rule 11 of the Court of Appeal Rules, 2007. He cited Paul Nwadike v. Cletus Ibekwe & Ors. (1987) 12 SC 34; Enang v. Adu (1981) 11 - 12 SC 25 at 42; Lokoyi v. Oloja (1983) 8 SC 61 at 68 - 73; Ojomu v Ajao (1983) 9 SC 22 at 53.

Mr. Osaka of counsel stated further for the respondent that every court is expected to look at its rules and implement the provision of its rules in order to ensure that justice is done to the parties and that was what the Court below did in *Nishizawal Ltd. v. Strichan D. N. - Jethwani* (1984) 12 SC 234 at 286. Learned counsel urged this court to dismiss the appeal.

From the summary of the submissions of counsel either way, it can be seen that the area of dispute between the parties is very narrow and that is, what mode to adopt in the sharing or partitioning of the property in question among the beneficiaries who are the disputing parties. I shall recapture what the trial Court had as its finding on the matter which is stated below as follows:-

"I have looked at Exhibit "P7" which is the plan proposed by the PW2 showing the partition of the land into 6 portions, As much as I agree that in the interest of peace and harmony, the property ought to be partitioned. I do not consider the proposal as per Exhibit "P7" as fair at all. This is because of the features on the land. The result is that one portion marked 'B' consist of about 80% of the one storeyed building on the land. On the other extreme is portion marked 'F'. This is just a bare strip of land with one small kitchen. The plaintiffs have proposed that they make the first choice while the Defendant takes last. In my view this can only lead to one thing and that is injustice. It is the Plaintiffs that shared the property into six. They want to take first and the Defendant last. If they consider the proposed mode of partitioning as fair, they should be willing to take after Defendant would have made his choice..."

The finding of the trial Court was received positively by the Court of Appeal which held thus:-

I agree with the learned trial judge that sharing the property in accordance with Exhibit "P7" cannot adequately reflect the equitable sharing of the disputed property... Truly I find Exhibit "P7" considered and titling very much in favour of the Appellants and therefore I discountenance it and hold that the disputed property be partitioned and shared equally in accordance with the Will of the Testator

Exhibit “P1”... I order that there should be a partition of the property in accordance with the Will except and that the Respondent should be or stand in the position of his father ought to have taken as his position as it is stated in the will Exhibit “P1.”

B These two concurrent findings of the Courts below show a focus that did not depart from the Will of the Testator, Michael Amanchukwu Atuanya wherein he stated thus:-

“I give and bequeath in equal shares unto my children namely: Paulina, Michael, Fidelis, Catherine, Cordelia and Felicia all my possessions”.

C Clearly, the testator stated the names of his children in order of seniority. The implication being that in the sharing process, Paulina (1st appellant) would take first, then Michael, Fidelis (late father of the Respondent), Catherine, Cordelia and Felicia in that order. Taken D further, it means that with the death of Fidelis and Respondent being his inheritor would automatically take the position, his late father would have occupied in matters pertaining to his father’s (grandfather of the Respondent) property on any partitioning. This natural flow of events fitted perfectly with the intention of the testator and maker of E the Will, Exhibit “P1”.

As a follow up on the summation above is to state further, that the Appellants hanging onto the fact of the Respondent being their nephew and much younger than themselves would not have any effect whatsoever in the matter on ground which is anchored on the F clear terms of the Will which cannot be deviated from. Therefore, attempting to utilize Exhibit “P7” as a sharing formula is to import an extraneous material to meet one’s dreams or aspirations different from those of the other party and outside the confines of the document which speaks clearly without equivocation on the intendment G of the maker. It is in the light of what I have stated above that it can be seen that the two concurrent findings in favour of the Respondent have not had anything exceptional such as a miscarriage of justice or a serious violation of some principle of law or procedure upon which H this court can set about disturbing those findings. See Paul Nwadike & Ors. v. Ibekwe & Ors. (1987) 12 SC 34; Ojomu v. Ajao (1983) 9 SC 22 at 53.

The point has to be made that the Appellants were in error in urging this court to hold that the Court of Appeal ought to have

confined its adjudication only upon the effect of Exhibit “P7” and not go into the matter of the ranking of the beneficiaries since a prayer in that regard was not before them. That posture of the Appellants is without taking cognizance of the Rules of the Court of Appeal and in particular Order 18, Rule 11 (1), (2) of the Court of Appeal Rules, 2007. I shall restate them below, viz:- B

Order 18, Rule 11 (1) provides:

“The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further order as the case may require including any order as to costs”. C

“11 (2): The powers contained in paragraph (1) of this rule may be exercised by the court notwithstanding that the Appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the Respondents or parties although such Respondents or parties may not have appealed from or complained of the decision.” D

It is therefore in keeping with the rules of court in the carrying out of its duties to ensure that substantial justice is made that the court would standing within the natural flow of events and its responsibility to see that justice is done that the Court of trial and the Court of Appeal were right not to stray beyond what the testator provided. See *Nishizawal Ltd v. Strichan D. N. Jethwani* (1984) 12 SC 234 at 286. E

Getting back to the question posed in the determination of this appeal, my answer is that the Court of Appeal was justified in altering the mode of making choices proposed by the Appellants in the interest of justice and fairness in the manner of the partition of the property, No. 25 New American Road, Onitsha. F

From the foregoing and the well set out reasoning in the lead judgment, I have no hesitation in dismissing this appeal. I abide by the consequential orders my learned brother made. G