AN APPRAISAL OF SELECTED NATIVE ESTATE LAWS AND CUSTOM IN NIGERIA

BY

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The mistake was often made, in the past, to mix up the principles of customary laws with those of English laws in respect of the administration of estates in Nigeria. So much was the notoriety of the error that it came before the Supreme Court in Lawal V. Younan[1] for much needed clarification. In his lucid exposition, Ademola CJF observed thus:

> Clearly, an administration under a grant by a customary court differs materially from an administration under the English law which is most applicable or taken cognizance of in an administration under the customary law. It is clear, a person to whom power is given under customary law to administer estate of a deceased person, is a person empowered by that law to administer the estate of the deceased where customary law can be invoked, and such power cannot be extended to matters which are statutory rights under English law and to which statutory remedies apply.[2]

It is the above rationale that informed the separate treatment of indigenous aspect of administration of estates, with a view of making clear distinctions in their features. In doing this, we shall have recourse to the customary rules of inheritance and succession where the deluge of the customary rules of administration of estates are derived from. Of utmost importance is the fact that since will are unknown to customary rules, the customary rules are evoked when the deceased died intestate and has married under the customary law without having to implicitly revoke the application of customary rules by way of marrying under the English laws. This goes to state that when a valid will is available, customary rules cannot apply, be it a marriage under the English laws or not. Furthermore, it has to be borne in mind that in Nigeria, the most common indigenous system of succession is patrilineal as opposed to matrilineal.

A good custom can be given judicial notice by the court where such custom is at variance with justice, equity and good conscience.[3] It should be noted here that the Hausa's of Northern Nigeria practice the Islamic system of estate administration, because their culture dovetails into the Islamic practices and can now be said to be coterming, so the Hausa system of estate administration will not be considered because it is not customary, but rather Islamic.

Administration of Estates among the Yorubas

Under Yoruba customary law, there are two methods of distribution or

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[1](1961) ALL NLR 245

[2]Ibid at 252-253

[3]Nelson V. Nelson (1932)1 WACA 215

inheritance. As clearly elucidated by Ademola CJN in Akinyede V. Opere.[4]

> It is a common ground that the Yoruba customary law admits of two methods distribution of assets when the progenitor died intestate. Distributions are usually made by what the Yoruba call "Idi-Igi" or 'Ori-Ojori.

The Idi-igi system method of distribution is done according to the number of wives the deceased had, so a wife who has 10 children will get an equal share of property with a wife who has just one child or a wife who has no child at all. This method of distribution was done so as to quench any dispute that may arise between the wives on the death of their husband. While Ori-Ojori (no head is bigger than the other) system of distribution is done according to the number of children the deceased had before his death, the property is distributed equally among all his children whether they be male or female, each child will get an equal portion, head by head.

Since the structure and organization of the family system is inherently germane to the rule of succession to headship of the family, it is pertinent to note that when the founder of the family dies in Yoruba land, the eldest surviving son called the "Dawodu" succeeds to the headship of the family with all that it implies including residence and giving of orders in his father's house or compound. Furthermore, on the death of the eldest surviving son, the next eldest surviving child of the founder whether male or female, is the proper person to succeed as the head of the family. Besides, if there is going to be an important dealing with the family property all the branches of the family must be consulted, and representation on the family council is also per strip according to the number of wives and children. Normally, the distribution of the estate is always on equal shares between the respective branches, regard being had to any property already received by any of the founder's children during his life time. This rights and privileges of the grand children are traditionally confined to the right of the immediate parents in the family property. Generally speaking, the founder's compound or house is usually regarded as 'the family house' which must be preserved for posterity.

The idi-igi system is the most universally acceptable mode of distribution of an intestate estate in Yoruba land. This was further confirmed and reinforced in the locus classicus of Danmole V. Dawodu[5] where the Supreme Court reiterated this principle with consummate clarity thus:

> Having carefully considered all the evidence now before us, I would hold that (i) Idi-igi is an integral part of the Yoruba native law and custom relating to the distribution of intestates (ii) that Idi-igi is in full force and observance at the present time, and has not been abrogated (iii) that Idi-igi is the universal method of distribution except where there is a dispute among descendants of the intestate as to the proportions in to which the estate should be divided.[6]

The facts of Danmole V. Dawodu are that one Suberu died intestate leaving nine surviving children by four wives. The wives were married to him according to Yoruba customary law. There were also a number of grandchildren. The Supreme Court defied

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[4] (1968) ALL LR 65 at 67

[5] (1985) 3 F.S.C 46

[6] Supra at p.49 Abott F.J

the consensus of the lower court for 'Ori-Ojori' in preference for Idi-igi. The Privy Council later confirmed the decision of the Supreme Court.[7] Adefarasin J. (as he then was), doubted the decision in Danmole's case but nevertheless followed it because he felt bound to follow it in the case of Salako V. Salako[8]. The doubt in the justice and equitability of the rule in Danmole's case is accentuated by the very dictum of the court. It says:

> The witness for defendants'/respondents substantially agreed that Idi-igi was always observed in former times, but stated that it has now been to some extent superseded by Ori-Ojori, the change having come about to preserve cordial relationships between the children. Those who, under Idi-Igi received a smaller share than their half-brothers and half-sisters felt aggrieved and this often resulted in the expenses of litigation. To avoid this, therefore Ori-Ojori was adopted in some instances. The upshot of this evidence is in my opinion, that Ori-Ojori is a fairly recent innovation introduced to avoid litigation.[9]

It should however be noted that although Danmole's case resolved rivalry between Idi-igi and Ori-Ojori in favour of Idi-igi, nevertheless, the plethora of cases relating to customary system of administration of estate which appear to prefer and vindicate the Ori-Ojori were more than those of Idi-igi.

It is against this background that we welcome the reinterpretation of the rule in Danmole's case by the Supreme Court in the latter case of Akinyede V. Opere.[10] There, the court attached some weight to the discretion of the family in adopting what mode to adopt in distributing the property of an intestate under the Yoruba customary law. The court held where a dispute arises as to the distribution of family property, the head of the family has a right to decide which system of distribution is to be adopted. Any method that is used in the distribution of the property will be enforceable under the Yoruba customary laws.

As to the rights of the surviving parents in their child's property, as against those if his/her brothers and sisters of the whole or half-blood, the court in Adedoyin V. Simeon[11] has held that under Yoruba law and custom of inheritance, the mother must take her deceased daughter's share to the exclusion of the deceased siblings of half-blood. In the same case, the court held that the following customary rules are the correct statements of native law and custom throughout Yoruba land:

(1) If a child dies, having personal property, her father being dead, but her mother alive, the property will pass to the mother, provided the child had no brother or sister being children of her mother.

(2) If the father had been alive as well as the mother the property could be shared between the father and the mother, although the father would generally invite the mother to take the whole.

(3) If the father had been alive as well as the mother and also a brother and

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[7]The Privy Council decision is reported in (1962) 1 WLR 1053

[8](1965) LLR 136

[9]Supra at p.48

[10](1968) ALL NLR 65

[11](1928) 9 NLR 76

> sister of the child by the same mother, the property would be divided between the brother and sister and the parents would take nothing. Half-brother and half-sister, being children of a different mother would not take any share. It makes no difference if the personal was given inter vivos or left by will to the child by her father.[12]

Next to consider is the right to administer estates under the customary law. In Aileru V. Abinu[13], it was held that customary law did not permit a widow to administer the estate of her husband. This custom was also reinstated in the case of Akinnubi V. Akinnubi where Mohammed JSC stated thus:

> Again the parties are not in dispute over the Yoruba native law and custom that a widow could not inherit her deceased husband's property nor could the woman be appointed an administratrix of her late husband's estate.

Onu JSC settled the issue beyond reasonable doubt in the following words:

> Now under the Yoruba customary law a widow under an intestacy is regarded as a part of the estate of her deceased husband to be administered or inherited by the deceased family, she could neither be entitled to apply for grant of letters of administration nor be appointed as co-administratrix of her deceased husband's estate.[14]

Before any alienation of family property can occur, the head of the family along with all the principal members of the family must agree unless the sale will either be void or voidable. The Court of Appeal in the case of Balogun V. Yusuff[15] held that alienation of family property without the consent of the family head was void, while alienation without the consent of the principal members was voidable.

Administration of Estates among the Ibos:

In majority of Ibo communities, the family grouping is strictly patrilineal. In this respect, an intestate's heir is his paternal next of kin.

Furthermore, a distinction is made in Ibo law of succession between the houses where a man lived with his family and other houses or property owned by him. The father's residence is inherited by his eldest son to the exclusion of all other children. In the case of house allocated to a wife for her occupation, she is allowed to live in the house in as far as she doesn't remarry. In Ngwo V. Onyejena[16] it was held that succession to the headship of the family in Asaba is by descendants of the eldest son. If this is so, we are inclined to believe that the death of the eldest son may not affect the rights of his descendants. Consequently, the title acquired by the eldest son over his inheritance is absolute, although he cannot exclude members of the family who were resident during his father's life time. In this respect, the eldest son cannot deal with the property in such a way as it will affect the possesory right of such family members. In other words, the eldest son holds the property in trust for himself and other sons of the deceased.

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[12] See also George V. Fajore (1939) 15 NLR, Caulrick V. Harding (1926) 7 NLR 48

[13] (1952) 20 NLR 46. See also Suberu V. Sunmonu (1957)2 FSC 33

[14] Ibid at 217

[15] (2010) 16 WRN 158 C.A

[16] (1964) WRNLR 138

It follows from the above that in Ibo land, female members of the family have no right to inherit land. Where a landowner dies without leaving any male issue, inheritance is by brother or other male paternal next of kin. This principle was applied by the Supreme Court in Nezianya V. Okague[17] in respect of Onitsha custom. It was held that it was wrong in Onitsha custom for real property of a man who died without a male heir issue to go to his female issue, who on her marriage would carry the property to her husband's father house. Following the same principle, a widow in Ibo land cannot succeed to her husband's property, although the widow and daughter have a right or residence with the consent of the family. In Ejiamike V. Ejiamake[18] Oputa J. sitting at High Court of the defunct East Central State held in respect of Onitsha custom that an "Okpala" (the eldest son) has the sole right to administer the property of his deceased father except where he is still an infant.

This Customary Practice of women not being allowed to own property is repugnant to natural justice, equity and good conscience. The court of appeal in the case of Mojekwu V. Mojekwu[19] struck down, as repugnant to natural justice, equity and good conscience, the Oli Ekpe custom which bars women from inheriting properties. In this case, the deceased died intestate having survived by his wife and four daughters, the Oli-ekpe custom prevented the daughters from inheriting their father's property, instead the property was given to the brothers of the deceased man. Justice Niki Tobi JSC (as he then was) gave a wise decision in this case when he said:

> The sex of a child is not something that is man-made, children are all gifts from God, whether they be male or female ... so custom that explicitly prevents them from inheriting the property of their own father is just very bad and archaic.... We need not travel to Beijing to know that the Nnewi Oli Ekpe custom is repugnant to natural justice, equity and good conscience.

It is unfortunate to note that this decision has been rejected by the Supreme Court; Uwaifo JSC in Mojekwu V. Iwuchukwu[20] held that:

> I cannot see any justification for the court below to pronounce that the Nnewi Oli Ekpe native custom was repugnant to natural justice, equity and good conscience, it would appear, for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornets nest ... I find myself unable to allow that pronouncement to stand and in the circumstances, and accordingly I disapprove of it as unwarranted.

The above pronouncement would appear to cut short the gender celebration in Mojekwu V. Mojekwu[21].

Where a woman acquires property on her own and she is survived by sons, her landed property is inherited by her sons. In the absence of sons, the legal position depends on whether she is married or not. In the case of a married woman, the following

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[16] (1964) WRNLR 138

[17] (1963) 1 ALL NLR 352

[18] (1972) ECSLR 11

[19] (1997) 7 NWLR pt. 512 at 283

[20] (2004) 7 MJSC p.165

[21] Supra

evidence was accepted by the court in Nwagege V. Adigwe.[22]

(a) Property acquired by the deceased before her marriage goes to her own family and not to her husband.

(b) Property acquired by her after marriage goes to her husband or his next of kin.

On the principles guiding alienation of family property in Iboland, the supreme court in Ekpendu V. Erika[23] held that a sale of family land by the head of the family without the concurrence of the family members is voidable and that a sale of family property by the principle members without the consent of the family head is void ab initio.

Administration of Estates among the Nupes

Under the Nupe customary rules, the system of inheritance is patrilineal and the old rule of primogeniture was prevalent in the pre-Islamic era which has not been displaced by modern democratic idea of joint succession with the eldest son succeeding his father. The eldest son is succeeded by his younger brother who is the man next in seniority of the same generation, until the generation is exhausted, the succession falls to the eldest son of the eldest brother who is the most senior member of the next generation.

All the foregoing principles were judicially considered and approved in Tapa V. Kuka[24]. In this case, a Muslim Nupe of Bida Niger state died intestate leaving landed property in Lagos. He was survived by a wife, a sister and a cousin. But there was no brother. When the sister and cousin applied for grant of letters of administration, the widow of the deceased entered a caveat. It was held by Brooke J. of the then Supreme Court of Lagos that the law to be applied was the deceased's personal law, namely the Mohammedan law prevailing among the Nupe people and that as there was no brother of the deceased, the sister was solely entitled to grant a letters of administration. It was considered not necessary to join the cousin.

Among the Nupes, succession in the paternal and in the maternal lines supplement each other. The sons naturally inherit the properties of their fathers while the girls inherit their mothers. The requirement of personal competence in the family head is also very crucial here.

Nomadic Fulanis

Among the normadic Fulanis, the eldest son inherits his deceased father's cattle, out of which he makes presents of some to each of his younger brothers according to need. A woman does not normally share in the distribution of cattle, which takes place at the father's death, but she regularly receives cattle from her brothers on behalf of her first child or possibly other children.

If a nomadic Fulani man dies, the order and mode of distribution are briefly stated as follows:

a) His younger brother or if there is no younger brother, his eldest son takes all the cattles as heir or inheritor.

[22] (1934) 11 NLR 134

[23] (1959) 4 FSC 79

[24] (1945) 18 NLR 5

[25] See Laregun V. Funlayo (1955-56) WNLR 167. See also Nwagwu V. Okoronkwo (1987) 3 NWLR (pt.60) 314

b) Female children of the deceased who are left under the charge of the inheritor are allocated a cow each, which goes with her when she gets married.

c) Younger brothers of the inheritor and male children of the deceased wives remain as helpers within the family homestead but without any specific allocation of cattle until they themselves get married in the course of time.

d) The wives of the deceased, if they have children, remain with their children, but if they have no children, they may leave with their own cattle and will probably remarry if still young.

e) A common custom is for a younger brother to inherit one of the deceased wives, but an elder brother does not do same with the younger brother's wives or cattle.

Customary Pledge

A pledge is created when an owner of land transfers possession of land to his creditor as security or rather, in consideration of a loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for taking the loan. The nature of the interest acquired is that the grantee has the right to exercise all acts of ownership over the land so long as the debt is unpaid and the right of the pledge is transmissible to his heirs. A pledge should not commit waste and he is not expected to plant economic trees or rebuild thereon. If he does, he cannot be prevented by the grantor, for that is the way he had chosen to sue the land. Such conduct will not however be allowed to hamper the grantors right of redemption. Consequently, a pledgee who plants economic trees or erects permanent structures does so at his peril in the absence of an express agreement to that effect.

The right of the pledgor to redeem cannot be defeated by lapse of time[25] and can be exercised by the pledger or his successor in title against the pledge or his successor in title. It seems the right cannot be fettered by agreement, as it is absolute. As the pledge is expected to obtain some benefit from the transaction, the right of redemption can only be exercised after a reasonable lapse of time from the date of the grant. Furthermore, the right of redemption cannot be exercised in such a way as to prejudice the pledgee's right to harvest grown crops from the land. The rationale for this customary rule is that only possessory rights are granted since the redemption is perpetual, a pledge can never become the absolute owner of the property by reason of long possession. He has no power to discharge the land or to discharge the pledgor's obligation to him, as such disposition will be void. A pledge who is pressed for money may repledge it to another creditor who is subrogated to him.

Customary Tenancy

The relationship created between an overlord and a customary tenant is totally different from that of a landlord and a tenant under English law. The rights of a customary tenant are indefeasible once permanent buildings or other structural improvements are erected on the land[26]. A customary tenant enjoy a perpetual right

[25] Ojomu V. Ajao (1983) 2 SC NLR 156

subject to good behaviour and once he improves the land either by extensive commercial farming or erection of buildings, his rights appears indefeasible. Furthermore, the overlord cannot grant the land or any part of it to a third party without the consent of the customary tenant. The indefeasibility of the interest of a customary tenant is exemplified in Itsekeri customary laws when the Supreme Court confirmed in Itsekeri Communal Land Trustees V. Warri Divisional Planning Authority[27] that where acquisitions takes place in respect of a land subject to customary tenancy, the tenant takes two-thirds, while the overlord takes one third of the compensation payable. This same principle applies where the compensation is as a result of a lease.[28]

It may be necessary to differentiate between a customary tenant and grantee under a customary lease. A customary tenant is a grantee of land that pays tribute and enjoys perpetuity of tenure subject to good behaviour, while a customary lessee is granted land as consideration for a loan for a particular length of time. In this respect, the defendants in Ejeanalonye V. Omabuike[29] were held to be customary tenants of the plaintiff as they were paying the yearly rent of N200 to their landlords. It was further emphasized in this case that the giving of any form of present does not form part of a customary lease.

Unless there is a challenge to an overlord's title, action for forfeiture cannot be against a customary tenant. It was held in Erinle V. Edelaja[30] that where a customary tenant shows by his conduct over a long period of times a determination of claim and maintain the subject matter of the tenancy as his own, that is a denial of the overlord's title which constitute a misbehavior for which tenancy is liable to be forfeited. A customary tenant stands to forfeit his estate if he is not of good behaviour or attempts to alienate his overlord's title without his consent or breaches any other incidents of customary tenancy. The Supreme Court further held that not all proved acts of misbehavior of a customary tenant are to be punished by imposition of fine and that misbehavior may attract forfeiture depending on the seriousness and repetitive nature of the acts constituting such misbehaviour. Non-payment of rent and denial of overlord's title is one of the gravest breaches that a customary tenant can commit[31].

CONCLUSION

On the administration of estates under the customary system, it is noted, with severe reservations, that the customary rule in Yoruba land which has been confirmed through plethora of cases is that a wife cannot be appointed an administrator of her deceased husband's estate. I doubt whether such customary rule can survive the repugnancy test contained in S.42 and the constitutional test against discrimination on grounds of sex coupled with the ever increasing feminine militancy and campaign for gender equality. I suggest that this customary rule should be seriously reviewed anytime it is brought before the court. After all, it is not clear whether any other relation of the husband can better protect the interest of the children in their father's property than their mother.

[27] (1971) 11 SC 235

[28] Aghenghen V. Waghoreghor (1974) 1 SC

[29] (1974) 2 SC 33

[30] (1969) NMLR 132

[31] See Akpagbue V. Ogu (1976) SC 63.

[32] Supra

We are not in agreement with the judgment of the privy council in Danmole V. Dawodu[32] that the 'idi-igi' system of distribution of estate should be sustained against 'ori-ojuori' method under the Yoruba customary rules. This is because there would be an apparent inequality where for instance one of the wives had two children while another has ten children and both branches were given equal shares under the Idi-igi system. The result would be that each child of the wife that had ten children at the end of such exercise, would have been discriminated against purely by virtue of the circumstance of their birth, which is a redressable constitutional infringement of their rights[33]. We are therefore more inclined to Ori-Ojuori system of estate distribution which the court itself has noticed as expedient to avoid litigation.

We also hold this same view when it comes to the customary practice of women being disallowed to inherit properties either as a widow or a daughter. This is also an infringement of their constitutional right solely based on gender. Though the courts are trying their best to rectify this custom, there has been no decided Supreme Court case to extinguish this customary practice at the time of the writing of this work.

Customary tenancy was mentioned and explained as a system of managing estates. I however emphasize here that the Land Use Act has modified its tenure and sustenance in such a way that it no longer retains its entire original customary attributes. For instance, the radical title no longer vests on the customary landowners but on the Governor. Thus, the position of the overlord is now that of a tenant subject to the administrative control of the Governor or Local Government. Also, the overlord's possession is no longer exclusive as he is now subject to the right of the Governor or the local Government as the case may be. The tenant has only the occupational right and still pays tribute to his overlord and he still holds the land in perpetuity subject to good behaviour[34] but his position is now precarious since he automatically losses that right when the overlords occupancy is revoked.

As regard customary pledge, Section 34(4) of the Act preserved its existence of the Act. The Act recognizes the right of the pledgor to a statutory right of occupancy with regard to pledged land situated in urban area while it protects the pledgee's interest in the property by recognizing and making any right of occupancy subject to it.

RECOMMENDATION

I recommend that a holder of right of occupancy may be referred to as the licensor while the holders of tiers of subsidiary interests may be referred to as sub-lincensee or subunder lincensor or sub-under lincesee as the case may be.

Furthermore, all agency native laws and customs in Nigeria be legislated upon, codified and clearly stated not minding its years of existence or practice, to the extent that it is repugnant to natural law and justice and or contrary to the provisions of the Section 42 of the Constitution stands and remains null and void with no effect whatsoever in any part of Nigeria.

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[33] See Section 42(2) of the Constitution Federal Republic of Nigeria 1999.

[34] Ameh V. Ameh (2011) & WRN see also the case of Damulak Dashi & Stephen Datlong & anor (2009) 1 SCM 17 at 27