Inheritance and Succession: Customary Law Practice and Procedure

Theme:

Enhancing Judicial Efficiency and Quality of Decision Making

Presenter:

His Worship Emmanuel J. Samaila, Esq.

Upper Customary Court, Kafanchan,
Kaduna State Judiciary

Event:

Refresher Course for Judges of the Lower Courts

(Magistrates, Judges of the Sharia, Area and Customary Courts)

Venue:

Andrews Otutu Obaseki Auditorium,

National Judicial Institute,

Abuja

Date:

Thursday 27 February, 2025

Inheritance and Succession: Customary Law, Practice and Procedure

Being a Paper Presented by His Worship Emmanuel J. Samaila, Esq. during the Hybrid National Workshop for Judges of the Lower Courts at the National Judicial Institute (NJI), Abuja under the theme: "Enhancing Judicial Efficiency and Quality of Decision Making" which held on 27th February, 2025

I. Introduction

I consider it a great honour and privilege to be nominated as one of the resource persons at this Hybrid National Workshop for Judges of the Lower Courts. I wish to express my profound gratitude to the Board of Governors of the NJI under the distinguished Chairmanship of the Chief Justice of Nigeria, Honourable Justice Kudirat Kekere-Ekun, GCON, FNJI. I am also grateful to the Administrator of the National Judicial Institute, Honourable Justice Salisu Garba Abdullahi (Rtd) and the Education Committee of the Board of Governors of the Institute, under the Chairmanship of Honourable Justice John Inyang Okoro, CFR, J.S.C., for affording me this opportunity to share my experiential knowledge as a customary law practitioner of almost two decades. Finally, I appreciate the Chief Judge of Kaduna State, Honourable Justice Muhammad Tukur Muazu and my Head of Court, Honourable Justice Danlami Garba, President, Customary Court of Appeal, Kaduna State for permitting me to take up this national assignment at the citadel of judicial knowledge and training.

The topic I was asked to speak on is: **Inheritance and Succession: Customary Law Practice and Procedure**. The variants of this topic have been variously considered in different forms in different fora, papers, articles and books. As it shall soon become manifest, I toed a less-trodden path to dissect this topic and its underlying sub-themes as I aim to stimulate a discourse on adjudication on issues of succession, in particular, and customary law issues, in general. I hope that at the end of this assignment, I would have justified the confidence reposed on me to make this presentation.

The objective of this paper is that there will be an effective understanding of the principles guiding the application of customary law in the determination of succession matters and thereby positively contribute towards enhancing our efficiency and the quality of our decision-making as Judges of lower courts.

II. Lower Courts with Jurisdiction over Succession under Customary Law

A. *Customary Courts.*[1] States that established Customary Courts give them the jurisdiction to hear and determine all disputes under customary law.

B. *Magistrates Courts (District Courts)*[2]. States (without Customary or Area Courts) empower their Magistrates Courts to adjudicate customary law disputes.

C. *Area Courts.*[3] These courts are vested with jurisdiction over customary law, Islamic law, criminal law and/or general law matters as needed by the State.

III. The Characteristics of Customary Law

In a discourse about customary law, it is appropriate that the expression is defined. In *Ohai v Akpoemonye*[4], the Court referred to *Zaidan, K v Mohsen. F.H*[5] where customary law was defined as:

> [A]ny system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.

Basically, customary law is flexible, unwritten and contextual. Being flexible simply means its rules change with time. Its unwritten form enhances its flexibility while its contextuality ensures that each community is bound by what it recognizes and practices as its custom giving credence to the fact that there is no customary common law or customary law of general application.

As a mirror of accepted usage, a custom, like a mirror, neither keeps a permanent form nor reflects the same form every time. It is offensive to the

---

1 Ss.10, 20, 21 and Second Schedule Kaduna State Customary Courts Law, 2001 Law (as amended) (KSCCL); Ss.2(1), 15(1)-(2) and Schedule of the Nasarawa State Customary Court Law 2022 (NSCCL); Ss.21, 22, 25, 26 and First Schedule Lagos State Customary Courts Law, 2011 (as amended) (LSCCL); ss.14 – 17, 19, 21 Akwa Ibom State Customary Courts Law 2020 (ASCCL)

2 I learnt that the Magistrates Courts in Niger State is a perfect example of this as there are only Magistrates Court with wide civil and criminal jurisdiction and Sharia Courts with jurisdiction over issues of Islamic law. As at the time of writing this paper, I could not get access to a copy of their enabling law.

3 Ss.12, 14, 15, 17, 19 & First Schedule Gongola State Area Courts Edict 1988 CAP.11 (GSACE) (applicable to Adamawa and Taraba States); Ss. 20, 21 & The Schedule Gombe State Area Courts Law, 2020

4 (1999) 1 NWLR (Pt.588) 521 at 527, paras.

5 (1973) 11 S.C. p.1 at 21

intrinsic nature of customary law to codify it as it will invariably lose its flexibility. Customary law must not be crystalized or codified in any way, either by case law, statute or textual authorities. When this happens, customary law loses its essence and becomes just another common or statutory law to which their rules, which are at cross-purposes with customary law, invariably apply.

In *Osolu v. Osolu*[6], after restating the definition of customary law as a mirror of accepted usage, the Court held that "a particular customary law must be in existence at the relevant time and it must be recognised and adhered to by the community."[7] The Court further held that:

> On the subject of the management and control of the deceased intestate property on his death, learned trial judge seems to have heavily placed reliance on the revised edition of Professor Nwogwugwu's book on Family Law, and Obi's Customary Law Manual. But this is not the case respondent set out to make. …
> The text of Professor Nwogwugwu's book is not on all fours with the evidence of the first plaintiff witness. The brothers have a role to play in the control and management of the deceased's estate according to the witness but the learned author of the books is of the view that the real property vests in his eldest son or *okpala…*
> There is no evidence before the trial Judge that the custom contained in Professor Nwogwugwu's book is accepted and recognised by Amichi community as the custom governing the control and management of property of an Amichi man who died intestate.[8]

The foregoing is an example of the impropriety of a Court's reliance on textual authorities as sources of the custom applicable to litigants in a particular matter who bear the burden of establishing their custom on the subject matter in dispute.

---

[6] (1998) 1 NWLR (Pt.535) 532
[7] *ibid.* p.562, paras. D – E
[8] *ibid.* p.565, para. D; p.566, para. C - D

IV. Nature of Proceedings in Adjudication Involving Customary Law

In proceedings in the Customary Courts, the court is enjoined to do substantial justice based on reasonable practice.[9] This entails keeping the proceedings simple in accord with common sense[10], devoid of technicalities, procedure or form[11] such as restricting itself to the claims of the parties but considering the whole case to distil the real issues joined between parties for proper and adequate determination.[12] Customary Courts are neither governed by the strict rules of common law courts[13] nor bound by the provisions of the Evidence Act[14] and the Limitation Law[15] in their civil proceedings. Also, in customary adjudication, a Court has the power to call independent witnesses to assist it in explaining some issues in a matter.[16]

It is desirable and in the interest of justice that all courts vested with jurisdiction over customary law disputes should be intentional about learning the peculiarities of customary law and it procedural rules[17] else they will invariably occasion miscarriage of justice when they apply the rules and laws of their Courts in proceedings involving customary law. It is noteworthy that these requirements are sacrosanct even where the court adjudicating over customary law disputes, particularly a Customary Court, is presided over by a legal practitioner or that legal practitioners appear before it.[18] The focus is on the parties, not the Judge.

---

9 *Arum v Nwobodo* (2004) 9 NWLR (878) 411 at 442

10 *Agbasi v Obi* (1998) 2 NWLR (Pt. 536) 1 at 14, paras. A-B

11 S.59 KSCCL n.1; *Ede v Mba* (2011) 18 NWLR (Pt. 1278) 236 at 272, para. A

12 *Ibrahim v Abashe* & Ors (2014) KCCLR-24 (CCA); *Erhunmwunse v Ehanire* (2003) 13 NWLR (PT. 837) 353

13 *ibid.*

14 See s.1(c) of the Evidence Act 2011 (as amended) (EA). See *Danfari & Anor. v Shugaba* (2022) KCCLR-259 (CCA). The exception to the applicability of the law is where Section 256(1)(c)is activated by appropriate authority. Apart from Edo State (2001) and Osun State (2010), no other State, to my knowledge, has conferred upon Customary Courts, Area Courts and the Customary Court of Appeal the power to enforce the provisions of the Act in their civil proceedings.

15 See s.4(1) Kaduna State Limitation Edict (Cap 89), Laws of Kaduna State, 1991; *Shehu v Yohanna* (2018) KCCLR-79 (CCA); *Majekodunmi v Abina* (2002) 3 NWLR (Pt.755) 720 at 744, paras. E-F

16 *Azuokwu v Nwokanma* (2005) 11 NWLR (Pt.937) 537 at 550-551, paras. H-B

17 E.J. Samaila, "Understanding the Dynamics of Civil Litigation in the Customary Court" [2022] (3 October 2022) <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=5468606> accessed 28 December 2024.

18 See the admonition of Idigbe, JSC in *Chief Karimu Ajagunjeun v Sobo Osho of Yeku Village & Ors* (1977) LLJR-SC

The need for specialty in dealing with cases involving customary law and its rules is the rationale behind the constitutional requirement for a certain number of Justices of the Court of Appeal and the Supreme Court to include "persons learned in Islamic personal law and persons learned in customary law".[19] This requirement is to ensure that justice is done in accordance with the peculiarities inherent in Islamic personal law and customary law disputes. If such specialty is required for the appellate courts, the need for the restriction of adjudication over customary law disputes to suitably trained judges or to special courts only, that is Customary Courts, cannot be overstated. This is also important as many litigants at the lower courts are indigent and unable to appeal against decisions in a customary law dispute which was apparently based on inapplicable common and statutory laws and rules.[20]

V. Applicable Laws

1. Customary Law

The primary law applicable to adjudication in any dispute over a custom is customary law. The Laws establishing Customary Courts makes this provision.[21] Such law must not be repugnant to natural justice. It must be equitable and in accord with good conscience. The Court asked to apply a custom must take existing social environment into cognizance in reaching its decision. It must ensure that the custom to be enforced is neither contrary to public policy nor incompatible, with any existing written law. All customs must pass the validity test before they can be judicially enforced. Consider the following:

A. A custom must not be applied merely because a family, tribe or community consent to it or practices it. Once an aggrieved practitioner of a custom seeks judicial imprimatur, the Court must subject the custom to the validity test. The custom must pass through the eye of the needle before it is given judicial endorsement. In *Okonkwo v Okagbue*[22], it was contested that the Onitsha marriage custom allowing a widow to bear children for her late

---

[19] S.288 Constitution of the Federal Republic of Nigeria, 1999 (as amended). (CFRN)

[20] n.17

[21] See KSCCL s.24; ASCCL s.14; ss 16-18 Federal Capital Territory Customary Court Act, 2007 (as amended) (FCTCCA)

[22] (1994) 9 NWLR (Pt.368) 301

husband was invalid. The trial High Court held that the custom is valid because the family and the village consented to it. The Court of Appeal upheld the decision. The Supreme Court set aside the concurrent decisions of the lower courts and declared the custom as repugnant and contrary to public policy. The marriage was declared null and void. The Court, per Ogundare, J.S.C., notably stated that:

> A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. The notion of public policy ought to reflect the change.
>
> That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static….[23]

B. A custom that is unconstitutional must not be enforced. Within the powers granted to trial Customary Courts or other lower Courts vested with jurisdiction over customary issues is the power to examine each custom to ensure that it is not inconsistent with any written law top among which is the Constitution.[24] Any custom which is discriminatory or disadvantageous to a person on the basis of gender or nature of birth conflicts with the provision of the Constitution and should be declared not just repugnant but also unconstitutional and unenforceable.[25]

In *Agbai & Ors v Okogbue*[26], the plaintiff/respondent sued the defendants/appellants after they confiscated his sewing machine for refusing to join an age group and pay levies. The trial Magistrate Court found for the

[23] *ibid*. p.341, paras. E-G
[24] CFRN s.1(3)
[25] *ibid*. s.42
[26] (1991) 7 NWLR (Pt.204) 391

plaintiff. The High Court allowed the appeal on the ground that the defendant's act is in accord with their custom which is not repugnant. However, the Court of Appeal reversed the decision and declared the custom unconstitutional. The Supreme Court upheld the judgment of the court below. In the leading judgment, Nwokedi, J.S.C. stated that:

> Customary laws were formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the Courts are there to enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment.[27]

In *John & Ors v Kumah*[28], the parties are members of the same family. The plaintiff contended that by custom, the 1st defendant is not qualified to be the head of the family because he is left-handed. The Court held that:

> I have no difficulty in dismissing the plaintiffs' basis for challenging the 1st defendant's qualification as the head of family on the ground that he is left-handed. First, no acceptable customary evidence was provided to the Court to support the contention and therefore the allegation remained unproven. Secondly, any such customary belief is not only repugnant to good conscience and common sense but would be inconsistent with the 1992 Constitution. …
>
> I am of the view that the effect of the plaintiffs' position is to deny any citizen whose physical make-up includes being a left-handed person from participating and holding a family position such as a

---

[27] *ibid*. p.417, paras. D-F

[28] *Nii Boye John & Ors v Nii Boye Kumah & Ors* (2019) JELR 65607 (HC); (2019) DLHC 6835

head of family. To confirm their weird position the plaintiffs are in Court to recruit the Court to participate and give its imprimatur to their discriminatory enterprise.

C. Peculiarity of each custom must be noted and considered. It is erroneous to rely on a custom presumed to be of general application. In *Jatau v Wakili & Anor*[29], the Court held thus:

> It is noteworthy that the defendants never gave evidence of the requirements of a valid sale transaction under Sanga custom which covers the area the disputed land is located. They have a burden of proving the Sanga custom for sale of land and demonstrating how the transaction between the buyer and the seller of the disputed land failed to meet that requirement. The defendants' blanket reference to and reliance on a general position of customary law is a fallacious ground upon which to build their case against the validity of the sale transaction between the buyer and the seller, whose lives were governed by Sanga custom, not a general customary law which was most likely established in a case between people from a different ethnic group bound by a different custom in a different locality at a distant time.
>
> The peculiarities of customary law cannot be overemphasized. Two prominent and distinct features of customary law are its flexibility and uncodified nature. While its flexibility depicts its susceptibility to change, its uncodified nature suits the lives of the people who are governed by it. Any violation of these features will rob customary law of its uniqueness and erode its peculiarity. If the practice of referencing a general position of customary law, which is developed from a dispute involving people from a particular tribe in a particular community in a particular location, is applied in a dispute involving a different set of litigants from a different ethnic group in a different location, this will lead to an unintentional and undesirable crystallization of customary law.

[29] (2024) KCCLR-233 (UCC). This is a decision of the Upper Customary Court, Gwantu, Sanga LGA, Kaduna State delivered on 30th April, 2024.

> Clothing customary law with the borrowed robes of common law and statutory law will rob it of its core essence, obliterate its uniqueness and erode its significance as a source of law for a people from a particular ethnic group in a particular community at a particular time.
> Customary law is a matter of fact to be proved at all times in all cases as it might have undergone changes from the last time it was judicially acted upon. He who alleges the existence of any particular custom from which a benefit is intended to be derived or as the law governing a particular transaction or state of affair bears the burden of proving it. The subtle crystallization of customary law presented as general elements of customary law may suit academic quests but for practical purposes, the best way of knowing what the current custom is on any particular issue is by visiting the particular community practicing the particular custom. At best, case laws on customary law may reveal the state of the law at the time a [an] agreement was entered into between two parties or an event giving rise to a dispute occurred. While parties from the same tribe or ethnic group may refer to previous decisions involving the custom in issue, it is open to a litigant in a current suit to challenge the currency of the custom as declared and applied in the previous suit which the court is invited to apply in a present suit.

2. Case Law

A discourse on the applicability of case law in customary adjudication necessarily includes the question of the applicability of the doctrine of judicial precedent. By its nature, customary law is not codified and is distinct from "common law principles with their characteristic certainty and ossification."[30]

From practical experience, there are customary issues to which the doctrine of judicial precedent should apply and customary disputes where it ought not to apply.

[30] Per Tobi JSC in *Onyenge & Ors v Ebere & Ors* (2004) 13 NWLR (Pt.889) 20 at 41, para. F

A. When the doctrine should apply:

i. Pronouncements on discriminatory practices based on gender e.g. refund of bride without a corresponding order to pay compensation or general damages
ii. Disinheritance of female children or women
iii. Land law – means of proof, oath-taking, customary arbitration etc.
iv. General issues in the administration of justice: fair hearing, evaluation of evidence, bias, miscarriage of justice, etc.

B. When the doctrine should not apply:

i. Requirements of a valid marriage[31]
ii. Return of bride-price after judicial divorce[32]
iii. Grounds for divorce[33]
iv. Succession. For example the doctrine of primogeniture[34] which states that the right to inheritance of the entire estate belongs exclusively to the eldest son of a deceased person who holds it as a trustee for the other children. Actually, the eldest child, male or female, ought to be the trustee in accordance with Section 42 of our Constitution.

Given the peculiarities of customary law and how it varies from one place to another, applying the doctrine of judicial precedent to the issue of succession will demean customary law and invariably occasion a miscarriage of justice. The proper approach to be taken is to apply the custom of the parties in an instant case subject to its passing the validity test. Courts bound by the Evidence Act and where pleadings are filed should take into consideration the dictum of the Court in *Nzekwu v Nzekwu*[35], where one of the issues for

---

[31] E.J. Samaila, 'Is the Payment of Bride Price a Requisite in the Creation of a Valid Customary Law Marriage?' *DNL Partners* (6 February 2023) <https://dnlpartners.ng/legalandstyle/2023/is-the-payment-of-bride-price-a-requisite-in-the-creation-of-a-valid-customary-law-marriage/> accessed 4 January 2025

[32] E.J. Samaila, 'Is the Return of the Bride-Price a Requisite for the Dissolution of a Customary Marriage?' *DNL Legal and Style* (15 February 2023) <https://dnllegalandstyle.com/dnl/is-the-return-of-the-bride-price-a-requisite-for-the-dissolution-of-a-customary-marriage/> accessed 4 January 2025

[33] E.J. Samaila, 'Are there Required Grounds for the Dissolution of a Customary Marriage?' *DNL Legal and Style* (14 April 2023) <https://dnllegalandstyle.com/dnl/are-there-required-grounds-for-the-dissolution-of-a-customary-marriage/> accessed 4 January 2025

[34] *Mojekwu v Mojekwu* (1997) 8 NWLR (Pt. 512) 283; *Mojekwu v Iwuchukwu* (2004) NWLR (Pt. 883) 196. The original respondent died before the appeal to the Supreme Court and was substituted with her daughter, Mrs Iwuchukwu, hence the change from *Mojekwu v Mojekwu* to *Mojekwu v Iwuchukwu*.

[35] (1989) 2 NWLR (Pt.104) 373 at 394, para. H - 395, para. A. See also *Onyenge v Ebere* (2004) 13 NWLR (Pt.889) 20 at 37, para. D

determination is: "Should the Court in the instant case have taken judicial notice of Onitsha customary law as pronounced in *Nezianya v Okagbue (1963) 1 All N.L.R. 352*?" The apex Court, per Nnamani, J.S.C., held thus:

> It seems that the custom, if it has been well established in a decision of the Superior Courts, need not be pleaded and proved. It would be necessary, however, to plead facts and lead evidence to bring the suit in question within the ambit of the judicially noticed custom.

The foregoing is one of the premises for distinguishing one case from another because where the facts and evidence are not on all fours with the judicially noticed custom, the Court will not take judicial notice of it but will apply the custom as established by the parties. The same principle will apply where the Court invites an expert witness, especially an author who is not a member of the community whose custom is in issue.

3. Applicable Statutory Laws

It is a fact that there are laws which bind courts vested with power to adjudicate on disputes over customary law. These statutes include laws that are enacted to regulate certain customary practices or procedures. The State has a duty to intervene through the enactment of appropriate Laws to ensure, for instance, that none of the fundamental rights of those whose lives are regulated by customary law is being trampled upon by the application of any custom. An example of such Laws is the Rivers' State *Prohibition of the Curtailment of Women's Rights to Share in Family Property Law. No.2 of 2022.* The Law demonstrates the efficacy of regulating customary law in a way that makes it more effective and desirous than case law. In one fell swoop, the Rivers' Law supplanted several customary practices which were discriminatory against women and were not being adequately addressed by the courts as many of the victims were either non-litigious or lack the means to seek judicial intervention. It is recommended that other States should enact similar laws.

While judicial authorities render some customs as being repugnant and unenforceable, their efficacy in protecting the rights of those bound by customs is limited in at least two ways. Firstly: the inadequate publicity given

to decided cases, especially judgments of the lower courts. It is a notorious fact that that there is no systematic publication of the decisions of lower Courts.[36]

Secondly: the limitations of judicial decisions. The doctrine of judicial precedent is activated only in a judicial dispute. Where there is no dispute on the custom or its kind by an aggrieved person, a custom which might had been declared repugnant continues to be practiced by a community without hindrance.

On the other hand, legislation has at least three advantages over case law in the protection of the rights of the people bound by customary law. Firstly: law making process gives visibility to a statute. Secondly: people are more aware of statutory laws than case laws. Thirdly: the applicability and enforceability of a statute. While a decision binds only the parties involved (seeing that only they can be held in contempt of a disobedience to it, a piece of legislation is binding on all persons within the limits of its operation. While only a contemnor can be punished, a piece of legislation creates offences arising from the breach of any of its provisions by any citizen within its territorial limit. Admittedly, legislation is a more effective way of regulating certain customary practices. However, care must be taken not to emasculate customary law and impede its growth.

4. The Constitution of the Federal Republic of Nigeria 1999

Section 42 of the Constitution contains the primary provision against all customs that are discriminatory or disadvantageous to any person. It provides:

> (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –
>
> (a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria, or any executive or administrative action of the Government, to disabilities or restrictions to which

[36] E.J. Samaila, 'Law Reporting, Case Publication and State Judiciaries in Nigeria' *BarristerNG* (14 August 2023) <https://barristerng.com/law-reporting-case-publication-and-state-judiciaries-in-nigeria/> accessed 29 December 2024. The mini-paper identified the challenges associated with access to the unreported decisions of courts with recommendations on how to resolve them.

> citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or …
>
> (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Among the fundamental rights provision in the Constitution[37], the right to dignity of person[38] stands out in connection to how females and wives married under customary law are treated. The right to freedom to associate[39] is also a constitutional provision to be considered in deciding the validity of a custom especially in matrimonial causes where most customs are skewed against women such as the requirement to refund her bride price if she dares to seek freedom from the bonds of the marriage as the respondent sought in *Reuben v Reuben*.[40]

VI. Succession

According to Justice Jibril Idrisu (Rtd), the terms succession and inheritance are "often used interchangeably to determine the distribution of the estate or property of a person after his/her death."[41] Studies in the law of succession expose us to the different principles and laws of succession in Nigeria. These are: statutory laws, customary law and Islamic law. For the purpose of this paper, the term "succession" is preferred.[42]

1. *Applicable laws*

The appropriate customary law applicable to disputes over succession is the customary law applying to the deceased.[43] The Court should ensure that it takes evidence of the applicable custom and apply same unless the Court finds

---

37 Chapter IV

38 *ibid*. s.34

39 *ibid*. s.40

40 (2024) KCCLR-281 (UCC). This is my decision at the Upper Customary Court, Gwantu, Sanga LGA, Kaduna State delivered on 10 January, 2024. You may request a copy: samailaemmanuelj@gmail.com or download it at: <https://lnkd.in/dPUpJ6rB >

41 Justice Jibril Idrisu (Rtd), 'Principles of Succession: Practice and Procedure- Customary Law Perspective.' Being Paper Presented At National Judicial Institute Abuja on Monday 18th March, 2019, p.3

42 O.M. Adekile, *Family Law* (Lagos, UNILAG Press and Bookshop Ltd, 2024) p.449 where the learned Professor distinguished the two terms and why succession is the more appropriate expression.

43 Ss.21, 24, 25 and First Schedule KSCCL; s.20 LSCCL; s.18 NSCCL; s.18 ASCCL, s.17 FCTCCA; First Schedule GSACE

it repugnant and unenforceable. Care should be taken by the Court not to rely on any textual authorities not supplied by any of the parties as containing a true statement of their custom.

2. ***Children (born within or outside wedlock) and wives (with or without children) can inherit their fathers and husbands respectively***

Under some customs, female children and wives, are disinherited from their fathers' and husbands' properties. In *Anekwe & Anor v Nweke*[44], the trial Court held that the wife of the deceased, who had no male child, cannot inherit her husband under Awka custom. The Court of Appeal unanimously upheld the decision. In an exceptional move, the apex Court overturned the concurrent decisions of the lower Courts, condemned the Awka custom disinheriting a wife and declared it repugnant. Hear Ngwuta, J.S.C. in his concurring decision[45]:

> My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle. The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the Creator for which the parents should be grateful. The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.

[44] (2014) LPELR-22697 (SC). See also *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt.104) 373 at 395, para.A; In *Ukeje v Ukeje* (2014) LPELR-22724(SC) Pp. 32-33, paras. E-G, the Supreme Court held that female children can inherit their fathers no matter the circumstance of their birth as the Igbo custom which disentitles them conflicts with Section 42(1), (a), (2) of the 1999 Constitution. Similar declaration was made in *Chiduluo v Attansey* (2020) 6 NWLR (Pt.1719) 102 at 123-124, paras. G-B; paras.C-D.

[45] *ibid*. p.42, paras. A-F

3. *Primogeniture*

It is believed by many that the Supreme Court's decision in *Mojekwu v. Iwuchukwu*[46] is "a drawback in the quest for the protection of women's right to inheritance under customary law and an endorsement of the right to primogeniture as exemplified by the Oli-ekpe custom."[47] This follows the setting aside of the celebrated decision of the lower court in *Mojekwu v Mojekwu*[48] where the Court of Appeal made a notable pronouncement on the proprietary rights of female children under Igbo custom. However, the apex Court's decision is actually "a correction of the commission of an error by the Court of Appeal, not a pronouncement on the repugnancy or otherwise of the Oli-ekpe custom or an approval of the right of primogeniture." As further stated[49]:

> Rather than criticizing the dictum of the apex Court in Mojekwu's case, focus should be placed on the enlightenment of females bound by the Oli-ekpe and similar customs to seek judicial enforcement of their constitutional right against discrimination based on their gender. In fact, the position of the Supreme Court is a wake-up call for the people bound by a custom to judicially challenge any aspect of it they feel is repugnant. It is only in such a circumstance that a Court will have the proper *vires* to declare a custom as being repugnant to natural justice, equity and good conscience, if it is found to be so.

4. *Succession should not be automatic because a custom says so.*

Courts are empowered to consider human rights issues, common sense, equity, good conscience, incompatibility with other laws while adjudicating over customary law disputes. Customary law ought not to be applied strictly without being subjected to relevant questions such as: Does this custom accords with common sense? Is it just? Is it equitable? Is it in consonance with

---

46 n.34

47 E.J. Samaila, 'Did the Supreme Court approve the Oli-ekpe Custom in Mojekwu v Iwuchukwu?' *BarristerNG BarristerNG* (6 May 2023) <https://barristerng.com/did-the-supreme-court-approve-the-oli-ekpe-custom-in-mojekwu-v-iwuchukwu/> accessed 29 December 2024.

48 n.34

49 n.47

good conscience? Is it incompatible with any written law? This is basically a reference to the Constitution not the Succession Laws of States as they are not applicable to issues of succession under customary law.

The questions asked in *Reuben's* case[50], which illuminated the pathway to the conclusion reached, are as follows:

> Can it be said that a custom requiring a woman to refund the token paid as her bride price, because she decided to divorce her husband, is not repugnant to natural justice when she is not an inanimate piece of property or an animal bereft of freewill acquired by him?
> Is it fair and in accord with the principles of natural justice to require a woman to refund the token paid as her bride price and return alone and empty-handed to her parents' house after investing her life in [a] matrimony she must have desired to last forever? Is it equitable to make and enforce such an order against a woman married under customary law, as in the instant case, when such is not a requirement for either an interim or final decree dissolving a marriage contracted under the Marriage Act?
> Will it be conscionable to blindly and slavishly give effect to and make such an order against the petitioner just because it is the custom of the Kagoma people as canvassed by the respondent? Is it conscionable that a woman married under the Marriage Act gets alimony and enjoys the just and equitable right to settlement of property and maintenance but her sister married under customary law gets nothing when she chooses to leave and is even required to refund to her man the token he paid as her bride price? Is it conscionable that a woman who was physically and psychologically battered and bruised in the course of discharging her numerous matrimonial responsibilities for eight (8) years, including taking care of their child and the respondent, especially when he becomes sick, should be ordered to refund her bride price for

[50] n.40

seeking to leave a broken union? How will the application of this custom encourage and inspire women married under customary law to be committed to their marriages to the point of returning to their husbands' houses, as the petitioner did severally in the instant case, even after being maltreated, bruised and battered? Isn't this customary practice manifestly discriminatory against the petitioner and breaches several of her constitutionally guaranteed rights, particularly the right to dignity of person as provided for in Section 34(1)(a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)? Doesn't this practice give more credence to the fact that women married under customary law are considered and treated as mere properties acquired by the man in whose favour exists a reserved and an unqualified right to the refund of the token he paid as bride price if at any time during her lifetime the woman dares to quit the matrimony, even after eight (8) years of complete obeisance to the respondent as in the instant case?

Without certain customs being so interrogated, obnoxious practices will be judicially stamped and given a new and better lease of life, a fertile ground for the perpetuation of injustices.[51]

---

[51] See *UCCK/CV/75/2024: Theresa Yohanna v. Yohanna Bako* (unreported) delivered on 9 January 2025 delivered at Upper Customary Court, Kafanchan, Kaduna State [Coram: HW Emmanuel J. Samaila (Judge) and Mr. James K. Kajang (Member)]. The respondent contended that the wife, a woman he had lived with and the mother of their four children, does not have any stake in their matrimonial home because he built it. The Court held that a wife does not have to make any monetary contribution to the building of their matrimonial home or prove same to establish that she is a stakeholder in their matrimonial home. Hear the Court:

"Firstly, must a wife make monetary contribution to the building of a matrimonial home before she owns a stake in it? We answer this question in the negative. A woman who was impregnated by a man and taken home to live with him and bear more children for him cannot be said to have made no contribution to the building of their matrimonial home. A woman, especially one married under customary law, is not a man's slave or a piece of property a man acquires for domestic chores and procreation that can be dumped at will without consequences. The dignity of women married under customary law is not an iota less than that of their sisters in statutory marriage. The reason is simple: they are all equal beneficiaries of the constitutional right to the dignity of person. See Section 34 Constitution of the Federal Republic of Nigeria 1999.

It is disheartening and disturbing that a man sees nothing wrong in taking a woman away from her parents and dishonourably neglects to go and perform her marriage rites despite having four children by her. We are perplexed: how will such a man even have the moral standing to say that the woman has made no contribution to the building of their matrimonial home? A woman who gave her all and was committed to her marriage to the extent of birthing four children with the Respondent cannot be said to have

VII. Tips to Enhancing our Judicial Effectiveness and Efficiency

1. Elicit the Current and Applicable Custom. Let us ensure that we elicit the current and applicable custom from the evidence of the parties in every dispute over customary law. It is the custom as narrated by the parties that will be applied in the resolution of their dispute subject to its passing the validity test and not contrary to the provisions of other relevant and applicable laws. Every court vested with jurisdiction over customary matters is a refiner, not a mere custodian of customary law.

2. *Boldly Apply the Relevant Laws*. As a lower Court Judge, you are not an inferior judge and the level of your court is not a definition of the limit and expanse of your intellect and mastery of the principles of the laws you apply. In her incisive, insightful and inspiring review of *Reuben's* case[52], Professor Adekile concluded that even though the precedent value of the decision is limited by the Court that delivered the judgment, she hoped that appellate Courts will affirm it if it goes on appeal. This is a testament to how profound the learned Professor found the reasoning of the Court.

***3. Make the Necessary Pronouncements*.**[53] Be bold in making the necessary pronouncements even when it seems to go against established legal principles. We apply a unique set of laws that is not fixed by its nature and ought to be kept so. Certainty, a trademark of common and statutory laws, is not a feature of customary law. Therefore, let us reflect the current form of the customs involved in disputes as elicited from the parties before us, not as contained in textual, judicial or statutory authorities unless the circumstance justifies such

---

contributed nothing to the building of their matrimonial home just because she probably did not make any direct financial contribution that she can prove."

[52] Oluwakemi Adekile, 'Refund of Bride Price on Dissolution of Customary Marriage: From Tradition to Constitutionality in the Case of Ruth Reuben V Reuben Ibrahim' (2024) 1 IBJ. It is also significant that the judgment was chosen by Citizen's Gavel as one of the landmark decisions in 2024 because of its "impact and societal implication". <https://open-justice.gavel.ng/assets/publication/landmark%20judgement.pdf> accessed on 28 December 2024. Their report is also available at: <https://lnkd.nd/dkvGKxeU>

[53] In *Okonkwo v Okagbue* (1994) 9 NWLR (Pt.368) 301 at 345, paras. F-G, the Court held that: "A custom which is not linked with any crime and has not been declared repugnant through the action of any interested party who has been affected by it will continue to have a legal force being a manifestation of the inner consciousness of those who give their consent to its application. However, once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application as a call has been made to examine whether it offends natural justice, the courts would pursue such complaint diligently in order to establish whether the custom is inconsistent with the principles of sound reason and good conscience."

reliance. In fact, there is a limit to the application of the doctrine of judicial precedent in adjudication over customary law. In the conclusion to their article titled, "Application of Doctrine of Judicial Precedent in Shariah Courts"[54], the authors said:

> In Islam, judges must decide each case in accordance with its own merit. Some might assert that there is communal interest in applying the doctrine of judicial precedent and it seems to be right to some extent. However, there are some significant negative effects which the incorporation of the doctrine of judicial precedent may cause, i.e., instability of legal rulings, closing the door of *ijtihad*, feeling inferiority of subordinate courts and continuation of erroneous judgment which leads to injustice.

Same reasoning and conclusions also apply to adjudication over customary law. In fact, a strict and general application of the doctrine might inevitably lead to the stultification of customary law, inhibition to the application of customary law as provided for in the establishing Laws, feeling of inferiority by lower Court Judges and the perpetuation of injustice.

4. Write Quality Decisions. We should endeavour to write quality decisions which reflect our legal research, legal reasoning and legal writing skills. Our goal is to demonstrate our analytical skills, knowledge of customary law, and mastery of the art of applying the relevant law to the credible facts of the case to arrive at a well-reasoned decision. The reason for our decisions should be so manifest and clear such that the parties and listeners or subsequent readers of our decisions will see and know exactly how and why we decided a matter the way we did. As the former Chief Justice of Nigeria, Honourable Justice Tanko Mohammed (Rtd) admonished in 2019 during the inauguration of the ultra-modern High Court complex in Imo State, we should write judgments for posterity like Justice Oputa who captured the law, explained it and expressed it

---

[54] Kyaw Hla Win @ H. Ahmed, S.A. Mikail, M. Arifin 'Application of Doctrine of Judicial Precedent in Shariah Courts' [2013] Issue 2 Malaysian Court Practice Bulletin <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405000> accessed 28 December 2024.

with clarity.[55] As lower Court Judges vested with the powers to adjudicate over succession and other issues under customary law, we have a duty to deepen customary jurisprudence.

Despite the challenges bedevilling the discharge of our duties, we must be intentional about upskilling. If we know better we will do better. We should read the decisions of our colleagues and also unreported decisions of our State courts as much as we can access. We should also subscribe to a law report, even if it is monthly. Reading law reports will give us at the lower Bench an unrestricted access to the judicial wisdom and skills of judges of superior courts. It is not in doubt that a lot of us desire to be mentored by our superior judges whose shoes we aspire to wear someday. While a physical or virtual one-on-one mentorship may not always be possible, we can freely but solemnly rub minds with as many of them as we wish by reading their decisions, either reported or unreported. That way, we will hone our legal research skill, deepen our legal reasoning skill, sharpen our analytical skill, improve our legal writing skill, imbibe legal principles that will reflect in our proceedings and decisions and invariably enhance our effectiveness, efficiency, quality of decision-making and decision writing.

VIII. Conclusion

All Courts vested with the jurisdiction to hear and determine issues of customary law should ensure that the appropriate laws are elicited and applied. Our decisions must not be based on or influenced by extraneous legal principles such as statutory laws on the administration of estate in our States or textual authorities, simpliciter. Customary laws, properly elicited and applied within the given parameters provided by our Court's establishment laws, are sufficient to resolve disputes over succession and other matters under customary law.

I find this notable pronouncement in the leading judgment in *Anekwe's* case by Honourable Justice Clara Bata Ogunbiyi, J.S.C[56] an apt conclusion to this discourse as it encapsulates the issues explored in this paper:

---

[55] 'Write Judgments for posterity, acting CJN tells judges' *The Nation* (Lagos, 19 May 2019) <https://thenationonlineng.net/write-judgments-for-posterity-acting-cjn-tells-judges/amp/> accessed 3 January 2025

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.

It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom.

Thank you for listening.

His Worship Emmanuel J. Samaila, Esq.

- Judge, Upper Customary Court, Kafanchan, Kaduna State Judiciary
- Chairman, Association of Customary Court Judges, Kaduna State (ACCJKS)

E-mail: samailaemmanuelj@gmail.com
LinkedIn: Emmanuel J. Samaila https://lnkd.in/dAa6arhk

[56] n.44 at pp. 36-37, paras. A-A