



The legal consequences of decision making against the backdrop of the traditionally held view

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Abstract

Succession under Benin customary law in Nigeria is governed by the principles of primogeniture. In other words, the concept of male succession prevails with little modification among the Benin people of Mid-Western Nigeria. The Igiogbe, which represents the family seat or the principal house of the deceased, is customary inherited by the eldest surviving son of the deceased after the performances of the second burial ceremonies. This has been the age long custom of the Benin people. This custom has been judicially recognized by the Nigerian Supreme Court in the case of *Arase v. Arase* (1981) N.S.C.C. 101. However, in *Idehen v. Idehen* (1991) 6 N.W.L.R. (Pt.198) 382 the same Supreme Court modified the definition of the Igiogbe under Benin customary law by introducing the concept of multiple Igiogbes, which was totally at variance with the hitherto acknowledged customary law definition. The decision has caused a lot of anxiety and confusion within the traditional society. This paper therefore seeks to address the legal consequences of that decision against the backdrop of the traditionally held view, and also discuss the steps taken by the Oba of Benin to remedy the effect of the decision on the custom of the Benin people.

Keywords: Succession, Benin customary law and Igiogbe.

INTRODUCTION

In *Arase v. Arase*¹ the Supreme Court of Nigeria stated the principles of inheritance under Benin² customary law relating to the "Igiogbe" as follows:

"The principal house in which the deceased lived in his lifetime and died is called the "Igiogbe" that always passes by way of inheritance on the distribution to the eldest son".³

The "Igiogbe" according to Benin customary law of inheritance has always being the sole entitlement of the eldest surviving son of the deceased after the performance of the second burial ceremonies. The Supreme Court in *Arase v. Arase*⁴ amply explained this custom as follows:

"The eldest son of a deceased person does not inherit

¹ (1981) N.S.C.C. 101

² The Benin (Bini) people speaks Edo language, but with different dialectical variations. They can be found in Edo State, in the Mid-Western Nigeria. The state is an administrative region named after the people. It has its administrative headquarter in Benin City.

³ *ibid* at page 114.

⁴ (1981) 5S.C. 33

the deceased's property until after the completion of the "second" or secondary burial ceremonies that is, funeral obsequies. The completion is marked by a ceremony by members of the family called "UKPOMWAN" this ceremony is performed by the member of the deceased's family for the eldest son at his request. It is only after this ceremony of Ukpomwan that the family distributes the property of the deceased".⁵

Therefore, it is after the performance of the "Ukpomwan" ceremony that the eldest son can inherit the "Igiogbe" as of right. However, in *Idehen v. Idehen*⁶ the Supreme Court further modified the definition of "Igiogbe" quoted above as follows:

"By Benin customary law, the family seat, called "Igiogbe" automatically goes to the eldest child on the death of the father. The "Igiogbe" in the instant appeal are the houses at 62 Akpakpava Street and 1 Oregbeni, Ikpoba Hill, both in Benin City and by Benin customary law they must pass

⁵ (1981) 5. S.C p. 62.

⁶ [1991] 6 NWLR (Pt.198) p 382

automatically to the eldest son of late Joshua Iserhienrhien Idehen at his death”.⁷

From the above quotation, the Supreme Court held that an “Igiogbe” consist of more than one house. This view is contrary to hitherto acknowledged Benin customary law principle that an “Igiogbe” consist of the principal house wherein the deceased lived and died. The principle of law that was enunciated in Idehen v. Idehen was bound to raise a lot of controversies among legal experts, academicians, and traditionalist. The reasons are not far fetched. By this act, the Supreme Court has re-define what constitute the Igiogbe under Benin customary law, and the resultant effect was the opening of a floodgate of litigations relating to succession matters under Benin customary law.

This paper therefore seeks to examine the legal consequences of this decision against the backdrop of the traditionally held view. Also the paper shall discuss steps taken by the Benin traditional council to remedy the effect of the Supreme Court decision in Idehen v Idehen on succession to the “Igiogbe” in other to bring it into conformity with the age long tradition of the Edo people.

NIGERIAN LAW OF SUCCESSION: AN OVERVIEW

In Nigeria, the laws governing succession can be divided into two broad categories namely: Testate and intestate succession. This classification can be further divided into intestate succession (non- customary) and succession under customary law.

TESTATE SUCCESSION

As the name implies, testate succession consist primarily of wills. In Nigeria, there is no uniformity of applicable laws relating to wills. Therefore, among the states created from the former western region⁸, the applicable law is the Wills Law⁹. However, by virtue of the provisions of the applicable laws edict of 1972¹⁰, Lagos State adopted the Western Nigerian Law. For the rest of the country,¹¹ consisting of states from the former Northern and Eastern region, the applicable statute is the English Wills Act 1837 and the Wills Amendment Act 1852¹² respectively.

A critical analysis of the provisions of the Wills Law shows that the legislation basically re-enacted the provisions of the Wills Act 1837 and the Wills Amendment

Act 1852 together with the provisions of the Wills (Soldiers and Sailors) Act 1918. In addition, it includes some provisions that incorporate the prevailing customary laws principles which regulate succession under customary law in the affected states. For example, section 3 (1) of the Wills Law provides that real and personal estate, which cannot be affected by testamentary disposition under customary law, cannot be disposed of by will¹³. Also, section 15 of the Wills Law provides that every Will made by a man or woman before marriage shall be revoked by his /her subsequent Statutory marriage. The law prohibit a marriage contracted under customary law from having such effect.

INTESTATE SUCCESSION

On the other hand, intestate succession basically involves the applications of three systems of laws. These are (a) the Common Law (b) the Administration of Estate Laws of the various States and customary law.¹⁴ The crucial question is how does one determine the applicable laws to be applied in cases of intestates’ succession non – customary? According to Prof. Itse Sagay (SAN)¹⁵ “the factor, which determine which system is to apply in every case, is the type of marriage contracted by the intestate person. In the case of Muslims the religion practised by the deceased is also relevant”. Commenting further, he stated the principles of law as follows:

“Thus if a person contracts a Christian (monogamous) marriage outside Nigeria, the common law of England governs the distribution of his estate. If he contracts a statutory (Act) marriage in Nigeria, then if he dies domiciled in Lagos or any of the states comprising the old Western Region, then the Administration of Estate Law¹⁶ will govern. If he contracts a statutory marriage, but dies domiciled in any of the states comprising the former Northern or Eastern Regions, which are yet to enact their own law on non-customary succession, then the common law will also govern the distribution of his estate.¹⁷ Finally if the intestate person was an indigenous Nigerian and he did not contract a Christian or Act marriage, or even if he did, and no issue or spouse of such a marriage survived him, his estate will be distributed in accordance with the relevant customary law. If the intestate was a Muslim,

⁷ Per BELGORE JSC at page 422, para A-F.

⁸ Oyo, Ondo, Ogun, Osun, Ekiti, Edo and Delta States.

⁹ Cap. 133, Laws of Western Nigeria 1959

¹⁰ No 11 of 1972

¹¹ With the exceptions of some few states that have enacted their own Wills Laws in line with the Laws of Western Nigeria, 1959.

¹² This Statute qualifies as Statute of general application in Nigeria.

¹³ See *Idehen v. Idehen* [1991] 6NWLR (Pt.198) P.382 and *Lawal-Osula v.Lawal-Osula* [1995] 9 NWLR. (Pt.419) P.259 where the Supreme Court, discussed extensively the legal implication of the provisions of section 3(1) of the Wills Law.

¹⁴ Customary Law in this context includes Muslim law. See also *Zaidan v.Zaidan* (1974) 4UILR 283.

¹⁵ I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1st ed, 2006, Malthouse Press Limited) at 73

¹⁶ Cap. 1, 1959 Laws of Western Nigeria

¹⁷ See *Administrator –General v. Egbuna and Others*. 18 NLR 1

then Islamic law would govern.¹⁸ Also, where a person who is subject to customary law or Islamic law dies intestate, it is his personal law that will apply to the distribution of his immovable property and not the *lex situs*.¹⁹

SUCCESSION UNDER CUSTOMARY LAW

Basically succession under customary law is intestate succession. It is applicable to the estate of a person who is subject to customary law, contracted a statutory or Christian marriage and dies without being survived by a spouse or a child of that marriage. In Nigeria, there is no uniformity of rules of succession under customary law. The reasons for this state of affairs are not far fetched. There are so many ethnic groups in Nigeria, each with their own peculiar characteristics even within a larger ethnic classification. In some part of Nigeria, for example among the Yoruba speaking ethnic groups in the southwest, succession is based on the concept of family property. While on the other hand, among the Edo people in the present day Edo State in Mid-Western Nigeria, the concept of male succession prevails with little modifications. How does one determine the correct law to apply in cases of intestate succession under customary law? Essentially, the deceased customary law is the appropriate law to be applied in such situation. The law, that is, the deceased customary law will be applicable even though the deceased died outside his ethnic group or leaves properties outside his hometown. It is also important to note that while it is true that with respect to land matters generally, the customary law of the place where the land is situated is applicable. However, with respect to inheritance, the appropriate customary law is the customary law of the deceased.²⁰ Before the Nigerian Supreme Court decision in *Adeniyi Oluwu and Ors v. Olabowale Oluwu and Ors*²¹ it was a generally accepted principle of law in Nigeria that a person carries his customary law with him. Therefore, it was not legally possible for a Nigerian to change his ethnic group and acquire another ethnic identity, irrespective of the number of years he must have spent in that "foreign" ethnic group. Thus, in *Osuagwu v. Soldier*²² were the court was faced with a situation, of whether to apply Islamic law, which was the *lex situs* and *lex loci*, or to apply Ibo customary law, which was the personal law of the parties to the resolution of a dispute between two Ibo men who were living in Kano, in the present day Kano

¹⁸ I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1st ed, 2006, Malthouse Press Limited) at 73

¹⁹ See *Zaidan v. Zaidan* Supra and section 13 of the Bendel State High Court Law.

²⁰ See *Tapa v. Kuka* (1945) 18 NLR 5, *Zaidan v. Zaidan* (1974) 4 UILR 283.

²¹ [1985]3 NWLR (Pt.13) 372

²² (1959) NRNLR 39. see also *Tapa v. Kuka* (1945) 18NLR 5 and *Zaidan v. Zaidan* (1974) 4 UILR 283.

State. The court, resolved in the interest of justice to apply the Ibo customary law in the resolution of the conflict. Consequently, the court held as follows:

"We suggest that where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties in the Muslim court in an area where Muslim law prevails, the native court will...in the interest of justice...be reluctant to administer the law prevailing in the area, and if it tries the case at all its will... in the interest of justice...choose to administer the law which is binding between the parties".²³

In *Yinusa v. Adebusokun*²⁴ Bello (as he then was) held that duration is immaterial when considering whether a settler and his descendants have merged with the natives of the place of settlement. The test is whether it can be established that as a result of the settlement, the settler has merged with the native, and has subsequently adopted their ways of live and custom. He continued as follows:

"Subject to any statutory provision to the contrary, it appears...that mere settlement in a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and custom, would not render the settler or his descendants subject to the native law and custom of the place of settlement".²⁵

The view expressed by Bello (as he then was) above received judicial recognition / consideration by the Nigerian Supreme Court in the case of *Adeniyi Oluwu and Ors v. Olabowale Oluwu and Ors*²⁶ here the court was urge to consider whether it was possible for a person to change his personal customary law of origin in favour of that of his adopted place of settlement. The facts of the case are as follows.

"The deceased, Adeyinka Ayinde Olowu, was a Yoruba man by birth from Ijesha. He had lived most of his life in Benin City. He married Benin women who bore him all his children who were the plaintiffs and defendants in this case".

In 1942 the deceased applied to the Omo N'oba of Benin (the traditional Ruler of Benin) to be "naturalized" as a Benin citizen. His application was granted. As a result of his status as a Benin man he was able to acquire a lot of landed property both in Benin City and elsewhere in Bendel State. The deceased died in 1960 without making a will. The defendants, two of his children were granted

²³ *ibid* at page 41.

²⁴ (1968) NNLR 97.

²⁵ *ibid* at page 99.

²⁶ See footnote 35 above.

Letter of Administration to administer the deceased's estate. First defendant distributed the estate in accordance with the Benin Customary Law, but the other children, the plaintiffs and the second defendants, were dissatisfied with the mode of distribution they claimed that the estate ought to have been distributed in accordance with Ijesha Customary Law rather than by Benin Customary Law. The plaintiffs applied to the High Court for an order setting aside the distribution according to Benin customary Law, and for a Declaration that Ijesha Customary Law was the applicable law. They failed in the High Court. The High Court held that Benin Customary Law was the applicable law. They appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal, wherein they further appealed to the Supreme Court. In a well considered Judgement, five Justices of the Supreme Court unanimously dismissed the appeal and confirmed the decision of the High Court on the ground that although the deceased was a man of Yoruba extraction, he had spent most of his life in Benin City, "naturalized" as a Benin and acquired considerable properties in Benin City. On the strength of this evidence, the Supreme Court held that his personal law and therefore the law governing the distribution of his estate at his death, was Benin Customary Law, not his personal law of origin, which was Ijesha (Yoruba) Customary Law. Coker in his lead judgement observed that in the light of the facts of the case, the deceased in effect relinquished his Yoruba cultural heritage and acquired Bini status. Accordingly, he held as follows:

"It follows therefore that by virtue of his change, his personal law changed to Benin Customary Law; distribution of his estate on intestacy must necessarily be governed by Benin Customary Law. He married Benin women who had children for him, he carried on various business activities in and around Benin City. He found also that the change of his status endowed him with the rights and privileges of a Bini indigene and his charge in status accords with Benin customary law. Unless this finding is reversed, Coker held the view that the trial Judge was right in saying that the applicable customary law for the distribution of the estate was in line with that of the Benin Native Law and Custom".²⁷

The legal effect of this judgement is that it makes it possible for any Nigerian, to change his personal customary law of origin in preference for another one which he acquires as a result of acculturation / assimilation.

²⁷ See I.E. Sagay, "The Dawn of legal Acculturation in Nigeria – A Significant Development in Law and National Integration: *Olowu v. Olowu*" (Autumn 1986) Vol.30, No. 2 *Journal of African Law*, at 179-189. See also I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1st ed, 2006, Malthouse Press Limited) at 260-261.

BENEFICIARIES UNDER CUSTOMARY LAW

Unlike the situation under the Administration of Estate Laws, children are the exclusive beneficiaries to the estate of a deceased person under customary law. Some tribes do not discriminate between the sexes of the children of the deceased. For example, among the Yoruba speaking tribes in the south –western Nigeria, there is no distinction between males and female in the distribution of their father's estate.²⁸

However, in Edo State, the patrilineal system is generally practised. Therefore in most cases, the eldest son inherits certain property of the deceased exclusively, while the other children are entitled to the distribution of the remaining estate. The practice is common among all the tribes in Edo state, and also amongst the Urohobo and Itsekiri in neighbouring Delta state. Under this system, it is a well-established principle of customary law that the deceased eldest son is entitled to inherit the house where the deceased lived and died. This house amongst the Benin is referred to as the "Igiogbe".

THE IGIOGBE

As noted earlier, the "Igiogbe" is the principal house in which the deceased lived in his lifetime and died, and it always passes by way of inheritance on the distribution of his estate, to the eldest surviving son after the performance of the second burial ceremonies. Therefore, a testator cannot make a will and disinherit the eldest son of his customary entitlement to the "Igiogbe" for any reason. This customary principle has received legislative approval by virtue of section 3 (1) of the Wills Law.²⁹ This law is currently applicable in Edo State as the Wills Law of Bendel state.³⁰ The section provides as follows:

"Subject to any Customary Law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him or if he became entitled by descent, of his ancestor, or upon his executor or administrator".

In attempting to interpret the provision quoted above, two schools of thought have emerged. One view is that the true meaning of the phrase "Subject to customary law relating thereto" is a qualification of the testator's testamentary capacity, rendering any purported disposition of property by will, which is inconsistent with customary law, null void and of no effect. The protagonist

²⁸ See *Andre v. Agbebi* (1931) 5 NLR 47.

²⁹ Cap. 133 laws of Western Nigeria 1958.

³⁰ Cap 172, laws of Bendel State of Nigeria 1976 applicable to Edo State.

of this view argued that “customary law” here includes the rule of intestate succession under customary law. Therefore, section 3(1) has effectively taken away the testamentary powers of all persons who were subject to customary law. On the other hand, the opposing view jettisoned the interpretation expressed above as one that is capable of defeating the object of the law, which was to give testamentary powers in a society in which almost every body is subject to one type of customary law or the other. In *Idehen v. Idehen*³¹ the Supreme Court was invited to consider the meaning of section 3(1) of the Wills law of Bendel State on the testamentary powers of a testator to make a will. After a careful consideration of all the facts before a full court (Seven Justices), the court held by a majority of five to two that section 3(1) of the Wills law does not restrict testamentary powers as such, but merely qualifies the subject matter of the properties that can be disposed of by will. Kawu who read the lead judgement, held that:

“In my view the above passage clearly lends purport to the appellant’s contention that the opening words of the section are intended to relate to the subject matter of the devise... Kawu held therefore that the expression ‘subject to customary law relating thereto’ could not have been intended to qualify the testamentary capacity so unambiguously conferred on every Bini citizen by section 3(1) of the Wills Law. It is only subject to any customary law affecting the property to be disposed of”.³²

Also, Nwokedi in his consideration of the effect of section 3(1) of the Wills law declared as follows:

“It seems to me therefore that the phrase “subject to customary law relating thereto” would be referable to the customary law regarding the particular devise or property sought to be devised. It is my view that section 3(1) of the Wills law Cap.172, Bendel State did not compel a Bini man to make his will in accordance with his customary law except where from the nature of the property devised, Bini customary law deprives him of the capacity to dispose of that particular property”.

Consequently, the court held that it was only the disposition that was contrary to customary law that was declared void, all other devises and bequest made by the testator were held to be valid. Similarly, in *Uwaifo v. Uwaifo*³³ the Court of Appeal (Benin Division) in considering the above statutory provision that is, section 3(1) of the Will law of Bendel State held that:

“A Will is not entirely invalid because a property which cannot be bequeathed to a person under native law and custom was bequeathed to that person in a Will. What

³¹ [1991] 6 NWLR (Pt.198) p 382

³² At p.408.

³³ [2005] 3 NWLR (Pt. 913) p479

the court would declare invalid in such situation is the bequest made contrary to native law and custom relating to the property so bequeathed”.³⁴

This judicial interpretation of section 3(1) of the Wills law of Bendel State has been applied in these following cases.³⁵

“*Idehen v. Idehen*³⁶ is significant for two reasons. Apart from establishing the principle regarding the interpretation of section 3(1) of the Wills law of Bendel State, it also introduced a new qualification to the definition of the “Igiogbe” under Benin customary law different from the definition provided by the same court in an earlier case of *Arase v. Arase*”³⁷

In *Idehen v. Idehen*³⁸, the Supreme Court held per

“By Benin customary law, the family seat, called the “Igiogbe” automatically goes to the eldest child on the death of the father. The “Igiogbe” in the instant Appeal are *the houses* at 62 Akpakpava Street and 1Oregbeni. Ikpoba Hill, both in Benin City and by Benin Customary law they must pass automatically to the eldest son³⁹ of late Joshua Iserhienrhien Idehen at his death”.⁴⁰

The facts of the case are as follows. The appellants and the respondent are some the children of late Joshua Iserhienrhien Idehen, a Benin man who died on the 18th day of September 1979. The deceased left a will in which he made several devises and bequests. In the Will, he devised to his eldest son Dr. Humphrey Idemudia Idehen his two houses in Benin City. It was common ground that the deceased lived in 2 houses in his lifetime. The houses therefore constituted his Igiogbe under Bini Customary Law. Dr. Idehen predeceased his father and consequently, the 1st respondent became the deceased’s eldest son. Subsequently, the respondents, as plaintiff instituted an action in the High Court against the appellants, who were the executors of their father’s estate, challenging the validity of their father’s will. They claim among others things, the following:

1. A declaration that the document dated on the 10th March 1973 purporting and / or pretending to be the Will of Joshua Iserhienrhien Idehen (hereinafter referred to as

³⁴ *ibid* at 485.

³⁵ See also *Agidigbi v. Agidigbi* [1992] 2 NWLR (Pt.221) p.98; *Lawal –Osula v. Lawal-Osula* [1995] 9NWLR (Pt.419) p.259; *Egharevba v. Oruonghae* [2001] 11 NWLR (Pt.724) p.318 and *Uwaifo v. Uwaifo* [2005] 3NWLR (Pt. 913) p.479.

³⁶ See footnote 6 above.

³⁷ See footnote 1 above.

³⁸ See foot note 6 above

³⁹ Emphasis are mine

⁴⁰ At page 422.

the "Deceased") who died on the 18th September 1979 at Benin City is null and void for not being the act of the Deceased as well as for non-compliance with the relevant statutory requirements relating to Wills.

2. A declaration that in accordance with Bini customary law of succession, the 1st plaintiff as the eldest surviving son of the deceased succeeds exclusively at all events to the house and or properties lying and situate at and known as No 62 Akpakpava street and No1 Oregbeni Ikpoba Hill, Benin City in addition to the lion's and / or disproportionately large share of the remaining part of the Deceased's Estate which the 1st plaintiff share with the other children of the Deceased.

The trial Judge in his judgement found that the deceased died testate having left a valid Will. On the question of the validity of the dispositions made under the will, the trial court held that the devise of the deceased's two houses (that is, Igiogbe) to his eldest son was done with the full knowledge of Bini customary law, which enjoins a bequest of the deceased's Igiogbe to the eldest son. However, since the deceased's eldest son to whom the bequest were made in the will had predeceased the testator, the bequest, according to the trial judge must pass to the eldest surviving son of the deceased at the time of the death of the deceased. He further held that it was not possible under the law to pass such bequest (that is, the Igiogbes) to the sons of Dr. Humphrey Idehen. Consequently, the court granted the plaintiff's second relief in the following terms:

"A declaration in accordance with the Bini customary law of succession, states that the first plaintiff as the eldest surviving son of Iserhierhen (deceased) succeeds exclusively the house and / or properties situated at No 62 Akpakpava street and No 1 Oregbeni Ikpoba Hill, Benin City. For the avoidance of doubt, it is ordered that the first plaintiff is entitled to hold these houses and / or properties in trust for himself, pending such time when he may perform any second burial ceremonies as may be required and after which the customary title to the said properties will be vested on him absolutely."

Dissatisfied with the judgement, both parties appealed to the Court of Appeal. By a majority decision, the Court of Appeal allowed the plaintiff appeal and dismissed the cross appeal of the defendant. The court then made some orders, which include the following:

1. The Will of the deceased Joshua Iserhiehlen Idehen, Exhibit D made on the 10th day March 1973, is hereby declared null and void.
2. It is hereby declared that under the Benin Customary Law of Succession, the 1st plaintiff appellant, Joseph Osemwegie Idehen, is entitled to inherit his deceased father's "Igiogbe" to wit all the property and houses situated at No. 62 Akpakpava Street and No 1 Oregbeni Ikpoba Hill, both at Benin City.

The defendants being dissatisfied appealed to the Supreme Court. The appeal turned on the construction or interpretation to be given to section 3(1) of the Wills law of Bendel state. The study has earlier referred to the decision of the Supreme Court on the construction of section 3(1) of the Wills law of Bendel State. Thus, it shall now deal with the reasons adduced by the court in arriving at the definition of Igiogbe earlier stated. Form the facts of the case earlier stated, it is clear that both parties in their evidence before the court admitted that the two houses that is, No.62 Akpakpava Street, and No 1 Oregbeni Ikpoba Hill, both situated at Benin constitute the "Igiogbe" of the deceased. Consequently, the court held per Belgore as follows:

"By Benin customary law, the family seat, called the "Igiogbe" automatically goes to the eldest child on the death of the father. The "Igiogbe" in the instant Appeal are the houses at 62 Akpakpava Street and 1 Oregbeni Ikpoba Hill, both in Benin City and by Benin Customary law they must pass automatically to the eldest son of late Joshua Iserhiehlen Idehen at his death. His making of a Will, giving the "Igiogbe" to Dr. Humphrey Idemudia Idehen would have been no problem if he had predeceased his son. It would have just confirmed the Benin customary law. But the unfortunate happened in that the eldest Son, Dr. Idehen predeceased his father the testator. To my mind right from the time of Dr. Idehen's death the portion of the Will giving him the "Igiogbe" must be read in consonance with Benin customary law. The customary law does not recognise such devise as Dr. Idemudia Idehen was no longer alive and the eldest child at the death of Joshua Iserhiehlen Idehen must automatically inherit the "Igiogbe". It is important to bear in mind that apart from the two houses which formed the "Igiogbe" the other devises were valid. In Benin customary law, the "Igiogbe" could not under any circumstances be given away as a gift, it must be left for the eldest male child at his death, the testator is entitled, under Benin customary law to devise all his property except "Igiogbe". Thus, he is no longer in the position to giveaway his "Igiogbe" since he is dead. Also, in *Lawal-Osula v. Lawal-Osula*⁴¹ a case that was decided after *Idehen v. Idehen* the Supreme Court adopted the same definitions it provided in *Idehen's* case to the effect:

"Igiogbe comprises of the house or houses where the deceased hereditary chief lived or used as seat as a Bini Chief. This cannot be taken away from the eldest son who succeeds him to the title or office and perhaps this include the paraphernalia of office".⁴²

The facts of the case are as follows. The second set of respondents herein, who were the plaintiff at the trial

⁴¹ [1995] 9 N.W.L.R. (Pt. 419) 259

⁴² Per Belgore JSC at page 274, paras. B-D

court sued the appellants and the first set of respondents at the Benin High Court and claimed *inter alia*

(a) A declaration that the pretended will and the last Testament of Chief Usman Mofeyintoluwa Lawal-Osula, the Arala of Benin dated 22/11/68 is null and void and of no effect for non compliance with the applicable Wills Law and as such, the said Testator died intestate.

(b) A declaration that the 1st plaintiff having performed the final burial ceremonies of his late father the Arala of Benin under Benin Native Law and Custom and as the acknowledged legitimate senior son entitling him to the hereditary title and having been conferred with the said hereditary chieftaincy title of his late father (Arala of Benin) steps into the late father's shoes as the head of the family of Chief Usman Mofeyintoluwa Lawal-Osula.

Chief Usman Mofeyintoluwa Lawal-Osula was an indigene of Benin. He lived and died in Benin. He died on the 2nd of December 1972 and until his death he was the Arala of Benin, a traditional chieftaincy. Before he died, he made a will, which contained detailed provisions for his wife Lydia Modupe Lawal-Osula, 1st appellant herein, and his children by this woman and two other children of his by other women. No mention was made of the second set of respondents in the will. The testator, prior to his Registry Marriage to the 1st appellant under the Marriage Ordinance, had had previous wives either under Benin native law and custom or under Muslim law or a combination of both. The testator was a Muslim prior to his marriage under the Ordinance. Prior to his ordinance marriage, the testator through his previous marriage had children. The 2nd and 3rd appellant came from the same mother, while the 4th appellant is the daughter of the 1st appellant. The 1st and 2nd plaintiffs/ respondents also came from the same mother. The testator, in marking his will devise several things in his estate, including the house where he lived to his wife, the 1st appellant and his other children apart from the special ones to the 4th appellant who is a daughter of the 1st appellant. The testator made the following declaration in the will:

"I declare that I make the aforementioned demise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that the native law and custom of Benin shall not apply to alter or modify this will".

The will was proved by the executors named therein and the estate has been administered by them since then. However, on the 26th of May 1986 the second set of respondents, who clam to be children of the deceased, and in the case of the 1st plaintiff/respondent, his eldest and sole surviving male child, instituted the action leading to this appeal. It is not worthy that the deceased, a Benin traditional chief by Benin native law and custom, was succeeded at death by his eldest son, in the instant case, the 1st plaintiff/ respondent.

At the conclusion of the trial, the trial judge dismissed

all the claims of the second set of respondents except the issue of the paternity which he found in their favour. Both side were dissatisfied with the judgement. While the second set of respondent appealed, the appellant cross-appealed, against the judgement to the Court of Appeal. The Court of Appeal allowed the appeal and dismissed the cross-appeal. The appellants were dissatisfied with the judgement and appealed to the Supreme Court. They contented that the Court of Appeal erred in affirming the finding of the trial court on the issue of paternity in favour of the respondent, in holding that the will was invalid and in not affirming their contention that the action was statute barred. (Oba Erediauwa 1996).

In resolving the appeal, the Supreme Court considered the provisions of section 3 of the Will Law Cap.172 Laws of Bendel State of Nigeria. 1976. On the effect of native law and custom on testamentary dispositions in the will of a Benin man, the court unanimously allowing the appeal held:

"Igiogbe comprises of the house or houses where a Benin hereditary chief lived or used as seat or seats as a Benin chief. This cannot be taken away from the eldest son who succeeds him to the title or office and perhaps this includes the paraphernalia of office. In the light of this native law and custom that the phrase "subject to any customary law relating thereto" has been employed in section 3(1) of the Wills Law of Bendel State and the clear provision of sections 1(2) of the Limitation Law of Bendel State. As such, the testator in the instant case, Chief Lawal-Osula was wrong to have devised the "Igiogbe" to person other than his eldest surviving son. And the right conferred in his respect by the said section 3(1) of the Wills Law of Bendel State is not affected by the Limitation Law".

Furthermore, in *Agidigbi v. Agidigbi*⁴³ the Supreme Court also adopted it earlier definition on the subject as enunciated in *Idehen's* case. It held that under Benin native law and custom, the eldest son of a deceased is entitled to inherit without question the house or houses known as the "Igiogbe" in which the deceased/testator lived and died, thus, a testator cannot validly disposed of the "Igiogbe" by his Will except to his eldest surviving male child and any devise of the "Igiogbe" to any other person is void.

In contrast⁴⁴, the Court of Appeal in *Egharevba v. Oruonghae*⁴⁴ and *Uwaifo v. Uwaifo*⁴⁵ two cases decided after *Idehen v. Idehen* followed the earlier Supreme Court definition of "Igiogbe" in *Arase v. Arase*⁴⁶ even though one of the parties to the suit contented that since there were more than one igiogbe, the eldest surviving son of

⁴³ [1996] 6 N.W.L.R. (Pt.454) 300

⁴⁴ [2001] 11 N.W.L.R. (Pt. 724) 318

⁴⁵ [2005] 3 N.W.L.R. (Pt.913) 479

⁴⁶ see footnote one above.

the deceased must inherit the houses as of right under Benin customary law. In that case, the son sought the order of the court to set aside the bequest made by his later father in his will wherein he specifically identified the properties that constitute his Igiogbe.⁴⁷ In *Egharevba v. Oruonghae*⁴⁸ the facts are as follows. The respondent sued the appellant at the High Court claiming a declaration of title to a building and premises situate in Sapele and damages for trespass on same. It is the case of the respondent that her late father made a Will, which had *inter alia* the following clauses:

“7 I give and devise absolutely to my son Emmanuel Osareni my building (bungalow where I lived until my death) situated at No. 3 Idahosa lane, Benin City”

“9 I give and devise my house (bungalow) and land situated at No1 Urhobo Road Sapele to my beloved senior wife by name Esegbe Erhumwunse for her use for her life time. I consider her as the most devoted wife to me. I regret the fact that she had no child for me. I commit her to the care of the Almighty God for her wonderful steadfastness. I further direct that the said property should be given to her for life, and after her death, should be passed to my daughter Comfort Ikuoyenwen absolutely”.

And by virtue of the aforesaid Will, the property in Sapele became vested in her upon the death of her father's wife and she started living in the premises. She tendered the will, which was admitted in evidence. She also called her witnesses; among them was the lawyer who prepared the Will. The case of the appellant in the main was that although Esegbe Erhumwunse Egharevba mentioned in the Will was his late father's eldest wife, she was not the owner of the property in Sapele as the possessory right in it and other properties of his late father vested in him as the eldest son until they were sheared. He testified that he was not in Nigeria when his father died in 1970, but on his return to Nigeria he performed some traditional ceremonies and appointed caretaker to look after the property in Sapele. He further testified that the respondent could not by Will inherit the property in Sapele because his father was incapacitated by ill health at the time the Will was made. He testified under cross-examination, in one breath that his father lived and died in Benin and in another breath, that his father lived all his life in the property in Sapele and died in Benin City. He however, conceded that his father's house in Benin was his “Igiogbe” because he was buried there but that the place where he lived all his life was also his Igiogbe. He also called witnesses to establish his claim. After the testimonies of the parties, the trial court in its judgement found for the respondent on the preponderance of evidence by holding the appellant liable in trespass and

general damages. The trial court also restrained the appellant his servant or privies from further act of trespass on the property in Sapele. The appellant dissatisfied with the judgement, appeal to the Court of Appeal where it was contended on his behalf *inter alia* that the will relied on by the respondent was not proved, and that the trial court should have held that the appellant was entitled to the property in Sapele under Bini native law and custom since the property was proved to be an “Igiogbe” of this late father. In determining the appeal, the Court of Appeal held on the issue whether a Bini man could dispose of his “Igiogbe” by Will thus:

“Section 3 (1) of the Wills Law of Bendel State does not state that a Bini man cannot make a Will but that in making such a Will, he should not bequeath his “Igiogbe” to any person other than his eldest surviving son. In the instant case, the testator in his Will identified his house in Benin City which he bequeathed to the appellant as the house in which he lived until his death. In the circumstance, the testator's house in Benin is his “Igiogbe” and he duly bequeathed same to the appellant in accordance with Bini native law and custom on inheritance. Consequently, the appellant cannot validly challenge the bequest of the property in Sapele to the testator's wife for her life and thereafter to the respondent absolutely on the ground that the property in Sapele was his father's “Igiogbe”.⁴⁹

In arriving at this conclusion, the court examined all the earlier cases dealing with succession to the “Igiogbe” under Bini native law and custom. These cases include *Idehen v. Idehen*, [1991] 6NWLR (Pt.198) 382; *Lawal-Osula v. Lawal-Osula* [1995] 3NWLR (Pt.382) 128; *Agidigbi v. Agidigbi* [1992] 2 NWLR (Pt.221) 98. It is pertinent to state here that the Court of Appeal rejected the argument of the appellant to the effect that since his later father lived in the two properties, that is, the house in Benin City and the house situated in Sapele, both houses constitute his father's Igiogbe under Bini native law and custom.

In *Uwaifo v. Uwaifo*⁵⁰ the Court of Appeal defined “Igiogbe” thus: “An “Igiogbe”, that is the house where a deceased lived and died, automatically devolves on his eldest surviving male child under Bini Customary law”.⁵¹ The facts of the case are as follows. The appellant's claim against the respondent at the trial court was for a declaration, among others that the Will of their father was invalid, null and void and of no effect whatsoever, because it failed to comply with Bini customary law of succession and section 3(1) of the Wills Law of Bendel State.

The appellant's case was that he was the eldest son of

⁴⁷ See *Egharevba v. Oruonghae* [2001] 11N.W.L.R. (Pt. 724) 318

⁴⁸ [2001] 11 N.W.L.R. (Pt. 724) 318.

⁴⁹ At page 323

⁵⁰ See footnote 47 above. See also *IMADE V. OTABOR* [1998]4NWLR (Pt. 544)

⁵¹

See footnote 45 above, at page 483.

his father who lived and died and was buried in the compound known as No. 2 and 4 Ohuoba Street, Benin City, which was also his father's "Igiogbe", that he was entitled to inherit the property under Bini customary law to the exclusion of other children of his father, and that the bequest by his father of the property to his children other than the appellant, nullified his father's Will in its entirety. On their part 1st-9th and 11th respondents admitted that the appellant was the eldest son of their father, and that he was entitled to inherit the "Igiogbe". But they however contended that their father's "Igiogbe" was No.4 Ohuoba Street, Benin City because that was the house he lived, died and was buried. They further contended that No.2 Ohuoba Street and the vacant land between No.2 and 4 Ohuoba Street, Benin City did not form part of their father's "Igiogbe". In its judgement, the trial court held that under Bini customary law, an "Igiogbe" can not be inherited by any person other than the eldest surviving son of the deceased; that the appellant's father's "Igiogbe" was No.4 Ohuoba Street, Benin City because that was where he lived and died, and the appellant being the eldest son of his deceased father was the person entitled to inherit the "Igiogbe" consequently, he ordered and declared that the bequest of No.4 Ohuoba Street by the appellant's father in his Will to other persons other than the appellant null and void on the ground that it contravened Bini customary law and section 3(1) of the Will Law of Bendel State. The court however held that the other devices in the Will of the appellant's father were valid. Dissatisfied with the judgement, the appellant appeal to the Court of Appeal. Unanimously dismissing the appeal, the Court of Appeal held that "An "Igiogbe", that is the house where a deceased lived and died, automatically devolves on his eldest surviving male child under Bini Customary law. The court further held:

"An "Igiogbe" under Bini customary law is an ancestral home of the family seat. Consequently, houses rented out for commercial purposes, vacant plot of land and unoccupied buildings which cannot be described as ancestral home cannot be regarded as the "Igiogbe" to be inherited by the eldest son of a Bini deceased, particularly as in this case where there were two houses, and the deceased lived, died and was buried in one, but rented out the other during his life time. In the circumstance, the trial court was right when it held that the "Igiogbe" was the house known and numbered as No.4 Ohuoba Street, Benin City, where the deceased lived, died and was buried".

From the foregoing analysis, it is important at this stage to determine what factor / factors does a court takes into consideration before concluding that a particular house constitute the "Igiogbe" under Bini native law and custom. Also, is it possible for a testator to have more than one "Igiogbe" at the same time under Benin customary law?

In attempting to answer the above questions, the court

has identified some factors that are relevant to the determination of the "Igiogbe" of a Bini Man. Thus, in *Uwaifo v. Uwaifo*,⁵² Augie declared as follows: "The evidence before the court determine what property constitutes the "Igiogbe" of a Bini deceased in any one case".

In *Oke v. Oke*⁵³ one of the issues for determination was whether the testator an Urohobo man, could devise his house where he lived and died⁵⁴ by Will to the defendant, who was his son by another woman. Also whether the Itsekiri / Urohobo customary law applies so that the testator eldest son who is the plaintiff should inherit the house alone. The Supreme Court held that customary law and not English law or the Wills Law should govern the succession to the testator's estate, and accordingly that the plaintiff was entitled to the house as the testator's eldest son under Itsekiri / Urohobo customary law. Commenting on how the court arrived at that decision, Elias held thus:

Mr. Ajuyah tried to show that No. 43, Warri-Sapele Road consist of 3 houses and that the respondent could only get the one house in which the testator lived and died, the remaining two going to the appellants. We think however, that No.43, Warri-Sapele Road was for the purpose of the case in hand, regarded by all parties as only one house consisting of a complex of three units. All the parties in their evidence had agreed that even though there were three units in the complex, the deceased regard all the units as one "Igiogbe", and so, the court was bound by the evidence before it. In *Idehen v. Idehen*⁵⁵ the Supreme Court held that the two houses of the testator i.e. No 62 Akpakpava Street and No.1 Oregbeni constitutes the "Igiogbe". According Kawu who read the lead judgement, "it was common ground that the deceased lived in these houses in his life-time and they therefore constituted his "Igiogbe".⁵⁶ Based on the evidence before the court, the deceased lived in the aforementioned two houses. Consequently, they constitute his "Igiogbe" under Benin customary law. Also in *Agidigbi v. Agidigbi*⁵⁷ the trial Judge held:

"The fact that the testator lived and died at No.34C Dawson Road is not in dispute. I accept the evidence tendered by the 1st defendant that the house which the deceased made his permanent home before his death, known as the Igiogbe, passes to his eldest surviving son under Bini native law and custom upon the eldest son completing the customary burial rites of his deceased

⁵² See foot note 47 above

⁵³ (1974) 3 SC 1

⁵⁴ The custom in issue here is the same as that of the Bini, although it is not call the "Igiogbe" under the Urohobo customary law.

⁵⁵ See footnote 6 above.

⁵⁶ At page 398

⁵⁷ See footnote 57 above.

father. There is a long line of decided cases in support of this custom and I take judicial notice of it. It is indisputable that Agidigbi Uwagboe's Igiogbe is No 34C, Dawson Road Benin City. It is a common ground that there are three buildings at No 34C Dawson Road Benin City, namely, No 34A, 34B and 34C".

The visit by the Court to the said No 34C Dawson Road confirmed this. It is also common ground that No. 34C, was the permanent place of residence of the testator before his death and that No.34A was rented out to the Ministry of Education. No.34B was unoccupied by anybody. Confirming the views of the trial Judge in the foregoing, the Court of Appeal held as follows:

It is believed that all the parties in this case agree that No.34C Dawson Road is the principal house of the testator where he lived and died and where he was buried. There are two other houses in the compound No.34A & 34B Dawson Road. No.34A was let out to the Ministry of Education and No.34B was unoccupied".

Finally the Supreme Court held that based on the evidence before it, although three houses were in the compound, the evidence led shows that the principal house wherein the testator lived and died was house No. 34 C Dawson Road, and so that house qualifies as the Igiogbe. However, in *Uwaifo v. Uwaifo*⁵⁸, the parties disagreed on the properties that constitute the Igiogbe of the deceased, while the appellant contended in paragraphs 5 and 6 of their amended statement of claim:

1. The late Pa Daniel Edigbonya Uwaifo (hereinafter referred to as the deceased) in his life lifetime acquired and built the property and its appurtenances known as Nos. 2& 4 Oluoba Street, Benin City.
2. The deceased in his lifetime lived, died, and was buried in the said property. The plaintiff shall rely on the approval to the plaintiff 's application to give the deceased a " compound burial". The 1st -9th respondents however averred as follows in paragraphs 3 and 4 of their statement of defence.
3. The 1st-9th defendants deny paragraph 5 of the statement of claim and further aver that the properties at Nos. 2 and 4 Oluoba Street, Benin City are two separate properties. The late Pa. Daniel Edigbonya Uwaifo lived, died and was buried in his principal house at No.4 Oluoba Street, Benin City, which said house is his "Igiogbe" under Bini native law and custom. The property at No. 2 Oluoba Street does not form part of the Igiogbe being a separate property.
4. The 1st-9th defendants state that it is a misconception under Benin customary law of inheritance to equate a whole premises of several houses with an Igiogbe which is the main house in which the deceased lived, died and

⁵⁸ See footnote 47 above.

was buried.

Augie who delivered the lead Judgment of the court agreed totally with the views expressed by the trial Judge in the course of his judgement. The trial Judge held as follows:

"The word evidence as underlined by me in the above three cases is to emphasize the fact that it is the evidence before a court that determines what property constitutes the deceased's Igiogbe.

The *Agidigbi v. Agidigbi*'s case is similar to the instant case where the issues as to whether the Igiogbe is limited to the principal house the deceased lived and died or extends to other houses and vacant plot in the same compound. Evidence established in this case is that the deceased lived and died at No.4 Oluoba Street. He did not live in the second house known as No.2 Oluoba Street Which was rented out to tenants. From the evidence and authorities I find as a fact that the house No.4 Oluoba Street which the testator is shown in evidence to have to have lived and died is his Igiogbe and not the second house used for commercial purposes which is No.2 Oluoba. The houses rented out for commercial purposes does not in my view qualify as, or have the attributes of "Igiogbe". The same goes for vacant plot and unoccupied building which cannot be classified as the principal house in which the deceased lived and died".

Consequently, the Court of Appeal held:

"The learned trial Judge was perfectly right. The "Igiogbe" in this case is House No. 4 Oluoba Street; and does not include No.2 Oluoba Street. There was overwhelming evidence to that effect before the trial court. The deceased himself made specific reference to the house he lived as No. 4 Oluoba Street In clause 6(b) of his Will (exhibit A)".

From the foregoing, it is clear that it is the evidence that is presented by the parties before the court that the court considered before reaching a decision as to whether the property or properties in question constitutes the "Igiogbe."

TRADITIONAL DEFINITION

According to Benin Customary law, an "Igiogbe that is the house in which the deceased lived and died and usually, though not always, where he was buried automatically devolves on the eldest son."⁵⁹ The Igiogbe is so important

⁵⁹ See *A supplement to the Hand Book on Some Benin Customs and Usages:Property Sharing*. Issued by the Benin Traditional Council, on the authority of the Omo N' Oba Erediauwa, Oba of Benin. (Vol.2, 1996, Soben Printers Limited) at 2

in the lives of a Bini man, because of the traditional values that are attached to it. Firstly, the building contains the ancestral shrine, wherein the head of the family and other family members worships the spirits of the departed ancestors. It also serves as the traditional family seat⁶⁰. This then underscores the fact that it is traditionally impossible for a man to have two buildings at the same time designated as the Igiogbe, because the ancestral shrine can only be situated in one house at a time.⁶¹ Therefore the idea that a Bini man can have two Igiogbes at the same time is unknown to Benin customary law, as the apex court with respect held in *Idehen v. Idehen*.⁶²

MATTERS ARISING

The legal consequence of the Supreme Court decision in *Idehen v. Idehen*⁶³ is that the decision is binding on all courts in the legal system because of the doctrine of stare decisis. From the analysis above, it is clear that the courts are bound by the evidence adduced by the parties in support of their case, provided the evidence is relevant to the fact in issue. With regard to the "Igiogbe", it is opined that the court must be guarded by the principles of native law and custom in that regard which has acquired judicial notoriety, rather than the evidence of the parties, because such a practice can be misleading. In *Egharevba v. Oruonghae*⁶⁴ the court held that "Benin native law and custom on 'Igiogbe' is a custom of general application within Benin Kingdom and it is judicially noticed as such". This therefore explained the reasoning behind the decision of the court, which refused to be persuaded by the argument of the appellant that his father's house in Sapele also constitutes his "Igiogbe" and thereby rejecting the notions of two or more houses constituting the "Igiogbe".

The resultant effect of the decision of the Nigerian Supreme Court in *Idehen v. Idehen*⁶⁵ was that it ushered in a floodgate of litigations in our courts. Also, there was significant increase in the number of traditional cases that were instituted at the Place of the Oba of Benin. All these cases share one thing in common; they basically deal with successions matter that is, succession to the "Igiogbe" under Benin customary law in line with the new definition as handed down by the Supreme Court. It was obvious that there was anxiety among the Benin people of Edo State because the court has modified a very

important aspect of their custom and tradition. Consequently, they looked up to the Oba of Benin for traditional clarification and direction.

TRADITIONAL REMEDIAL STEPS

In fulfilment of his role as the repository of Benin Native Laws and Custom, the Oba of Benin Omo N' Oba Erediauwa immediately, took steps through the Benin Traditional Council to re-instate the custom as it affects the "Igiogbe" of a deceased Bini man and also effect some modification to the custom by way of codification of the Native law and Custom relating to the "Igiogbe".⁶⁶ In accordance with the true customary position and in disapproval of the Supreme Court decision in *Idehen v. Idehen* the Oba of Benin with his chief in council recently gave a traditional ruling that further confirmed the view that the concepts of two "Igiogbes" is unknown to Benin customary law. A dispute arose among the Guobadia family of Akpakpava road in Benin City. Guobadia in his life time had a house and was blessed with children. At his death, his eldest son inherited his house as the "Igiogbe" in accordance with native law and custom. The said eldest son also in his lifetime built his own house, thus having two houses. He too had many children from many wives. After his death, his eldest son claimed that he must inherit the two houses i.e. the one his father built, and the other house his father inherited, He contented that the two houses constitute the "Igiogbe" under Benin customary law. His brother objected to his claims and protested to the Place of the Oba of Benin. At the Place he argued that his elder brother could not inherit the two houses of their late father, as the "Igiogbe" as such custom is unknown to Benin customary law. The place upheld the claim of the younger brother and sheared the two houses between the two brothers with the eldest son inheriting the "Igiogbe" while the younger brother was given the house at Ibiwe Street. The place held that the eldest son could not inherit the two houses as Igiogbe.⁶⁷

The Oba of Benin has consistently handled succession to the "Igiogbe" in this manner; having re-stated the custom as it affects the "Igiogbe" the initial anxiety that was generated by the Supreme Court decision in *Idehen v. Idehen* has reduced significantly. The local people prefer to have such matters resolved in the place of the Oba of Benin rather than resulting to expensive legal expenditure.

⁶⁰ In modern times, the second reason appears to be more relevant than the first because of the effect of Christianity on traditional society. However, certain percentage of the population still practises the Traditional Religion where ancestral worship is a key feature.

⁶¹ For a detailed procedure for the installation / movement of the ancestral shrine, see I.E. Solo *Igiogbe (And Miscellany) in Benin Jurisprudence*. (1st ed, 2008, Seevon Prints) at.68

⁶² See footnote 6 above

⁶³ *ibid.*

⁶⁴ see note 48 above.

⁶⁵ See footnote 6 above

⁶⁶ See generally *A Handbook on some Benin Custom And Usages And A Supplement to the Handbook on some Benin Customs and Usages* Issued by the Benin Traditional Council, on the authority of the Omo N' Oba Erediauwa, Oba of Benin. (Vol 1 & 2 1996, Soben Printers Limited).

⁶⁷ See I.E. Solo *Igiogbe (And Miscellany) in Benin Jurisprudence* (1 ed, 2008, Seevon Prints) at.87

Furthermore, the Oba of Benin has modified the custom concerning succession to the Igiogbe in order to reflect modern realities and to do equity among the children of the deceased. Usually the practise amongst the Bini is that soon after the death of the head of the family, which could be an ordinary person or a non-hereditary title holder, the inventory of the properties of the deceased person is taken by the Okaegbe⁶⁸ (or his representative) in the presence of the deceased eldest son and any other children who may be present. The inventory is kept by the Okaegbe, who has the responsibility to ensure their safe keeping pending the completion of the burial ceremonies by the children. Before the introduction of inventory concept, all the moveable properties were kept physically in the house of the Okaegbe, while the immovable properties were identified. On the completion of the final burial ceremonies by the eldest son which is known in Benin custom as "orere-okoe"⁶⁹ the okaegbe who presided over the burial ceremonies with other senior member of the extended family will share the deceased properties among his children as prescribed by customs in this manner.

(a) The Igiogbe that is the house in which the deceased lived and died and usually, though not where he was buried automatically devolves on the eldest son.

(b) Custom enjoins the eldest son to accommodate all his brothers and sisters (subject to good behaviour) until they are able to build their own house and move out or (if women) until they get married.

(c) Where the deceased has other landed properties, these are distributed to other children according to "Urho"⁷⁰ in other of seniority, i.e. according to the number of wives, the male child taken precedence in each "Urho". The eldest son is still entitled to a share of the remaining properties.

(d) All the other properties are similarly distributed among all the children starting with the eldest son.

(e) It may happen that the most senior of the deceased person's children is a female. In such a case, while custom places all responsibility on the eldest son, and give him all the precedence, it is permissible, and expected, by mutual agreement between the family eldest and the children, for something reasonable to be given to the woman being the most senior of all the children.

For hereditary traditional titleholders, the custom is as follows. On the death of a holder of a hereditary title, the principal actor in the burial ceremony is the eldest son-surviving son, though the other children may make contribution to assist him. He performs all the ceremonies.

⁶⁸Head of the extended family.

⁶⁹It means that the he the son has established an alter for the worship of his departed parent.

⁷⁰It means gates.

Once this has been done, and he has establish an alter for his late father known as (Ukomwen), he succeeds to his late father's title and inherits the entire estate exclusively. He is however expected to accommodate his other brother and sisters and also distribute the estate to them in other of seniority. This gesture is subject to their good behaviour. But if the deceased title holder dies without a male child, his brother or any male paternal relation will succeed to the title after due confirmation by the Oba. His estate is preserved for his female children who are the beneficiaries. It is important to state that once a person makes a gift out of his estate, It is immaterial whether the person is a title holder or not, such property ceases to be part of his estate to be shared after his death. As mentioned earlier, the Oba of Benin introduced a key reform to the custom affecting succession to the "Igiogbe" in other to give the eldest surviving son a right of choice between the "igiogbe" his deceased father inherited, and the houses the deceased built while alive. Since it will be contrary to native law and custom for him to inherit the two houses as his late father's "Igiogbe". Accordingly, the Omo N' Oba Erediauwa Oba of Benin in council has held:

"The custom says that it is the eldest son that automatically inherits the Igiogbe of his deceased father while the remaining landed properties, if any are shared among the remaining children. But there have been cases were the Igiogbe property is by far inferior to the other landed property or properties usually because the late man chose to live in the inferior house while he put the superior house out for commercial purpose. The eldest son in such a case would feel cheated to be confined to the inferior Igiogbe while his juniors are given the superior landed properties. On strict interpretation of custom, that is how it should be. But in these days of modern development, it would be manifestly unfair to give the eldest son the dilapidated property simply because it is the Igiogbe and give a more superior one that the deceased earmarked for commercial purpose to a junior. Such cases have come to the Place and the Omo N' Oba Erediauwa, in consultation with chiefs in attendance, has exercised his traditional discretion by giving the eldest son the option to chose between the inferior Igiogbe property and the other superior property on the condition that if he choose the superior property, he would forfeit his traditional rights to the (inferior) Igiogbe property with all that go with it".⁷¹

Conclusion

From the above analysis, it is clear that the decision of the Nigeria Supreme Court in *Idehen v. Idehen*⁷² created

⁷¹ See footnote 69 at 3.

⁷² See footnote 6 above.

a lot of anxiety as to whether the Supreme Court has expanded the scope and definition of Igiogbe under Benin customary law. The Oba of Benin responded quickly to correct this impression and restore the age long traditions of the Bini people. With the reform he introduced affecting succession to the “Igiogbe”, the eldest surviving son of the deceased now has a choice as to which of the two properties he would prefer in a situation where the deceased had more than one house. These reforms which are documented and widely circulated in the state has reduced the efficacy of the Supreme Court decision in *Idehen v. Idehen* concerning the concept of two “igiogbe” under Bini native law and custom. Consequently, inheritance to the “igiogbe” is now done on the bases of the Oba’s proclamation rather than in accordance with the principles in *Idehen v. Idehen* thereby reducing if not eliminating completely the conflict introduced by the concept of two “*igiogbe*”. It is my humble submission that, our courts should avail themselves with these documents and take judicial notice of the custom contained therein and apply them accordingly, irrespective of the evidence adduced by the parties. When this is done, the court, as agent of social engineering would have contributed toward the perseverance of our Native Law and Custom.

REFERENCES

- Oba Erediauwa (1996). A hand Book on some Benin Customs and usages (1st ed.). Soben Printers Limited, pp. 11-15.
- Oba Erediauwa (1996). A supplement to the Hand book on some Benin customs and usages (1st ed.). Soben Printers Limited, pp. 1-4.
- Sagay IE (2006). Nigerian Law of Succession, Principles, Cases, Statute and Commentaries (1st ed.). Maithouse Press Limited, p. 73.
- Solo IE (2008). Igiogbe and miscellany in Benin Jurisprudence (1st ed.). Seevon Prints, p. 68.
- Sagay IE(1986). “The Dawn of Legal Acculturation in Nigeria – A significant Development in the Law and National Integration: Olowu v Oluwu (Autumn, 1986). J. Afr. Law., 30(2): 179-189.

CASES

- Administrator –General v. Egbuna & ors. 18 NLR 1
- Adeniyi Oluwa & Ors v. Olabowale Oluwu & Ors. [1985] 3NWLR (Pt.13) 372
- Andre v. Agbebi (1931) 5 NLR 47
- Agidigbi v. Agidigbi [1992] 2NWLR (Pt.221)
- 98 Arase v. Arase (1981) NSCC101
- Egharevba v. Onuonghae (2001) 11NWLR (Pt.724)318
- Idehen v. Idehen [1991] 6 NWLR (Pt.198) 382
- Imade v. Otabor [1998] 4NWLR (Pt.549) 20
- Lawal – Osula v. Lawal- Osula [1995] 9 NWLR (Pt.419)
- 259 Oke v. Oke (1974) 3 SC 1
- Uwaifo v. Uwaifo [2005] 3 NWLR (Pt.913) 479
- Yinusa v.Adebusokun (1968) NNLR 97
- Zaidan v. Zaidan (1974) 4UILR 283.

STATUTES

- Applicable Laws Edicts No. 11 of 1972.
- English Wills Act 1837
- Wills Amendment Act 1852
- Will (Soldiers and Sailor) Act 1918
- Wills Laws of Bendel State Cap 172 Laws of Bendel State applicable to Edo State.