**GLADYS ADA UKEJE**

**v.**

**MRS LOIS CHITURU UKEJE**

COURT OF APPEAL, LAGOS JUDICIAL DIVISION

26TH FEBRUARY 2001

CA/L/174/93

**LEX (2001) - CA/L/174/93**

**OTHER CITATIONS**

3PLR/2001/139 (CA)

**BEFORE THEIR LORDSHIPS:**

GEORGE ADESOLA OGUNTADE, JCA

SULEIMAN GALADIMA, JCA

PIUS OLAYIWOLA ADEREMI, JCA

**BETWEEN**

MISS GLADYS ADA UKEJE

**AND**

1. MRS LOIS CHITURU UKEJE (Administratrix of the estate of L.O. Ukeje – deceased)

2. ENYINNAYA LAZARUS UKEJE (Administratrix of the estate of L.O. Ukeje – deceased and for himself and on behalf of L.O.Ukeje (except the plaintiff

**REPRESENTATIVE**

G.O.K. AJAYI SAN., with M.N. ONYUIKE Esq., M.A. AKINWALE Esq., - For the appellant

A.O. IDIGBE SAN.with N.C. NJOKU Esq. - For the respondent.

**ORIGINATING COURT**

LAGOS STATE HIGH COURT [Monifafiade J., Presiding]

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW:- Disability based on circumstances of birth – Right of inheritance of a person deemed ineligible by operation of customary law by reason of sex [female] – Validity of customary rule in light of Section 39(2) of the 1979 Constitution (now Section 42(2) of the 1999 Constitution) – How treated

CUSTOMARY LAW:- Customary law relating to intestate succession on immovable properties – Personal law of deceased owner of property - Whether applicable to immovable properties which is governed by lex situs or law of the place where the property is located – Legal effect

CUSTOMARY LAW:- Igbo - Native law and custom which disentitles a female whether born in or out of wedlock from sharing in her deceased father’s estate – Whether void as it conflicts with sections 39(1) (a) and 39(2) of the Constitution of the Federal Republic of Nigeria, 1979 [now contained in section 42(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria]

CHILDREN AND WOMEN LAW:- *Children/Women and Inheritance - Children/Women and Justice Administration* - Children born out of wedlock – Whether disentitled to inherit from father’s estate because mother was not married to deceased parent – Constitutional foundation - Section 39(2) of the 1979 Constitution (now Section 42(2) of the 1999 Constitution) – Whether the circumstances of the birth of a person should not constitute a disadvantage to her as to so contend is to subject her to a disability based on the circumstances of her birth –

CHILDREN AND WOMEN LAW:- Children/Women and Customary Law - Native law and custom which disentitles a female whether born in or out of wedlock from sharing in her deceased father’s estate – Whether void as it conflicts with sections 39(1) (a) and 39(2) of the Constitution of the Federal Republic of Nigeria, 1979 [now contained in section 42(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria]

CRIMINAL LAW:- Civil proceedings where allegation of criminal offence is alleged – Need for same to be pleaded with utmost particularity and proved – Whether forgery like fraud, is a criminal offence - Alleging forgery and fraud in the final address - Whether goes to no issue if they were not pleaded - Whether ought to be discountenanced by Court

ESTATE PLANNING AND ADMINISTRATION:- Succession to immovable property of a deceased person who died intestate – where the lex situs is in conflict with the personal law of deceased person – How resolved – Legal effect

FAMILY LAW – PATERNITY AND LEGITIMATION:- Proof of Paternity - What plaintiffs need to prove – Nature of evidence deemed relevant – Documents - Sections 114(1) and 149 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria - , 1990 - When the burden to provide credible and probable evidence of paternity is deemed to have been duly discharged

PRIVATE INTERNATIONAL LAW AND JURISPRUDENCE:- Conflict between the Personal law of deceased person who died intestate and the lex situs governing immovable properties in his estate – Application of the lex situs principle – Effect on succession rights – Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Civil proceedings - Approach which must be followed in a proper judicial decision making process - Consideration of the evidence led by the plaintiff to discover whether the plaintiff has led evidence on all the material issues that needed to be proved - Evaluation of the evidence adduced by the parties bearing in mind on whom the onus of proof always lies - Placing of the evidence adduced by both parties on an imaginary scale and weighing them together - Making findings based on facts and invariably application of legal principles

EVIDENCE - EXPERT OPINION:- Photographic evidence – Evidence of an expert as to its genuineness – When deemed speculative, hypothetical, or discredited – Duty of court thereto – Whether the court is not bound to accept the opinion of an expert – Whether court can abandon its responsibility thereby leaving the fortunes of a case to an expert

COURT:- Witness – Recall of a witness – Whether it is the position of the law that the court must obtain the consent of the parties before a witness is recalled in a civil suit – Need for a clear distinction to be drawn between a court suo motu calling a witness not called by either of the parties and a court granting leave, on an application of a party, to recall a witness – Relevant considerations - When the court has the right to exercise its discretion to grant the recall of a witness in order to find out where the justice of a case lies

COURT:- Exercise of Discretion – Reopening of case - Duty of Judge in exercise of his judicious discretion, a Judge is to ascertain whether there are sufficient reasons in the interest of justice why a party should be allowed to reopen a case – Relevant considerations

EVIDENCE:– Genuineness of document – presumption of under section 114 (1) Evidence Act Cap112 L.F.N.1990.

EVIDENCE:– Documentary evidence – admissibility of under section 91 Evidence Act Cap 112 L.F.N. 1990.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The plaintiff brought an application asking for declarations and claims aimed at blocking the exercise of powers under the grant of letters of administration over the estate of the deceased person - (who was the father of the Respondent (and four other persons) and husband of the 1st Appellant) – to the 1st and 2nd Appellants. She claimed as a daughter of the deceased and by virtue of that fact had a right to partake in the sharing of her late father's estates. She therefore claimed among others for “an order that the grant of Letters of Administration dated 15th June, 1982 made to the 1st and 2nd defendants in respect of the estate of the said L. O. Ukeje (deceased) be revoked and declaring the same to be null and void to all intents and purposes in law; and for an order that the grant of Letters of Administration of the said L. O. Ukeje (deceased) be made to the plaintiff and the second defendant.”

DECISION(S) APPEALED AGAINST

The trial judge, found that the plaintiff is a daughter of L.O. Ukeje (deceased) and proceeded to grant the reliefs sought while varying the order as to persons who should be appointed administrators – ordering instead that the administration of the estate be handed over to the Administrator General pending when the children (the plaintiff/respondent inclusive) would choose 3 or 4 of them to apply for fresh letters of Administration.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT(S):*

1. Was the finding of fact in favour of the plaintiff on the issue of her paternity sustainable having regard to the principles applicable to a proper decision-making process as established by the courts?

2. Even if the plaintiff established her paternity as that of the deceased was she entitled to judgment having regard to the basis of her claim to relief?

3. Even if the plaintiff had established her paternity as being that of the deceased would a native law and custom which precludes her from inheriting his property be unconstitutional?

4. Was the learned trial Judge right in declaring the letter of administration null and void and setting it aside and then granting the same to the administrator general of Lagos State?

5. Was the learned trial Judge right in rejecting the evidence offered by the 1st defendant relative to the ownership of the Mercedes Benz car?"

*BY RESPONDENT(S)*

i. Whether the plaintiff/respondent, by the preponderance of both oral and documentary evidence adduced at the lower court, proved that she was acknowledged natural daughter of L.O. Ukeje (deceased).

ii. Whether it was necessary for the defendants to plead fraud or forgery which they wish to rely on and to prove same.

iii. Whether the learned trial Judge was right to have granted leave to the plaintiff to recall her witness and re-open her case and to have relied on the evidence given upon such recall of witness.

iv. What is the applicable law to the distribution of the immovable property of a person who dies intestate and if the answer to issue (1) above is affirmative whether the plaintiff/respondent is entitled as a daughter to share in the estate of her father L.O. Ukeje (deceased).

v. To what extent is the relevant Igbo native law and custom relating to the estate of a person who dies intestate applicable in this case?

vi. Whether the learned trial Judge was right when she held that the Igbo native law and custom which disentitles a female issue from sharing in the estate of her deceased father is unconstitutional.

*AS ADOPTED BY COURT*

*[Adopted the issues for determination formulated by the Respondents]*

DECISION OF COURT OF APPEAL

1. The Respondent was an acknowledged child of the deceased father, owner of the estate in dispute;

2. Evidence of a photo expert demonstrating that it is possible to superimpose pictures is not evidence that a specific picture was superimposed on another one to achieve a non-existent fact.

3. The Igbo native law and custom which disentitles a female whether born in or out of wedlock from sharing in her deceased father’s estate is void as it conflicts with sections 39(1) (a) and 39(2) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended) (now contained in section 42(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria.)

**MAIN JUDGMENT**

**SULEIMAN GALADIMA,JCA (Delivering the leading judgment):**

This is an appeal against the decision of the Lagos State High Court delivered by Monifafiade J. delivered on 10/1/1992. The respondent as plaintiff claimed the following reliefs set out in the statement of claim:

"1. A declaration that the plaintiff, as daughter of one L.O. Ukeje (deceased) is the person entitled to the estate or one of the persons entitled to share in the estate of the said L.O. Ukepe (deceased).

2. An order that the grant of letters of administration dated 15th June 1982 made to the 1st and 2nd defendants be revoked and declaring the same to be null and void to all intents and purposes in law.

3. An order of injunction restraining the 1st and 2nd defendants from administering the estate of the said L.O. Ukeje (deceased) and relying on the said letters of administration dated 15th June 1982 granted to them and/or holding themselves out as administrators of the said estate to members of the public and/or transacting any business with any person in respect of the estate of the said L.O. Ukeje (deceased).

4. An order that the 1st and 2nd defendants prepare an inventory of all and singular the estate and/or render account of all monies, transactions and/or properties which have come into their possession since the grant of the said letters of administration of the estate of Mr. L.O. Ukeje (deceased).

5. An order that the grant of letters of administration of the said L.O. Ukeje (deceased) be made to the plaintiff and the second defendant."

The respondent’s case is that she is the daughter of one Lazarus Ogbonnaya Ukeje (now deceased). That her paternity was acknowledged by the said L.O. Ukeje. She contended that she was entitled to the estate or one of the persons entitled to share in the estate of the L.O. Ukuje (deceased).

At the trial both parties called witnesses and also relied on some documentary evidence. At the conclusion of the trial, the learned trial Judge gave judgment in favour of the respondent; granting all the reliefs prayed by the said respondent. Dissatisfied with the judgment the appellant appealed to this court stating in their notice of appeal nine grounds, out of which they formulated five issues for determination as follows:

1. Was the finding of fact in favour of the plaintiff on the issue of her paternity sustainable having regard to the principles applicable to a proper decision-making process as established by the courts?

2. Even if the plaintiff established her paternity as that of the deceased was she entitled to judgment having regard to the basis of her claim to relief?

3. Even if the plaintiff had established her paternity as being that of the deceased would a native law and custom which precludes her from inheriting his property be unconstitutional ?

4. Was the learned trial Judge right in declaring the letter of administration null and void and setting it aside and then granting the same to the administrator general of Lagos State?

5. Was the learned trial Judge right in rejecting the evidence offered by the 1st defendant relative to the ownership of the Mercedes Benz car?."

The respondent formulated six issues for determination in her brief of argument as follows:-

i. Whether the plaintiff/respondent, by the preponderance of both oral and documentary evidence adduced at the lower court, proved that she was acknowledged natural daughter of L.O. Ukeje (deceased).

ii. Whether it was necessary for the defendants to plead fraud or forgery which they wish to rely on and to prove same.

iii. Whether the learned trial Judge was right to have granted leave to the plaintiff to recall her witness and re-open her case and to have relied on the evidence given upon such recall of witness.

iv. What is the applicable law to the distribution of the immovable property of a person who dies intestate and if the answer to issue (1) above is affirmative whether the plaintiff/respondent is entitled as a daughter to share in the estate of her father L.O. Ukeje (deceased).

v. To what extent is the relevant Igbo native law and custom relating to the estate of a person who dies intestate applicable in this case?

vi. Whether the learned trial Judge was right when she held that the Igbo native law and custom which disentitles a female issue from sharing in the estate of her deceased father is unconstitutional.

I am satisfied that the issues postulated by the respondents are quite relevant to the determination of this appeal. I shall therefore be guided by these issues. However, I intend to consider these issues seriatim.

With respect to the first issue, it is the contention of the learned senior counsel for the appellant that the learned trial Judge failed completely to follow the established principles of the Supreme Court relating to the burden of proof on the respondent and the dispassionate consideration of the issues by the court as presented by the parties. In other words that the learned trial Judge, in effect had placed the initial burden of disproving the respondent’s case on the appellants. It is further contended that the trial Judge did not follow the principles of a proper decision making process in her judgment as out-lined in the case of Sanusi v. Amayogun (1992) 4 NWLR (Pt. 257) p.527 at 547-548. The three pronged approach which must be followed in a proper decision making process as outlined in by Nnaemeka-Agu JSC in that case involves the following considerations. Firstly, the consideration of the evidence led by the plaintiff to discover whether the plaintiff has led evidence on all the material issues that needed to be proved. The second step involves the evaluation of the evidence adduced by the parties bearing in mind on whom the onus of proof always lies. The third consideration involves the placing of the evidence adduced by both parties on an imaginary scale and weighing them together. The fourth and the last stage which is the most difficult, involves making findings based on facts and invariably application of legal principles. These will then form the basis for the final decision of the court.

I find that the main plank of the appellants’ complaint in this appeal is on the decision making process of the learned trial Judge which the appellants contend is not in consonance with the procedure, I have outlined above. However, I am of the firm conviction that by a careful examination of the judgment of the learned trial Judge, she duly considered and followed the procedure outlined in the case of Sanusi v. Amayogun (supra). From the record, pages 251-256, particularly, the learned trial Judge considered the evidence put forward by the respondent in proof of her case. The evidence of the appellants was also considered at pages 267-274. Thus the evidence adduced by the parties were carefully evaluated. At page 267 of the record, the learned trial Judge stated thus:

Plaintiff’s claim for declaration that as daughter of one L.O.Ukeje (deceased) is the person entitled to the estate or one of persons entitled to share in the estate of the said L.O. Ukeje is contested on the averments in paragraphs 1, 6 and 7 of the defendants 3rd amended statement of defence dated 29th May 1990. These paragraphs in a nutshell denied plaintiff claim as daughter of Lazarus Ogbonnaya Ukeje. From her oral testimony and that of her mother tendered to buttress her assertion that she is a daughter of L.O. Ukeje:

1. Her birth certificate

2. Judgment in her divorce proceedings.

3. Form of undertaking and guarantee."

The learned trial Judge referring further to exhibit 3 (the form of undertaking and guarantee to be furnished for Nigeria passports) stated thus:

"Lazarus Ogbonnaya Ukeje in the form which was admitted exh.3 declared father of Gladys A. Kocha. This form was sworn to on 5th of March, 1976. Plaintiff in the divorce proceedings was named Kocha Gladys Ada Nee Ukeje. The judgment was pronounced on 29th October, 1981. The birth certificate issued on 12th August 1952 stated date of birth of 5th July, 1952. Place of birth Massey Street, Dispensary, Lagos.

Sex : Female  
Full Name : Gladys Ada Ukeje  
Full Name at birth of father :  
Lazarus Ogbonnaya Ukeje – Ibo  
Full Name at birth of mother :  
Maud Ukeje Sierra-Leone-Crede  
Occupation of father and address :  
Photographer 51 Moleye St. Yaba."

At page 268 of the record the learned trial Judge went further to consider the photographs respondent took with her deceased father and exhibit ‘L’, the obituary in which defendants acknowledged her. The evidence placed before the trial court is such that the respondent did not only just acquire intimate knowledge of the deceased but she supported her claim with her birth certificate, papers from divorce proceedings, form of undertaking and guarantee for passport and a number of photographs. The appellants have argued that the birth certificate does not establish that the deceased acknowledged the respondent as his daughter while he was alive. The only basis for this argument is that the information was supplied by the respondent’s mother. Of course, it is the mother not the deceased who should have supplied the information in exhibit ‘H’. By section 114(1) of the evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 there is a rebuttable presumption that exhibit H is genuine. That section provides thus:

"The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Nigeria who is duly authorized thereto to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by the law in that behalf."

Here, by virtue of this section there is presumption of law that the birth certificate of the respondent is genuine. The onus is on the appellants to rebut this presumption by adducing sufficient and probable evidence. Since the appellants have not discharged the onus placed on them to disprove the genuineness of exhibit H, the learned trial Judge is obliged in law to assume that exhibit H is genuine.

Further, the oral evidence of P.W.2, is that she is the mother of the respondent and that the deceased was her father. Exhibit H is a confirmation of the oral evidence of PW2 that the respondent is her daughter. If therefore P.W.2’s direct oral evidence is admissible, then the statement made by her to the register of births and recorded in the birth is admissible under section 91 of Evidence Act; which provides that:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document; be admissible as evidence of the fact if the following conditions are satisfied

(a) if the maker of the statement either -

(i) had personal knowledge of the matter dealt with by the statement, or

(ii) where the document in question is or forms part of a record purporting to be a continuous record made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and

(d) if the maker of the statement is called as a witness in the proceedings…………"

I do not think that P.W.2’s evidence that registration of birth was done by the deceased in anyway that contradicts the statement that the information supplied in exhibit ‘H’ was given by P.W.2. The deceased, whom the respondent claimed was her father could have done the registration even though the P.W.2, the respondent’s mother supplied the information in exhibit ‘H’.

Further section 149 presumes the existence of certain facts or things that would naturally take their course. It is curious, but it is a question that should be asked in the circumstances of this case. That is, whether in the common course of natural events and of human conduct, P.W.2 would have decided to tell a lie in exhibit ‘H’ regarding the fact of her baby soon after the birth as far back as 5/7/1952, at a time when the deceased was a mere houseboy living with a white man in his boys quarters, so that the baby can make a claim in 1983. That shouldn’t be the case!

Considering the evidence adduced by the respondent and exhibits tendered in this case, I feel the burden on the respondent to provide credible and probable evidence of paternity has been duly discharged. The burden is shifted to the appellants not only to contradict the evidence of the respondent but also to show and challenge such evidence. This the appellants did not do. It is pertinent that I refer to one of the grounds on which the appellants (sic) attacked the judgment of the lower court. It is that the trial Judge did not make a finding as to whether the plaintiff’s mother was married to the deceased or not. I am of the opinion that the learned trial Judge rightly regarded the issue of whether there was a marriage between the deceased and the respondent’s mother as irrelevant having regard to the provisions of section 39(2) of the 1979 Constitution (now Section 42(2) of the 1999 Constitution). This is because the circumstances of the respondent’s birth should not constitute a disadvantage to her in view of the clear provision of the said S.39(2) of the 1979 Constitution. It provides thus:

"No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of the birth."

The success or failure of the respondent’s case does not depend on whether her mother was married to the deceased or not. To so contend is to subject her to a disability based on the circumstances of her birth. It is also noted that the appellants had alleged forgeries and lies in the evidence procured by the respondent’s mother. The appellants would be correct to have so alleged because of the contradictory residential addresses the P.W.2 herself gave between 1950 – 1955. She stated that she resided at No.11 Onikan Road, Ikoyi. But in exhibit H the address contains therein shows no. 51 Moleye Street, Yaba as her address at the time of birth and registration of the respondent in mid – 1952. The learned trial Judge with due respect was wrong in saying that the issue of different address inserted in the birth certificate was never put to the PW2 under cross-examination. This issue was put to her. Whilst the issue of address might generally affect the credibility of P.W.2, I am of the firm opinion that that does not in any way rule out the possibility of P.W.2 having ever lived with the deceased at 11, Onikan Street and also registered respondent’s birth. Under cross-examination P.W.2 said :

"I maintain my earlier evidence that Lazarus registered plaintiff’s birth. I maintain that I was living with Lazarus either at Onikan or Ikoyi at the time of plaintiff’s birth. It is not correct to say Lazarus never registered plaintiff’s birth. It is not true to say Lazarus never lived at 11, Onikan Street, Ikoyi. I do not know what address Lazarus put in the birth certificate."

I am of the considered view that what is crucial to the determination of this matter is undisputed fact that the respondent was born in Lagos on 5/7/1952 and her birth was registered in August 1952. Her claim of being Ukeje’s (deceased) descent has been maintained throughout. She was stated to have been "nee Ukeje" in her divorce proceedings . (See exhibit ‘J’, the judgment in divorce proceedings). In the guarantor’s form, exhibit 3, she was acknowledged as deceased’s daughter. Both the divorce proceedings and guarantor’s form were in existence well before the death of her father in 1981. Exhibits M, M1, and P are the photographs which both the respondent and her mother claim to have been taken together with the deceased, in spite of the evidence of D.W. 8 that the deceased’s photograph was superimposed on respondent or vice versa. D.W.8’s evidence demonstrated that it is possible to superimpose pictures. This evidence is speculative. D.W.8 expressed this opinion as an expert witness as a photo analyst. But where an expert evidence is discredited, then the court will have to cautiously accept or rely on such expert evidence. See Seismograph Nigeria Ltd. v. Ogbeni (1976) NSCC 132. It would appear the evidence of D.W.8 was shaken or discredited under cross-examination when he said :

"It is true I said earlier lots of things could have been done. Other things the lady could have been superimposed and shadow painted in for touching purposes. It is also possible to have two separate photographs put together on a different background and a composite picture taken to create million, e.g. like superimposing the photograph of a person with Trafalgar square as the background. Exhibits M and M1 could have been taken with the same background, but I do not think is so."

I do not see how this opinion that is hypothetical and speculative can assist the court in arriving at the truth of the matter and decide the issue in dispute between the parties. The court is not bound to accept the opinion of an expert. When court are faced with the opinion of expert witnesses they should exercise great and due care in accepting wholly as "gospel truth" the opinion of such experts. It cannot just abandon its responsibility "and leave the fortunes of the case to the expert witness." See U.T.B. v. Awanzigana Ent. Ltd (1994) 6 NWLR (pt. 384) 56 at 63. I will be very brief on the second issue which raises the question whether it was necessary for the respondents to plead fraud or forgery which they wish to rely on and to prove same. It is fairly settled law that when fraud is being alleged in any suit, it must be pleaded with utmost particularity. See George v. Dominion Floor Mills (1989) 1 All NLR 71 at 102; Onamade v. A.C.B. Ltd (1997) 1 NWLR (Pt. 480) 123. The appellants’ contention that fraud or forgery which became apparent only at the trial need not be pleaded is not correct in law. Forgery like fraud, is a criminal offence. It must be pleaded specifically with detail particulars and proved.

There should be no room for speculation as to whether the crime is pleaded or not and a fortiori whether it has been proved by the party alleging it. See Aina v. Jinadu (1992) 4 NWLR (Pt.233) 91. The appellants’ attack on the entire evidence of the respondent both oral and documentary, including exhibits H, L, P, J and 3 were based on the alleged conclusion of D.W.8 that exhibits M and M1 were forgeries. If the appellants had intended to place reliance on forgery or fraud which they alleged was visible at the trial they would have raised it in their final pleading, the third amended statement of defence filed on 19/6/1990. They should not have alleged the forgery and fraud in their final address as they did. This therefore goes to no issue as they were not pleaded and therefore ought to be discountenanced. See George v. Dominion Flour Mills (1963) supra; Iseru v. Catholic Bishop of Warri Diocese (1997) supra. The third issue is whether the learned trial Judge was right to have granted leave to the plaintiff to recall her witness and reopen her case and to have relied on the evidence given upon such recall of witness. The appellants had contended that the learned trial Judge was wrong in granting leave to the respondent to be recalled to give evidence. They also contended that it was wrong for the learned trial Judge to have relied on the evidence so given. This court on 5/6/2000 granted the appellant leave to file an additional ground of appeal. The additional ground of appeal is based solely on the fact that the respondent having been recalled, the lower court was wrong in relying on the recalled evidence in her judgment without the consent of the defendants. Reference was made to the case of Solomon Ojo v. Egbon Edoh (1964) M-W (NLR 12). There is a misconception of the decision of the lower court in Ojo’s case (supra) regarding the position of the law that the court must obtain the consent of the parties before a witness is recalled in a civil suit, as contended by the appellants. A clear distinction ought to be drawn here between a court suo motu calling a witness not called by either of the parties and a court granting leave, on an application of a party, to recall a witness, as is in this case. With respect to the first situation it has been settled that a court cannot call a witness not called by either of the parties, without the consent of the parties. The issue in the instant case is not that of the power of a court on its own volition calling a witness but rather it is the power of the court permitting one of the parties, who has requested to recall a witness that has already testified before the court to come and adduce further evidence. I am of the view that with respect to this second situation a different consideration applies. In that case the court has the right to exercise its discretion to grant the recall of a witness in order to find out where the justice of the case lies. See Omoregbe v. Lawani (1980) NSCC. 164. There is no doubt that in civil cases dispute is between the parties. The Judge merely keeps the ring. But he must find out the truth. The parties must be willing to allow him to arrive at the truth and nothing but the truth. The appellants are not contending that the learned trial Judge exercised her discretion wrongly in permitting the respondent to reopen her case but that the learned trial Judge never had the power to permit the respondent to give further evidence without their consent. In the exercise of his judicious discretion, a Judge is to ascertain whether there are sufficient reasons in the interest of justice why a party should be allowed to reopen a case. The respondent did give reasons in her affidavit in support of her application why she could not tender exhibit 3, the guarantor’s form; earlier during the trial.

The appellants were not taken by surprise with respect to the exhibit tendered, because it was plead at paragraph 19 by the respondent in her amended reply to the amend statement of defence. The appellants did not cross-examine the respondent after she gave her evidence on being recalled. In the circumstances, I find that the learned trial Judge exercised her discretion judiciously and judicially too in favour of the respondent to reopen her case. The case of Ojo v. Edo (supra), relied upon by the appellants in support of their contention is irrelevant and not applicable to this issue. In that case the Judge suo motu called an expert witness to testify. The witness was not called by either party to the proceedings. With respect to the fourth and fifth issues, they will be taken together. It is contended by the appellant that the respondent is not entitled to share in the estate of the deceased having regard to the case pleaded by her that she is an Ibo woman.

The questions here, as postulated in the respondent’s brief, are the applicable law to the distribution of the immovable property of a person who dies intestate, and whether the respondent is entitled to share in the estate of her deceased father. It is the general principle of law, as it is trite law that succession to immovable real property is lex situs i.e the law of the place where the land is situated. In Olowu v. Olowu (1985) 3 NWLR (Pt 372) at 375, it was held that the immovable properties of the deceased being situated in Benin city, their distribution must be determined according to the Customary law of the Benin. It is agreed by both parties that the two properties at No.7 Awoyemi Close Surulere and No.13 Norman Williams Ikoyi are situate in Lagos State. By applying to the lex situs principle, the applicable law to the two properties is Yoruba native law and custom. This custom stipulates that when a man dies intestate his properties devolve on all his children who share same equally and the eldest child assumes the position of head of family and manager of estate on behalf of all children.

In paragraph 27 of her reply to further amended statement of defence, the respondent pleaded that she was entitled to share in the immovable properties and other personal properties of her late father. By applying the lex situs principle as explained above respondent being the eldest child of her late father she is entitled to share in the estate of the said late father. The relevant Ibo native law and custom relating to intestate succession is not applicable to all immovable properties of the deceased situate in Lagos at No.13 Norman Wlliams Street, S.W. Ikoyi and No. 7 Awoyemi Close, Surulere, Lagos. A few legal authorities will lend support to the position I have taken in this issue. The learned authors of the "Conflict of laws, 10th edition volume 2; Dicey and Morris have this to say at page 612 rule 98 state thus:

"The succession to immovable of an estate is governed by the law of the country where immovables are situated."

In Duncan v. Lawson (1989) 41 Ch.D344 it was held as follows:

"Accordingly where the owner of immovables dies intestate the order of descent or distribution prescribed by lex situs is applied by English court."

This court has expressed similar opinion in Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) p. 288 thus:

"Lex situs simply means the law of the place where the property is situate or is situated. The general state of the law is that the lands or immovables are governed by the lex situs."

See also Udensi v. Mogbo (1976) SC1.

The last issue no. VI having been exhaustively dealt with in the first issue as well need not be repeated. I have held the opinion that the Igbo native law and custom which disentitles a female whether born in or out of wedlock from sharing in her deceased father’s estate is void as it conflicts with sections 39(1) (a) and 39(2) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended). These provisions are now contained in section 42(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria. See Agbai v. Okogbue (1991) 7 NWLR (Pt.204) 391 where Wali JSC said:

"I have no hestitation in coming to the conclusion that any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our court."

See also Mojekwu v. Mojekwu(supra).

In the final result, I hold that this appeal lacks merit. It is accordingly dismissed. The judgment of the learned trial Judge is hereby affirmed. I award the sum of N5,000 costs to the respondent.

***GEORGE ADESOLA OGUNTADE, JCA:***

I read before now a copy of the lead judgment by my learned brother Galadima JCA. As I agree with his reasoning and conclusion, I would also dismiss this appeal as unmeritorious. I award N5,000.00 costs against the appellant in favour of the respondent.

***PIUS OLAYIWOLA ADEREMI, JCA*:**

I have been privileged with a preview of the judgment delivered by my learned brother, Galadima JCA. All the issues raised in the appeal have been exhaustively dealt with in the leading judgment by my learned brother such that I do have anything to add. I adopt the judgment as mine. I also hold that the appeal is unmeritorious and I accordingly dismiss it and affirm the judgment of the court below. I abide by the order as to cost.

**Cases cited in the judgment**

Agbai v. Okogbue (1991) 7 NWLR (Pt.204) 391.

Aina v. Jinadu (1992) 4 NWLR (Pt.233) 91.

Duncan v. Lawson (1989) 41 ChD. D344.

George v. Dominion Flour Mills (1963) 1 All NLR 71.

Iseru v. Catholic Bishop of Warri Diocese (1997) 3 NWLR (Pt. 495) 517.

Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) 288.

Ojo v. Egbon Edoh (1964) M-W (NLR 12).

Omoregbe v. Lawani (1980) NSCC. 164.

Olowu v. Olowu (1985) 3 NWLR (Pt 372).

Onamade v. A.C.B. Ltd (1997) 1 NWLR (Pt. 480) 123.

Sanusi v. Amayogun (1992) 4 NWLR (Pt. 257) 527.

Seismograph Nigeria Ltd. v. Ogbeni (1976) NSCC 132.

Udensi v. Mogbo (1976) 7 SC 20.

U.T.B. v. Awanzigana Ent. Ltd (1994) 6 NWLR (Pt. 384) 56.

**Statutes referred to in the judgment**

Evidence Act Cap. 112: Section 91, section 114(1), section 149.

1979 Constitution: Section 39(2), section 39(1)(a).

1999 Constitution: Section 42(2)