**MRS. EUNICE OBARO**

**V.**

**PROBATE REGISTRAR AND OTHERS**

IN THE COURT OF APPEAL [LAGOS DIVISION]

5TH DAY OF JULY, 2000

CA/L/283/99

**LEX (2000) - CA/L/283/99**

OTHER CITATIONS

2PLR/2000/143 (CA)

(2002) 6 NWLR (PT. 762) P. 56

**BEFORE THEIR LORDSHIPS**

ATINUKE OMOBONIKE IGE, JCA (Presided)

SULEIMAN GALADIMA, JCA

AMIRU SANUSI, JCA (Delivered the leading judgment)

**BETWEEN**

MRS. EUNICE OBARO – Appellant

AND

1. PROBATE REGISTRAR

2. MR. OMORUYI ALONGE

3. MRS. OMOLARA AYANRU

4. MRS. EDOWAYE AFADAMA

5. MRS. YEMISI AKINRINADE

6. MR. OGHOGHO AYO ALONGE

7. MISS. UYIGUE ALONGE

8. MRS. IMADE-IZE-IYAMU

9. MISS AGHARESE ALONGE – Respondent

**ORIGINATING COURT(S)**

LAGOS STATE HIGH COURT

**REPRESENTATION**

S. ASEMOLA, SAN with T. ALASA for the Appellant

A. O. EGBOBNMIEN (Jnr) for 2nd – 9th respondent.

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

ESTATE ADMINISTRATION:- Bini customary law and estate administration – When estate of a deceased person whose personal law is Bini customary law of inheritance is deemed constituted – Where deceased left a will – Whether all rights to litigation in relation to deceased’s properties are deemed suspended until the traditional rite of second burial is concluded

CUSTOMARY LAW:- Succession to property under Bini Customary Law - When litigation can be instituted - Locus standi to institute proceedings - Whether anyone can administer deceased’s estate before the second burial

CUSTOMARY LAW:- Female inheritance and Bini customary – Right of a woman in the administration of estate of deceased father – Rule that only a first son can hold estate in trust for himself and other heirs until deceased father’s second burial – Implication for female heirs right locus standi to initiate suit challenging management of the estate – When deemed ousted

CHILDREN AND WOMEN LAW: *Women and Inheritance/Customary Law* – Bini customary law - Female child of deceased Bini man – Whether has legal standing to institute any form of action over his properties before the second burial

**PRACTICE AND PROCEDURE ISSUES**

ACTION – COUNTER-AFFIDAVITS:- Failure to file any counter affidavit on the originating summons but instead choosing to file the preliminary objection on ground of jurisdiction to the institution of the originating summons by the appellant – Duty of court thereto – Whether court must dispose of such jurisdictional issue first, before it considers the merit or otherwise of the matter

APPEAL – GROUNDS OF APPEAL:- Rolling of multiple complaints into one grounds of appeal - Whether each complaint represents a distinct ground – Whether the terms "misconstrued" "misapplied" "came to a wrong decision" each entails a separate complaint which raised distinct ground

JURISDICTION:- Rule that in determining the issue of jurisdiction the court is simply empowered to consider or refer to the statement of claim or the originating summons in order to decide whether it has jurisdiction to adjudicate on the matter or not – Effect – Whether precludes trial court from referring to or considering the affidavit evidence and exhibits annexed to a motion which was not taken

JURISDICTION:- Preliminary objection relating thereto – Duty of court - Need for court to dispose the issue of jurisdiction before considering the merit or otherwise of the matter - What court must consider in its determination

**MAIN JUDGMENT**

**AMIRU SANUSI, JCA** (DELIVERING THE LEADING JUDGMENT):

On the 6th of November, 1998 the appellant took an application to the Lagos High Court for an order for grant of interim preservation of property by the appointment of a receiver to manage and collect rent of the property of the applicant’s deceased father, late Chief Joshua Alonge who died on the 21st September 1998. It is not disputed by all the parties that the deceased was at the time of filing the said originating summons was not buried and that he during his life time made a will which said will was then yet to be read and was also deposited with the probate registrar of the lower court (1st respondent). On the application, the applicant/appellant listed in the supporting affidavit 14 landed properties situated in many places, namely: one at Ibadan, seven in Benin City, one in Akure and one in London. The applicant/appellant in the said application also named two estate management firms from which one could be selected to manage her deceased father’s estate. The 2nd to 8th respondent were other children of the deceased.

At the lower court four respondents i.e. 5th, 6th, 8th and 9th respondent’s jointly filed affidavit on 16/6/99 endorsing the action filed by the appellant for appointing a receiver by the court to manage and collect rents on the landed properties of their late father. The 4th respondent also on the same date filed a similar affidavit making the number five of the deceased person’s children supporting the action. It is pertinent to note that on 1/12/98 one counsel of one Samuel Abbe brought a motion on behalf of himself and the family seeking to be joined as respondents in the suit but that motion was never taken. Similarly, on 29/1/99 the appellant filed a motion on notice annexing some exhibits and affidavit of urgency seeking for an interlocutory injunction against the 2nd to 9th respondents but such motion was also not taken. A notice of preliminary objection was filed by the 2nd respondent on 21st January, 1999 on the following two grounds; namely:

(a) That the deceased left a will, yet to be read in accordance with section 3(1) of the Wills Law of then Bendel State, Cap 172 Laws of Bendel State of 1976. (Now applicable in Edo state)

(b) That the deceased not having been buried, therefore the Benin Customary law, the personal law of the deceased applies that the said custom confers on the applicant being the eldest son of the testator the sole responsibility of retaining all the property of the deceased in first for himself and other children of the deceased.

(c) Flowing from (a) female child of the deceased lacks the competence and as such has no locus standi to make the application which is against the Benin Native Law and Custom that governs the estate of the deceased.

The preliminary objection was taken on 8th February, 1999 and on 15/4/99 the trial court delivered its ruling upholding the objection. The trial court subsequently struck out the appellants originating summons. The appellant became dissatisfied with the lower court’s ruling and thereupon appealed to this court. She filed her notice of appeal on 23/6/99 containing two grounds of appeal. Since the grounds of appeal and their particulars have been made part of the respondents preliminary objection in this appeal I shall reproduce them for ease of reference.

The two grounds of appeal and their particulars read as follows:

Ground 1

The learned trial Judge erred in law and misconstrued and misapplied the case of Ovenseri v. Osagiede (1998) 11 NWLR (Pt. 572) at 3 ratio 3 to the instant case and came to a wrong decision in striking out the appellant’s originating summons which he held in that part of his ruling as follows:

"In the recent decision of Ovenseri v. Osagiede (1998) 11 NWLR (Pt. 572) at 3 ratio 1, the Supreme Court unanimously held that under Bini Native Law and custom once the second burial of a deceased has not been performed, no one including his children could administer the estate or succeed to the estate. It means that there can be no litigation until the important second burial has been performed. In this case, since the second burial of the deceased has not been performed, this action taken in respect of the estate was incompetent under Bini Native Law and Custom."

Particulars

(i) In law, a court is entitled to look at its record in order to appreciate the nature/character of the case before it.

(ii) In the instant case, there is uncontroverted affidavit evidence and exhibits In the Court’s record over looked by the court showing that since after their father’s death, the 2nd respondent has been claiming ownership and administering through his agent, the property at No. 7 Oshuntokun Avenue, Bodija, Ibadan which is one of the properties comprised in the estate of their deceased’s father notwithstanding that no burial ceremonies of the deceased have been performed and no distribution of the property has been done.

(iii) The case of Ovenseri v. Osagiede supra is inapplicable to the circumstance in the instant case where the eldest son of the deceased being a trustee under the Bini Native Law and Custom begin to administer any property comprised in the estate before the burial of the deceased and subsequent distribution of the property.

(iv) The case of Ovenseri v. Osagiede (supra) can not be construed as precluding any beneficiary in the estate of a deceased person under Bini Native Law and Custom from seeking a relief for the preservation of any property or properties comprised in the estate where the eldest son as in the instant case has already claimed for himself any of the property comprised in the estate before distribution, and while the body of the deceased is yet to be buried.

(v) In law where any Native Law and Custom precludes access to judicial process in the face of any apparently wrongful act, the custom is contrary to law, equity and good conscience. Such native law and custom can not be followed as there can be no wrong without a remedy:

Ground No. 2

The learned trial Judge erred in law in striking out the appellant’s originating summons prematurely after holding in his ruling as follows:

"In Idehen’s case, inheritance under Bini Customary Law by the eldest son of the deceased person was recognized but the law of inheritance will only apply after the completion of the "second" or secondary burial ceremonies. It was also found in that case that until the exercise of distribution under customary law has been performed, the eldest son retains all the property of the deceased in trust for himself and the children of the deceased. See also Arase v. Arase (1981) 5 SC 33.

Particulars

(i) In law the recognized role of the 2nd respondent under Bini Native Law and Custom as first son of the deceased is to retain all the deceased’s property in trust for himself and the children of the deceased until distribution after completion of the deceased’s burial ceremonies – vide Idehen v. Idehen (1991) 6 NWLR (Pt. 198) and Arase v Arase supra63;

(ii) There is uncontroverted affidavit evidence in the instant case that the 2nd respondent is currently living in far away London. As an absent trustee, the 1st respondent can not effectively exercise the power and functions of a trustee of the deceased’s property until burial and distribution of the deceased’s property imposed upon him under the decisions in Idenhen v. Idehen (supra) and Arase v. Arase (1981) 5 S.C 33 at 63;

(iii) The cases of Idenhen v. Idehen (supra) and Arase v. Arase (supra) did not contemplate, and are therefore inapplicable to a situation as in the instant case where the 2nd respondent who retains the deceased’s property as trustee for himself and other children of the deceased is living in a far away place like London.

(iv) In law the 2nd respondent as a trustee, can not delegate the exercise of his duties and functions over the estate where he cannot supervise the same."

The appellant distilled and formulated two issues for determination from the two grounds of appeal. The two issues formulated are:

(a) Whether in the light of the totality of the affidavit evidence and exhibits before the court in this case the learned trial Judge was right in striking out the appellants originating summons on the ground that the action was incompetent under Bini Native Law and customs on the principle in Ovenseri v. Osagiede (1998) 11 NWLR (Pt. 512) 1 at 3.

(b) Whether in the light of the affidavit evidence before the court, the learned trial Judge was right in applying the principles in Idehen v. Idehen) supra and Arase v. Arase supra to the facts and circumstances of this case and striking out the appellant’s originating summons for preservation of the deceased’s properties comprised in his estate pending probate.

The appellant also filed a reply brief to the respondent’s brief of argument on 22/12/99. The respondents on 15/11/99 filed their brief of arguments. The brief filed is written in two parts. In the first part they raised preliminary objection to the two grounds of appeal filed in the appellant’s notice of appeal in which they urged this court to strike out the said notice of appeal. The second part of the brief is a response to the appellant’s brief in the event that the objection raised is over ruled. The respondents also raised two issues for determination in his brief of argument, namely:

(i) Whether the learned trial Judge was right in striking out the appellant’s originating summons for being incompetent.

(ii) Whether the applicant had any locus standi to institute this action when the second burial of the deceased had not been performed.

I shall first of all dispose of the preliminary objection raised. The first leg of the respondent’s preliminary objection is that in the two grounds of appeal the appellant rolled three complaints in the grounds, namely, she used the term misconstrued and misapplied the case of Overnseri v. Osagiedi (supra) "came to a wrong decision…" According to the learned counsel for the respondents the terms "misconstrued" "misapplied" "came to a wrong decision" each entails a separate complaint which raised distinct ground. Thank God the learned respondents counsel chose to abandon this leg of his objection when orally arguing the appeal in the light of the recent case of Aderemi v. Oluwo (2000) 4 NWLR (Pt. 652) 260. That in my view is the most ideal thing for him to do as such argument can never stand in the light of the recent decision of Supreme Court in Aderemi’s case (supra). The argument has no substance and is accordingly overruled. I therefore hold that the 2 grounds of appeal are competent and their particulars are also valid. Having carefully considered the grounds of appeal vis-a-vis the ruling appealed against, I am convinced that they arose from the ruling of the lower court now on appeal here. I therefore unhesitatingly overrule the entire preliminary objection as it is lacking in substance and merit.

What remains now is to consider the merit of the appeal. In doing so I chose to be guided by the 2 issues for determination formulated by the appellant which I consider more germane and relevant. I also see convenience in dealing with them together. It is important to note at this stage that the ruling now appealed against dated 15/4/99 is on the respondent’s preliminary objection challenging the competence of the appellant to institute the action by way of originating summons seeking order of interim preservation by appointing a receiver to manage and collect rents on the landed property owned by the late father of both the appellant and respondents. The lower court having sustained the objection consequently struck out the originating summons. The said originating summons was supported by an affidavit of ten paragraphs sworn to by the appellant herself. There are other affidavits by 5th, 6th and 9th respondents and also by 4th respondent both filed on 16/6/99 containing 6 and 5 paragraphs respectively and both supporting the application by the appellant. As I said earlier, the motion filed by the appellant on 29/1/99 on interlocutory injunction was not taken by the court before ruling appealed against in this appeal was delivered.

It has been submitted by the Asemota learned SAN for the appellant that these motions of 29/1/99 form part of the record of proceeding in the lower court since it and the annexed exhibits were filed and as such ought to be considered to by the trial court in its ruling now appealed against. He argued that the failure to file counter affidavit by respondent controverting the averments on the said motion, the trial court ought to have considered the said affidavit evidence and exhibits annexed thereto and having not done so, the trial court was erroneous in striking out the originating summons.

It is not in dispute that the respondents in this appeal did not file any counter affidavit on the originating summons but instead chose to file the preliminary objection to the institution of the originating summons by the appellant. By so doing, they were challenging the jurisdiction of the court in entertaining the originating summons filed by the appellant. In that situation therefore, the trial court ought to and was correct in taking the objection at that stage to resolve the issue once and for all. It is trite that whenever a court’s jurisdiction is challenged, such court must dispose of such jurisdictional issue first, before it considers the merit or otherwise of the matter. See Adeyemi v. Olakunri (1994) 2 NWLR (Pt. 327) 500.

Both parties in this appeal are not disputing the fact that the motion for interim injunction filed on 29/1/99 which contained the averments and exhibits the appellant’s counsel was relying on was not taken by the trial court. Although such averments and exhibits might form the record of the proceeding, the trial court was not in error in overlooking them. The ruling of the court appealed against is on the preliminary objection challenging the locus standi of the appellant to institute the originating summons and not on the motion for the interim injunction which was indeed never moved. It is trite law that in determining the issue of jurisdiction the court is simply empowered to consider or refer to the statement of claim or the originating summons in order to decide whether it has jurisdiction to adjudicate on the matter or not. See Emecheta v. Oguezi (1996) 5 NWLR (Pt. 447) 239 per Rowland JCA where he said thus at page 239:

"I am of the view that a preliminary objection on points of law challenging the validity of institution of a suit could only be determined at the initial stage by reference to the pleadings particularly the statement of claim."

Thus, in the instant case, the trial court was to concern itself only with the affidavits filed in the originating summons and the materials filed to the objection and not to concern itself with the affidavit evidence and exhibits in the said motion which was in fact never taken at all, as it in fact rightly did. The affidavits and exhibits referred to by the learned SAN for the appellant had not having been considered by the trial court and are in my view irrelevant to the preliminary objection on which the ruling appealed against was given by the trial court and as such are not material to this appeal. The trial court was therefore not supposed to refer to or consider the affidavit evidence and exhibits annexed to the motion which was not taken. This therefore knocks the bottom out of the arguments advanced in the appellant’s counsel’s reply brief that the trial court was in error in overlooking that aspect of the record of appeal for to do so in my view, is to bring extraneous matter in the actual issue before it which is not permissible in law. The trial court on its finding had this to say:-

"The Supreme Court’s finding in Ovenseri’s case that there can be no litigation until the important second burial has been performed is binding, 2nd respondent by the decision in Idehen v. Idenhen is empowered to hold and retain all the property of the deceased in trust for himself and the other children until the second burial is performed. I agree with counsel for 2nd respondent that plaintiff’s originating summons is premature. Objection by 2nd respondent is therefore upheld, originating summons is struck out."

The trial court before making the finding quoted above took into consideration and judicially noticed the Bini Customary Law as upheld and restated in the cases of (1) Idehen v. Idehen (supra) (2) Arase v. Arase (supra) Osula v. Osula, Agidigbi v. Agidigbi (supra) Ovenseri v. Osagiede (supra) all to the effect that under Bini Native Law and Custom unless second burial is performed there should be no litigation to be instituted by any child of a deceased person on or in relation to the estate of such left by such deceased person. From the affidavit evidence supporting the originating summons and indeed the materials supplied in the notice of preliminary objection at the lower court all the parties agreed that as at the time of instituting the originating summons by the appellant and as endorsed or supported the affidavits of 5th, 6th, 8th and 9th respondents and that filed by 4th respondent, (1) Chief Joshua Ekome Charles Alonge died on 21/9/98 (2) that the deceased has not been buried (3) that the Will he left had not been read.

In the recent case of Ovenseri v. Osagiede & Ors (supra) the 1st respondent applied to join the 2nd respondent in the administration of the estate of a deceased relation and also to be joined to act as plaintiff. The Benin High Court found that second burial had not been performed and hence found that the estate can not vest and dismissed the action. On appeal to the Court of Appeal, this court merely strike out the action and substitute to the order of dismissal of the action made by the trial court. On further appeal to the Supreme Court, it was held that under the Bini Native Law and Custom, once the second burial of a deceased has not been performed, no one, including his children could administer the estate or succeed to the estate. It means that there can be no litigation until the important second burial has been performed. The appellant’s learned counsel in his brief and reply brief emphasised that he was not disputing the existence or correctness or applicability of the Bini Custom mentioned above. The gravemen of the appellant’s complaint according to the learned SAN is the alleged overlooking of the affidavit evidence and exhibits which he alleged were not controverted.

I have already held above that the said affidavit and exhibits were rightly overlooked by the trial court since they were only produced to support a motion which was entirely on a different application completely unrelated to the notice of preliminary objection on which it based its ruling. It is apposite to state here that the affidavits supporting the originating summons and the materials supplied in the preliminary objection all go to establish that the second burial has not been done or celebrated. That being the case and going by the authorities of a plethora of decided cases mentioned above, the Bini Custom disallows institution of any action until after the second burial ceremonies were performed. By instituting the action prior to the time of the performance of the second burial of her deceased father, the appellant has violated the well established Bini Native Law and Custom. She lacks the locus standi to do so at that time she filed the action. The action was therefore filed prematurely as rightly found by the trial court. In the result, I adjudge this appeal to be devoid of any merit. It therefore fails and I accordingly dismiss it. I make no order as to cost so each party should bear her or their own costs.

**ATINUKE OMOBONIKE IGE, J.C.A:**

I have had a preview of the judgment just delivered by my learned brother, Sanusi JCA. I agree with the reasoning and conclusions of my learned brother. There are many cases in the law reports stating and restating the Benin Customary Law in regard to the estate of a Benin man who has died a Benin man nothing can be done with regards to the Estate of a Benin man. Nothing can be done with regards to the Estate of a Benin man under Benin Customary Law until the second burial of the deceased has been performed. See the cases of Osula v. Osula (1995) 9 NWLR (Pt. 419) 259; Ogiamen v. Ogiamen (1967) NMLR p. 24; Ovenseri v. Ovenseri (1998) 11 NWLR (Pt. 572) 1; Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382 and a host of other cases. I am in full agreement with the decision of my learned brother that this appeal lacks merit and should be dismissed. I too dismiss the appeal. I abide by the consequential order of my learned brother including his order as to costs.

**SULEIMAN GALADIMA, JCA:**

I have had the advantage of reading in draft the judgment just read by my learned brother Sanusi, JCA. I entirely agree with him. However, I wish to add the following merely by way of emphasis, the facts of the case having been fully stated in the lead judgment.

From a number of decisions of this court and indeed the Supreme Court, judicial notice has been taken of many rules of Bini Customary Law. The estate of a Bini man under Benin Customary Law is to remain intact until after the performance of the second burial ceremony. This customary law is held sacrosanct and generally observed. See the following cases;

1. Ogiamen v. Ogiamen (1967) NMLR 245;

2. Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382;

3. Lawal Osula v. Lawal Osula (1995) 9 NWLR (Pt. 419) 259; and

4. Ovenseri v. Osagiede (1998) 11 NWLR (Pt. 572) 1.

The evidence before the trial court clearly showed that the "second burial" of the deceased has not been celebrated. That being the case and going by the above authorities, the customary law of Bini precludes institution of any action until after the second burial ceremony.

For this reason, I have given and for fuller reasons in the judgment of my learned brother, I will also dismiss the appeal. I make no order as to costs.

CASES REFERRED TO IN THE JUDGMENT

Aderemi v. Oluwo (2000) 4 NWLR (Pt. 652) 260.

Adeyemi v. Olakunri (1994) 2 NWLR (Pt. 327) 500.

Arase v. Arase (1981) 5 S.C. 33.

Emecheta v. Oguezi (1996) 5 NWLR (Pt. 447) 239.

Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382.

Osula v. Osula (1995) 9 NWLR (Pt. 419) 259.

Ogiamen v. Ogiamen (1967) NMLR 245.

Ovenseri v. Osagiede (1998) 11 NWLR (Pt. 572) 1.

STATUTE REFERRED TO IN THE JUDGMENT

Wills Law of Bendel State, Cap. 172, Laws of Bendel State of 1976 s.3(1).