**KHARIE ZAIDAN**

**V.**

**FATIMA KHALIL MOHSSEN**

SUPREME COURT OF NIGERIA

16TH DAY OF NOVEMBER, 1973

SUIT NO. SC. 52/1973

**LEX (1973) - SC 52/1973**

OTHER CITATIONS

(1973) All N.L.R 740

LR/1973/71 (SC)

**BEFORE THEIR LORDSHIPS:**

TASLIM ELIAS, C.J.N.

ATANDA FATAI-WILLAMS, J.S.C.

DAN IBEKWE, J.S.C.

**BETWEEN:**

KHARIE ZAIDAN – Appellant

AND

FATIMA KHALIL MOHSSEN (By her Attorney Hussein Khalil Zaidan) – Respondent

**ORIGINATING COURT**

HIGH COURT OF BENDEL STATE HOLDEN AT WARRI (Ovie-Whiskey, J., Presiding)

**REPRESENTATION**

O. M. ODJE with A. F. O. FRANKLIN for the Appellant

F. R. A. WILLIAMS with S. A. AJUYAH and M.N.O. ELIAS for the Respondent

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

ESTATE ADMINISTRATION/PLANNING:- Intestacy – Estate of a deceased foreigner – Applicable law of inheritance/succession – Lex Situs – Meaning – Whether includes Moslem personal law of a foreigner – Conflict of law rules relating to inheritance – How resolved

REAL ESTATE AND PROPERTY LAW – LAND:- Succession to real estate in Nigeria and Lex Situs - Applicable legal rules applicable to real estate of foreigner who died intestate – How treated

CUSTOMARY LAW:- Meaning – Whether includes conflict of law rules designed to resolve rival customs applicable to any matter – Whether moslem law is part of customary law

CHILDREN AND WOMEN LAW:- *Women and Inheritance* – Childless wife of deceased foreigner who died a Muslim– Rival right of wife and mother to inherit his estate in Nigeria – How treated

INTERNATIONAL LAW - PRIVATE INTERNATIONAL LAW:- Conflict of laws – Applicable law governing a Nigerian based immovable property of a deceased Moslem citizen of Syria – Personal law of a foreigner – Applicability in Nigeria

INTERNATIONAL LAW:– Lex situs – Meaning in Nigeria – Scope - Whether encompasses personal law of non-citizens resident in Nigeria – Parties – meaning – Statutory delimitations

RELIGION AND LAW:- Islam – Moslem law relating to intestate inheritance – Whether global in nature – Applicability to foreigners in Nigeria – Statutory justification

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Precedent – When a court decision is deemed given per incuriam

INTERPRETATION OF STATUTES:- Section 20 of the Customary Courts Law of the Western State - Section 49 of the Administration of Estates Law (Cap. 1) of Western Nigeria 1959 applicable in the Mid-Western State of Nigeria

WORDS AND PHRASES:- “Lex Situs” – “Customary law” – “Parties”

**MAIN JUDGMENT**

**ELIAS, C.J.N**. (DELIVERING THE JUDGMENT OF THE COURT):

This is an appeal from the judgment of Ovie-Whiskey, J. delivered in Suit No. W/70/66 at the High Court, Warri, in which the plaintiff (herein respondent) claimed against the defendant (herein the appellant) in her final amended claim as follows:

“A declaration that the defendant is not entitled to a share in the residuary estate of the late Y.K. Zaidan - deceased.

In the alternative, the plaintiff’s claim is that the said residuary estate is to be distributed in accordance with Moslem Law.”

In her final amended counter-claim, the defendant sought a declaration that she is entitled to:

“(1) 5/6 (five-sixths) of the residue of the immovable part of the estate of Yussuf Khalil Zaidan (deceased) lying and situate in Warri registered as No. 48 at page 48 in Volume 324, No. 11 at page 11 in Volume 480 and No. 11 at page 11 in Volume 484 of the Lands Registry in the office at Ibadan now at Benin City; together with all the houses, structures, etc., thereon and/or permanently attached thereto;

(2) A further portion of the estate aforesaid equivalent to interest at 2 per annum charged on the aforesaid estate from the 22nd August, 1964 (date of the deceased’s death) until payment or appropriation, which has not been made; both reliefs claimed above being based on the Administration of Estates Law Cap. 1 Laws of the Western State of Nigeria, 1959;

(3) 1/4 (one-fourth) of the movable part of the residuary estate of the deceased especially the deceased’s movable property situate in the Lebanon, in accordance with the Lebanese Moslem Law of the school and/or known as Jaafarite;

(4) An order for payment over to the defendant of her share of the residuary estate to which she is entitled;

(5) Any other relief and/or order which this Honourable Court may deem fit to grant and/or make in the circumstances.”

It is common ground that the parties are Lebanese Moslems, that the deceased husband, Yussuf Khalil Zaidan, died domiciled in Lebanon and intestate, and that he was survived by the defendant wife also domiciled in Lebanon and by the plaintiff who is his mother who had given her son, Hussein Khalil Zaidan, a power of attorney to sue on her behalf. Hussein Khalil Zaidan has long been resident in Nigeria with his deceased brother prior to the latter’s death, but the mother and other surviving relatives have never been to Nigeria.

It is also common ground that the deceased left an estate consisting of leasehold properties, Nos. 1-8 Khalil Road, Warri (see Exhibits J, K, and L), and the “Delta Cinema-scope” theatre, Warri; he, however, left no building or house in Lebanon. In their final addresses before the Warri High Court, learned counsel for both parties admitted that the defendant and the deceased were lawfully married in accordance with Moslem Law, and both counsel relied on the judgment of the Supreme Mohammedan Jaafarite Religious Court of the Republic of Lebanon (Exhibit H) dated May 10, 1972 as proof of the validity of the Moslem marriage.

At the hearing, the plaintiff’s attorney and three other witnesses gave evidence, but the defendant did not give evidence nor call any witness. The plaintiff and his witnesses testified that, according to the Koran, the surviving wife of the childless Moslem marriage, takes one quarter of her deceased husband’s estate, while the mother as the only surviving parent takes three quarters after payment of the intestate’s debts (If any) and other necessary expenses. As the defendant had not contradicted this evidence, nor adduced any in support of her counter-claim which the plaintiff strenuously denied in her statement of defence to the counter-claim, the learned trial Judge found for the plaintiff on this point. He also found it proved that the defendant and the deceased were lawfully married under the Moslem Law of Lebanon and that they lived as husband and wife until the husband died in Lebanon on August 22, 1964. The learned trial Judge then observed:

“It is clear from the evidence before me that only the leasehold properties referred to above constitute the estate of Yussuf Khalil Zaidan - deceased. All the estate is situate in Warri in the Mid-Western State of Nigeria.”

The main question is to determine the law to be applied to the intestate succession to the immovable property of a deceased person in Warri. The learned trial Judge, after considering the arguments from both sides, agreed that the lex situs should govern the matter as leaseholds are classified as immovable for the purposes of the conflict of laws in cases of succession. He, therefore, held that the applicable law is the Moslem law of Lebanon and not the Administration of Estates Law, Cap. 1 of the Laws of Western Nigeria 1959 which is applicable in the Mid-Western State of Nigeria. The learned trial Judge said:

“I do not accept the submission of Dr. Odje learned counsel for the defendant that the Administration of Estates Law (Cap.1) referred to above is applicable to the distribution of the deceased’s estate in a case like this where the defendant and the deceased were married in accordance with the provisions of Moslem law. The distribution of intestate estate under section 49 of the Administration of Estates Law applies only to cases where the husband and wife are married in accordance with the Marriage Act. This type of marriage is usually called Christian Marriage.”

The present appeal has been brought against this judgment on the following fourteen grounds:

“1. Having regard to the undisputed non-Nigerian nationality of the parties and the clear findings to that effect, the learned trial Judge has no power in law to apply Moslem law (i.e. customary law and/or native law and custom) with respect to the distribution of the estate constituting the subject-matter in dispute in this case.

2. The learned trial Judge erred in law in applying Moslem law aforesaid in the distribution of the estate when such Moslem law violates the provisions of the Administration of Estates Law, Cap. 1, Laws of the Western State of Nigeria applicable in the Mid-Western State of Nigeria.

3. It was a misdirection in law and on the facts for the learned trial Judge not to have considered at all the submission made on behalf of the appellant inviting him to apply the Administration of Estates Law, Cap. 1 aforementioned because of the nature of the interest comprised in the deceased’s estate (leasehold) which is unknown to customary and/or Moslem law, in English form and he thereby arrived at a wrong decision.

4. The learned trial Judge misdirected himself in law and on the facts in holding that no evidence was led in support of the counterclaim when:

(a) on the state of pleadings and the facts admitted by the parties it was not necessary to lead evidence in respect of the counter-claim;

(b) the court was bound to take judicial notice of the law (Cap.1 Laws of the Western State of Nigeria) on which the counterclaim is based;

(c) the appellant tendered three documents in this case.

5. The learned trial Judge erred in law in receiving and acting on the evidence of the 2nd-4th respondents’ witnesses which was clearly hearsay, the relevant portion of the Koran on which their evidence was based not having been tendered and/or referred to throughout the proceedings.

6. The learned trial Judge misdirected himself in law and on the facts in accepting and basing his judgment on the evidence of the 2nd respondent’s witness when:

(a) the said evidence did not establish the position with respect to the local succession to a non-Nigerian Moslem such as the deceased;

(b) the said evidence was not at all corroborated.

7. It was a misdirection both in law and on the facts on the part of the learned trial Judge to have applied Tape v. Kuka (1945) 18 N.L.R. 5 (involving solely the grant of administration where the personal law of the deceased as opposed to the lex situs is applicable) to the instant case in which the subject-matter is succession to, and/or distribution of an intestate’s estate and he thereby came to a wrong decision.

8. The learned trial Judge erred in law and on the facts in holding that the appellant is not a surviving spouse within the provisions of the Administration of Estates Law Cap. 1 aforesaid having regard to:

(a) the absence of any provisions of the said law limiting the word ‘spouse’ to the parties to a Christian marriage;

(b) the actual monogamous position and tenure of her marriage with the deceased.

9. The learned trial Judge was in error in accepting the evidence of the 2nd and 4th respondents’ witnesses as to the applicable moslem law without considering at all the relevant legal submissions and authorities (including those filed at his request) in support of the appellant’s case.

10. The learned trial Judge misdirected himself in law and on the facts in accepting the universality of Moslem law relating to succession without adverting his mind to the legal authorities and legal work to the contrary cited on behalf of the appellant in this case.

11. The decision is against the weight of evidence.

12. Having held that the law governing succession in the instant case is the law of Nigeria applicable in the Mid-Western State of Nigeria, the learned trial Judge erred in law in again holding that ‘in my view, therefore, the personal law of the deceased should also be applied in this case, that is, Moslem Law,’ especially when there is no admissible evidence that the personal law of the deceased is applicable in the Mid-Western State of Nigeria; and he thereby came to a wrong decision.

13. The learned trial Judge misdirected himself in law and on the facts in agreeing with and being influenced by Tapa v. Kuka 18 N.L.R. 5 where:

(a) the law that was applied was agreed by the parties;

(b) the law applied as aforesaid was that obtaining in a particular locality or area of the country and not the all-embracing Moslem law contained in the Holy Koran applied by him in the case on hand.

14. The learned trial Judge erred in law and on the facts in holding that ‘the estate of ... the deceased is to be distributed in accordance with the Moslem Law prevailing here in Warri ...’ when:

(a) no expert evidence was given to that effect;

(b) such finding was based upon the religious law of the deceased;

(c) at all events, the evidence of Moslem law given by the respondent’s 4th witness was negatived by the documents tendered by, and the legal authorities and legal works submitted on behalf of, the appellant.”

Dr. Odje, learned counsel for the appellant, agreed to argue all the grounds together since they all centre around the question as to which law of the ex situs - the statute law or the customary law of the Mid-Western State of Nigeria - should govern the succession. He submitted that customary law does not apply in this case at all because of the choice of law provision in section 13 of the Mid-Western State High Court Law No. 9 of 1964 (which is the same as section 12 of the Western State High Court Law) which specifies the circumstances in which customary law applies; in particular, section 13(4) is important as showing the type of customary law to be applied by reference to section 20 of the Customary Courts Law (which is the same as section 23 of the Mid-Western State Customary Courts Edict No. 38 of 1966). Section 13 of the Mid-Western State High Court Law No.9 of 1964 provides as follows:

“1. The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such customary law.

2. Any such customary law shall be deemed applicable in causes and matters where the parties thereto are Nigerians and also in causes and matters between Nigerians and non-Nigerians where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.

3. No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

4. Where the High Court determines that customary law is applicable in any cause or matter, it shall apply the particular customary law which is appropriate in that cause or matter having regard to the provisions of the section 20 of the Customary Courts Law.”

And section 23 of the Mid-Western State Customary Courts Edict No.38 of 1966 reads:

“1. In land matters the appropriate customary law shall be the customary law of the place where the land is situated.

2. In causes and matters arising from inheritance the appropriate customary law shall, subject to subsections (1) and (4) of this section, be the customary law applying to the deceased.

3. Subject to the provisions of sub-sections (1) and (2) of this section –

(a) in civil causes or matters where -

(i) both parties are not natives of the area of jurisdiction of the court; or

(ii) the transaction the subject of the cause or matter was not entered into in the area of the jurisdiction of the court;

(iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties;

(b) all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court.

4. Where the customary law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land it shall not operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other customary law.”

According to him, the law to be applied in the case of intestate succession to immovables in MidWestern Nigeria is either English Law or Customary Law. It is his submission that only English Law, by which he means the local statute law - the Administration of Estates Law Cap.1 of Western Nigeria 1959 which is applicable in Mid-Western Nigeria 1959 which is applicable in Mid-Western Nigeria - applies in the present case since the parties, being Moslems, are not subject to the jurisdiction of any customary law. Learned counsel argued that, although Moslem law is customary law as enshrined in the Koran, it is not applicable as such in any part of Nigeria, and that it is only applicable in the Northern States of Nigeria by virtue of section 22 of the High Court Law of those states which has no counterpart in the High Court Law of the Mid-Western State. He referred to Adeshubokan v. Yinusa, S.C. 25/70 decided on June 17, 1971, as authority for the proposition that Moslem law does not apply as customary law in the Southern States of Nigeria; he also tried to derive some support for his submission from Re Allayo (1946) 18 N.LR.88 at pp.91-3. We think that both cases do not go as far as that. He nevertheless submitted that customary law does not apply to the parties in the present case and that the only applicable law is the Administration of Estates Law. In his submission, once the issue of marriage between the parties has been settled by reference to Moslem Law, the question of the parties’ status should be put on one side and that of the succession to property should be determined by reference to the lex situs, he cited in support the following cases: Coleman v. Shang (1961) 2 All E.R. 406, at 409, 410-412; King v. Elliot (1971) 1 Ghana L.R. 54, at p.57; EI-Mir v. Sarkis 13 N.L.R. 20; and Absi v. Absi, January 1973, Selected Judgments of the High Court of Lagos State, p.30, in which Savage, J. at the Lagos High Court held that the Statute of Distribution and not the Moslem law of the Syrian husband and wife should govern the distribution of the intestate estate of the deceased husband situate in Lagos. We shall consider this case later. As regards the others, we say no more than that they are beside the point.

A further submission of learned counsel is that, granting without conceding that customary law (including Moslem law) is applicable to the instant case, the alleged customary or Moslem law was not satisfactorily established before the trial court because all the witnesses who gave evidence were not experts and the point involved judicial notice of it; he maintained that section 56 of the Evidence Act which regulates the giving of expert evidence was not complied with. He further contended that the learned trial Judge misdirected himself when he applied Tape v. Kuka 18 N.L.R. 5 to this case, because in that case, both parties had agreed in a Lagos suit that their personal law should govern the deceased’s estate situated in Biada, whereas there was no such agreement in the present case. Another submission of learned counsel is that section 49 of the Administration of Estates Law (Cap. 1), even though it excludes a wife by customary law, applies to the instant case, since ‘wife” in its context includes a spouse under Moslem Law. His final submission is that, as the leasehold properties involved In this case were acquired under the Property and Conveyancing Law, (an English law statute), succession to it must be governed by the English law embodied in the Administration of Estates Law. He cited Green v. Owo 13 N.L.R. 43 which, we observe, is a case involving a question of Statute of Limitation, not succession to property.

Chief Williams, learned counsel for the respondent, replied by pointing out that the only question for decision is whether or not the Administration of Estates Law applies to the administration of the deceased’s estate. It was his submission that it does not apply for two reasons: the first is that the terms of the Administration of Estates Law are not really applicable to a potentially polygamous form of marriage like the one involved in the present case; and the second reason is that, on a true construction of section 1(3) of the Administration of Estates Law, anyone subject to Moslem law is excluded from its operation. With respect to the terms used in the law, learned counsel drew attention to the reference in section 49(1)(i) to “a “a husband” or “a wife,” and in section 49(1)(1) to “a surviving husband” or “a wife”; in the latter case, if there are two “wives,” difficulties are bound to arise. Again, in section 51(2) which refers to “election,” would two or more wives be put to their election? Learned counsel argued that these and other terms used in the Administration of Estates Law show clearly that only a monogamous form of marriage is envisaged. In support of his submission that anyone subject to Moslem law is excluded from the operation of the Administration of Estates Law, learned counsel argued that section 1(3) excludes the application of the law where succession to property is governed by customary law. For him, customary law is a conglomeration of custom, including (where appropriate) the received Moslem law; Moslem law is one of the systems of law, like Roman Law and Roman-Dutch Law, which have no territorial boundaries in the sense that they are not confined to one country. At any rate, and two Moslems who are aliens can marry under the local Moslem law, at least in the Northern states. Learned counsel accordingly submitted that section 12 of the Western Nigeria High Court Law, like section 13 of the Mid-Western State of Nigeria High Court Law, is not confined to Nigerians; that section 12(2) speaks of customary law only being “deemed” applicable where the parties are Nigerians; and that section 12(4) says that the High Court may apply an “appropriate customary law” having regard to section 20 of the Customary Courts Law (Cap.31) of Western Nigeria 1959. Where there is a conflict between two system of customary law, the rules to be applied are set out in section 20 of the Customary Law reads:

‘(1) In land matters the appropriate customary law shall be the customary law of the place where the land is situated.

(2) In causes and matters arising from inheritance the appropriate customary law shall, subject to subsections (1) and (4) of this section, be the customary law applying to the deceased.

(3) Subject to the provisions of sub-sections (1) and (2) of this section

(a) in civil causes or matters where

(i) both parties are not natives of the area of jurisdiction of the court; or

(ii) the transaction the subject of the cause or matter was not entered into in the area of the jurisdiction of the court; or

(iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties;

(b) in all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court.”

In the Judgment appealed from, the learned trial Judge would appear to have applied section 20(2) which gives the wife something; If he had applied section 20(1), she would have got nothing. If one looks at section 20(3) (a) (i), one finds that, where both parties are not “native” to the area of the court’s jurisdiction, then, at least in the High Court, the customary law binding between the parties must be applied. Where, therefore, a person dies leaving immovable property in Warri and is subject to a system of customary law which does not obtain in Warri, the law to govern the succession to his estate is not Administration of Estates Law because section 1(3) of the Administration of Estates Law is quite clearly against it, but the Moslem law which is binding between the parties. We agree with the learned counsel that this is the rationale of Tape v. Kuka 18 N.LR.5. Just as the court in Lagos is entitled to apply as between the parties before it a system of Tape Customary Law in respect of immovable property in Bida, so can a Mid-Western Nigeria High Court apply Lebanese law to succession to immovable property in Warri in the case of Lebanese parties.

The present appeal appears to be a case of first impression, except for the recent case of Absi v. Absi to which Dr. Odje drew our attention and to which we referred earlier. To the extent to which this case decided that the Statute of Distribution, which applies within Lagos State in common with the rest of the country outside the Western and the Mid-Western States, governs succession to an intestate estate of immovable, we can find little assistance from it because no reason was given by the learned trial Judge in the Lagos High Court as to why the estate should be distributed in accordance with the Statute of Distribution, rather than the customary law of the Syrian husband and wife. It does not appear that section 12 of the High Court Law of Lagos by reference to section 20 of the Customary Courts Law was ever cited to the learned trial Judge who must therefore be deemed to have given his judgment per incuriam. The report of the case shown to us also wrongly transposed the counsel who appeared for the parties in the case, thus giving the false impression that learned counsel for the respondent in the present appeal had taken the opposite legal position in the earlier case, in which he also appeared. In any case, we do not consider ourselves bound by the decision in Absi v. Absi which, if correct, would make the Administration of Estates Law of Mid-Western Nigeria (as the counterpart of the Statute of Distribution in the rest of the country applicable in the present appeal.

We do not see any substance in the argument of the learned counsel for the appellant that the respondent’s witnesses are not experts within section 56 of the Evidence Act, which provides:

“(1) When the court has to form an opinion upon a point of foreign law, native law or custom, or science or as to identity of handwriting or finger Impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting of finger impressions, are relevant facts.

(2) Such persons are called experts.”

To be read in conjunction with this is section 57 which says:

“(1) Where there is a question as to foreign law the opinion of experts who in their profession are acquainted with such law are admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.

(2) Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, in the case of trial with a jury, be decided by the Judge alone.”

The uncontradicted evidence throughout the whole case in the trial court is that the Moslem law that is applicable is the same everywhere, whether in Lebanon or in Nigeria or elsewhere. Even in Absi v. Absi the evidence is that the wife has one quarter, the same as in the present case. We are equally of the opinion that learned counsel for the appellant is in error when he argued that section 13 of the Mid-Western State High Court Law does not envisage any customary law outside Nigeria, because under section 17 of the Customary Courts Law of the Western State and the Mid-West Customary Courts Edict, only Nigerians are subject to customary law. We think that the lex situs governs the immovable property of a deceased intestate, and the lex situs means the law of Nigeria which embraces customary law including the conflict rules between two systems of customary law as laid down in section 20 of the Customary Courts Law which is a summary of the various previously existing decisions on internal conflicts of laws. We think that while “parties” in section 17 of the Customary Courts Law may apply only to Nigerians within the context of the Customary Courts, Law, it does not follow that “parties” can be so restricted within the context of the High Court Law since all persons in Nigeria, whether Nigerians or foreigners, are subject to the jurisdiction of every High Court in Nigeria. This point was confirmed in an appeal from Ghana to the West African Court of Appeal on an analogous provision of section 15 of the Native Courts (Colony) Ordinance of the then Gold Coast in Mary Ekem v. Ekua Nerba (1947) 12 W.A.C.A. 258, at pp.259-250:

“The learned Judge held that the lex situs applied, and that therefore the plaintiff could have no interest in her father’s property. His judgment was delivered prior to the date of the judgment of this court in Ghamson v. Wobill in which it was held that, where a conflict of native customary laws arises in a case, the question must be decided in accordance with the provisions of section 15 of the Native Courts (Colony) Ordinance, 1944. The learned Judge does not appear to have considered this section. In the above cited case it was held that the law to be applied was not the lex situs. However, as some of the relevant facts in this case are different from those in Ghamson v. Wobill it does not necessarily follow that the lex situs should not have applied in this case. As it is, although it is common ground that the deceased Johnson was a Nigerian it does not appear from the evidence to what part of Nigeria he belonged, and there is nothing to show what would be the nature of the law applicable, if some foreign law is binding on the parties within the meaning of proviso (b) to the said section 15.”

It follows, therefore, that, having regard to our own built-in rules in section 20 of the Customary Courts Law governing the choice of law in the application of the lex situs to the succession to the intestate estate of a deceased person In Warri, the applicable law is not the Administration of Estates Law (Cap. 1), but the (Moslem) Customary law of Lebanon which is the one binding between the parties (section 20(3) (a) (i) of the Customary Courts Law). We are of the view that, in this context, customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway. We are also of the view that anyone subject to any such law is excluded from the operation of section 49 of the Administration of Estates Law (Cap. 1) of Western Nigeria 1959 applicable in the Mid-Western State of Nigeria.

For the foregoing reasons, the appeal fails and it is hereby dismissed. The judgment of Ovie-Whiskey, J. in Suit No. S/70/66 dated December 15, 1972 is affirmed. The appellant will pay to the respondent the costs of this appeal fixed at N134 out of the estate before its distribution.

Appeal dismissed.