

**Titled: PRINCIPLES OF SUCCESSION:
PRACTICE AND PROCEDURE- CUSTOMARY
LAW PERSPECTIVE.**

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By

**JUSTICE JIBRIL IDRISU (Rtd)
Chairman, Equity Multi-Door Courthouse, Lafia
(Former President, Customary Court of Appeal
Nasarawa State)**

Principles of Succession: Practice and Procedure- Customary Law Perspective.

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PROTOCOL

1. INTRODUCTION

I consider it a great honour and privilege to be nominated as one of the resource persons at this workshop for the Area/Sharia/Customary courts Judges. I wish to express my profound gratitude to the Administrator of the National Judicial Institute, Hon. Justice R.P.I Bozimo, OFR and the N.J.I Education Committee for affording me this unique opportunity of sharing my experience with you (Participant).

The topic of this paper is: ***Principles of Succession; Practice and Procedure - Customary Law Perspective.*** I will approach the topic by defining the operative words herein i.e; customary law and succession.

2. Meaning of Customary Law

There are several definitions of Customary law just as there are various customs, traditions, norms and practice of Customary law in Nigeria. In OYEWUNMI V. OGUNESAN (1990) NWLR 182 @207, Customary law is

*“organic or living law of the indigenous people
Of Nigeria regulating their lives and transactions...”*

The Nasarawa State Customary Court of Appeal Law, 1996 in section 2, defined Customary law as follows:

“The rule of conduct which govern legal relationship as established by customs and usage;.... but does not include Islamic personal law...”.

Essentially, Customary law is a community based system of law. It is that body of unwritten customs and traditions which regulate the various kinds of relationships (marriage, custody of children, burial, alienation of land, succession/inheritance etc) between members of the community and have the force of law.

There are provisions in the High Court laws of various jurisdictions in the country which enjoined the courts to apply customary law which is not considered repugnant. For instance, section 34 (1) of the High Courts law of Northern Nigeria provides that

“The High court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good consciences, nor incompatible either directly or by necessary implication with law for the time being in force, and nothing in this law shall deprive any person of the benefit of such native law and custom”.

Similarly, section 20 of the Area Courts Law 1968 provides:

“Nothing contained in this section shall be deemed to authorize the application by Area courts of any customary or part thereof in so far as it is repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law in force for the time being ...”

Customary law differs from one locality to another but in all, its ramifications, customary law is largely unwritten, it is a mirror of accepted usage and its rules change with time.

The observance of a customary law is rooted in the strong belief of ancestral spirit. Generally a failure to comply with the law/customs and rules for living may lead to punishment by the ancestral spirit because such disregard or deviation is regarded as disgracing or neglectful of the ancestors.

Regrettably, Customary law is a branch of law most complained of in matters of succession and inheritance. A lot of concern has been expressed that Customary law is inequitable and more often than not leads to injustice, to women and children in particular.

3. Definition of Succession

The term succession or inheritance is often used interchangeably to determine the distribution of the estate or property of a person after his/her death. In a strict sense, succession is an act of following in sequence, while inheritance is the passing of title to an estate upon death.

The Black's law dictionary defined succession as follows:

"The fact of the transmission of rights, estate, obligations and charges of a deceased person to his heirs...the right of the heir to step into the places of deceased with respect to the possession, control enjoyment, administration of the latter's property, rights and obligations".

According to **Kerridge R**; Succession is concerned with the transfer or devolution of property on death. He defines succession as:

"the order in which or the condition under which one person after another succeeds to a property, dignity, title or throne; the act or process of a person becoming beneficially entitled to a property or property interest of a deceased person"

Inheritance is deriving interest by blood relation or genetic connection while succession signifies the taking over of the position, title or property which the deceased exercised authority before his demise. It is simply, exercising control over the property of a deceased which exclude those who take by deed, grant, gift or any form of purchase.

The concept of succession is as old as man. Ultimately, it is natural that when a person dies, custom or tradition requires that the property left behind by the deceased would not be left unattended.

By custom or tradition, the landed property in most of our native communities first belonged to the ancestors or forefathers who either by conquest or deforestation founded them from which they become devolved from generations to generations.

The law of succession deals with the process of devolution (transfer) of property on the death of the owner to beneficiaries (heirs). Succession can either be testate (by will) or intestate (without a will).

There are three competing legal systems which a deceased estate/ property may be administered when one dies intestate. These systems are (i) statute law (ii) Islamic law and (iii) customary law. The linking factor to any of these legal systems is either ethnicity or religious affinity.

Whereas the law of inheritance under statute law or the Islamic law is reasonably settled and certain, the aspect dealing with customary law is not and in consequence breeds conflict and acrimony among heirs.

The customary law governing succession is so diverse that every ethnic/native community or tribe has his own peculiar pattern of customs and rules of inheritance for intestacy through their traditional beliefs as adopted over the years.

4. Factors affecting order of succession

i. Gender

Traditionally, gender is a strong determinant in a person's status in customary law succession. In most traditions, it is the male who are considered eligible to succeed to positions of status. A woman was incapable of succession to the family head.

ii. Family Rank

This is the status held by members within a family. Under customary law, male members hold a higher rank than female counterparts. Older sons always had higher rank than younger members. Again ranking may exist among the eldest son of the deceased first wife and other children by the other wives. Females are subjected to the authority of males and only males were allowed to become family head.

Two main reasons have been advanced for such differences. First, there is the common notion that the property especially land, belongs to the family and thus considered necessary that the land must be preserved for family or males.

A community head, the Elesi of Odogbolu was quoted when he appeared before the ***West African Lands Commission in 1908*** that:

"Land belongs to the vast family of which many members are dead, few are living and countless members are still unborn".

Giving the above scenario, the fact that females are likely to get married and join their husbands elsewhere, where they are expected to get their shares through marriage. Besides, some customs recognize the women/deceased wives as property to be inherited.

The second reason why female are excluded from succession has to do with the age long common concept that upon parents becoming of age, it is the male child who could provide for them. The rights of female heirs to landed property under some customs are limited to use for life and not disposition. While male members are entitled to reside in the family house with their wives, the female member on her marriage has no right to bring her husband on the family house to reside.

5. Qualification for inheritance

The qualification for inheritance is generally traced or dependent on blood relationship. Under customary law a person cannot inherit from a deceased on any other premise other than blood bondage.

6. Principle of Primogeniture

It is to be noted that most customary rules in Nigeria adopt the principles of primogeniture where the eldest son of the deceased is the person to succeed the deceased father, and of course, the effect is that women are denied inheritance or succession.

The heirs of a deceased estate among some cultures in Nigeria are seven in number. They are

- i. Children
- ii. Grand children
- iii. Brother
- iv. Sisters
- v. Father/mother

- vi. Paternal uncle and aunts
- vii. Husband/wife

7. Intestate Succession

Intestacy is a condition in which one dies without a valid Will. Customary succession is mainly intestate ie without a will. Considering the pluralistic nature of Nigeria with over 250 ethnic groups, it is apparent that this paper may not have the scope to discuss the subject of succession across the tribes. It is in this regard that an attempt is being made to highlight the customary rules of succession of the following selected ethnic groups:-

Igbo, Yoruba, Bini and some tribes in the North Central geo-political zone.

8. Igbo Customary Succession

Customary succession among the Igbos (Ibos) is mainly patrilineal. Inheritance is governed by the principles of primogeniture wherein the eldest son of the deceased succeeds to his estate. This is known as "**Okpala**" or "**Diokpa**". The *okpala* who is the eldest son automatically on the death of his father steps into the shoes of the father as the head of the family. In a situation where the deceased had more than one wife, the eldest sons of each of the wives take part in the sharing of the deceased estate.

The right of the *Okpala* includes the occupation of his deceased father's dwelling house, even though he holds landed property as trustee-beneficiary for his other brothers and for himself.

Where however, the deceased is not survived by any male child, his estate is inherited by his surviving brothers of full blood and where there is no brother of full blood, the deceased father inherits. It is to be noted that beside the general

practice, there are few variations in some community in Igbo land. The tradition exclude the wives and daughters from inheritance in Igbo customary succession law. This principle was affirmed by the Supreme Court in **NEZIANYA VS OKAGBUE**(9) where it was held that

“under the native law and custom of Onitsha, a widow’s possession of her deceased husband’s property- however long, does not make her owner, she cannot by effiction of time claim the property as her own...she has however the right to occupy the building or part of it but this is subject to good behaviour”.

The only ground where females can inherit is under the ‘**Nrachi**’ or **Igegbe**” institution. Under this practice, where a man dies without a male child to inherit his estate, the daughter will remain unmarried in her father’s house with the intent of raising children in her father’s home. The legal interest in the deceased father’s estate vests in her until she gives birth and only her children can succeed the deceased according to the rule of primogeniture.

Where however the female child is married, and any property she acquired before marriage reverts back to the maiden family. Property acquitted after marriage goes to her husband and his family on her death, but personalities like pots, clothes etc of a deceased wife goes to the daughter.

9. Judicial Intervention

There is no doubt that inheritance where some children of the deceased are exempted not only brids family disharmony but a breach of **section 42** of the **1999 Constitution of the Federal Republic of Nigeria**, a fundamental right provision guaranteed to every citizen.

The Nigeria Constitution is supreme and its provisions are binding on all authorities and persons and any law contrary to it is void.

S 42 (1) is to the effect that:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall by reason only that he is such a person....”

42 (2)shall be subjected to any disability or deprivation merely by reason of the circumstance of his birth.....”

The Supreme Court of Nigeria in a ground breaking judgment, applying the above provision of the Constitution invalidated the Igbo customary law denying female descendant's right to inherit.

In **UKEJE V. UKEJE (2014), LPER – 22724 (SC)**, Mr. Lazarus Ukeje, a member of Igbo ethnic group died intestate in 1981.

His daughter (Ada Ukeje) sued Mrs. Ukeje deceased wife (plaintiff/stepmother) and Ukeje Jr.(plaintiff's half brother) seeking that she be included among the heirs to administer the deceased estate. The High Court sided the plaintiff. Dissatisfied, Mrs. Ukeje and her son appealed to Court of Appeal which dismissed the appeal. Upon further appeal to the Supreme Court, Justice Bode Rhodes- Vivour (JSC) held as follows:

"No matter the circumstance of birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased, father's estate is in breach of section 42 (1) and (2)

of the Constitution, a fundamental right provision guaranteed to every Nigerian”.

See also **Anekwe & Anor Vs. Maria Nweke**

10. Yoruba Customary Succession

In generally, under the Yoruba customary succession, the children inherit the estate of their deceased father whether male or female. The eldest son is recognized as the head of the family.

In **AMUSAN V. OLAWUNMI**, the court upheld the right of a woman to be family head under Yoruba customary succession.

Among the Yorubas, the mode of distribution of estate of a deceased include the **Idi-igi** method where property is shared per stripes (*i.e according to the number of wives*) and the **Ori-Ojori** method whereby property is distributed per capita (*according to the number of children*). However, the more popular method is the **Idi-igi** system see **DAWODU V DANMOLE (1962) 1 ALL NLR 702.**

Facts:

One Suberu died intestate leaving his surviving nine children by four wives married according to Yoruba customary law. At the trial, the plaintiffs adduced evidence of a Yoruba Native law and custom of Lagos known as '**Idi-igi**' where the estate of an intestate is distributed according to the number of mother of the children of the intestate.

The defendants claimed that the proper native law and custom of Lagos is '**Ori-Ojori**' distribution according to the number of children.

It was held on appeal to FSC that the distribution should not be among the nine children (per capita) but into four shares (per stripes) according to the number of wives.

Invariably, in the Yoruba native law and custom a wife cannot inherit her husband's property because she herself is like a chattel to be inherited by a relation of her late husband.

In **FAKOYA V. ILORI (1983) 2 FNC 602**. The plaintiff/appellant claimed against the defends/respondents for a declaration of title and recovery of possession of a piece of land in Oyo State. It was held that the widows of a deceased owner are not competent, under Yoruba customary law to effect a valid sale of a property of the deceased because upon intestacy, devolution of property follows the blood and a wife or widow not being of the blood has no claim to any share of the inheritance. In fact in **AKINUBI V. AKUNUBI (1997) 2 NWLR (PT 486) 144 @ 159**, Onu, JSC state thus:

"A widow under an intestacy is regarded as part of her deceased husband's estate to be administered or inherited by the deceased's family.

However where a woman marries under the statute, succession to the estate is regulated by the Marriage Act.

11. The NUPE

Under the Nupe customary law rules, the system of inheritance is patrilineal and the old rule of primogeniture was prevalent in the pre-Islamic era which has not been displaced by modern democratic idea of joint succession with the eldest son succeeding his father. The eldest son is succeeded by his younger brother who is the man next in seniority.

Among the Nupes, succession in the paternal and in the maternal lines supplement each other. The sons naturally inherit the properties of their father while the girls inherit their mother.

12. The Binis (Edo)

Under the Benin customary succession, the eldest son of a deceased person is entitled to inherit the "**igiogbe**" (*literally meaning the house which deceased father lived and died*).

See **AGIDIGBI V. AGIDIGBI (1996) 6 NWLR 302-303**. The inheritance by the eldest son of the deceased takes effect after completion of the 'second' burial ceremonies (*called 'Ukpomwan'*).

Apart from the *Igiogbe*, the eldest son also inherits the principal personal effect of the deceased, and what is left is then distributed among other children.

See **IDEHEN V. IDEHEN (1991) 6 NWLR 397**. Where the court held:

"It is one of the fundamental principles of Benin customary law of succession that the eldest surviving male child of a deceased person who performs all the customary funeral ceremonies of the burial of his deceased father succeeds his deceased father as heir and inherits his property except that which he gave away before his death".

13. Proof of Traditional History

Traditional history is the evidence of succession and inheritance. Apparently, the majority of land cases that come before Area /Customary Courts border on the declaration of title to customary land or family land which are based on rights, or claims said to have accrued through devolution or inheritance. There are five basic ways of proving title to land in this country as set out by the Supreme Court in the celebrated case of **IDUNDUN V OKUMAGBA (1976) 9-10 SC 227**.

One of these five ways is the **proof by traditional evidence**. This method requires that the claimant must prove

- i. How the land was founded***
- ii. Who founded the land and***
- iii. The names of intervening owners- i.e. all those who had inherited the land before the claimant.***

The other methods of proof are:-*documents of title, lengthy and positive transactions involving the land, long*

possession/enjoyment and proof of ownership of connected land.

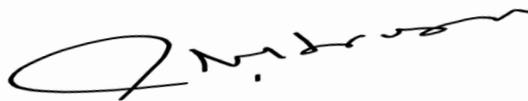
14. CONCLUSION

The law of succession is about the transfer of property on the death of the owner.

Inheritance and succession are two words of the same meaning which can be used interchangeably. As we have seen, the customary law of succession is basically patrilineal and primogenitor rule. The rule is tailored against female beneficiaries, both wives and children.

It is heart warming that the supreme court in ***Ukeje v Ukeje (Supra)*** has now assume the role of judicial midwife and assisted in the birth of a new world struggling to be born. Discrimination against gender on inheritance no longer has place in our modern day society.

THANK YOU



Justice Jibril Idrisu (Rtd)

*Former President of Customary Court of Appeal
Nasarawa State*