Privy Council Appeal No. 13 *of* 1960

Yisa Dawodu and others – – – – – – – *Appellants*

v.

Suwebatu Danmole and others – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1962

Present at the Hearing:
LORD EVERSHED.
LORD JENKINS.
LORD GUEST.
[*Delivered by* LORD EVERSHED]

This appeal is concerned with an unhappy family dispute between the children and remoter issue, by his four wives, of Suberu Dawodu, who died in September 1940. The substantial question is whether certain rents arising from property known as 4, Balogun Square, in Lagos, should be divided among Dawodu's children and issue in fourths or in ninths; i.e. whether the children and the issue of the deceased children *per stirpes* of each of Dawodu's four wives should respectively receive one fourth of the rents or whether such rents should be divided into nine equal shares, the children of a deceased child taking between them the share the child would have taken if living.

In the course of the case the division into fourths was referred to as a division according to a custom known as Idi-Igi and the division into ninths according to a custom known as Ori-Ojori. It may be observed that of the deceased's four wives (all of whom are also dead) one, Morinatu, had one child only, a daughter, the first plaintiff in the action; another, Raliatu, had two children, namely, the second plaintiff, a daughter, and a son now deceased, of whom the remaining three plaintiffs are the children; but the other two wives, Moriamo and Osenatu had each three children, of whom the first three defendants are the three surviving, the remaining nine defendants being children of the other three children now deceased. It follows from the statement of the deceased's family that division into fourths materially favours the plaintiffs but division into ninths materially favours the defendants.

Having regard to the issues raised before their Lordships it is desirable to state briefly the history of the distribution of the rents since Dawodu's death as it appears from the evidence and findings of the trial Judge. Not long after Dawodu's death a meeting took place between members of his family. It was then suggested by some of the children that Dawodu had left a will, but as no will had been or could be found, it was then agreed that letters of administration to the deceased's estate should be taken out by four of the surviving children, namely, Amusa, a son of the deceased's wife Moriamo (who was then the eldest son and head of the family) and the first and second plaintiffs and second defendant; and that the rents in question should be distributed in fourths in the manner above stated, that is, according to Idi-Igi. The grant of administration was accordingly obtained and it

appears not to be in doubt that for ten years or more the distribution of the rents was made in fourths and generally so accepted. Before the end of that period, however, Amusa received a letter from a member of the family (being the letter recorded at page 56 of the Record) suggesting that division into fourths was wrong and that division into ninths according to the number of the deceased's children should be substituted therefor. As a result a further meeting or further meetings was or were held at some later time thereafter but before the death of Amusa, which occurred in August 1953. Although it was suggested in evidence at the trial on the defendants' behalf that agreement had been reached for such substitution, the learned trial Judge (Jibowu, J.) found as a fact that there had been no agreement and, as a consequence, following the institution of some other abortive proceedings, the present action was instituted at the beginning of the year 1954. By their Statement of Claim the plaintiffs in the action alleged that Suberu Dawodu had in truth left a will and that he had thereby directed a division of his property into fourths and they asked accordingly for a declaration that the rents in question should be so divided, as they had been until the dispute arose. By their defence the defendants denied the existence of any will and claimed a division into ninths as being in accordance with the proper and appropriate native law and custom which would require such division.

An order was made upon interlocutory proceedings in the action that certain evidence should be taken on commission on the plaintiffs' side tending to prove the existence and contents of the alleged will. This was done accordingly but such evidence was at the trial rejected by Jibowu, J. as inadmissible. In their Lordships' opinion there is no doubt that the learned Judge was right to reject the evidence and indeed it is no longer contended by the plaintiffs (and was not so contended before the Federal Supreme Court) that Suberu Dawodu died otherwise than intestate. At the trial the evidence consisted of that of the first two plaintiffs and the first defendant (which substantially related to the history above mentioned) together with the evidence on the defendants' side of one Moriamo Molade, a sister of the intestate, which was in part directed to the appropriate native law and custom. The learned trial Judge in the course of his judgment found that division into fourths was in accordance with native law and custom:

> " Distribution of the estate according to the number of the mothers of the children followed principles of native law and custom.
>
> " Moriamo Molade, who gave evidence for the Defendants, knew about this method of distribution under native law and custom but she considered that the rule is no longer binding as people have become civilised. She, however, could not say when the rule was abrogated ".

The learned Judge then referred to section 17 of the Supreme Court Ordinance which makes native law and custom applicable to such circumstances as have arisen in the present case " if the native law and custom is not repugnant to natural justice, equity and good conscience " and proceeded accordingly to consider whether the condition cited in the section was applicable. After referring to certain cases the learned Judge concluded that the native law and custom as found by him (namely Idi-Igi) did not satisfy the section:

> " The idea " he said " behind the old rule was that each wife who had a child was given no cause for jealousy as it was understood that the number of wives would determine the distribution of the properties of the intestate. Under the rule an only child of a wife got the same share as many children of another wife, with the result that the children did not get equal shares of their father's estate. This does not agree with the modern idea that the basis of distribution is the number of the children of the intestate, which assures equal shares to all the children ".

The learned trial Judge accordingly made an order for division of the rents into ninths. From this judgment the plaintiffs appealed to the Federal Supreme Court and upon the case first coming before them the learned Judges of the Supreme Court, after hearing argument by counsel, proceeded to invoke the powers contained in Rule 30 of the Rules of the Federal Supreme Court and adjourned the case in order that further evidence on

both sides could be called upon the question—What in truth was the Yoruba native law and custom properly applicable? As a result, upon the resumption of the appeal, three witnesses were called on each side whose competence as witnesses upon such question was not challenged. As a consequence, and after hearing argument, the learned Federal Appeal Judges found as a fact that the relevant native law and custom was (as Jibowu, J. had also found) for division into fourths, i.e. Idi-Igi, subject to the qualification later mentioned; but held, contrary to the view of the learned trial Judge, that such native law and custom was not contrary to natural justice, equity or good conscience. They accordingly reversed the judgment of the trial Judge and made an order for division of the rents into fourths as prayed by the plaintiffs in their original claim. It is from this decision that the defendants have appealed to the Board.

Their Lordships have stated the above narrative as a necessary foundation for a formulation of the questions raised before the Board. Having done so their Lordships can now state those questions and will be able to deal with them without undue length.

The first submission by Mr. Bernstein on the defendants' behalf challenged the validity and propriety of the direction on the part of the Federal Supreme Court for the calling of fresh evidence before them upon the question of the proper native law and custom. Rule 30 of the Rules of the Federal Supreme Court, so far as relevant, is as follows:—

> " 30. It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but, for the furtherance of justice, the Court may, where it thinks fit, allow or require new evidence to be adduced: such evidence to be either by oral examination in Court by affidavit or by deposition taken before an examiner or commissioner as the Court may direct. A party may, by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations ".

It was first said on the defendants' side that since it had been no part of the plaintiffs' case, as set out in their Statement of Claim, that the division should be into fourths according to native law and custom, it was therefore outside the scope of Rule 30 for the Federal Supreme Court to direct or permit the calling of evidence on the plaintiffs' part upon such question. True it is that the point was not in terms raised by the plaintiffs' Statement of Claim but there can, in their Lordships' judgment, be no doubt from the plaintiffs' Notice of Appeal to the Federal Supreme Court and the record of the argument of counsel before the making of the order under Rule 30, that the question, what in truth was the appropriate native law and custom to be applied, was the main issue between the parties upon the appeal. Moreover, their Lordships are not satisfied that there is in truth any such limitation as was suggested on the powers of the Federal Supreme Court according to the language of the Rule and particularly of its second sentence. In any case it is to be observed that Jibowu, J. had found division into fourths to be in accordance with native law and custom, that is, Idi-Igi. Finally, there can in their Lordships' view be no doubt of the justice of the observation in his judgment of Abbott, F. J. that the evidence before Jibowu, J. on native law and custom was " scanty ". The witness before the trial Judge upon it was the deceased's sister. She appears to have been some eighty years of age but her qualifications as a witness upon such a subject do not appear, and, as the learned trial Judge observed, she could not say when the old custom, Idi-Igi, was, as she alleged, " swept away ".

In the circumstances their Lordships entertain no doubt that it was competent for the Federal Supreme Court to direct the calling of the evidence which they did and that, by so directing, the Court properly exercised its discretion. Mr. Bernstein suggested that a more proper course would have been to remit the case to the trial Judge: but it does not appear that such a suggestion was ever made to the Federal Supreme Court nor can their Lordships find in the Rule any ground for it.

If, then, the fresh evidence was properly directed and heard it is no less clear in their Lordships' opinion that the Judges of the Federal Supreme Court, who saw and heard the witnesses, were entitled to find as they did upon the evidence and that there can be no ground on which the Board could interfere with that finding. The relevant finding was as follows:—

> " Having very carefully considered all the evidence now before us, I would hold (i) that Idi-Igi is an integral part of the Yoruba native law and custom relating to the distribution of intestates' estates; (ii) that Idi-Igi is in full force and observance at the present time, and has not been abrogated; (iii) that Idi-Igi is the universal method of distribution except where there is a dispute among the descendants of the intestate as to the proportions into which the estate should be divided; (iv) that where there is such a dispute, the head of the family is empowered to, and should, decide whether Ori-Ojori ought, in that particular case, to be adopted instead of Idi-Igi; (v) that any such decision prevails; (vi) that Ori-Ojori is a relatively modern method of distribution adopted as an expedient to avoid litigation ".

As their Lordships have already observed, in so far as the Federal Supreme Court found that Idi-Igi was and is the relevant native law and custom, their finding was concurrent upon the question with that of Jibowu, J. Upon well-recognised principles, the Board would not (in the absence of some special circumstances of which none are present here) interfere with such a concurrent finding. It is, however, to be observed that the Federal Supreme Court's finding in favour of the Idi-Igi custom is subject to a qualification, namely, that where dispute arises the head of the family may, in the interests of avoiding litigation, decide that a division into ninths, that is according to Ori-Ojori, should be adopted in lieu of Idi-Igi and that, should the head of the family so decide, the decision prevails. It follows that in the present case it would have been competent for Amusa, as head of the family, when the present dispute arose to decide authoritatively in favour of division according to Ori-Ojori (which he himself apparently favoured). So it was suggested by Mr. Bernstein that upon the evidence the Board should hold that Amusa had so decided. In their Lordships' opinion there is no possible basis for such a conclusion. There was no evidence of such a decision before Jibowu, J. and no finding of the learned Judge to that effect. Their Lordships repeat, in reference to a further submission on Mr. Bernstein's part, that there is equally no basis for a finding that all the children of the deceased mutually agreed to adopt an Ori-Ojori division. Though one of the defendants' witnesses did so suggest, that evidence was rejected by the trial Judge who held as a fact that no such agreement had been reached.

There remains only the final point whether the Board should hold, contrary to the view of the Federal Supreme Court but as Jibowu, J. had decided, that division according to Idi-Igi should be rejected as repugnant to natural justice, equity and good conscience. Upon this matter Mr. Le Quesne did not invite their Lordships to base their conclusion upon the point which appears to have appealed to Abbott, F. J. viz that the experience of the first ten years after the deceased's death made a departure from Idi-Igi inequitable in the present case. On the other hand their Lordships are not satisfied that as a matter of general principle they would be justified in differing from the Federal Supreme Court's conclusion. Their Lordships were referred to the cases mentioned in the judgment of the trial Judge but it does not appear that the point with which their Lordships are concerned arose in any of them. It has also to be borne in mind, in considering this question, that the only evidence upon native law and custom which was before the learned trial Judge was to the effect that the Idi-Igi system had at some unspecified date been " swept away " as outmoded; whereas according to the finding of the Federal Supreme Court Idi-Igi still remains in full force and effect. In their Lordships' opinion the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy. Their Lordships are not therefore

satisfied that Idi-Igi, proved and found to be still in full force and effect in Lagos, ought not fairly and equitably to be applied to the estate of one who left children by his four wives.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

(85985) Wt. 8004/82 100 8/62 Hw.

In the Privy Council

YISA DAWODU AND OTHERS

v.

SUWEBATU DANMOLE AND OTHERS

DELIVERED BY LORD EVERSHED

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