

IN THE SUPREME COURT OF NIGERIA

Suit No: SC235/2004

Petitioner: Chukwuemeka N. Ojiogu

And

Respondent: Leonard Ojiogu , Joseph Ojiogu

Date Delivered: 2010-03-05

Judge(s): George Adesola Oguntade, Mahmud Mahammed, Walter Samuel Nkanu Onnoghen ,Christopher Mitchell Chukwu

Judgment Delivered

In the trial court i.e. the Anambra State High Court of Nnewi Judicial Division the Plaintiff (the Appellant) claims against the sole Defendant ' Stephen Ojiogu (deceased) (later substituted by the Respondents) as per paragraph 20 of the Amended Statement of Claim as follows:

'(i) A Declaration of Court that the Plaintiff is the son of late Nwachukwu Ojiogu, the elder brother of the Defendant and as such the person entitled to occupy the \"Obi\" compound and 'Obi' lands of Ojiogu Ifionu of Ndiojukwu-Uruagu-Nnewi in accordance with the Nnewi Native Law and Custom.

(ii) A Declaration of Court that it is the right and responsibility of the Plaintiff under Nnewi law and custom as 'Diokpala' in Ojiogu Ifionu family to allot to the Defendant, the Defendant's share of the unshared family land of Ojiogu.

(iii) A Declaration of Court that the three commercial buildings erected (sic) on Ojiogu Ifionu's family land by the Defendant from the proceeds of a disposition by sale of a portion of Ojiogu Ifionu family land to one Eric Anosike are common properties of both Plaintiff and the Defendant.

(iv) An Injunction Restraining the Defendant his agents and servants from unilaterally meddling, controlling, alienating or managing any Portion of Ojiogu Ifionu's estate whatsoever at the exclusion of the Plaintiff who is a full grown adult-male with children, until the said estate is properly shared and demarcated between the Plaintiff and the Defendant under Nnewi native law and custom.'

Nine witnesses including the Plaintiff testified in support of the Plaintiff's case while five witnesses testified for the defence. At the close of Learned Counsel's addresses the trial court in a considered judgment upheld the Plaintiff's entitlement to the Reliefs Sought in the Claim and granted the same accordingly. In concluding the judgment, the trial court at page 240 of the Record pronounced as follows:

'I have held above that from the evidence before me, Stephen Ojiogu did not perform 'Itugha Nkwu' customary ceremony for Margaret Ojiogu. That being so, Margaret Ojiogu continued to be the wife of Nwachukwu Ojiogu since she is still living in Nwachukwu Ojiogu's (sic) house, under the customary law of Nnewi people. I hold that the Plaintiff even though born Seven years after the death of Nwachukwu Ojiogu, is the son of Nwachukwu Ojiogu according to the customary law of Nnewi people.

There is evidence that the Plaintiff is the first son of Nwachukwu Ojiogu. It follows then that since it is common ground that Nwachukwu Ojiogu was the head or Obi of Ojiogu Ifionu family and that Ojiogu Ifionu's property has not been shared, the Plaintiff is the head or Obi of Ojiogu's Ifionu's family, and I so hold.\"

The Defendants being dissatisfied with the decision have appealed to the Court of Appeal, Enugu Division which allowed the appeal and set aside the judgment of the trial court by holding at page 326 of the Record thus:

'From the facts of this case, it is not disputed that the Respondent was born seven years after the death of his purported father. A dead person cannot procreate. The Nnewi custom which allowed such a practice is certainly contrary to natural justice, equity and good conscience. The trial Judge was therefore wrong in upholding that custom. Consequently, it is my view that the first Relief in the Respondent's Claim upon which depended the other Reliefs was not proved before the trial court.'

The implication from the foregoing is that the court below in exercise of its equitable jurisdiction has acted as the \"keeper of the conscience of native communities' as it were and so has not seen it fit to approve of the 'Itugha Nkwu\" custom of Nnewi people. In striking down this custom it has employed the repugnancy clause principle which I will have to expatiate upon later in this judgment.

Being dissatisfied with the decision, the Plaintiff (i.e. Appellant) has appealed to this court as per a Notice of Appeal filed

on 9/11/2004 containing three Grounds of Appeal. In his Brief of Argument filed on 23/4/2007 in accordance with the rules of this court, the Appellant has raised two issues for determination to wit:

1. 'Whether it was proper for the Court of Appeal to decide the appeal before it on the basis of an issue not treated at the trial court and in respect of which there was no ground of appeal and no leave was sought or granted for same to be raised as a fresh point on appeal.

2. Whether the Court of Appeal was right to apply the decision in *Okonkwo v Okagbue* (1994) 9 NWLR (368) 301 to invalidate the 'Itugha Nkwu' custom when both parties accepted and admitted the custom as applicable'

The Defendants have also on 15/1/2010 filed the Respondents' Amended Brief of Argument and therein have raised one issue for determination to wit:

'Whether the issue of repugnancy came up in the Court of Appeal for the first time, and if it did whether or not the Court of Appeal could have dealt with it without leave and indeed whether the claim of the Appellant that he was the son of Nwachukwu Ojiogu who died seven years before he was born, is repugnant to natural justice, equity and good conscience.'

Save perhaps expatiating further on the custom of 'Itugha Nkwu', I think the facts as stated in the above Reliefs will suffice in dealing with i.e. resolving the main issue in this Appeal. On the pleadings as per the Amended Statement of Claim and evidence by the Plaintiff/Appellant as conceded by the Defendants/Respondents - the instant custom dictates that for a brother to re-marry his late brother's wife he has to perform 'Itugha Nkwu' custom. The details of its performance as such are immaterial here for, again, dealing with this Appeal. However, the effect of its performance is that the brother of the deceased now takes over the burden and responsibilities including inheriting the proprietary rights of the late brother's family as he remarries his late brother's wife. But where this custom has not been performed because the late brother's wife is not willing, as in this case, it is permissible for the brother all the same to perform 'Inye Mma' custom which enables the widow of his late brother to end the widowhood and get re-integrated into the family and larger society. In fact, it is not in dispute that the late original Defendant i.e. Stephen Ojiogu has performed 'Inye Mma' custom and is the biological father of the Plaintiff. Indeed, it is the defence case that the Defendant remarried the Plaintiff's mother but not by 'Itugha Nkwu' custom but by performing 'Inye Mma' custom and that the Plaintiff is therefore his first son and so, should customarily take his inheritance after the death of his father i.e. the original sole Defendant (Stephen Ojiogu).

The Appellant's case is that nowhere in the pleadings and evidence before the trial court has the question of the repugnancy of the said 'Itugha Nkwu' custom of the Nnewi people been made an issue in the case. And that in that vein it is needless asserting whether neither the Plaintiff/Appellant and his eight witnesses nor the defence five witnesses have testified or even have been cross-examined as to the repugnancy of 'Itugha Nkwu' custom of the Nnewi people. The Appellant argues that the question has now surfaced for the first time via the issue raised for determination in the court below and as having been formulated from ground one of the Grounds of Appeal filed by the instant Respondent as the Appellant in the court below. The Appellant has challenged the competency of the issue as it has not arisen from ground one or any of the grounds of appeal and so it has not been properly laid before the court below for adjudication. See: *Attorney-General Bendel State v Aiyedan* (1989) 4 NWLR (Pt.118) 646 at 665; *Opara v Omolu* (2002) 10 NWLR (Pt.774) 177 at 189 Paragraph H; *Yusuf v Kode* (2002) 6 NWLR (Pt. 762) 231 at 245 paragraph D; *Osinupebi v Saibu* (1982) 7 SC.104 at 110 and *Ogundiyan v State* (1991) 3 NWLR (Pt.181) 519 at 532.

He also submits in the circumstances, that such an issue not having been founded on any of the grounds of appeal has even then raised a fresh issue of repugnancy of 'Itugha Nkwu' custom before the Court below and therefore requires leave of

Court and that without leave having been first sought and obtained the said issue for determination has been incompetently raised. See: *Musa v INEC* (2002) 11 NWLR (Pt.778) 223 at 300 paragraphs B-E; *Queen Bank Plc v Olatunyi* (2002) 12 NWLR (Pt.781) 259 at 302 paragraphs C- F.

Even moreso, it is submitted as wrong in law in that as the question of repugnancy has not been pleaded nor at all canvassed before the trial Court it is improper to throw out the trial Court's decision on that sole ground. See: *Comptor Commercial and Industry S.P.R. Ltd. v Ogun State Water Cooperation* (2002) 9 NWLR (Pt.773) 629 at 651 paragraphs B-C; *Inyang v Ebong* (2002) 2 NWLR (Pt.751) 284 at 332 paragraphs A-F. Furthermore, the Appellant submits that the decision of the Court below has occasioned a miscarriage of justice by founding its decision upon an incompetent point. See: *Ndukwe v Baronci* (1994) NWLR (Pt.367) 241 at 246 and *Okonji v Nwachukwu* (1991) 7 NWLR (Pt.202) 131. The Court is urged to answer the 1st issue in the negative and allow the Appeal.

On issue 2: That is on the justification of the Court below relying on the case of *Okonkwo v Okagbue* (1994) 9 NWLR (Pt.368) 301 in reaching the conclusion to upset the trial Court's decision basing it on the said custom being repugnant

to natural justice, equity and good conscience; the Appellant submits that the two cases i.e. this case as against the cited case are different on the basis of facts and circumstances and even then that there is nothing barbarous or inequitable about 'Itugha Nkwu' custom which has been accepted and admitted as pleaded by both parties. The Appellant having examined the custom against the background of the provisions of Section 42(2) of the 1999 Constitution has urged that the Appellant should not be subjected to any disability and deprivation because of the circumstances of his birth by striking down the custom. He makes the point that as the facts stand now that the Appellant is admitted to be the 'first son' of the original sole Defendant i.e. Stephen Ojigu now deceased and so the oldest surviving male member of the Ojiogu Ifionu's family, which fact has been admitted by the Respondents and therefore the 'Diokpala' of the family. (That is to say, head or tail, it is win position for the Appellant).

The court is urged to resolve the issue in favour of the Appellant and allow the Appeal.

The Respondent's case on Appeal is rather terse, simple and straightforward. He has joined issues on the question that there has been no reference by way of Cross Examination and Address by Counsel on the repugnancy of 'Itugha Nkwu' custom at the trial Court and so, also that this question rightly has formed the basis of the said ground of appeal and the issue raised therefrom and thereby has debunked the claim that the Respondent has raised a fresh point of law not otherwise raised before the trial Court. He therefore has canvassed the point that the custom has been canvassed in the proceedings in the trial Court to warrant the disparaging pronouncement of the Court below that has invalidated the Plaintiff's case as a whole. For all this, the Respondent further contends that the Court below is obliged to draw any necessary conclusions or make inferences from the Record before it in order to reach the correct conclusion to dismiss the Claim and relies on *Gbadamosi v Dairo* (2007) 3 MJSC 1 at p.21 paragraph A; Section 14(3) of the Evidence Act and on the case of *Okonkwo v Okagbue* (supra).

The Respondent also has contended as extraneous any suggestions that 'Itugha Nkwu' custom has anything to do with Section 42(2) of the 1999 Constitution particularly as no issue of discrimination or deprivation per se has been joined on the section in this matter nor are there any pronouncements by both lower Courts on it or even so any appeal on it. The Court is urged to dismiss the appeal as devoid of any merit.

The Appellants reply Brief is, with respect, most superfluous and a waste of valuable time as there are no new points raised in the Respondent's Brief of Argument to necessitate a reply brief here. For the umpteenth time, a reply brief is necessary when an issue of law or new questions are raised in the Respondent's Brief of Argument otherwise it is not required. The instant Appellant's Reply Brief is unnecessary as it is tediously repetitive of the Appellant's case as adequately covered in the main Brief of Argument.

This Appeal has thrust forward once again the ageless contemporary issue of repugnancy principle in the proper application of customary law in this country. Simply put, it means that there are provisions which set down the test customary law must be subjected before it is observed and even so enforced by the Courts. These are without mentioning them here not necessary for deciding this case as there are specific enactments containing repugnancy clauses. However a number of cases dating from the reception of English Law in Nigeria have expounded this principle such as and including *Laoye and Ors. v Oyetunde* (1913) AC 662; (1931) AER (Ref.) 44, *Lewis v Bankole* (1908) 1 NLR 81; *Amachree v Goodhead* (1923) 4 NLR 101; *Cole and Anor. v Akinyele & Ors.* (1960) 5 FSC 84, *Ashogbon v Oduntan* (1935) 12 NLR 7, *Effiong Okon Ata Ekpan v Henshaw & Anor.* (1930) 10 NLR 65 at p.66. These enactments as expounded in the above cited cases, demonstrate the criteria for enforcing of native law and custom.

Currently this principle is clearly provided for as the provision to Section 14(3) of the Evidence Act and Section 14(3) reads thus:

'Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom binding upon them.

Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.'

(Underlining mine)

The foregoing provision simply put comprises the tests which native law and custom must surmount or subject to before it is accorded acceptance and recognition and enforced by the Courts. The subsection has even widened the criteria by adding that the native law and custom must also not be against public policy which has been described as an unruly horse, which may otherwise lead you from the sound law, per Burrough J. in *Richardson v Mellish*. It is to give some perspective to the crux of this matter that I have made the digression. Besides, the issue of repugnancy is central to this Appeal. Coming to the specific question in this appeal, I think it is the stage to examine the said issue for determination and ground one of the grounds of appeal from which the said issue for determination has been formulated for

adjudication by the Court below as both questions are in the eye of the storm in this Appeal; it is even more so as it is the only issue decided by the Court below in allowing the appeal and dismissing the Plaintiff's Claim. The said issue reads as follows:

Whether it is not contrary to natural justice, equity and good conscience for the Plaintiff to claim that he is the son of Nwachukwu Ojiogu the deceased husband of his mother and as a result, disinherit the Defendant of the Obi compound and other lands when he was born seven (7) years after the death of his mother's husband, Nwachukwu Ojiogu'.

The issue is alleged to have been formulated from Ground 1 of the Grounds of Appeal to the court below and it reads:

Grounds of the Appeal

Error in law

The learned trial judge erred in law when he held that the Plaintiff though admitted by all the parties to be born about seven (7) years after the death of his mother's husband, Nwachukwu Ojiogu was still the natural son of the said Nwachukwu Ojiogu to enable him succeed as the 'Okpala' of Ojiogu family and occupy the 'Obi' land of Ojiogu Ifionu.

Particulars

(a) Both in the parties' pleadings and evidence it is not disputed that Nwachukwu Ojiogu died in 1949.

(b) Both in the parties' pleadings and evidence, it is not disputed, that the Plaintiff was born almost about 7 years after the death of Nwachukwu Ojiogu.

(c) From the above admission, it is abundantly clear that the Plaintiff can never be the natural son of Nwachukwu Ojiogu to enable him succeed as the 'Okpala' of Ojiogu Ifionu family.

(d) There is abundant evidence that the Plaintiff is a product of a marital relationship between Stephen Ojiogu and the Plaintiff's mother, years after the death of Nwachukwu Ojiogu, the former husband of the Plaintiff's mother.'

The Appellant sequel to the foregoing has submitted that on a calm examination of the ground and the particulars, and I agree with him, that they have revealed that the complaint is not that 'Itugha Nkwu' custom per se as has been applied by the trial Court is repugnant to natural justice, equity and good conscience but that the sole Defendant - Stephen Ojiogu, now deceased is conclusively at customary law the natural father of the Appellant and has to take his inheritance under his lineage. There is no way the said ground of appeal can be construed as complaining of want of natural justice, equity and good conscience talk less of being against public policy.

To my mind to hold otherwise will be standing the entire defence case as put forward in their pleadings i.e. the Further Amended Statement of Defence at page 45-50 of the Record, on its head. Again, I think that to drive home this point I should further set forth the pertinent paragraphs i.e. 4, 5, 7a, 8, 9 & 10 of the Further Amended Statement of Defence to buttress my stance for so holding.

There is no doubt that the remaining paragraphs i.e. 2, 3, 6 and 11 of the Further Amended Statement of Defence are in regard to general and particular traverse. It is crucial to set forth paragraphs, 4, 5, 7a, 8, 9 and 10 as follows:

'4. The Defendants vehemently deny paragraphs 8 and 9 of the Statement of Claim, and will put the Plaintiff to very strict proof. In further answer, the Defendants aver that after the death of Nwachukwu Ojiogu in 1949 without a son, the Defendant's father remarried the late Nwachukwu Ojiogu's wife (who is the mother of the Plaintiff) according to Nnewi customary law. This the Defendant's father did by giving the Plaintiff's mother a matchet (a ceremony known as 'Inye Nma') and later went to the Plaintiff's mother's home at Nnewichi and performed the Itugha Ukwu ceremony. After these two ceremonies, the Plaintiff's mother became the wife of the Defendant's father according to the laws and customs of Nnewi. In 1956, seven years after the death of Nwachukwu Ojiogu, the Plaintiff was born having the Defendant's father as his father and the former wife of the late Nwachukwu Ojiogu as his mother. The Plaintiff became the Defendant's father's first son. The customary Court in fact found as a fact that the Plaintiff is the Defendant's father's son, and the Defendant's father duly performed all the customary ceremonies for re-marrying the Plaintiff's mother.

5. In still further answer, the Defendants answer, that the Plaintiff who was born seven years after the death of Nwachukwu Ojiogu could not have become the Okpala of Nwachukwu Ojiogu. When the Defendant's father performed all the customary ceremonies relating to re-marriage in these circumstances, any son born there-after became the son of the defendant's father. Under the Nnewi Customary law, the Obi of Ojiogu is today held by the Defendant's father and not by the Plaintiff.

7(a) In further answer, when the Plaintiff started to deny that the Defendants' father is his biological father the matter was, with the consent of the parties, referred to the arbitration of the parties' family of Dunuanyichie family of Ndiojukwu. All the important members of Ojiogu family including Nwachukwu Ojiogu sisters testified before the arbitration. The arbitrators positively found as a fact that the Defendants' father, the late Mr. Stephen Ojiogu, re-married the Plaintiff's mother after the death of Nwachukwu Ojiogu by performing the ceremony of Inye Mma and Itugha Nkwu. The Defendants will rely on the decision of Dunuanyichie family which was reduced into writing.'

8. In further answer, the Defendants aver that in 1988, the father of the Defendants then as Plaintiff, instituted an action in the Nnewi Customary Court against the Plaintiff (then Defendant) claiming the piece or parcel of land known as and called Ani Obi Ojiogu and clearly shown and verged blue in Plan No MU/ D.5/90 filed with this Further Amended Statement of Defence. The suit No was CCN/ 29/88. While the suit was pending, the Plaintiff in this suit filed an action - Suit No HN/50/88 at the Nnewi High Court claiming the same piece of land the subject matter of Suit No CCN/29/88 in the Nnewi Customary Court. The Plaintiff in this suit later filed a motion at the Nnewi High Court asking for a transfer of the Customary Court suit No CCN/29/88 to the Nnewi High Court for determination with the present suit. The plan used in the Native Court and therein tendered as Exhibit \"c\" will also be relied upon.

9. The High Court refused this application and ordered the Customary Court Nnewi to proceed with and determine Suit No CCN/29/ 88 while the present suit would be adjourned sine die. The application for transfer was thereafter dismissed. The order of the Court in this respect is hereby pleaded and will be relied upon at the trial. This was on 11/11/88."

10. Consequently, the Nnewi Customary Court proceeded with the case and gave judgment in favour of the Plaintiff (Defendant's father in this case) for the piece or parcel of land now in dispute. This was on 26/4/89. The proceedings in the Customary Court together with the judgment is hereby pleaded as constituting estoppel per rem judicatam'.

The defence case as averred above is to undermine the important basis of the plaintiff's case of entitlement to the 'Obi' and other 'Obi lands' of Ojiogu Ifionu family having descended from lineage of the late Nwachukwu Ojiogu, elder brother of Stephen Ojiogu, the original sole Defendant in this matter.

These averments have as it were; put the defence case in this matter beyond peradventure. The gist of which is pleading that having remarried the Appellant's mother in accordance with 'Itugha Nkwu' and 'Inye Mma' customs of the Nnewi people, the Appellant's mother has thus become his wife at customary law. And that the Appellant has been begotten for him (Stephen Ojiogu) during the currency of the said customary marriage thus making him the biological father of the Appellant who otherwise is his first son born about seven years after the death of Nwachukwu Ojiogu, the former husband of the Appellant's mother and his late elder brother. And therefore the Appellant can only inherit the 'Obi' and 'Obi lands' through him (Stephen Ojiogu) as his 'Okpala'.

The Record has shown that the defendant and their witnesses have testified in the proof of these averments. the logical effect of the these averment is to knock the bottom off the Appellant's Claim as 'Diokpala' of Ojiogu Ifionu's family and as descending from the lineage of the late Nwachukwu Ojiogu; the elder brother of Stephen Ojiogu.

Clearly, there is no averment or evidence of 'Itugha Nkwu' custom being against natural justice, equity and good conscience. I must make the point that one cardinal principle of pleading is that parties are bound by their pleadings and so

also the corollary that evidence given not in accordance with pleadings goes to no issue. See: Obazee Ogiamien & Anor. v Obahan Ogiamien (1967) NMLR 245; Y.A. Oseni & Ors. v Salami Taylor (1975) 2 WSCA 66; The National Investment & Properties Co. Ltd. v The Thompson Organization Ltd. & Ors. (1969) NMLR 99.

What has emerged from my examination of the instant Ground of Appeal and its particulars against the backdrop of the above averments in the Further Amended Statement of Defence is that the Court below has premised its decision, with respect, arrived at without due consideration of the facts pleaded and proved by evidence on the principle of repugnancy and even moreso upon a point, that is, a proposition of law upon which the Appellant never fought or contested on the pleadings and evidence. Even then I hold that notwithstanding whether or not the 'Itugha Nkwu' custom is contrary to natural justice, equity and good conscience which I do not decide here, it is without doubt clear that on the parties' pleadings and proved evidence that the Court below has decided the opposite of the Defendants' case that the Appellant is the first son of Stephen Ojiogu. It follows normally that the said issue for determination having arisen from the said ground of appeal is therefore incompetent and cannot properly have formed the basis of the decision of the appeal before the court below.

In this case more importantly the Court of Appeal should not have entertained the appeal on the instant ground of appeal which more or less has raised a new ground of law thus introducing a new case, indeed a different case upon which the parties have not joined issues neither in their pleadings nor canvassed in evidence before the trial Court; it has proceeded to decide upon a matter not submitted to it for adjudication. See Obikoya v The Registrar of Companies (1975) 4 SC.31 at 32-35, and Oloriode v Oyebi (1984) 1 SCNLR 390 at 407 F; 19845 SC. I at P.32-33. I agree with the Appellant that all the issues that have been pleaded and canvassed by the parties have to be jettisoned for the new point or case incompetently raised. The new point without any doubt has changed the character of the case as per the parties' pleadings and evidence and the decision of the Court below having been founded on an issue for determination not founded on a competent ground of the appeal is itself incompetent. I must also note it is settled law that a party relying on a special statutory provision for his defence or case must plead that defence specifically, although the specific

statutory provision need not be specifically stated. Equally so there must be sufficient facts pleaded upon which such defence will have to be based. In this regard references have been made in this judgment to the proviso to Section 14(3) of the Evidence Act on repugnancy doctrine. Again, in this matter the defence has not specifically pleaded the special statutory provisions being relied upon in raising the question of repugnancy doctrine. See *NBTC Ltd. v Narumal & Sons Ltd.* (1986) 4 NWLR (Pt.33) 117.

Obviously the fresh point of repugnancy has been introduced without leave of Court. It is trite that an appellate Court will not allow a fresh issue on appeal to be taken without leave as it has not been pronounced upon by the Court below. This is even moreso as in this case where an appellant is trying on appeal to raise an issue which has not been raised, nor considered by the trial Court. However, where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence may be called, the court may allow the issue to be raised subject to leave having been first sought and obtained. In this instance, the Appellant in the Court below not having first sought and obtained leave of the Court below to raise the question of repugnancy of the said 'Itugha Nkwu' custom the said issue for determination is incompetent so also the ground of appeal from which it has been distilled.

Even then, it is open for the Appellant in the Court below to have recourse to a Respondent's notice to justify deciding the case on other grounds not relied on by the trial court. This procedure has not been invoked in this matter. Therefore leave to raise such points as in this case must be sought and failing to do so is fatal to the fresh point sought to be raised. I must say I agree with the Appellant that the Court below has erred in deciding the issue of repugnancy when the same has been improperly raised before it and thus it has failed in its duty and so the decision cannot stand.

For all this, I find no need to go any further in this matter to discuss issue 2 as there is nothing left to be discussed having held the ground of appeal and the issue raised from it as incompetent. It is the only issue decided by the Court below and upon which it has rested its decision to allow the appeal and dismiss the Plaintiff's claim, which issue I have found to be baseless and incompetent for want of leave of Court. There is no cross-appeal by the Respondents on the other issues arising in the matter not pronounced upon the Court below. In view of my stance in this matter I have not pronounced on the merit and demerit of 'Itugha Nkwu' custom. I find that the appeal is meritorious and should be allowed. I allowed it and set the decision of the Court below. And this being a family feud and in order to promote peace in the family, I make no order as to costs.

Judgment delivered by

George Adesola Oguntade. JSC.

I have had the advantage of reading in draft the lead judgment by my learned brother Chukwuma-Eneh, JSC. I agree with his reasoning and conclusion. I would also allow the appeal and subscribe to the order made on costs.

Judgment delivered by

Mahmud Mohammed. JSC

I have had the opportunity of reading the judgment of my learned brother Chukwuma-Eneh, JSC which has just been delivered. I agree with him that there is merit in this appeal which ought to be allowed. I therefore allow the appeal and abide by the orders in the leading judgment including the order on costs.

Judgment delivered by

Walter Samuel Nkanu Onnoghen. JSC

This is an appeal against the judgment of the Court of Appeal Holden at Enugu in appeal No CA/E/1SO/2001 delivered on the 2nd day of November, 2004 in which the court set aside the decision of the High Court of Anambra State, Holden at Nnewi, in suit No HN/SO/88 delivered on the 29th day of October, 1999 in which it entered judgment in favour of the Plaintiff, who is now the Appellant before this court.

The Appellant, as Plaintiff, claimed the following Reliefs from the original Defendant, to wit

1. A Declaration of Court that the Plaintiff is the son of late Nwachukwu Ojiogu, the elder brother of the Defendant and as such the person entitled to occupy the "Obi" compound and 'Obi' lands of Ojiogu Ifionu of Ndiojukwu-Uruagu-Nnewi in accordance with the Nnewi Native Law and Custom.
2. A Declaration of Court that it is the right and responsibility of the Plaintiff under Nnewi law and custom as 'Diokpala' in Ojiogu Ifionu family to allot to the Defendant, the Defendant's share of the unshared family land of Ojiogu.
3. A Declaration of Court that the three commercial buildings erected (sic) on Ojiogu Ifionu's family land by the Defendant from the proceeds of a disposition by sale of a portion of Ojiogu Ifionu family land to one Eric Anosike are common properties of both Plaintiff and the Defendant.
4. An Injunction Restraining the Defendant his agents and servants from unilaterally meddling, controlling, alienating or managing any Portion of Ojiogu Ifionu's estate whatsoever at the exclusion of the Plaintiff who is a full grown adult-male with children, until the said estate is properly shared and demarcated between the Plaintiff and the Defendant under

Nnewi native law and custom.

The facts of the case, as found by the trial court are straight forward. Ojiogu Ifionu of Ndiojukwo, Nnewi had two sons to wit; Nwachukwu Ojiogu and Stephen Ojiogu in order of seniority. Nwachukwu being the first son and in accordance with the Native Law and Custom of Nnewi people was the 'Diokpala' and head of the family of Ojiogu Ifionu and occupied the patriarchal homestead of Ojiogu Ifionu usually known as 'Obi'.

While alive, Nwachukwu got married to Margaret who had only female children for him during his life time. However, after the death of Nwachukwu, Margaret did not return to her people but remained in the homestead of her late husband and unmarried to continue to bear his name and raise their children. The original Defendant, though allowed by the custom of the people, refused to marry Margaret after the death of her husband by performing the customary ceremony of 'Itugha Nkwu'. It is in evidence that by the custom of the people of Nnewi, where a living brother performs the 'Itugha Nkwu' ceremony on the wife of his late brother, he is said to have married her and any child born by the lady thereafter becomes the child of the living brother whilst the rights of the late brother over the lady are thereby extinguished. The ceremony is usually performed for the maiden family of the lady in question. By the said 'Itugha Nkwu' ceremony the new husband also assumes the burden and responsibilities of the family of his deceased brother as it is immaterial whether, he is the biological father of the child born by the lady. In addition he also inherits the proprietary rights of the deceased brother.

However, where that ceremony is not performed or the lady refuses to marry the brother of her late husband or fails to remarry but continues to stay for her late husband under his roof, she is by custom allowed all that was due to her husband and any child born by the lady in the circumstance is deemed to have been born for her late husband and all the rights of the late husband shall thereby accrue to the child or children she has for the late husband particularly where the child or children is/are male(s).

It is in the above circumstances that Margaret became pregnant and bore the Appellant in 1955. Initially the original Defendant did recognize the Plaintiff/Appellant as the son of his late brother under Native Law and Custom until the Appellant came of age and wanted to assume his rightful position as the 'Diokpala' in Ojiogu Ifionu Family and to take control of the 'Obi'. It was then that the original Defendant started to claim that he had remarried Margaret and that the Appellant is his first son. As stated earlier in this judgment the trial court found for the Appellant. However, upon appeal, the lower court reversed that judgment by holding that the Nnewi Custom in question is repugnant to natural justice, equity and good conscience resulting in the instant appeal, the issues to be determined therein as identified by Learned Counsel for the Appellant, Gordy A. Uche Esq being as follows:-

1. Whether it was proper for the Court of Appeal to decide the appeal before it on the basis of an issue not raised at the trial court and in respect of which there was no ground of appeal and no leave was sought or granted for same to be raised as a fresh point on appeal. (Arising from Grounds 3 and 4 of Amended Notice of Appeal).
2. Whether the Court of Appeal was right to apply the decision in *Okonkwo vs Okagbue* (1994) 9 NWLR (368) 301 to invalidate the 'Itugha Nkwu' custom when both parties accepted and admitted the custom as applicable (Arising from Grounds 1 and 2 of the Amended Notice of Appeal).

It is the contention of Learned Counsel for the Appellant that the issue of repugnancy never rose at the trial of the action neither was it determined one way or the other by that court, that issues were joined by the parties on Nnewi Customs of 'Itugha Nkwu' and 'Inye Mma' particularly whether 'Itugha Nkwu' was performed and whether the second custom can take the place of the first; that the grounds of appeal filed in the lower court did not raise the issue of repugnancy of the custom in issue; that the issue suddenly emerged in the Appellant's Brief of Argument allegedly grounded on ground 1 of the grounds of appeal; that the issue of repugnancy was raised suo motu and for the first time on appeal and without leave of court.

On the other hand, learned counsel for the Respondents submitted that it is not true that the issue of repugnancy was formulated before the lower court; that the lower court relied on facts established on Record to apply the principle of repugnancy particularly the fact that the Plaintiff was born seven (7) years after the death of his purported father.

I have gone through the Record, particularly the pleadings of the parties and it is very clear that the issue of the 'Itugha Nkwu' custom of the Nnewi people being repugnant to natural justice, equity and good conscience was never pleaded by the parties, particularly the defendant. The case of the Defendants was rather that the original Defendant did perform the 'Itugha Nkwu' ceremony of the Nnewi people on the mother of the Appellant thereby making the Appellant the original Defendant's first son. The issue before the trial court and which was resolved by that court was therefore, whether the original Defendant did perform that custom which the court found to the contrary. There was nothing about the said custom being repugnant to natural justice, equity and good conscience either in the pleadings, the facts before the court and the judgment of the said trial court.

The fact that the Plaintiff/Appellant was born seven (7) years after the death of his purported father, though naturally impossible, is recognized by the custom of the people concerned to be a legitimate way by which a deceased husband is deemed to continue to be the father of the children born by his wife who remains in his homestead unmarried and on whom the 'Itugha Nkwu' custom has not been performed by a brother of the deceased husband. For one to rely on that fact to hold that the custom is repugnant to natural justice, equity and good conscience, the facts must be pleaded to give notice to the other party.

It is settled law that customary law is a question of fact which must be proved or established by evidence. Equally settled is the principle that facts relevant to the proof of an issue in contention must be pleaded by the party intending to rely on same before any evidence can be adduced thereon. However where such relevant fact is not pleaded any evidence given in proof of same is said to ground no issue.

In the instant case, if it was the intention of the Respondents to rely on the principle of repugnancy, it was their duty to have pleaded facts to ground the said principle which they failed to do. It is not enough to say that Appellant was born seven (7) years after the death of his purported father and that since it is naturally impossible for the late husband of Margaret to be the father, the custom that deemed him the father is repugnant to natural justice, equity and good conscience. The party relying on that principle must not only plead facts to show how repugnant the custom but must also adduce evidence to establish the repugnancy.

In the instant case, none of the above is present and I hold that the lower court was in error when it applied the principle in the circumstances.

That apart, the issue of repugnancy as formulated by Counsel to the Appellant at the lower court did not arise from Ground 1 of the grounds of appeal as alleged.

Ground 1 of the Grounds of Appeal complains thus:-

Error in Law

The learned trial judge erred in law when he held that the Plaintiff though admitted by all the parties to be born about seven (7) years after the death of his mother's husband, Nwachukwu Ojiogu, was still the natural son of the said Nwachukwu Ojiogu to enable him succeed as the 'Okpala' of Ojiogu family and occupy the 'Obi' and lands of Ojiogu Ifionu.

Particulars

- (a) Both in the parties pleading and evidence, it is not disputed that Nwachukwu Ojiogu died in 1949.
- (b) Both in the parties pleadings and evidence, it is not disputed that the Plaintiff was born almost about seven (7) years after the death of Nwachukwu Ojiogu.
- (c) From the above admissions, it is abundantly clear that the Plaintiff can never be the natural son of Nwachukwu Ojiogu to enable him succeed as the 'Okpala' of Ojiogu Ifionu family.
- (d) There is abundant evidence that the Plaintiff is a product of a marital relationship between Stephen Ojiogu and the Plaintiffs mother, years after the death of Nwachukwu Ojiogu the former husband of the Plaintiffs mother.

Now the issue formulated by the Appellant in the lower court allegedly as by arising from the above Ground of Appeal and on which the lower court determined the appeal, is as follows

"Whether it is not contrary to natural justice, equity and good conscience for the Plaintiff to claim that he is the son of Nwachukwu Ojiogu the deceased husband of his mother and as a result disinherit the Defendant of the Obi Compound and other lands when he was born seven (7) years after the death of his mother's husband, Nwachukwu Ojiogu".

From the ground of appeal it is very clear that the issue formulated for determination does not arise from that ground of appeal and as such it ought not to have been countenanced by the lower court. The ground of appeal does not complain of the custom in issue being repugnant to natural justice, equity and good conscience - that is granted that there was any pleading and evidence in that respect in the decision of the trial court on the matter. When one looks at particular (d) of the Ground of Appeal supra, it is clear that the Appellant before the lower court was still sticking to his story that he had remarried the mother of the Plaintiff and that the Plaintiff is a product of that marriage.

I am not saying that in an appropriate case the custom in issue may not be found to be repugnant to natural justice, equity and good conscience particularly where the relevant facts, pleadings and evidence adduced to establish same are present. All that I am saying is that in the instant case, the issue of repugnancy did not arise for determination and the lower court was in grave error when it decided the appeal on that issue, which was even raised for the first time before that court and without leave as required by law. There was no ground of appeal to support or sustain the issue.

A custom is the way of life of the people. This particular one must have been borne out of the people belief that a woman, particularly a married one, is a chattel to be owned. Be that as it may, it remains the custom of the people

unless in an appropriate case it is properly and legally declared repugnant to natural justice, equity and good conscience. In the instant case, both parties recognise this particular custom and relied on it in attempt to establish their respective contentions. There was no question of the custom being repugnant.

It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother Chukwuma-Eneh, JSC, just delivered that I too find merit in this appeal which is accordingly allowed.

I abide by the consequential orders contained in the said lead judgment including the order as to costs. Appeal allowed.

Judgment delivered by

Muhammad Saifullahi Muntaka-Commassie. JSC.

I have had a preview of the leading judgment prepared by my learned brother, Chuwuma-Eneh, JSC which has just been delivered. I agree with the conclusions as set out therein. I abide by the order on costs made in the leading judgment. Appeal allowed.

Counsel

Gordy Uche

with him

Doris Chime (Miss)

Ebere Nwanya (Miss)

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For the Appellant

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F.A. Kaine (Miss)

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For the Respondents