REPUGNANCY OF THE REPUGNANCY TEST; RE. CUSTOMARY RIGHTS OF INHERITANCE OF PROPERTY IN NIGERIAN URBAN AREAS VERSUS JURISDICTION OF THE COURTS.[1]

Abstract
The Land Use Act promulgated in 1978 was intended to control ownership and use of land in Nigeria, the primary focus and the mischief it was meant to cure was to divest absolute ownership of land from original landowners, but rather vest such right in the state governors who shall hold land in the state in trust for every citizen of that state. This paved the way for easy access to land by government for public purposes. The implementation and application of the provisions of the law, no doubt will clash with the interests of the existing customs on possessory interests in land. The appellate courts interpreted the sections of the Act in such a way that the jurisdiction of the customary courts got fettered to a point where the latter was excluded from determining the customary rights of inheritance inhered in properties in urban areas where the owner died intestate. This paper disagreed with such decisions. It concluded that though the High Courts have exclusive jurisdiction to determine issues of title, statutory right of occupancy and compensation payable for land acquisitions in urban areas, it shares a concurrent jurisdiction with the customary court on matters of customary rights of inheritance in respect of such properties in urban areas where the deceased died intestate.

Keywords: *Customs, Rights, Inheritance, Urban Areas, Jurisdiction,*

1.0. Introduction

It is a long settled practice in our adjectival jurisprudence that jurisdiction is the threshold through which an action is activated. Therefore the competency or otherwise of a suit and indeed the jurisdiction of the court is determined by the claims and/or reliefs of the plaintiff.[2] Jurisdiction may also be conferred by the evidence received or by a motion supported by affidavit stating the facts upon which reliance is placed[3].

Principally however, since it is the plaintiff that is invoking the jurisdiction of the court, it is the averments in his statement of claim that would determine the jurisdiction of the court, but not the statement of defence of the defendant or his answer to the claim. Sometimes it requires a microscopic examination before the pendulum moves to pinpoint or sift jurisdiction from the evidence received. One of the cardinal requirements to vest jurisdiction is whether the subject matter of the action is within the jurisdiction of the court.[4]

For any statute to oust the jurisdiction of the court, the wordings of the enabling statute must be specific and not conjectural. The Supreme Court emphasized this in *Federal Republic of Nigeria v Nwosu*[5] when it held that the jurisdiction of court can only be ousted on the basis of specific provisions and words used in the enabling statute.

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[2]**Balonwu v Obi** (2007) 5 NWLR, pt 1028, p. 488; ADH ltd v AT ltd (2006) 1 NWLR pt. 989 p 635
[3]Per the Supreme Court in **Ngere v Okuret** "XIV" (2016) 9-12 KLR pt 395 p 4597
[4]**Madukolu v Nkemdilim** (1962) ALL NLR p 7 at 94; **Sken Consult (Nig) ltd v Ukey** (1981) 1SC p 6
[5](2016) 17 NWLR pt. 1541 p 226

The Land Use Act[6] conferred exclusive jurisdiction to the High Court of States over proceedings in respect of land situate in urban areas. It provides as follows:

(1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings:
   (a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph proceedings include proceedings for a declaration of title to a statutory right of occupancy.
   (b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under this Act.

(2) All laws, including rules of court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the laws shall have effect with such modifications as would enable effect to be given to the provisions of this section.

On the other hand, the same Act conferred similar jurisdiction on customary and area courts in a state where they exist or in the Federal Capital Territory. It provides that:[7]

> An area court or customary court or other court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act; and for the purposes of this paragraph proceedings include proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modification as would enable effect to be given to this section.

It further provides that:[8]

> Proceedings for the recovery of rent payable in respect of any customary right of occupancy may be taken by and in the name of the Local Government concerned in the area court or customary court or any court of equivalent jurisdiction.

The Act also provides that:[9]

> Proceedings for the recovery of rent payable in respect of any certificate of occupancy may be taken before a Magistrate Court of competent jurisdiction by and in the name of the Chief Lands Officer or by and in the name of any other officer appointed by the Governor in that behalf.

In spite of these clear wordings of the law, there are still some reported and unreported cases some of which we shall soon examine anon, that are on the neck of the customary Court denying it the exercise of its statutory jurisdiction over inheritance of property of a deceased intestate person situate in urban area by the constraint of the Land Use Act, even where the fact in issue borders on rights of customary inheritance.

2.0. Jurisdiction of Courts over Customary Rights of Inheritance over Properties in Urban Areas.

Customary inheritance is viewed in this paper as rights inhered in a property by virtue of the custom of the area where the deceased and the potential beneficiary hail from. Enjoyment of, and access to such rights are guided by the customary law of the community. Customary law of a community is a

[6] Cap L5 Laws of the Federation of Nigeria 2004 s 39.
[7] ibid s 41
[8] ibid s 42(2)
[9] ibid s 42

body of customs and traditions which regulate the various kinds of relationships between members of the community and thus binding on them. In the case of *Oyewumi v Ogunsesan* [10] Obaseki, JSC defined customary law as:

> *The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that the customary law goes further and imparts justice to the lives of all those subject to it.*

In spite of these glorious judicial expression of the relevance and importance of customary law to the lives of the people, validity of customary Law, its application and enforcement was made contingent on satisfying the repugnancy test. The repugnancy test applies the criteria of compliance with:[11]

- public policy
- natural justice
- equity and good conscience

This qualification has been the bane of rights based on custom of Nigerian communities, where the test of validity of their customs is dependent on decisions of people who may not even members of their community. Thus the provisions of the Land Use Act have been interpreted severally by the appellate courts to divest the customary courts, manned by persons knowledgeable of the customs and traditions of the communities within their area of jurisdiction, of jurisdiction to inquire into the rights of inheritance in properties of an intestate estate in urban areas.

In *Nwinya Nzegwu & Ors v. Chukwuma Omata*[12] the Court of Appeal denied jurisdiction of the Customary Court to adjudicate over rights of inheritance of a deceased intestate because the subject matter was located in an urban area. In *Godwin Muogbo Nnama v. Christopher Muogbo Nnama & 4 ors,*[13] the High Court relied on and followed the decision in *Nwinya*..

The cardinal objection sustained by the courts in the two cases was a challenge to the jurisdiction of the customary court to entertain such claim/relief to the effect that once a property is situate in the urban area, any legal contest howsoever construed in that regard must be heard by the High Court which they adjudged to have the exclusive jurisdiction to hear and determine the proceedings.

So, we intend to examine all the attendant legal permutations and the relevant existing laws and some other sections of the Land Use Act, with a view to adjudging the veracity of these irrepressible contentions. In doing so, we do not think that the issues involved will be well taken without any symbiosis of an expressive situation. Thus, for proper appreciation of this treatise, we shall hereunder erect hypothetical claim/reliefs, in order to see if the ascription of the specific wordings of the Section 39 of the Land Use Act to the scenario debilitates the jurisdiction of the Customary Court to hear and determine the claim/reliefs as hypothetically couched in **Box 1** hereunder.

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[10] (1990) 3 NWLR (pt.13) 182 at 207.
[11] Evidence Act Cap. 112 Laws of the Federation of Nigeria 2011, s 18(3).
[12] (1999) 2 NWLR (pt. 592) 537
[13] Suit no. OT/141m/2010 (unreported) decided by the High Court of Justice, Otuocha Judicial Division.

Box 1: Hypothetical Reliefs in a Statement of Claim

a. A declaration that under the native law and custom of the people of Awokor Town, the Plaintiffs and the defendants are the blood children of their late father, Late Chief Omengboji through his stirpes (Mkpukes) and are severally and collectively entitled to his properties situate at Awokor Town.
b. An order of the court directing the defendants to release the title documents of all his properties in the custody of the 1st defendant immediately to the 1st plaintiff, the first son and incumbent head of Late Chief Omengboji family, as required by the native law and custom of Awokor Town for commu nal use of all the children as direct beneficiary of their late father.
c. An order of the court directing for the sharing of all the properties of Late chief Omengboji between the two stirpes (Mkpukes) representing the two wives
d. A declaration that the 2nd plaintiff being the 1st wife of Late Chief Omengboji, is entitled to continue to live in the very house she lived with her late husband for the rest of her life.
e. An order restraining the plaintiff by himself, servants, agents, and or privies from further trespass and/ or sell of any the said properties pending the determination of this suit.
f. General damages of the sum of ₦10,000,000 only for trespass.

The hypothetical defendants filed a simulated preliminary objection in **Box 2** hereunder.

Box 2: Hypothetical Motion/Preliminary Objection

An order of the Honorable Court striking out this suit for want of jurisdiction.

Grounds on Which the Application is Brought:

a. That the proceedings/dispute concerns or relates to Houses of Late Chief Omengboji situate at Awokor.
b. That the two landed properties situate at Awokor, an urban area of Anambra State are subject to Statutory Right of occupancy under the Land Use act and only the High Court has exclusive jurisdiction to adjudicate upon proceedings concerning and relating to them.

We shall anchor our x-ray into jurisdiction of the Customary Court upon the hypothetical scenarios in **Boxes 1 and 2** in an attempt to justify or otherwise disagree with the decisions in *Nwinya Nzegwu & Ors v. Chukwuma Omata and Godwin Muogbo Nnama v. Christopher Muogbo Nnama & 4 ors,*[14] In determining this, we shall discuss the provisions of 39 of the Land Use Act which the courts relied on to disrobe the Customary Court of Jurisdiction.

To hem the hypothetical claim/reliefs, we shall call to fore only one issue for determination, to wit:

> *Whether the customary Court of Awokor has the jurisdiction to entertain the reliefs of the plaintiffs as couched in respect of properties of late Chief Omengboji situate in Awokor*

[14] Supra

Section 39(1) (a**)** of the Land Use Act 1978 provides, as follows:

> *The High Court shall have exclusive original jurisdiction in respect of the following proceedings:*
> *Proceedings in respect of any land the subject of a statutory right of occupancy granted by the governor or deemed to be granted by him under this decree; and for the purpose of this paragraph proceedings include proceedings for a declaration to title to a statutory right of occupancy.*

Section 39(1)(b) provides also in same perspective for the High Court to hear and determine:

> [A]*ny question as to the persons entitled to compensation payable for improvements on the land under the act.* (**Authors' emphasis**)
>
> **(2)** *All laws, including rules of court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the laws shall have effect with such modifications as would enable effect to be given to the provisions of the section.*

The entire Section 39 above clearly adumbrates the nature of the proceedings that would be brought before the High Court as underlined above which border on *declaration of title* or a *statutory right of occupancy* as well as *compensation for land* in an urban area. The only conceivable objection in the hypothetical setting in **Boxes 1 and 2** is that the subject matter is situate in Awokor, an urban area and consequently, the Awokor Customary Court is precluded from entertaining any or all of customary questions on the right of parties of lands and property of the deceased Chief Omengboji who died intestate.

This contention is rather too wide to represent the real intendment of Section 39 of the Land Use Act. We say so because the Land Use Act does not set aside existing laws, hence Section 48 of the Act provides that:

> *All existing laws relating to the registration of title to, or interest in land or the transfer of title to or any interest in land shall have effect subject to such modifications (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment.*

Such laws envisaged in Section 48, no doubt, include unwritten laws such as customary law. In our Igbo Custom, the whole estate of a deceased person vests at the moment of his death in his heirs. Equally, if there are liabilities or encumbrances of the deceased, the property would remain liable for its discharge. The estate does not immediately rest in the lawful heirs individually until it is customarily shared, allocated and even challenged as provided by the native law and custom of the people. For instance, who takes the *obi* compound of the deceased, the *mpuke* or the *ana-obi,* except where hitherto divested by nuncupative will by the deceased.

The High Court and the Customary Court have concurrent jurisdiction over the rights of the beneficiaries to the intestate. The possible challenge the beneficiary of any property might have after the family or customary court resolution of the customary inheritance is only in actualizing or exercising the vestment of his share through obtaining the statutory right of occupancy or alienation, of which he would have recourse to only the High Court in case of any adverse claim.

The High Court is so vested because of the yoga of inherent and unlimited jurisdiction. Whereas the customary Court is *strictu sensu* established to interpret and give effect to the customs of the people where in contest without any let or hindrance. It is therefore an *infra dig* seeing the customary court being divested of this statutory function of interpreting the customary laws of the people, no matter the subject matter or where they situate.

A careful glean through the Land Use Act does not disclose any clause prohibiting the customary court from performing its customary function with respect to property/land in the urban areas, insofar

as the proceedings brought before the court are not in respect of title, statutory right of occupancy or claim to compensation. The jurisdiction of court can only be ousted on the basis of specific provisions and words used in the enabling statute.[15]

Rather a propulsive inference is the more likelihood of the Act tilting more on the Customary Court to do the needful as could be garnered in **Section 24** of the Act.[16] This section of the Act clearly enunciated that the custom of the deceased at the time of his death would be used in the devolution of his intestate estate. It provides that:

The devolution of the rights of an occupier upon death shall –

a. *In the case of a customary right of occupancy, (unless non-customary law or nay other customary law applies) be regulated by the customary law existing in the locality in which the land is situated; and*
b. *In the case of a statutory right of occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at his time of death relating to the distribution of property of like nature to right of occupancy. (Authors' Emphasis)*

By the provisions of section 24, transmission of customary right of occupancy is governed by the customary law existing in the locality where the land is situate. With respect to the statutory right of occupancy the same section states that the applicable law regulating devolution is the customary law of deceased occupier at the time of his death with relation to the distribution of like nature unless any non-customary law or other customary law applies. Therefore, all the perimeters of how the customs of the occupier/owner inure should take preeminence in bequeathing his property.

The fact that the High Court enjoys unlimited jurisdiction will in no way attenuate the statutory position of the customary court to interpret the prevailing customary laws of the deceased intestate estate as set out in Section 24. Section 39 therefore cannot throw away the purport of Section 24, so as to hamstring or limit the jurisdiction of the customary court in giving vent to the said section of the Act. Section 39 cannot in the light it is being projected, be consequently allowed to deny the customary court the jurisdiction to hear the customary devolution of the customary rights of parties over properties situate in urban area without mischief being done to Section 24.

Since Section 24 does not particularise on the mode of commencing contest that might arise in such circumstances, it would be tantamount to imputation of meaning not contemplated in the section vis-à-vis the clear wordings of Section 39 to the extent of the avowed exclusive jurisdiction to hear and determine the proceedings of the prevailing custom of the deceased occupier/owner in the devolution of his intestate estate to the High Court only. Put the other way, section 24 on the devolution of the estate of the deceased and Section 39(1) are distinct as they are very clear, explicit and lead themselves to no ambiguity of any sort.

Espousing legally, section 39 does not make reference to inheritance or expended on devolution of the property in the urban area. It is just concerned with the declaration of title or statutory right of occupancy including proceedings emanating therefrom would be prosecuted.

But the Court of Appeal in *Nzegwu v. Omata* found otherwise**.** The plaintiff/respondent and the 1st and 2nd appellant are brother and sisters of full blood while the 3rd appellant does not seem to be interested in to appeal. She was "summarily discharged" by the Customary Court since the plaintiff/respondent made no allegation against her. The appellants are all married and apparently happy with their respective husbands. The said property was inherited by the respondent on the death 1st and 2nd appellants however, in spite of their marriage and living peacefully with their respective husbands still occupy the said property. The respondent therefore brought the claim in the Customary Court, in effect, to eject the 1st and 2nd appellants from the property.

[15] *Ibid.* (note 2)

[16] The devolution of the rights of an occupier upon death shall:

The Customary Court found for the respondent. The appellants' appeal to the High Court was dismissed. They further appealed to the Court of Appeal arguing that the trial Customary Court lacked jurisdiction to entertain the suit since the property is situated on a land subject of statutory right of occupancy for which only the State High Court had original jurisdiction to entertain.

The Court of Appeal, Enugu per Ubaezuonu JCA, after considering only the wordings of section 39(1)(a) held *inter alia* that the proceedings envisaged by section 39 is not limited nor restricted to one of title to land alone but is all embracing. Consequently, it held that it is wrong to restrict it to title. With the greatest of respect to the Court, failure to interpret section 39 conjunctively with sections 24, 42 and 48 of the same Act, denied the court a more comprehensive appreciation of the legislative intent of the Act. It is trite that sections of a statute are considered conjunctively in order to determine the overall intendment of the legislature. With respect, this was not the case in this case. We shall attend to the propriety of this failure in the legal arguments of this discourse, anon.

It is trite that where words of a statute are clear and unambiguous, those words would be given their ordinary and simple meaning by the court without the importation into the statute, words which are never intended or contemplated by the legislative. It is not the duty of the court to introduce into the statute extra language or meaning where that provision of the statute is clear, all in an in an endeavor to make the meaning conform to the court's own view of sound social justice.[17] Rather, it is the duty of the court to construe from the words used in the statute, the intention of the legislature and when it is unambiguous, effect should be given to it.[18] The words of the statute must not be overruled by judges.

3.0. Legal Arguments in Support of the Jurisdiction of Customary Court

There is no iota of doubt as to the literal meaning of Section 39 of the Land Use Act. The literal meaning used by the legislature specifically stated the nature of proceedings that would be prosecuted in the High Court in furtherance of the Act and therefore unambiguous. It is trite that where a clause in a law or Act is clear, the court is bound to give its literal meaning and nothing more.[19] Since the relief of the plaintiffs couched in the hypothetical claim in **Box 1** are not asking for any declaration of title to any properties but only the declaration of their legal rights as children of their late father under the native law and custom, to his intestate estate as co-owner, customary court in our respectful view has the jurisdiction to entertain the suit which from all intents and purposes is predicated on customary inheritance.

It is not in any legal system to ascribe meaning to things not specifically provided in the statute and/or to include by inference those other things not specifically provided. Here the proceedings within the context of the title are exclusive to the jurisdiction of the High Court and the provision is to the effect of the proceedings being heard by it to the exclusion of any other courts. It stands to argue and rightly too that where another court is vested with specific jurisdiction to hear and determine proceedings in respect of customary rights of occupancy to the property under its jurisdiction, the jurisdiction of the customary court to determine devolution of the customary property or the inheritance to that effect cannot be clear-sightedly inhibited. Consequently, the provision of **Section 39(1)** which is direct on the subject matter of proceedings that should be heard and determined by the High Court cannot prohibit other courts like the customary and the magistrate courts from circling round other issues unconnected with the prohibited section of the Act.

In the context under reference, it only means that the proceedings in **Section 39(1),** respecting a declaration of title to a statutory Right of Occupancy and proceedings to determine any question as to

[17] Osadev v. Bendel state (1991) 1 NWLR (pt. 169) p. 525

[18] **Ojokolobo v. Alamu (1987) 3 NWLR (pt. 16) p. 377**

[19] **Ugwu v. Araume** (2007) 7 KLR (pts 238 to 241) p. 2635 at 2664; **AG Federation v. Abubakar** (2007) 6 KLR (pt. 233) p. 1435 at 1468; **NAAC v. Econet Wireless Ltd** (2006) 37 WRN 129 at 130 (ratio)

the person entitled to compensation payable for improvement on land shall be irrefutably ascribed to the High Court exclusively as against other courts. Hence, the jurisdiction of any other courts is ousted to the extent of the specific provision and words used in **Section 39(1)** of the Land Use Act and nothing else.[20]

We are not unmindful of **Section 41** of the Land Use Act which provides for the jurisdiction of the Customary Court to entertain proceedings in respect of:

> *Customary Right of Occupancy granted by a local Government under this Act and for the purpose of this paragraph proceedings include proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section.*

When this provision is squared with **Section 39,** it is also in respect of hearing and determining disputes arising from grant of occupancy by the local government which is akin to the grant made by the Governor whose proceedings should be in the High Court. So it can be read to mean that such has ousted the jurisdiction of the Customary Court in other customary fringes in the urban areas.
To straighten the creases that not only the High Court has jurisdiction over proceedings respecting to land and property in the urban areas, it is shown in the same Act that other courts can equally exercise jurisdiction over lands and properties in the urban area not bordering on the title or statutory right of occupancy.
For instance, Section 42 of the Act provides as follows:

> *(1) Proceeding for the recovery of rent payable in respect of any certificate of occupancy may be taken before a magistrate court of competent jurisdiction by and in the name of the Chief Land Officer or by and in the name of any other officer by the Military Governor in that behalf.*
> *(2) Proceeding for the recovery of rent payable in respect of any customary right of occupancy may be taken by and in the name of the Local Government concerned in the area court or customary court or any court of equivalent jurisdiction. (**Authors' Emphasis**)*

Under **Section 42,** the magistrate court can exercise part of its original jurisdiction on rent recovery and even eviction of tenants in the urban areas. This clearly snubs the notion that only the High court has monopoly to entertain proceedings in respect of any subject matter touching on land or property in the urban area by virtue of **Section 39** of the Act. Concomitantly, by the extant position of the Magistrate Court in the Act, nothing debilitates the same ascription to other courts/tribunals which have various statutory jurisdictions to exercise in the urban area, insofar the proceedings on such matters do not circle round the declaration of title, statutory right of occupancy or determination of any question as to the persons entitled to compensation payable for improvements on land under the Act.

4.0. Statutory Jurisdiction of the Customary Court over Rights of Inheritance upon Intestacy

We shall now proceed to x-ray other relevant sections of extant laws relating, pertaining and/or concerning Customary Court's jurisdiction vis-á-vis customary inheritance determining the justiciability of the subject matter. The Customary Courts Law of Anambra State [21] vests jurisdiction in Customary Courts on *Causes and Matters relating to inheritance upon intestacy under customary law and grant of power or authority to any person to administer the estate of an intestate under customary law* (**authors' emphasis**)

[20] **FRN v. Nwosu** (2016) 7 KLR (pt.391) p. 3709 at p.3745 (Note. The inference is not to denigrate the unlimited jurisdiction of the High Court but to underscore the fact that other courts with concurrent jurisdiction with the High Court can calmly exercise same without being muffled by the recherché of "unlimited jurisdiction").
[21] Customary Courts of Anambra State (as amended) 2012 **s** 12 (2) Column 1

Section 15 (1) & (2) of the Customary Courts Law also provides that:

Customary law shall be deemed to be binding upon a person where that person-

(a) is an indigene of a place in which the customary law is in force;

(b) being in a place in which the customary law is in force, does an act in violation of the customary law;

(c) in case of claims under customary law of inheritance makes a claim in respect of the property or estate of a deceased person who prior to his death was an indigene of the place in which the customary law is in force; (authors' emphasis) or

(d) Agrees or is deemed to have to be bound by the customary law.

However, with the showcase of the extant jurisdiction of the Customary Court above, we shall also give definitions intermittently to each of these listed sections of the law in the context of the hypothetical scenario using the case of *Thankgod Sibeudu & Anor v. P.N Efobi Esq. & 4 ors,* the Ekwulobia Judicial Division of the High court of Anambra State. the Court refused to make an Order of Certiorari against a decision of a Customary Court and held *inter alia:*

> *In the light of the foregoing, I hold that customary court Umunze has jurisdiction under Section 15 of the Customary Courts Law to hear and determine the 5th Respondent's claim in Suit No. CCUM/22/2007, being a mere claim for the determination of the customary law of Umunze with respect to the sharing of the lands of the late Mr. Sibeudu situate at Umunze and nothing more. I hold therefore that the proceedings, ruling or decision of the customary court Umunze presided over by the 1st to 3rd Respondents delivered on 31st March 2008, were valid and competent and so cannot be quashed by an order of certiorari sought for by the applicants in this case.*

A careful perusal of the reasons given in the decision of the Court of Appeal in *Nzegwu v Omata* and that of the Otuocha High court of Justice which are *impari materia* with the hypothetical scenario espoused above is to the effect that because the property of the Late Chief Omengboji situate in Awokor, an urban area, the customary court of Awokor has no business to attend to the issue of inheritance of the parties under their native law and custom. Perhaps a perusal of this claim/relief would show whether they fit into the orbit of the prohibitive intendment of **Section 39(1)**.

In all the reliefs, it could be seen that what the customary court of Awokor is being asked is to determine the customary rights of the deceased heirs to his property in the context of the two stirpes. With all the respect, we cannot find any feature of the claim/reliefs in which the proceedings in the customary court in the customary court would infer the clear wordings of **Section 39** of legally capable to prevent or oust the jurisdiction of the customary court from entertaining the claim/relief as couched. This is even more apt when the rights of the heirs to inherit the intestate estate of Late Chief Omengboji under the Awokor native law and custom was not the issue or that the content is to the declaration of title or quest for statutory Right of occupancy, other than the place where his properties situate.

In *Okoroafor v. The Miscellaneous Offences Tribunal*,[22] the Supreme Court held *inter alia*:

> *Courts are not frightened by an ouster clause. They respect it but when ouster clause seeks to make it impossible for the courts to protect the common man, and make laws which cannot stand the test of reason or that is an affront to decency and intelligence, then a court should be careful not to lend its weight to a law that would make it enemy of the common man and not the last hope of the common man.*

[22] (1995) 4 NWLR (pt. 59) p. 67 at p. 70

The same dictum was expressed by the same court in the case of *Attorney-General of the Federation & Anor v. Sode & Anor,*[23] where it opined that it was not an aberration by:

> *Their stand is that once the statute ousts the jurisdiction of the court, it has a tone of finality and the court has no business to encircle round it. I respectfully disagree, if that means that the court cannot try to find out whether its competence has been taken away. Since the right of an individual is affected, the court seized of the matter ought to carefully examine all the circumstances with a view to discovering whether it fits into the orbit of the intendment of the statute. To close its eyes to the sinister tenor of the ouster statue would amount in my view to abrogation of its constitutional responsibility.*

It is almost always the demand on any court faced with such a precarious situation to call to fore the jurisprudence of its jurisdiction, in order to determine if the clause of the statue wrestled its jurisdiction.

5.0. Conclusion.

The Customary Court **s**hould not be carried away by the imperial of **Sections 3, 4, and 5 of the** Land Use Act to wash their hands clean of competence to adjudicate on the cultural inheritance of the people. The court whose jurisdictions being thrown away would not readily lend its hand to postulations that seek to emasculate and render its jurisdiction toothless in any circumstance.

After all, what is expected in the present instance is the competence of the Customary Court enabled by the statute establishing the Court. Again, the community reading of the relevant sections of the Land Use Act, shows that other proceedings which relate to land in an urban area but do not raise issues of title to land may be determined by other courts other than the High Court, such as the issue of recovery of rent the Magistrate Court.[24]

It therefore follows that the contention of the Defendants/Applicants that once any issue touches on the land in an urban area, only the High Court has the exclusive jurisdiction to circle round it, is too wide to represent the real intendment of the Land Use Act as set out in **Section 39(1).** With respect, we have shown that it is actually not the law using in addition **Section 42(1)** of the same Act. We assert without fear of equivocation that it is only the Land Use Act creation of right of occupancy that is the new tenure in land in Nigeria. The Land Use Act does not therefore set aside all existing laws or procedures relating or pertaining to other laws on its inception as clearly adumbrated in **Section 48.** Section 48 shall be read widely to include unwritten laws such as customary law.[25]

This is against the backdrop that the reliefs of the plaintiffs as couched both in the main hypothetical reliefs and ancillary prayers are not asking for any declaration of title to any land but for declaration of their legal rights as members of the two stripes (mkpukes) of Late Chief Omengboji under the Awokor native law and custom to his intestate estate as beneficiaries. See **Section 15(1) and (2)** of the customary courts law above.

In the old case of *Owonyin v. Omotosho,* [26] the Federal Supreme Court defined "native law and custom" as "a mirror of accepted usage". It does not require any legal authority to hold that it is the principal jurisdiction of the customary court to interpret the native customary law of the deceased occupier at the time of his death whether or not such property is the one under customary right of occupancy or statutory right of occupancy; though there is no doubt that the customary court enjoys

[23](1990) 21 NSCC (pt. 1)
[24]Section 42 of the Land Use Act
[25]Obasohan v. Omordion (2001) 7 KLR (pt. 128) p. 3015 at 3030
[26] (1961) All NLR 304

such concurrent jurisdiction with the High Court. The stance of law cannot be stretched to any imagination in order to portend enough reason to emasculate the jurisdiction from the customary court as set out in **15(2) (c) of the Customary Courts Law** in respect of inheritance of the deceased people in urban areas in accordance with the customary law prevailing at the time of the deceased owner/occupier under **Section 24.** The invocation of **Section 39 of the Land Use Act,** to limit such customary inquiry, hearing and determination to the High Court as part of its exclusive proceedings even where such is unanticipated in **Section 39(1) and (2)** is obviously outside the intendment of the Land Use Act. We say so because we do not see any corollary between what this court is being called to determine, which is, what the accepted usage of native law and custom is in Awokor with respect to the sharing/devolution of the intestate estate of Late Chief Omengboji under **Section 24 of the Land Use Act and Section 15(2)(c) of the Customary Courts Law** in relation to **Section 39(1) and (2) of the Land Use Act** in order to divest the customary court of its jurisdiction to entertain the substantive suit.

Expounding further on the jurisdiction of the customary court as summed up in the old case of **Cole v. Cole** [27] on the following decisions:

1. *When the court has before it a matter which is purely native, or all the circumstances to be taken into account are connected with native life, habit or custom, then undoubtedly native law and custom should apply.*
2. *Where on the other, the matter before the court contains elements foreign to native life, habit and custom, the court is not bound to observe native law and custom***.**

In all, it should be seem that the customary court is in no way denied its jurisdiction to hear and determine the substantive suit. We are equally strengthened from the community reading of the reproduced sections of the laws that banal allusion to jurisdiction as in the words of Pats-Achlonu JSC is allow the euphoria to "literally run riot or seek to obfuscate the real issue in controversy by resorting to inanities".[28]

We therefore have no difficulty in holding that the reliefs of the plaintiffs as couched in the hypothetical claim/reliefs are by *Sections 12 and 15 of the Customary Courts Law of Anambra State and Section 24(b) of the Land Use Act* within the confines of this court's jurisdiction. It is therefore our humble opinion that the Court of Appeal decision in. *Felicia Nwinya Nzegwu & ors v. Christopher Chukwuma Omata (supra)* was arrived at *per incuriam.*

6.0. Recommendation

It is our respectful view that the decision of the Court of Appeal in *Felicia Nwinya Nzegwu & Ors v. Christopher Chukwuma Omata (supra),* now the supposed *locus classicus* in this division of law be revisited with a view to giving holistic consideration to other sections of the Land Use Act not conjunctively considered. Such a review will no doubt give a different coloration to it earlier stand in this respect.

The appropriate Law in determining the right of inheritance shall be that of the deceased. Where both parties are not natives of the area of jurisdiction of the court or the transaction is not entered into in the area of jurisdiction of the court or one of the parties is not a native of the area of jurisdiction of the court and the parties agreed that their obligation shall be regulated by customary law applying to the

[27](1890) 1 NLR p. 15

[28]*See Associated discount House ltd v. Amalgamated Trustees Ltd (2006) 5 KLR (pt. 218) p. 1735 at 1747.*

party, the appropriate Customary Law shall be the customary law binding between the parties. As for all other civil causes or matters the appropriate customary law shall be the one prevailing in the area of jurisdiction of the court.

The Nigerian jurisprudence on customary matters should not be timorous in promoting and enforcing the culture of the people. A former Chief Justice of Malaysia, Rt. Hon. Dato Bin Chin in his speech of 13th September, 1999 at the opening ceremony of the 12th Commonwealth Law Conference held in Kuala Lumpur, Malaysia echoed the need for respect for the culture of a people vis-à-vis colonially transmitted standards when he said *inter alia* as follows:

> *In Malaysia, like other Commonwealth countries, we apply the English legal system, while the bulk of the laws are statutory, the Courts in Malaysia also apply the Common Law of England, we do not follow it blindly, because by law, we have also to consider the Malaysian circumstances, the culture, the customs and religions of the various races in Malaysia. So it is not surprising if, on a given subject, a Malaysian court may come to a different conclusion from an English Court.*

We agree that the application and enforcement of customs should comply with the test of repugnancy with regards to compliance with public policy and natural justice. However, taking a cue from the non-judicial view of Rt. Hon. Dato Bin Chin, we query the requirement of compliance with equity and good conscience in testing the validity of our customs. What we are quarrelling with is the third limb of requirement of compliance with equity and good conscience. If we may ask, whose conscience are we talking about? Should we be constrained to make our custom adaptable to the conscience of the English people who bequeathed the test of repugnancy to our customary law jurisprudence. *If the conscience of the members of the community that own the customs is not the yardstick, we can conclude that the repugnancy test is repugnant.*