

## **Analysis of Law of Intestate Succession under the Yoruba Customary Law of South West, Nigeria**

**Ademola A Taiwo**

*Senior Lecturers, JPL Department, School of Law and Security Studies  
Babcock University, Ilisan Remo, Ogun State, Nigeria  
Adewumi Eyitayo PhD, Senior Lecturer, Political Science Dept. VASSS  
Babcock University, Ilisan Remo, Ogun State; Babatunde Adebua PhD, Senior Lecturer  
Languages and Literary Studies, Babcock University, Ilisan Remo, Ogun State, Nigeria*

**Adekunbi Imosem**

*Senior Lecturers, JPL Department, School of Law and Security Studies  
Babcock University, Ilisan Remo, Ogun State, Nigeria  
Adewumi Eyitayo PhD, Senior Lecturer, Political Science Dept. VASSS  
Babcock University, Ilisan Remo, Ogun State; Babatunde Adebua PhD, Senior Lecturer  
Languages and Literary Studies, Babcock University, Ilisan Remo, Ogun State, Nigeria*

### **Abstract**

Succession appears to be an important aspect of every human being's life regardless of the nature of law, whether Statutory, Islamic or Customary law. However, the main objective of this study is to analyze the law of succession particularly law of intestate succession under the Yoruba Customary law of South West, Nigeria. It is also to explain the Customary Law of intestate succession in Nigeria from Yoruba cultural world views. That is, to discuss Customary law from perspective of the fact that it is a set of acceptable rule by all normal members of a society laying claim to it as defining their rights and laying down reasonable ways through which members ought to behave and conduct themselves in relation to one another, practices, things and ways of obtaining protection for one another in a define society or group. The article look at the concept of custom from Section 239 of the Evidence Act as "a rule which in a particular district has form a long usage, obtained the face of Law" No wonder, the Anambra Customary Court perceived the Customary law as a rule or body of rules regulating the rights and imposing correlative duties, been a rule fortified by established usage which applicable to any particular cause, matter, dispute, issue or question. The study recommended that the Customary Law Reform Commission should be established by the state and the Federal government respectively.

**Keywords:** Law, Intestate, Succession, Custom, Analysis, the Yoruba

### **1.0. Introduction**

Law is a set of rules accepted by all normal members of society as defining their rights and laying down reasonable ways in which persons ought to behave in relation to each other and things, including ways of obtaining protection for one's right<sup>1</sup>. A critical study of African Law as a whole, one will no

---

<sup>1</sup> Gluckman M, Essays on Loziland and Royal Property, Rhodesia Living Stone, Paper No 10, Northern Rhodesia, 1943 pp 1-3.

doubt be convinced that the idea of law existed in Nigeria before the advent of the British colonial Lords. Nevertheless, some colonial Scholars conceived that Africans have no what could be law because there was no structure like European courts, Police Stations, Prisons *etcetera*. Hitherto, Ogundare JCA (as he then was) posited that, Native Courts had been in existence before 1842 in Nigeria, these courts had both original and appellate jurisdictions. This was on ground for about 20 years before the ceding of Lagos and its Island. No wonder, Sir James Marshal supported this argument by paying glowing tributes to the efficiency of the native administration and testified to the quality and effectiveness of administration of justice being administered in the indigenous courts.

However, the customary law comprises of all these rules of conduct which regulates and regularizes the behaviour of individuals and communities which maintaining the equilibrium of society are necessary for its continuance as a corporate whole<sup>2</sup>. Hence, each unit whether a family, the clan or ethnic group has its own corpus of customary law which is directed towards maintaining the interests of the unit against outsiders. Generally speaking, there is no universal definition of customary law, different scholars and writers used different terms such as “native law and custom”; “local law” to refer to these class of laws. Customary law is a body of customs and traditions which regulate the various kinds of relationship between members of the community in their traditional settings. Concept of custom; custom was equally defined in section 291 of the Evidence Act<sup>3</sup> as “a rule which is a particular District has form a long usage, obtained the face of law”. In the same vein, Customary Court of Law of Anambra State<sup>4</sup> defined Customary law as, a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage which is appropriate and applicable to any particular cause, matter, dispute, issue or question.

The main issue to be treated in this article is the analysis of succession to the interstate estate of persons who are not married under the English and Islamic/Sharia laws, but lived under the customary law of the Yoruba of the South West, Nigeria.<sup>5</sup> That is, this study discusses the rules of succession under the Yoruba customary/ indigenous law of intestate succession.<sup>6</sup> The south west states, otherwise known as six Yoruba states in this study practice the patriarchal pattern of succession, that is, the Yoruba people’s pattern of inheritance is through patriarch lineage<sup>7</sup>.

Although, there are variations in customary practices among different ethnic groups despite the fact that, there are broad similarities among the various ethnic groups.<sup>8</sup> These states<sup>9</sup> consist of Egba, Oyo, Igbomina, Akoko, Ilaje and Ekiti kingdoms, where rights to land are transmitted through the male line only<sup>10</sup>.

---

<sup>2</sup> Oyewo & Olaoba, A Survey of African Law and Custom, ( Ibadan: Jator Publishers, 1999 ) p p 2-3.

<sup>3</sup> Evidence Act, 2004 Law of Federation of Nigeria(LFN)as amended in 2012.

<sup>4</sup> The Revised Edition Laws of Anambra State of Nigria, 1991, in Force on the 26<sup>th</sup> day of August, 1991; Cap 38, Parts 5 & 6, Customary Court Law of Anambra State. Nigeria. See, Ademola A Taiwo, Legal Pluralism and Law of Intestate Succession in South West, Nigeria, PhD Thesis, 2017, p287.

<sup>5</sup> Onokah Magaret, Family Law, (Ibadan: Spectrum Law Series, 1998) p 317

<sup>6</sup> Oyewo and Olaoba. Op cit p137

<sup>7</sup> Inheritance through the male line or lineage. The only acceptable requirement is paterlineage.

<sup>8</sup> Akin Ibidapo-Obe, Synthesis of African Law, (Concept Publications Limited , Lagos 2005) p 34

<sup>9</sup> Smith made the following remarkable statement that “finally in contrast, the patrilineal system of inheritance is quite distinct from the utimogeniture principle practiced amongst the Vere of Morki group in Northern Nigeria”

<sup>10</sup> Duncan M. Derrett, Studies in the Laws of Succession in Nigeria, (Published for the Nigeria Institute of Social Economic Research (NISER) by the Oxford University Press Ltd, London 1965) p141; See Oyewo and Olaoba Op cit p 145.

### **1.1. Right of Succession under Customary Law of Yoruba People**

Apart from the fact that customary law is very flexible and easily adaptable to changes, the applicable customary law must be an existing customary law of the people and not merely a custom of ancient times. This was stated by Buraimain C.J (as he then was) in *Owonyin v Omotosho*<sup>11</sup>, where the court held that,

Where a person subject to native law and custom, marries under the Marriage Act and dies intestate, the applicable law for the distribution of his estate is the Marriage Act.

It should be noted that, the time the case was instituted, reference was made to S36 of the old Marriage Act though the state law did not provide for such distribution. This provision of intestacy has now emerged in the new Marriage Act.<sup>12</sup> The various relevant statutes did not provide for the distribution of a deceased's estate under intestacy.

The customary law is only applicable to a deceased's estate where the person died intestate and did not contract his marriage under the marriage Act. On the other hand, where the deceased contracted a marriage under the marriage Act, the distribution of his estate becomes subject to local statutory law, and, where there are no such statute, the rules of English intestate law applies.

It is pertinent to note that distribution of the estate of a deceased person who first marries under customary law and later contracts a marriage under the Marriage Act was erroneously held to be subjected to statutory law of intestacy, if he dies intestate.<sup>13</sup> However, where a man who marries under the customary law, subsequently marries the same woman under Marriage Act, the marriage become monogamous. It is also important to add that such marriages are referred to as "double-decked marriages".<sup>14</sup>

It should be stressed that "Customary Law of succession straddles all the important and controlling units of the activities of the society. It concerns the consequences of marriage, the laws relating to land, the political organization and the creation of family unit".<sup>15</sup> The essence of inheritance of land under customary law was, no doubt, to preserve unborn in perpetuity the immovable asset which appears to be one of the basis for the homogeneity of the family.

This mode of distribution, in the view of the Yoruba people was to avoid the disintegration of the nuclear and the extended family.<sup>16</sup> The main idea behind this was to retain and keep jealously the land within the family and denies rights of inheritance to those who might leave the family eventually, that is, the female members. Although, 'female heirs' being regarded as temporary sojourners, are generally denied rights of inheritance to land, chieftaincy titles and some other positions of leadership within the family.

However, the courts have frowned against the denial of the right of female members of the family to inherit family property either of their fathers or husbands and held that it is repugnant to natural justice, equity and good conscience. Consequently, the rights of inheritance have considerably changed as a result of judicial intervention.<sup>17</sup> It should be added that, the courts have not found it all that easy and even the Supreme Court has not been consistent on the issue.<sup>18</sup>

---

<sup>11</sup> *Owonyin v Omotosho* (1961) ALL WLR 304 @309; Also, *Salubi v Nwariaku* (1997) 5 NWLR pt 505@442

<sup>12</sup> See Cap 218 of the 1990 LFN

<sup>13</sup> This was decision in *Okon v Administrator-General* (1992) 6 NWLR 248 @ 473; See *Animasahun and Oyeneye*, Law of Succession, Wills & Probate in Nigeria, (MIJ Professional publishers limited 2006) p 10

<sup>14</sup> See generally Hon. Justice S.Ade. Falade *Marriage, Divorces and inheritance in Nigeria*, (Igalalaye Printing 1999) p. 110

<sup>15</sup> Per Hon. Justice Kabiri-whyte of the Supreme court of Nigeria made this statement in the paper presented on "Customary Law of Succession and the Wills Law" (at the National Judicial Institute (NJI) at Sheraton Hotel and Towers held at Abuja on 3<sup>rd</sup> November, 1992) p 116.

<sup>16</sup> *ibid.* p 117

<sup>17</sup> *ibid.* 118

<sup>18</sup> *Oyewo A T, African Customary Law in Comparative Milieu and Related Topics*, (Jator Publishing Company, Ibadan 2003) p62 ; However, this aspect of the court's decision will be discussed extensively in the latter part of this thesis.

## **1.2. The Essential Features of Customary Law**

The word features (essential ingredients) in this perspective connote the distinguish quality or trait of customary law. Simply put, it means in general and in ‘lazy’ parlance the notable and prominent parts of customary law. That is, the highlights or basic features of customary law<sup>19</sup>. Hence, it is in the light of these meanings that the features of the customary law will be examined.

Customary law generally, means, a law derived from custom or usage of a given community or society. It is trite to state, that, customary law emerges from the traditional usage or practice of people in a given community, which by common adoption and acquaintance on their part and by long and varying habit, has acquired to some extent, element of compulsion and force of law with reference to the community<sup>20</sup>.

Custom is a rule of conduct, obligatory on those within its scope, established by long usage. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law.<sup>21</sup>

### **1.2.1. Custom and the Law**

Customary law must be sourced from custom of the people. This is one of the key features of customary law. There is a difference between the two concepts. The word, ‘custom’ may only reflect the common usage and practice of the people in a particular matter without necessarily imbuing it with the force of law<sup>22</sup>. However, a custom may exist without the element of coercion.<sup>23</sup>

Customary law was the basic law of the people in the South West before the advent of colonial Administration. It is not just an exception to the “law proper” within the British conception<sup>24</sup> ‘Law’ as a concept embraces all the elements of force, sanction and coercion flowing from the authority and the society under the British legal system.<sup>25</sup>. The bases of application of “custom” as law in England are stated as follows;

- i. The custom must not conflict with any fundamental principle of the common law;
- ii. The custom must have existed from time immemorial, which by a legal convention is set at 1189;
- iii. It must have been continuously observed and peacefully enjoyed,
- iv. It must be certain,
- v. It must not conflict with other established customs,
- vi. It must be reasonable,

It is important to state that in Nigeria customary law is about the equivalent of the British Common Law which was built up by judicial decisions<sup>26</sup>.

## **1.3 Elements of Yoruba Customary Law**

Among the Yoruba community the criteria for customary law have been stated as follows:

### **1.3.1 Acceptance**

One of the features of customary law is its acceptance as an obligatory rule by the community. It is “a mirror of accepted usage”<sup>27</sup> ‘Accepted usage’ refers to repetitive acts and differs ordinarily from unusual behaviour in the sense that, the latter is the law which arises from such repetition acceptable by

<sup>19</sup> Niki Tobi op cit, p103; See Obilade, op cit 84.

<sup>20</sup> Black’s Law Dictionary, (Ninth edition, West 2004 )p 443

<sup>21</sup> Osborn’s Concise Law Dictionary (Eight Edition, Sweet & Maxwell 1993) 105

<sup>22</sup> Niki Tobi op cit p105.

<sup>23</sup> ibid

<sup>24</sup> ibid

<sup>25</sup> ibid

<sup>26</sup> It must satisfy the provisions of section 14 of the Evidence Act (as amended in 2011).

<sup>27</sup> Owonyin v Omotosho op cit

the local community in which the customary law operates. Hence, a customary law which is harsh cannot endure.<sup>28</sup>

### **1.3.2. Existence**

There must be evidence that customary law is in existence, one feature of customary law is that it must be in existence at the material or relevant time. If a customary law is moribund or dead, it is no more customary law. This feature connotes that, where a thing or substance does not exist anywhere any more, then it cannot attract the conscious or subconscious mind of man<sup>29</sup>.

Speed, Ag C.J emphasized that it is one of the characteristics of customary law that it must be in existence at the material time. The recognition of this characteristic of existence was stated in the celebrated case of *Lewis v Bankole*<sup>30</sup> where the learned judge said that “the native law and custom enforceable must be in existence and not that of bygone days”.

### **1.4. Bases of Distribution of Estate among Yorubas**

The line of descent, governing inheritance of the people in Yoruba land is paternal. This is not to say that the practice is universal. Clearly, the mode of distribution of the deceased’s estate under customary law of the Yoruba varies depending on whether the deposition is by a man or a woman<sup>31</sup>. Where a woman dies, her husband inherits all her assets. However, immovable property which she inherited from her family will at her death automatically reverts to her maiden family. Where the deceased leaves no children, the estate devolves on his brothers and other blood relations. Women cannot inherit her husband property. This fact was buttressed by the court in *Suberu v Sumonu*<sup>32</sup>, where the court upheld the Yoruba custom that a wife cannot inherit her husband’s asset. Since she herself is treated like a chattel, to be inherited by a relation of her deceased husband.

Generally speaking, the Yoruba customary law of succession stipulates that upon the death intestate of the founder of a particular family, his death creates a family property and the eldest son, Dawodu, becomes the head of the family<sup>33</sup>. He is the head and manages the property for himself and the entire members of the father’s family<sup>34</sup>.

It is the responsibility of the Dawodu as head of the family in Yoruba land upon assumption of office to decide which mode of distribution will apply to the distribution of the intestate’s estate of the deceased. The methods of distribution among the people of south west are “Ori- ojori” and “Idi-igi” systems as stated in *Olowu v Olowu*<sup>35</sup>. Ori-ojori (per stirpes) simply means a system of distribution of a demised estate whereby an intestate estate is shared among all the children of the deceased equally regardless of male or female. While, Idi-igi (per capital) is a system of distribution of a deceased estate whereby the estate is shared according to the number of wives (iyawo) for the benefit of the children of each wife. Any of the wives without an issue will not benefit from the deceased husband’s estate. It is interesting to note that both distributions formula under Yoruba native land and customary were upheld in *Damonle v Dawodu*, where the court accepted that Ori ojori is more modern than the Idi-igi but emphasized further that Ori ojori is an offshoot of Idi igi system.

---

<sup>28</sup> .See *Eleke v Government of Nigeria* (1931) AC 662 @67; Also, *US for Use of E and R Construction Co. Inco V Curry H. James Construction Co.* DC Tenn 390 F, Sup 1190, 1290.

<sup>29</sup> Putting it in a more religious or pious language, man who was created by God was created by God cannot take cognizance of anything which was not created by the Almighty God, of course such a thing does not exist at all, God is the Greater of all things.

<sup>30</sup> *Lewis v Bankole* (1908) INLR 81

<sup>31</sup> *Animasahun v Oyeneye* op cit p13-14

<sup>32</sup> *Suberu v Sumonu* (1951)2 FSC 33; See also *Akinnubi v Akinnubi* (1997)2 NWLR pt 486@144.

<sup>33</sup> See *Osondu Ajuzie, Modern Family Law & Practice, With full Complement on the Matrimonial Causes Rules 1983* (Printable Publishing Company, Lagos 2012).

<sup>34</sup> This custom was emphasized in *Lewis V Bankole* (supra).

<sup>35</sup> *Olowu V Olowu* (2002) 46 WRN 102

However, the learned trial judge laid down the following principles of law in respect of the Yoruba rule of customary law of intestate succession.

- I. That Idi-igi method of distribution is an integral part of the Yoruba native law and custom;
- II. Idi-igi is still in force, and is the universal method of distribution except where there is a dispute among the descendants of the intestate as to the proportion into which the estate should be divided;
- III. That where there is such a dispute the head of the family is empowered to, and should decide whether Ori-ojori ought, in the particular case, be adopted instead of Idi-igi
- IV. That Ori-ojori is a relatively modern method of distribution adopted when expedient to avoid litigation.
- V. That Idi-igi method of distribution is not repugnant to natural justice, equity and good conscience.

There is the need to emphasize that under the Yoruba customary law of inheritance both male and female children share equally in the distribution of the intestate's estate<sup>36</sup>. Though, the uncles and brothers usually take care of the portion of the property on behalf of the female heirs and they collect the accrued proceeds therein as arranged.

This principle was corroborated in *Sule v Ajisegiri*<sup>37</sup> where the plaintiffs requested for partition and sale in respect of six properties alleged to form the undistributed portion of their grandfather's estate. The plaintiffs in this case were children of the same mother who they claimed were entitled to an equal share of the properties with the defendant. The defendant claim was that being a male heir he was entitled to a larger share than the plaintiffs' mother. The court held, inter alier, that, the partition must be equally shared between those entitled to it regardless of sex<sup>38</sup>.

Another important fact about the Yoruba rule of intestate succession is that the widows of the deceased are not entitled to share in the distribution of the intestate's real and personal property. However, the Administration of Estate Law allows the widows to inherit part of their late husband's property. This advantage was limited only to intestates who married under the Marriage Act.

In addition, "upon the death of the eldest surviving son, the Dawodu, the next eldest surviving son of the founder of the family, succeeds to the family leadership. It has been held that a woman cannot succeed as the head of the family. For instance, in *Adeniji v Adeniyi*<sup>39</sup> where one Abudu Karimu Adeniji, a Yoruba man died intestate and was survived by wives and children, the eldest surviving child was a daughter. There arose a dispute among the family members as to whether the distribution of the deceased's estate under Yoruba customary law should be according to the Ori-ojori method rather than the usual Idi-igi method. The questions as put before the court were:

- I. Who is the head of the family of the deceased?
- II. What is the proper method of distribution of the estate of the deceased in accordance with native law and custom in view of the dispute in the family over the sharing of the estate?

The trial court held that since the eldest surviving child was a daughter, she could not assume the position of the head of the family, and declared the next eldest surviving male child as the head of the family.

---

<sup>36</sup> Onokah acknowledged that the rule of Yoruba customary law recognizes equality of the children in succession to the intestate estate of their father. This was supported by Kasumu A and Salacuse J.W in their work titled ' Intestate Succession in Nigeria 'published by NIJ publication, Lagos(1964) p 50. See also Salacuse A. "Birth, Death Marriage Act; Some Problems in Conflict of law 53.

<sup>37</sup> *Sule v Ajisegiri* (1937) 13NLR 146)

<sup>38</sup> See provisions of 1999 Constitution of Federal Republic of Nigeria Cap 4, section 42(2 (as amended in 2011)

<sup>39</sup> *Adeniji v Adeniyi* (1972)1 ALL NLR (pt 1) 298

Osborn C.J (as he then was)<sup>40</sup> pointed out that, according to Yoruba custom the other sons of the founder of the family take the leadership as occasion warrants. He emphasized further that “this was a well established rule both in Lagos and in other parts of Yorubaland”.

The family has been judicially interpreted to mean the nuclear family. The interests of all the children who became owners of the property under customary law vest in possession at the time of death of the deceased and not when a decision has been made on it by the court. As joint owners of the property they each have a right to ingress and egress and to attend meetings therein<sup>41</sup>.

### **1.5. Modes of Distribution of Intestate Estate in Yorubaland**

There are two distinct mode of distribution of intestate estate under the rule of Yoruba customary law, that is, Idi-igi (per stripes) and Ori-ojori (per capital) mentioned earlier. It is trite to note, that, where the deceased married one wife and had all his children through the same woman, the distribution of his estate among the heirs is in equal portions. But where the intestate had children by different women or wives, the question arises as to which mode of distribution should be adopted in this situation? This question is pertinent because the wives definitely may have had unequal number of children for their late husband.

Usually the deceased’s estate may be distributed among the children under the two judicially acceptable rules of distribution among the Yoruba people of the south west either by the Idi-igi formula or by Ori-ojori formula.<sup>42</sup> Obilade, in a critical examination of the two modes of distribution in the south west described the two existing modus governing the distribution of the property of a deceased person who married more than one wife concluded that Idi-igi mode is preferred.<sup>43</sup> However, where two parties lay claim to the existence of two relevant customs, one of the parties may prove the existence of the other custom. Where both customs are valid at law, the court has to decide which of the two is most suitable to the issues before the court.<sup>44</sup>

### **1.6. Validity of Customary Law Rules**

To be regarded as valid every rule of customary law must fulfilled the following conditions

- a) It is not repugnant to natural justice, equity and good conscience;
- b) It is not incompatible with any law for the time being in force;
- c) It is not contrary to public policy<sup>45</sup>

---

<sup>40</sup> See *Lewis v Bankole* (supra); Kasumu A and Salacuse JW, *Nigeriann Family Law*, (NIJ, Lagos 1966) 292; And that, creation of family property is automatic upon the death of intestate. The authors meant family to be ‘the immediate family, that is, the children of deceased. This fact was buttressed by superior court- Supreme Court in *Omo-Ogunkoya v Omo- Ogunkoya and Another*, (unreported Suit No LD/444/84 of 16/1/87), Lagos High Court, stated that the children had not acted ultra vires when they changed the locks to their deceased fathers house of which the customary law wife was still in possession and thereby prevented her from gaining further access to it . As joint owners of the property they each have right to ingress and egress and also to attend meetings therein. Also see *Abeje v Ogundairo* (1967) LLR9; See *Akinwale v Thomas* Suit No M/178/81 of 14/7/88 ( unreported Lagos High Court).

<sup>41</sup> This rule was reinstated by Osborn C.J (as he then was) in *Lewis V Bankole* (supra)

<sup>42</sup> See *Kasumu A & Salakusi CW* (supra) 346

<sup>43</sup> Obilade AO, *Op cit* pp 86-7. Also, it is important to note the conclusion of Onokah that equal distribution of estate between male and female heirs under Yoruba rules of intestate estate made divorce rampant among the Yoruba women than the Ibo land whose customary law is rigid and against women inheritance. Exception to the discrimination against women right of inheritance in Ibo land was a well thought decision of the apex court in *Mojekwu v Mojekwu* (1997)7 NWLR (pt 572) 283.

<sup>44</sup> *Ibid*

<sup>45</sup> See the High Court Law of Lagos State S26 (1) of 1973, Cap 521 and Evidence Law of Lagos State S14 (3) of 1973 Cap 39 Laws of Lagos State; See also decision in *Adeniyi v Adeniyi* (1973) 1 All NLR 208 as the Supreme Court follow the interpretation and the decision in *Daodu v Danmole* (supra).

## **1.7. Nature of Property**

The way and manner of distribution of deceased's estate depends largely on whether the property is family property or a self acquired property. These two ways of owning property will be discussed in this segment of this study for the purpose of clarity.

### **1.7.1. Succession to Family Immobile Property**

It is observed that the concept of family property among the Yorubas of the south west Nigeria is not too dissimilar to the principle of settled land in England. The ultimate idea in both concepts is to ensure that the land remains in the family. However, family property is an asset that devolves on the descendants of a deceased and is regarded as property to be used for the benefit of the whole family and belongs to all the members of the family as one indivisible entity. As a result the individual member of the family cannot therefore dispose of it by will or otherwise<sup>46</sup>.

However, one key area to be noted is when the founder of a family dies the eldest surviving son succeeds as head of the family. He is in control of his father's estate/compound. The eldest son who succeeds to the headship of the family is called Dawodu (whether male or female, in some part of Ibadanland and Lagos) but every other place in Yorubaland is the male heir. The court equally held in *Abibatu Folalami v Flora Cole*<sup>47</sup>, that if the eldest child is a female and happens to be a strong and influential person and there are no other male member of the family or if they exist but are infants to assert a claim to the leadership of the family, a female child could head the family.

The administration of the family estate is usually under the control of the head of the family<sup>48</sup>. The Dawodu is a trustee and custodian for all the beneficiaries of the deceased estate including his wives, children and his siblings. No member of the family have individual right to the estate but all members have collective and equal rights. The members have no right to dispose or alienate the family estate. This was corroborated by the court in *Kadir Adigun v Fagbola*<sup>49</sup>, where the court held that a member of a family cannot alienate part of the family property without prior consent of the family head and other principal members of the family. The court stated further, that, it is only when the family property is partitioned with the consent of all the members of the family that a right of ownership can be claimed.<sup>50</sup> Any claim of single/individual ownership of the family property must be backed up by proof of partition of the property; hence the burden of proof of such claim is on the shoulder of the person who asserts to be entitled to the property.

However, with the knowledge of the Dawodu, each member of the family may be given a portion of family land for use, for a long period. This does not confer a right of permanent ownership on the allottee.<sup>51</sup> But, the right of user/ allottee is limited to his life time. Nevertheless, the heirs of allottees acquire their own life interest in the family land by virtue of the fact that they are born into the family<sup>52</sup>. The court in *Sogunro-Davies v Sogunro and ors*, held that, the children born into a family 'inherit as members of the family.' In this respect, any member of the family, have the right to go to court to seek protection of the family land for the use of all of them.

---

<sup>46</sup> Oyewo A.T. Handbook on African Laws of Marriage, Inheritance and Succession (Jator Publishing, Jbadan 1999)

<sup>47</sup> *Abibatu Folalami v Flora Cole* (1990) All NLR 310

<sup>48</sup> *Ibid*; See Oyewo & Olaoba (supra) 145.

<sup>49</sup> *Kediri Adigun v Fable* (1932) 11 NLR 110

<sup>50</sup> *Animasahun and Oyeneye* (supra) 15

<sup>51</sup> *Alao & Another v Ajani & Another* quoted in *Shelle v Asajoh* (1957) 2 FSC 65; Oyewo AT, African Customary Law in Comparative Milieu and Related Topics, ( Jator Publishing Co Ibadan 2003) 73.

<sup>52</sup> *Johnson v Macauley* (1961) ALL NLR 773, *Sogunro Davies v Sogunro & Ors* (1829) 8 NLR79

### **1.7.2. Self-Acquired/Movable Property**

Movable or self-acquired property can be described as the property of a person acquired during his life time through a conveyance or certificate of occupancy or any other formal means of allotment. This could be done through statutory or customary mode of acquisition. Self-acquired property excludes the family land being used during the life time of an allottee. It is purely self-acquired.

Self-acquired property can become family property after the demise of the first owner. The descendant of the first owner of self-acquired property owned it collectively as family property. The property acquired in this context is restricted to the heirs of the owner. The self-acquired and movable property is not preserved for the family but is distributed among the deceased's children after the death of the father. The movable property of the deceased devolves on the children through any of the methods as discussed earlier. These modes are the basic systems of inheritance prevalence among Yorubas of south west.

### **1.7.3 Succession to Titles**

Apart from the afore-discussed succession to immovable and mobile property, another aspect of succession that the Yorubas usually lay emphasis on is inheritance to titles. Children of the deceased title holders in Yoruba-land are equally entitled to these chieftaincy titles. The titles inheritance is as important as inheritance to chattel. For instance, Obaship (King) position and other titles are on hereditary in Yoruba-land. It is important to note that, the inheritance of title is more controversial than other forms of inheritance. However, the court is yet to settle which of the two modes is the best applicable to determine succession to titles. The head of the family (Dawodu) also plays a prominent role in determining which of the formula to be applied.<sup>53</sup> These two formula as a matter of priority need to be harmonized together and the legislature in the South West and the National Assembly in Nigeria should pass a bill into law that will make it a reality.

### **1.8. Conclusion and Recommendations**

However, over time, the custom begins to change in phase to social needs of the society and the state as a whole with land now speedily acquiring a commercial status, which has instigated so much demand in contemporary society. Hence, the customary law today recognizes absolute transfer of title to land to individuals<sup>54</sup> and also to non-blood relations. Whereas, any transaction involving use of unit of land was considered to be aberration and outside the purview of African Customary law which encompassed Yoruba Customary law. This development has changed the hitherto custom and tradition in most of African countries and Nigeria is not exempted particularly the South Western Nigeria, where land before now is not alienable or divisible. It is forbidding to alienate or sell family land, it is there for benefit of all and sundry even unborn generation. Most of the land established by the first founder cannot be transferred for any reason whatsoever then. It must be added that in many of the African societies where women as wives and female children are denied inheritance, the tide has changed drastically as a result of several court decisions in favour of women and female inheritance, where it was clearly stated that men and women are born free and such act of denial by any custom and tradition is not only barbaric, inhuman to man, it is contrary to natural justice, equity and repugnant<sup>55</sup>. Furthermore, in a situation where the courts have at various times delivered judgement in error in favour of Statutory Marriage as superior to legal or valid Customary Marriages; the wrong and erroneous believe that Statutory marriage celebrated during the pendency/ subsistence of valid customary marriage was valid and sustainable has been found to be misleading, unacceptable and

---

<sup>53</sup> The responsibility of Dawodu was stated in *Adeniji v. Adeniji* (supra) where the court held that it is the responsibility of Dawodu as family head to determine which of the two modes to be applied or suitable in the distribution of deceased estate (that is, family property).

<sup>54</sup> See *Amadu Tijani v Secretary Southern Nigeria* (1921)2 AC 399.

<sup>55</sup> See particularly decisions of apex court in the following cases; (i) *Mojekwu v Mojekwu* (2004) 4 SC (pt. 11); (ii) *Ukeje v Ukeje* (2001) 27 WRN 14.

invalid. The current decisions of superior court of record have authoritatively declared the subsequent Statutory Marriage during the subsistence of a valid Customary Marriage null and void and of no affect<sup>56</sup>

This development should be transformed into a Customary Law Reform in Nigeria as a whole among the major ethnic groups as experimented with success in South Africa, Ethiopia, Ghana and Tanzania<sup>57</sup>

Furthermore, a Law Reform Commission should be set up to fast tract the above recommendation and pass the bill to be called Customary Law Act. The South African National Assembly passed similar bill into Law in 1996 called Customary Law Act. The Bill was sponsored by the Central Government.

In addition, the courts in Nigeria, at various levels should be given pat at back and the judiciary should be encouraged to continue to make relentless efforts to maintain the new tide of elevating our traditions, customs, and values within the legal space to disabuse peoples' mind against the wrong conception in the name of custom and tradition that promote disinheritance widows and female children from their father's estate.

The three tiers of governments should embark on enlightenment programme to correct the notion that our customary law is no law or it is subservient to Statutory Law. Customary law is our own law and has been with us from time immemorial.

---

<sup>56</sup> See the decision of the President of Customary Court of Appeal sitting in Akure, capital of Ondo State in *Omolade Adela v Sunday Adela*, Suit No AKCC/ 309/ 2012; Appeal No CCA/ 5A/ 2014

<sup>57</sup> Ademola A Taiwo, *Legal Pluralism and Law of Intestate Succession in South West, Nigeria*, PhD thesis, submitted to the School of Post Graduate Studies, ( Ilisan Remo: Babcock University, Ogun State, Nigeria, 2017) p 169. See Chapter IV of the same Thesis titled Development of Law of Succession pages 67- 85.