

THE PRINCIPAL HOUSE IN BENIN CUSTOMARY LAW

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Introduction

The concept of the principal house or '*igiogbe*' is of utmost importance in Benin customary law. This is due to the incidents attached to it under the Customary Law of inheritance, the most important being that the principal house is always inherited by the eldest surviving son of a deceased person absolutely notwithstanding any instruction, disposition in a will or family arrangement to the contrary.^{1[1]} It must be pointed out at the outset that although the system of primogeniture governs inheritance in Benin customary law,^{2[2]} two variants of this system are recognised. The first, which was judicially noticed obiter in *Ogiamien v Ogiamien*^{3[3]} provides that the eldest son of a deceased hereditary title holder succeeds to all the property of his father to the exclusion of other children^{4[4]}. The second variant provides that the eldest son inherits only the principal house absolutely.^{5[5]} Most of the litigation on this issue turns directly or indirectly on the question of what amounts to the principal house.^{6[6]}

It can therefore be seen why the question of what constitutes the principal house is all important in Benin customary law. The contention over its inheritance has been described as sometimes a "life and death struggle"^{7[7]} among the protagonists.

In this contribution, we shall examine the various facets of this concept, a concept which has contributed immensely to customary Law jurisprudence in Nigeria.

1. Definitions

The *igiogbe* has been variously defined in judicial pronouncements and writings. In *Arase v Arase*,^{8[8]} Sowemimo, JSC said that "the Principal house in which the deceased lived in his life time and died is called the '*igiogbe*'"^{9[9]}.

In *Ugbo v Asemota*^{10[10]}, it was described as "the house in which the deceased lived before his death". The Benin traditional Council described it as "the house in which the deceased lived and died and usually, though not always where he was buried".^{11[11]} '*Igiogbe*' has also been described as "where the *ukhure* is"^{12[12]} and "the family seat".^{13[13]} The *igiogbe* is therefore the residence of the deceased in his lifetime. It is not necessary that he died there or was buried there. Of course the house must be his before it qualifies to be his '*igiogbe*'.

2. Historical/Religious Basis

^{1[1]} *Ugbo v Asemota*, unreported, Suit No. B/49/70 of 30th March 1974 High Court, Benin, *Arase v Arase* [1981] 5 SC 33, *Agidigbi v Agidigbi* [1996] 6 NWLR (pt 454) 300, (1996) 38 LRCN 907, *Olowu v Olowu* [1985] 3 NWLR 372.

^{2[2]} Egharevba, Jacob U, *Benin Law and Custom* 3rd edition, 1949, p. 36

^{3[3]} [1967] NMLR 245

^{4[4]} In *Lawal Osula v Lawal Osula* [1995] 9 NWLR 259 the Supreme Court, with respect, purported to follow this customary law, while actually applying the second variant applicable to ordinary persons or non-hereditary title holders.

^{5[5]} See n. 1 supra.

^{6[6]} See for example *Agidigbi v Agidigbi* supra n.1 and *Imade v Otabor* (1998) 56/57 LRCN 3116.

^{7[7]} Eghobamien, S I, "Idehen v Idehen: Why the Supreme Court Must Review the Decision" *The Guardian*, Tuesday, July 14, and Tuesday July 21 1998, 14 and 43 respectively.

^{8[8]} (1981) 5 SC 33 at 63

^{9[9]} See also *Lawal Osula v Lawal Osula* (1995) 9 NWLR 259

^{10[10]} Unreported Suit No. B/49/70 of 30th March, 1974, High Court, Benin City.

^{11[11]} *A Handbook on some Benin Custom and Usages* (Benin Traditional Council, 1996), 13.

^{12[12]} Eghobamien Supra, n.7

^{13[13]} *Idehen v Idehen* (1991) 6 NWLR 198, 382.

The 'igiogbe' concept is based on ancestor worship. In Benin, the medium of ancestor worship is a wooden staff known as 'ukhure' (hereinafter, the ancestor staff). This is a sort of staff of office which is taken by the eldest son on the conclusion of his deceased father's burial ceremonies^{14[14]}. All the children of a deceased man seeking to communicate with his spirit would go to the eldest son or the head of family in custody of the ancestor staff to do so. Such communication usually involves sacrifices to the spirit of the departed ancestor. The house where the ancestor staff is kept is known as the family seat, the principal house or "igiogbe"^{15[15]}.

There are three types of ancestor staff.^{16[16]}

- (i) That held by the eldest male on behalf of the entire family.
- (ii) That which passes on to the eldest son on the death of a man who was himself an eldest son.
- (iii) That which is taken by the eldest son of a deceased person in the absence of the second type above (that is, the deceased man was not an eldest son or head of family and so is not in custody of any staff).

The relevant ancestor staffs for the purpose of inheritance are the last two types. The principal house, 'igiogbe', or family seat contemplated by the inheritance rules is the house where any of the last two types of ancestor staff is kept, and such a house is usually, but not always the abode of the custodian of the ancestor staff. The inheritance rules do not contemplate the first type identified above because that type of ancestor staff is not personal, but held on behalf of a family or lineage. It is therefore possible for an individual to be in custody of more than one type of staff, namely the first type, if he is the eldest male member of the larger family or lineage, and another, (the second or third type) if he is the eldest male child of his deceased father.

It is necessary to point out that in modern times many individuals of Benin descent now subscribe to other religions – chiefly Christianity and Islam - which do not recognise ancestor worship. The keeping of the ancestor staff and the attendant ancestor worship is therefore no longer practised by a large number of individuals. But the customary law concerning the inheritance of the principal house is still recognised, notwithstanding the religion of the parties. The "Ukhure" or ancestor staff component of the principal house is therefore now largely optional or symbolic, and for those whose religious beliefs are incompatible with ancestor worship, a house is still regarded as a principal house even if no ancestor staff is formally installed therein.^{17[17]}

3. Can More than one House Constitute the Principal House?

Most authorities seem to assume that one house only can be the principal house or 'igiogbe'^{18[18]}. But in *Idehen v Idehen*^{19[19]} two houses lying some kilometers apart from

^{14[14]} S.I. Eghobamien Supra, n.7

^{15[15]} See Footnotes 8 - 13 Supra.

^{16[16]} Osarumwense, N, "Re Idehen V Idehen revisited" *Benin Studies Newsletter* Vol. 3 No.2, pg. 3.

^{17[17]} This point should not be taken for granted. If the deceased was, for example, a Christian who did not believe in ancestor worship, then it may be easier to sustain the conclusion above. But if the deceased in his lifetime believed in ancestor worship, and perhaps had an ancestor staff in memory of his own father or other ancestor, it may be difficult for his eldest son to, as it were, approbate and reprobate at the same time i.e insist that he is entitled to inherit the principal house, but refuse to fulfill the traditional conditions precedent to inheriting the Igiogbe, which of necessity involve the installation of the 'ukhure' during the final burial rites. The second burial ceremony terminates with the establishment of the ancestral altar where the ancestor staff is kept. In *Ovenseri v Osagiede* (1998) 11 NWLR (pt. 572) 1, (1998) 61 LRCN 4584 the first defendant who claimed to be the eldest son of the deceased refused to perform the second burial ceremonies on the ground that as a Christian of Jehovah Witness sect, he found the belief and the practice of the second burial paganistic and repulsive to his faith. The Supreme Court upheld the decision of the trial judge that until the performance of the second burial ceremonies the estate (including the principal house) of a deceased Benin man cannot vest on any of the children and such children do not have the locus standi to sue on behalf of their father's estate.

Further, even if the deceased was a Christian, his heritage may stamp him with an indelible mark because, the Nigerian Supreme Court prefers the "descent test" rather than the "manner of life test" in deciding whether customary law or any other type of law should govern the affairs of any Nigerian on his death. See O. Aigbovo "Towards a More Effective Application of the Internal Conflict Rules in Nigeria" (1997/2000) 5 *University of Benin Law Journal*, 130 .

^{18[18]} *Ugbo v Asemota* Supra, n. 1, *Arase v Arase* [1981] 5 SC 33.

^{19[19]} (1991) 6 NWLR. (pt. 198) 382.

each other were held to be the '*igiogbe*' of the deceased. This decision has been severely criticised.^{20[20]}

However in the later case of *Agidigbi v Agidigbi*^{21[21]} the Supreme Court upheld the decision of the two lower courts which refused to declare the entire compound consisting of three separate houses in Benin City as '*igiogbe*'. It is submitted that these decisions are not contradictory, although on the surface they appear to be so. The latter of the two criticisms referred to above assumed that it was the Supreme Court which on its own decided to constitute the two properties in *Idehen's* case as the '*igiogbe*' of the deceased. But as even that writer conceded, the Supreme Court only upheld the finding of the trial court that the plaintiff and defendants "agreed" that their late father lived in the two houses - a fact which led the trial judge to conclude (rightly, it is submitted) that the two houses are the deceased's *igiogbe*.^{22[22]} What is more, at the Court of Appeal and the Supreme Court the question whether more than one house can constitute a deceased's *igiogbe* was not directly in issue between the parties since they had agreed on that point. It is therefore arguable whether it can be taken that part of the ratio of *Idehen's* case is that if a Benin man had two residences whether some distance apart or in the same compound, in his lifetime, then all the houses in both cases constitute his '*igiogbe*'. In *Oke v Oke*^{23[23]} which the Supreme Court relied upon in *Idehen's* case, it is true that it was decided that all the buildings in a compound should pass to the eldest son of the deceased, since the deceased could not deprive his eldest son of this right by Will. But the facts of *Oke's* case are not on all fours with *Idehen's* case:

- (i) In *Oke's* case, the land on which the houses were built did not belong to the deceased but to his first wife, the mother of the first plaintiff, the eldest surviving son.
- (ii) The deceased man purportedly gave the compound to a younger son (the first defendant) by another wife.
- (iii) The deceased's first wife was of the Itsekiri tribe and the piece of land on which she permitted her husband build the houses was given to her by her father's family.
- (iv) The first defendant's mother (the younger wife of the deceased) was of the same Urhobo tribe as the deceased.

In the light of these facts, it is easy to understand the decision in *Oke's* case. It is further submitted that even if the first defendant was the eldest son of the deceased, it would have been difficult, if not unconscionable, for the court to hold that the compound should go to him seeing that the land on which the houses were built belonged to the other wife and not the deceased or first defendant's mother.^{24[24]}

From the authorities on the point the question whether or not more than one house constitutes the '*igiogbe*' of a deceased is a question of fact to be determined in the light of the available evidence.^{25[25]} If the deceased or his children decide to treat more than one house as '*igiogbe*' (as happened in *Idehen's* case) a court would have no justification whatsoever to insist that only one of the houses should be the '*igiogbe*'. To

^{20[20]} See Nwabueze, B O, "Power of testamentary Disposition in Bendel and the Western States of Nigeria" (1992) *The Journal of Nigerian Law* 121, and Eghobamien, S I, "Idehen V Idehen : Why the Supreme Court Must Review the Decision" *The Guardian*, Tuesday, July 14, 1998 and Tuesday, July 21. The latter is more to be point of this contribution.

^{21[21]} [1996] 6 NWLR (pt 454) 300, (1996) 38 LRCN 907.

^{22[22]} The main issue which pre-occupied the parties in this case was the interpretation of section 3 (1) of the Wills Law of Bendel State. While the plaintiff argued that the effect of that section was that the deceased testator cannot by testamentary disposition derogate from the Benin Customary Law that the eldest surviving son inherits the '*igiogbe*' exclusively, the defendants pressed the contrary argument. The Supreme Court upheld the plaintiff's argument.

^{23[23]} (1974) 1 NMLR.443

^{24[24]} It may be argued that in such a case he could have given away the houses simpliciter, since he built them. But this argument can be countered easily. The deceased's position was akin to that of a licensee. His first wife who was the owner of the land would most probably have been able to claim the land and request whoever inherited the houses to remove them.

^{25[25]} See *Agidigbi v Agidigbi*, supra 1 & 21.

do so would be akin to a stranger wailing louder than the bereaved; a clear case of a court constituting itself into a busybody.

1 Does Bare Land Qualify as 'Igiogbe'?

The relevant question under this heading is whether bare land or the ruins of an ancestral home can be regarded as 'Igiogbe' or as a part of it. This question was in issue in the case of *Imade v Otabor*.^{26[26]} The relevant facts are as follows: The plaintiff's case was that his grandfather (G) acquired an interest in the disputed land many years before the present suit. G built his house on the said land and also demarcated its boundaries. When G died, F plaintiff's father being the eldest male child inherited the house. The house subsequently fell into ruins. F who was still alive at the time of these proceedings then gave the land to the plaintiff who is his eldest son. At the trial, the plaintiff contended that the land was his grandfather's 'igiogbe'. But the Supreme Court disagreed. In the first place, said the apex court, "All existing authorities seem to agree that it (the *igiogbe*) is the principal house where a deceased lived and was buried"^{27[27]}. In other words, although the Supreme Court also described '*igiogbe*' as 'ancestral home', that phrase is not wide enough to include the "ruins of an ancestral home". Bare land or the ruins of an ancestral home cannot therefore be '*igiogbe*.'^{28[28]} According to the Supreme Court:

An 'Igiogbe' would appear not to be just any landed property that could be treated as such but one that carries with it special notions of customary law such as that it is inherited by the eldest surviving male child of a deceased^{29[29]}.

The second limb of this question is whether vacant land which forms part of the principal house or '*igiogbe*' can be regarded as part of it. The only known decision on the point is the case of *Igbinoba v Igbinoba*.^{30[30]} In that case, the Court of Appeal upheld the decision of the trial court which ruled that the eldest son should inherit the house where the deceased lived in his lifetime, together with the entire premises thereof, including vacant areas of the compound to the exclusion of any other person.

5. Is the 'Igiogbe' Alienable?

This question was clearly an issue in the case of *Ugbo v Asemota*^{31[31]}. In that case, T was survived by among others, two sons. P was the eldest son (second plaintiff) and S the second son (defendant). T left behind a house and rubber plantation. S lived in the house, and P subsequently sold it to first plaintiff. S and other members of the family argued that before T's death he had told the *okaegbe* (family head) that the house should be shared between P and S. It was held that under Benin customary law, T could not deprive P from absolutely inheriting his house and also, more importantly, that P was free to sell the house to 1st plaintiff.

Although this judgement was given by a High Court, it is of compelling importance in the light of the calibre of witnesses who gave evidence in that case. One of them was Akenzua II, Oba of Benin and repository of Benin customary law who testified as witness for the plaintiff. According to him, under Benin Custom, when a person dies intestate, his eldest male child inherits the house in which the deceased

^{26[26]} (1998) 56/57 LRCN. 3116

^{27[27]} Per Ogundare JSC 3134

^{28[28]} The recent practice is to bury a deceased person who has land but was unable to build it while alive on the land with a view to treating such land as '*Igiogbe*'. Clearly, by virtue of *Imade's* case the burial of the deceased on the land alone cannot constitute such land into '*Igiogbe*'.

^{29[29]} Pg. 3137

^{30[30]} (1995) 1 NWLR (pt.371) 375

^{31[31]} Unreported Suit No. B/49/70 of High Court of Justice Benin

lived and died; the house belongs to him absolutely, and he can do anything he likes with it.

A second aspect of this question is whether the 'Igiogbe' can be given out as a gift *inter vivos*. In other words, is succession to 'Igiogbe' by gift or by inheritance. In *Imade v Otabor*^{32[32]} the Supreme Court was of the view that:

Succession to an 'Igiogbe' is not by gift but by inheritance. I would need a (sic) strong evidence of Bini Customary Law to hold the contrary.

This view may be dismissed as being so obvious that it is unworthy of detailed analysis. But its analysis is compelling so that it is not taken as accommodating a proposition that an *igiogbe*, or a property which would have become one in the event, cannot be given away as gift by the person entitled to it in his lifetime. The 'gift' referred to here is a gift *inter vivos*, not a testamentary gift. The present writer has heard some lawyers take that position after that decision was handed down by the Supreme Court. One would concede that the temptation to reach such a conclusion can be found in the judgement. For example:

Having regard to the nature of the 'Igiogbe' I cannot see how it can be given out in the lifetime of the owner to someone who may not be the eldest surviving male at his death. At all times relevant to this case, plaintiff's father was alive.^{33[33]}

It is submitted that the meaning of this passage is that once a person gives away his house which would have been his 'Igiogbe' if he had died without making the gift, then such property no longer qualifies as his Igiogbe upon his death, as it is no longer his house once he gives it away or otherwise alienates it. The house will lose that special character of 'Igiogbe' even if he subsequently lived, died and was buried in it.

This position is borne out by the case of *Ugbo v Asemota*^{34[34]} where Oba Akenzua II testified that once the eldest male child inherits the 'Igiogbe' the house belongs to him absolutely, and he can do anything he likes with it. If the son who inherits the 'Igiogbe' can do anything he likes with the house, is it logically consistent to say (as the Supreme Court, on the surface, appears to be saying in *Imade v Otabor*) that the man who built it cannot in his life time give it away as a gift *inter vivos*?

Also, a further conclusion which appears to be deducible from the passage reproduced from the case above, that a person cannot give his house which he inherited as Igiogbe by way of gift *inter vivos* to a person other than his first son, is not necessary to the decision of this case. This is because the plaintiff and his father were eldest male children to their respective fathers, and these are facts which would have been sufficient to show that in this case, a gift *inter vivos* of the 'igiogbe' was validly done.

6 Can the Eldest Son Renounce his Claim to the 'Igiogbe' in Preference for Another Property?

The Benin Traditional Council has supplied direct answer to this question:

The custom says that it is the eldest son that automatically inherits the 'Igiogbe' of his deceased father while the remaining landed properties, if any, are shared among the remaining children. But there have been cases where the Igiogbe property is by far inferior to the other landed property or properties usually because the late man chose to live in the inferior house while he puts the superior house out for commercial purpose. The eldest son in such case would feel cheated to be confined to the inferior Igiogbe while his juniors are given the superior landed properties. On strict interpretation of custom, that is how it should be. But in these days of modern development, it would be manifestly unfair to

^{32[32]} Supra n. 6 & 22 pg. 3138

^{33[33]} at pg. 3138

^{34[34]} Supra n. 1 & 31

give the eldest son a dilapidated property simply because it is the Igiogbe and give a more superior one that the deceased earmarked for commercial purpose to a junior. Such cases have come to the palace and the Omo'N' Oba Erediauwa, in consultation with chiefs in attendance, has exercised his traditional discretion by giving the eldest son the option to choose between the inferior Igiogbe property and the other superior property on the condition that if he chose the other superior property he would forfeit his traditional rights to the (inferior) Igiogbe property with all that go with it. The eldest son had accepted the choice; and it has been endorsed by the palace.^{35[35]}

Although the direct question about renunciation has been answered in the positive by this passage, it has raised certain questions of its own:

1. What is meant by "he would forfeit his traditional rights to the (inferior) Igiogbe property with all that go with it"? Apart from forfeiting his right to inherit the bare house, does this phrase also mean that the eldest son, if he was so minded would thereby be unable to install the ancestor staff '*ukhure*' in the superior property (if he chooses to live there) or in his own house (if he has one)?
- ii Does this phrase mean that the eldest son, by renouncing the 'Igiogbe' must be taken as also having renounced his position as custodian of the ancestor staff in favour of his junior who inherited the 'Igiogbe'.
- iii Is renunciation possible only upon the exercise by the Oba of Benin, of a discretion to endorse the renunciation?

The writer is not aware of any legal case in which any of the questions was directly in issue, but the day may not be far when the law courts will be faced with these questions.

^{35[35]} A Handbook on some Benin Customs and Usages, Benin Traditional Council, 1996, p, 14

7 Does a Woman have an 'Igiogbe'.

All the reported cases on succession under Benin customary law have concerned the estate of males. In describing the principal house or 'Igiogbe' therefore, the various courts have always used the masculine "he" or "his" in referring to the deceased and in stating the general principle governing inheritance.

Also, as seen above, the concept of 'Igiogbe' is based on the practice of establishing an ancestor staff or '*Ukhure*' in memory of, and as a means of communication with a male deceased since inheritance is by primogeniture, and lineage is traced through the male line under Benin custom.

These facts strongly suggest that only males and not females can have 'Igiogbe' under Benin Custom. Even then, one must be careful not to confuse the concept of 'Igiogbe' with the issue of succession to the estate of a deceased female in Benin.

The fact that a woman cannot have 'Igiogbe' does not mean that her property cannot be shared based on the same method as that of a deceased male. Thus it has been stated in this regard that:

A woman's property is inherited in the same way [as that of a man] except that her daughters may receive a share in her household utensils, clothes etc.^{36[36]}

Conclusion

In this contribution, we have sought to clarify the concept of the principal house in Benin customary law. We have seen the various definitions of the principal house and situated the origin of the concept in ancestor worship.

It has been seen that the question whether one or more house is the principal house depends on the facts of the case and that although bare land cannot be regarded as the principal house, vacant land in the compound of the principal house has been held to be part of it.

We have seen that the principal house can be alienated, that the eldest son can renounce his claim in preference of another property, although it is not clear whether the right to do so is unilateral or with the discretionary consent of the Oba of Benin.

The question whether the concept applies to women was also examined and we saw that although it does not, succession to the property of women follow the same pattern as that of men.

It is clear that as in all aspects of life in Nigeria today, modernity has influenced the '*igiogbe*' concept so that it can reflect the values and expectations of the persons subject to the custom. However there are still some gray areas which will hopefully become clearer as cases are decided on them

^{36[36]} Bradbury, R E, *The Benin Kingdom and the Edo Speaking People of Southern Nigeria* (London, International African Institute, 1970), 49.