

**Mojekwu v. Mojekwu [1997] 7 N.W.L.R 283
(Nigeria, Court of Appeal)**

Summary of Facts

The appellant, Mr. Augustine Mojekwu, relying on the *Ili-Ekpe* custom of some parts of South-East Nigeria, had instituted action against the respondent, Mrs. Caroline Mojekwu, claiming that he was entitled to inherit her deceased husband's property. The basis for his claim was that the deceased, his paternal uncle, was survived by the respondent and two daughters. Being all women, they were excluded from inheriting property under the *Ili-Ekpe* customary laws applying to the deceased.

The appellant's Counsel argued that the *Ili-Ekpe* custom allowed the deceased's closest male relative to inherit if he had no son. The closest male relative would have been the appellant's father, who was also the deceased's brother. However, the appellant's father was dead and the appellant had become his heir. As a result, the appellant claimed ownership of the deceased's house situated in the town of Onitsha, which the deceased had built on the land he had acquired from the Mgbelekeke family of Onitsha.

The respondent claimed that her son, Patrick, who had predeceased his father, had fathered an infant son who should inherit the property. Disputing this fact, the appellant claimed that Patrick had died without a son.

Summary of the Court of Appeal's discussion

Based on the facts and on evidence adduced, the Court of Appeal found that the *Kola Tenancy* governed the devolution of the house. As a result, despite the disputed fact whether Patrick had a son at the time of his death- recognizing the *Kola Tenancy* as the applicable customary law rendered the absence of a male heir irrelevant since it allowed the respondent's daughters to inherit their father's property.

Furthermore, the Court determined the *Ili-ekpe* custom to be repugnant and applied the Repugnancy Doctrine. This doctrine prescribes that the courts shall not enforce any custom as law if it is contrary to public policy or repugnant to natural justice, equity and good conscience. The Court also pronounced the custom contrary to human rights guarantees in the Nigerian Constitution and in the Convention on the Elimination of all forms of Discrimination against Women, which prohibit discrimination on the ground of sex.

Comment

This Court of Appeal's pronouncement/decision represents a turning point in Nigerian jurisprudence, as the judiciary scrutinized the customary laws of inheritance through a human rights lens. As a result, the case has been cited severally by women's human

rights activists and proponents. However, this pronouncement also formed the basis for the criticism made by the Supreme Court when the case was appealed to it.

**Appeal of *Mojekwu v. Mojekwu* to the Supreme Court of Nigeria:
Mojekwu v. Iwuchukwu [2004] 4. S.C. (Pt.II). 1.
(Nigeria, Supreme Court)**

The case was further appealed to the Nigerian Supreme Court. The names of the parties to the case changed because, when the decision was delivered in 2004, Caroline Mojekwu, the original party to the case, had died. As a result, her daughter, Mrs. Iwuchukwu, was substituted as a party to the case.

Legal Issue

Whether the Court of Appeal erred in holding the *Ili-ekpe* custom to be repugnant and contradictory to the gender equality provisions provided under the Constitution of Nigeria and pertinent international human rights instruments.

Judgment at the Supreme Court

Faced with the same facts and legal issue, the Supreme Court argued that the rules of procedure precluded the Court of Appeal from determining whether *Ili-ekpe* was repugnant since neither of the parties to the case brought the validity of the custom as a legal issue before the court. The Supreme Court, led by Justice S.O. Uwaifo, criticized the Court of Appeal pronouncement as follows:

I cannot see any justification for the court below to pronounce that the Nnewi native custom of '[o]li-ekpe' was repugnant to natural justice, equity and good conscience...the learned justice of appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.

It is evident from the facts of the case that the *kola tenancy* was the applicable principle of law in this case, and that the Court of Appeal need not have considered the repugnancy of *Ili-ekpe* in order to give judgment in this case. To this extent, the Court deserved the criticism it received. However it is also evident from the statement above that the Supreme Court Justices were not just disagreeing with the Court of Appeal on this issue but also disagreed with its condemnation of *Ili-ekpe*, and of other customs that privilege men over women, without sufficient engagement with the people whose customs they may be.

However, the Supreme Court upheld the Court of Appeal's judgment since, in their view, it did not result in a miscarriage of justice, as the *kola tenancy* was indeed the applicable law, and thus the respondent and her family were rightfully held to be the owners of the property in issue.

Conclusion

The Court of Appeal erred in holding that the *Ili-ekpe* custom is repugnant to natural justice. However, the Respondent and her family were entitled to the property under the *Kola tenancy*.

Commentary

To the extent that the Supreme Court did not overrule the decision of the Court of Appeal, the *Mojekwu v. Mojekwu* decision remains very important and valid case law. Widows who are excluded from inheriting their deceased husband's property solely because they are women can ask the courts to determine whether their human right to be free from discrimination on the ground of sex is violated as a result. However, this Supreme Court decision raises considerable doubt as to whether the apex court would fulfil the rights guaranteed women by international, regional and national laws by refusing to uphold discriminatory inheritance customs. Indeed the judge's statement reveals that similar customs, such as those that exclude women from being family heads would not be discountenanced without hearing from the communities in question. To the extent that this suggests that the Supreme Court will engage with the people while upholding human rights laws over contradictory customs, this is laudable. However, the Supreme Court's statement also reveals that it is not eager to deem such customs discriminatory since they represent the ways of life of the people in question.

This decision could dissuade lower courts from using human rights to challenge customary law. Indeed, the chilling effect may have already occurred, as this author is unaware of any new court cases using human rights guarantees to challenge customary law exclusions of women from property inheritance.

It is hoped that another Supreme Court case would make its position clear. In the meantime, women's rights proponents should try to convince the Nigerian judiciary that human rights laws must always be respected, protected and fulfilled, despite contradictory customary law requirements.

by Onyema Afulukwe