

# **INTER VIVOS DISPOSITION OF PROPERTY SUBJECT OF A WILL: A CRITIQUE OF *EZENWERE v EZENWERE***

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## **Introduction**

One constitutional right which every person in Nigeria enjoys is the right to acquire and own property.<sup>1[1]</sup> An incident of this right is the general freedom to use and dispose of one's bounties. Some choose to do so at death by way of wills with its many options. Others prefer to dispose of their properties while alive either as a prelude to what happens to the property at death or to by-pass certain obligations at death, for example, taxes and other death dues or levies.<sup>2[2]</sup> Some<sup>3[3]</sup> opine that the best way to dictate the manner in which a person would like his estate to be distributed after his death is by making a will, for he can leave specific instructions as to how his estate should be administered and to whom it should go. Subject to laws governing wills, he has liberty to dispose of such property in the way he likes and no one can modify it.<sup>4[4]</sup>

A hybrid to which these rights may lead is a situation where an owner of property after making a will devising or bequeathing certain property thereafter disposes of the same property *inter vivos*. Using Nigerian decisions as a yardstick, this phenomenon is rare. Yet it does occur as it did in *Ezenwere v Ezenwere*.<sup>5[5]</sup> There an *inter vivos* transfer was made of the same property subject matter of a gift under a will made three months before the *inter vivos* sale. What is the effect of a disposition of property which is subject of a specific gift under a prior will? Are they inconsistent acts raising suspicion as to the validity of the will? The trial judge exalted wills to documents of title and, with respect, betrayed a failure to appreciate the nature of wills and gifts made thereunder. After setting aside the will for want of proof of due execution, the court went ahead to set aside the sale because, according to it, there was no interest to be passed to the purchaser after the execution of the will. Those pronouncements<sup>6[6]</sup> stared the Court of Appeal in the face yet it closed its eyes to them. Technically it approved them.

It is the intent of this paper to show what ought to have been the attitude of the court towards the *inter vivos* sale and to contend that the sale ought to stand.

## **Case History**

The case emanated from the High Court of Imo State. The facts that are of interest and relevance are as follows: The deceased, a retired customary court official built a large estate called Silver Valley Estate (SVE) in Owerri, with proceeds from sale of other properties and assistance of his large family. Upon completion of part of the estate, the deceased moved into the estate with the appellants (some of the children of the deceased) and left his other wives and children at his ancestral house as SVE had not been completed. Before the deceased was buried, the appellants boasted that the entire SVE belonged to them. This prompted the respondents (other children of the deceased) to make inquiry at the land and probate registries. The inquiry revealed a

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<sup>1[1]</sup> Constitution of the Federal Republic of Nigeria, 1999 s.43.

<sup>2[2]</sup> Abayomi, K, *Wills: Law and Practice*, Lagos, Mbeyi, 2004, 1(hereafter Abayomi, *Wills*).

<sup>3[3]</sup> Animashaun, T O G and Oyenehin, A B, *Law of Succession, Wills and Probate in Nigeria*, Lagos, MIJ Professional Publishers, 2002, 28 (hereafter Animashaun and Oyenehin, *Law of Succession*).

<sup>4[4]</sup> *Igboidu v Igboidu* [1999] 1 NWLR (pt 585) 27.

<sup>5[5]</sup> [2003] 3 NWLR (pt 807) 238.

<sup>6[6]</sup> The pronouncements as will be seen are technically obiter since the will against which the trial judge weighed the sale was set aside.

power of attorney dated 10/3/87, made by the deceased in favour of the 1<sup>st</sup> appellant by which the entire SVE was sold to the 1<sup>st</sup> appellant for the sum of N10 000. At the probate registry, their inquiry revealed that the deceased was purported to have made a will dated 10/12/86 (i.e. 3 months before the sale of SVE to the 1<sup>st</sup> appellant) in which SVE was devised to the 1<sup>st</sup> appellant alone. After the burial, the respondents commenced an action in the High Court challenging the purported power of attorney and the will on grounds of fraud and undue influence. The High Court granted all the reliefs sought by the respondents and set aside both the will and the power of attorney.

The appellants articulated three issues on appeal in their brief, the third and relevant one of which was: “Whether the power of attorney executed in favour of the 1st appellant (Exhibit “C”) is invalid assuming without conceding that the appellants did not prove due execution of the will.” On this issue, the appellants submitted that if the setting aside of the will was proper (which was not conceded), the invalid will cannot be used to void the power of attorney, exhibit “C” executed in favour of the 1<sup>st</sup> appellant stressing that if the will is invalid, it implied that the deceased died intestate and as such SVE which he sold to the 1<sup>st</sup> appellant as borne out by exhibit “C” cannot be questioned in the absence of any fraud or any other vitiating factor which was proved by the respondent in the case.<sup>7[7]</sup>

Generally, the Court of Appeal held<sup>8[8]</sup> that that where circumstances exist which excite the suspicion of the court and whatever their nature may be, it is for those who propound the will<sup>9[9]</sup> to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the document and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will.<sup>10[10]</sup>

The above is a rule of long standing<sup>11[11]</sup> and cannot be impeached. Those who are against a will being admitted to probate may challenge it on such grounds as lack of due execution, fraud, undue influence, mistake, absence of testamentary capacity in the testator or may even proffer any circumstance about the will which will put the court on inquiry as to determine whether or not the will is really a manifestation of the wishes of the testator. Where such dispute exists, the rule holds sway and the propounders must show by evidence that the testator had mental capacity to do so and was a free agent before the onus can shift to the challengers to establish their allegations against the will.<sup>12[12]</sup>

*Adesanya and Anor v Olatunji*<sup>13[13]</sup> provides an instance of such suspicious circumstance. There Kazeem J quoted Park B in *Barry v Butlin*<sup>14[14]</sup> that “if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the court.”<sup>15[15]</sup> In that case the only executor under the will was the substantial beneficiary under it. Kazeem J declared as follows:

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<sup>7[7]</sup> Ibid, p.251. It was for the respondents to prove such fraud and/or undue influence as alleged and not for the appellants as defendants to disprove: s.135, 137(1) Evidence Act Cap E14, LFN, 2004. The authenticity of the form of the power of attorney evidencing the sale was not challenged; the presumption of regularity will stand in its favour: s.118 Evidence Act; *Prospect Textile Mills (Nig) Ltd v Imperial Chemical Industries PLC England* [1996] 6 NWLR (pt 457) 668.

<sup>8[8]</sup> Relying on *Adesanya & Anor. v Olatunji & Anor* [1970] 2 All NLR 247, 250-51.

<sup>9[9]</sup> In disputes relating to wills, the evidential rule that he who asserts must prove under the Evidence Act does not apply: *Johnson and Anor. Maja and Ors.*(1951) 13 WACA, 290.

<sup>10[10]</sup> *Ezenwere v Ezenwere* (supra) at 249.

<sup>11[11]</sup> *Johnson and Anor. v Maja and Ors* (supra); *Nelson v Akofiranmi* (1959) LLR 143.

<sup>12[12]</sup> *Odjegba v Odjegba* [2004] 2 NWLR (pt 858) 566.

<sup>13[13]</sup> Supra.

<sup>14[14]</sup> 2 Moo. P.C 480.

<sup>15[15]</sup> Note 5 (supra) at 250. This would occur where a solicitor who prepares a will takes substantial benefit: *Wintle v Nye* [1959] 1 All E.R 552; [1959] 1 WLR 284 (Viscount Simmond said, at 557: “the fact creates a suspicion that must be

The rule in *Barry v Butlin* ... is not ... confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicion of the court...whatever their nature may be.<sup>16[16]</sup>

It is on this premise that Akpiroroh JCA<sup>17[17]</sup> concluded:

An issue that arouse (sic) the suspicion of the lower court was that (the deceased) was alleged to have made a will, exhibit D, by which he devised the estate to the appellants, the same (deceased) again sold the same property to the 1<sup>st</sup> appellant before his death as borne out from exhibit C. *It is my view that the sale of the estate by exhibit C to the 1<sup>st</sup> appellant and the devise by exhibit D of the same property to the appellants are inconsistent acts which render the will suspicious...*<sup>18[18]</sup>

The learned Justice, in support of his conclusion above then quoted from the following disturbing lines from the judgment of the High Court:

... when cross examined by counsel for the plaintiff, the 1<sup>st</sup> defendant admitted that he paid his father #10 000 as shown in Exhibit C, the power of attorney and it was also in respect of the same property that the will was made. *At the time of the purported sale, the property had been disposed of by will. The question is why did the same testator seek to sell the same property willed to D.W.1 alone? It is obvious that having devised the property registered as 7/67/132 referred to in Exhibit C there was nothing to transfer.*<sup>19[19]</sup>

The court concluded that the inconsistencies or conflicts between the two instruments raised suspicion and that the appellants had not discharged the onus cast on them by law to satisfy the court that the deceased not only approved the contents of the will but that he also executed it.

While the principles stated and relied on by the courts cannot be faulted, the application of same in treating the acts of the testator as raising suspicion is to say the least curious.<sup>20[20]</sup> These dicta are queer and exciting and deserve comments. Even if the will had been found for, it is obvious that the court of first instance would have led the way in setting aside the *inter vivos* sale. Incidentally the Court of Appeal made no comments on them but instead used them to support its own conclusion. Whether or not the will was invalid, the courts ought to have come to the same conclusion with respect to the *inter vivos* sale, namely that the transfer ought to stand.

### Where the Will is Invalid

In *Ezenwere v Ezenwere*,<sup>21[21]</sup> both the appellants and respondents were at one on the effect of a will being declared invalid and set aside. They agreed that the implication is that the deceased died intestate. However while the appellants argued that in the event, the sale of SVE, which the deceased sold to the 1<sup>st</sup> appellant as borne out by exhibit C cannot be questioned in the absence of any fraud or any other vitiating factor which was proved by the respondents in the case<sup>22[22]</sup>, the respondents, proceeding from the

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removed by the person propounding the will.... The degree of suspicion varies with the circumstance of the case"). See also *Okelola v Boyle* [1998] 2 NWLR (pt 539) 533.

<sup>16[16]</sup> Ibid, at 250.

<sup>17[17]</sup> Delivering the lead judgment, Ogebe and Nsofor JJCA concurring.

<sup>18[18]</sup> *Ezenwere v Ezenwere* (supra) at 249. Emphasis mine.

<sup>19[19]</sup> Ibid, at 249-250. Emphasis mine.

<sup>20[20]</sup> The waterloo in the appellants' case was their failure to make a *prima facie* case for the will which they ought to have since the will had been challenged at all.

<sup>21[21]</sup> Supra.

<sup>22[22]</sup> Ibid, p.251.

premise that the sale was invalid, argued that the deceased estate, including SVE, should be distributed in accordance with the Owerri customary law on succession.<sup>23[23]</sup>

The two views are actually reconcilable except that the respondents' inclusion of SVE as part of the estate to be distributed would have to be excised. Intestacy occurs when a person dies without leaving a valid will. A will will not exist where one has been set aside by a competent court. Intestacy will be the implication of a will being declared invalid. When this happens, either the customary law on succession or common law or statute on intestate succession will apply to determine the distribution of the intestate's estate.<sup>24[24]</sup>

Whichever rule applies, only property to which the deceased is entitled at the time of his death can be subject to intestacy rules. Property which the intestate had disposed of at the time of his death cannot be subject to intestacy rules except where such disposition is void<sup>25[25]</sup> or there is the presence of any vitiating factor such as fraud, mistake, duress etc. which will void the transaction under which it was sought to be transferred.

Therefore as the respondents did not establish any of the above circumstances above which would have supported the court's setting aside of the sale, there was no basis for the court to have done so. The suspicion<sup>26[26]</sup> said to have been raised casts its shadows, not on the sale, but on the will. The appellants had asked the Court of Appeal to determine whether the court of first instance was right in using the invalid will to void the sale evidenced by the power of attorney. The court, rather unfortunately, closed its eyes to this issue and confined itself to a non-consequential and technical question as to whether or not the appellants made the dispute over the power of attorney an issue in the High Court as to entitle them to raise same on appeal. It is submitted that what is stated above would have been a simple answer to the question posed by the appellants.

The Court of Appeal's eye continued shut to the above quoted pronouncements from the High Court<sup>27[27]</sup> which disappointingly it also used to support its own conclusions: it is to them we now turn.

### **When the Will is Valid**

It has been noted above that the pronouncements are technically obiter<sup>28[28]</sup> since the will was actually declared invalid and set aside. The dicta would have had their place within the judgment if the will was valid. However the dicta appear to be the only basis upon which the court set aside the sale. It looks clear that the court first treated the will as if valid to enable it set aside the sale, then went ahead to set aside the will. This "tactful" judicial surgery is rather painful as the tools used by the Court are, with respect, way out of tune with established principles of law governing will and gifts made thereunder: the Court said that at the time of the purported sale the property had been disposed of by will and that having devised the property, there was nothing to transfer by the power of attorney.

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<sup>23[23]</sup> The deceased was evidently subject to customary law as shown by the polygamous nature of his family, a practice which is impossible in law when one has contracted a marriage under the Marriage Act. The High Court actually ordered that the deceased estate be distributed in accordance with the customary law of Owerri. The order was however set aside by the Court of Appeal as the respondents had not asked for the remedy: *ibid*, p. 250-251.

<sup>24[24]</sup> For example, Lagos State and states created out of the former Western and Mid-Western Regions have their own Administration of Estate Laws. Anambra State has a Succession Law Edict. See generally Animashaun and Oyenehin, *Law of Succession*, 21.

<sup>25[25]</sup> For example, where a member of family purports to dispose of family property as his personal property or a customary tenant purports to transfer his interest etc.

<sup>26[26]</sup> As will be seen, there is no basis for the court's conclusion on suspicion.

<sup>27[27]</sup> See notes 18 and 19 above and the accompanying quotes especially the italicized sections.

<sup>28[28]</sup> See note 6 above

The statement will be examined on two platforms – the ambulatory nature of wills and the principle of ademption.

### **Ambulatory Nature of a Will**

Generally, a will is an instrument that both contains and is made with the intention that it should be a revocable ambulatory disposition of the maker's property which is to take effect on death.<sup>29[29]</sup> A document can only be a will if made with an immediate testamentary intent and the testator therefore is free as many times as he wishes to alter, amend or even cancel it by destruction.<sup>30[30]</sup> Until the death of a testator, a will has no effect at all;<sup>31[31]</sup> it operates as a mere declaration of his intention which may be changed from time to time.<sup>32[32]</sup> Similarly, no beneficiary can take any interest in any property disposed by will until the death of the testator. Even at that, the beneficiaries can only become entitled after the executors have, depending on the nature of the gift, passed legal title to such beneficiaries. For example where the gift is land by some form of conveyance or assent or the prescribed transfer form under the Registration of Titles Law in Lagos; delivery of chattels; written instruction to deceased's bankers to transfer funds; completion of share transfer form in case of stocks and shares etc.<sup>33[33]</sup> Besides, where the property is land it is subject to the Land Use Act 1978 and its consent requirements.<sup>34[34]</sup>

Again, subject to statutory<sup>35[35]</sup> and other exceptions<sup>36[36]</sup> a gift to a beneficiary who predeceases the testator will generally lapse. The doctrine of lapse buttresses the rule that a will is of no effect while the testator is alive.<sup>37[37]</sup> Section 24 of the Wills Act<sup>38[38]</sup> provides:

Every will shall be construed with reference to the property comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will.

In *Okelola v Boyle*,<sup>39[39]</sup> the testator and two brothers inherited property as family property. In 1972, the testator made a will devising his undivided share in the property to the appellant. By 1976, the testator became entitled to the property as his two brothers died without issues. A will purported to be executed by the testator on 24<sup>th</sup> February 1976 was presented for grant of probate. The appellant entered a caveat to the application for probate and later brought this action. One issue was whether or not the 1972 will was valid. The trial judge held that the testator had nothing to devise at the time he made the 1972 will and that so far as it purported to devise an undivided share in property, it was void. The Supreme Court upheld the decision of the trial court, and stated that one distinguishing feature of a will is that it is testamentary. In other words, it is ambulatory and does not take effect until the death of the maker. Two phenomena result from this feature – the testator is free to revoke his will and insert new provisions, and beneficiaries who predecease the testator cannot take.

The Court reasoned that if a will speaks from death, the material time to inquire whether the property in question was family property or not was not the date of the will

<sup>29[29]</sup> *Re Berger* [1990] Ch 118 at 129-130,132, *per* Mustill, Mann L.JJ.

<sup>30[30]</sup> *AG v Jones and Bartlet* (1817) 3 price 368 at 391.

<sup>31[31]</sup> *Re Baroness Llanover* [1903] Ch 330 at 335; *Re Thompson* [1906] 2 Ch 199, 205.

<sup>32[32]</sup> Harpum, C, *Megarry & Wade The Law of Real Property*, (6<sup>th</sup> Edition), London, Sweet & Maxwell, 2000, 590-591 (hereafter Harpum, *Real Property*).

<sup>33[33]</sup> Abayomi, *Wills*, 145-146.

<sup>34[34]</sup> Cap L5 LFN, 2004, ss. 21 and 22.

<sup>35[35]</sup> Wills Act, 1837, s.33; Wills Law s.18.

<sup>36[36]</sup> Class gifts, alternate gifts.

<sup>37[37]</sup> Abayomi, *Wills*, 36.

<sup>38[38]</sup> Also Wills Law, Lagos, s.17; Wills Law, Bendel s.21 (applicable in Edo and Delta States).

<sup>39[39]</sup> [1998] 5 NWLR (pt 539) 533.

but the date of the testator's death. At that date the testator was sole owner of the property and in consequence, the incidence of family property was gone and the testator became the absolute owner.

Although the plaintiff did not appeal against the finding of the trial court on this score, the Supreme Court nonetheless relying on sections 3(1) and 21 of the Wills Law<sup>40[40]</sup> declared:

It follows that the validity or otherwise of the devise or bequest in a will is dependent *on whether the property so devised or bequeathed belonged to the testator at the time of his death and not at the time of the making the will.*<sup>41[41]</sup> If at the time of the death of the testator, in this case, the property was still family property, the learned trial judge would still be right in his decision. But as it turned out that at that time the said property belonged solely to the testator; the learned trial judge was in error to void the 1972 will for the reason he gave.<sup>42[42]</sup>

Applying this principle, we submit that the learned trial judge in *Ezenwere v Ezenwere* was in error in setting aside the sale and the power of attorney for the reason he gave, namely that at the time of the sale, the property had been disposed of by will and that having devised the property there was nothing to transfer under the sale. The apropos time to inquire into value or worthlessness of a will is at the time of the death of the testator and not at the time of making of the will and at that time the will was worthless in relation to SVE. By his dicta, the learned trial judge exalted the will to an instrument of transfer of property, a document of title which it definitely is not. A will can never be a document of title.<sup>43[43]</sup> The ambulatory nature of a will distinguishes it from a conveyance, settlement or other *inter vivos* dealings which operate immediately or at some fixed time.<sup>44[44]</sup> The other modes pass a present interest but a will passes no interest until after the death of the maker.<sup>45[45]</sup>

### **Inconsistent Acts?**

The Court of Appeal held that the sale and the devise by will to the same 1<sup>st</sup> appellant alone<sup>46[46]</sup> were inconsistent acts raising suspicion. The trial judge had queried, 'why would the same testator seek to sell the same property willed to the 1<sup>st</sup> appellant alone?'<sup>47[47]</sup>

The reasons may be many and diverse and may be best known only to the owner of the property. This is a question of motive. He may foresee disputes which the will may generate among family and friends and choose dispose the properties even after he has made a will. It may be that he wishes to benefit certain persons who acts benevolently towards him while alive<sup>48[48]</sup> or circumstances may arise necessitating his disposing of the property subject of his will for value to meet present needs. Whatever the reason may be, this is a general freedom which a testator enjoys – a freedom to deal with his property (real or personal) in any way he desires *inter vivos*.

Such dealing may result in the specific property devised or bequeathed under the testator's will ceasing to exist or ceasing to belong to the testator at the time of his death

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<sup>40[40]</sup> Cap 141 Laws of Lagos State

<sup>41[41]</sup> Emphasis mine.

<sup>42[42]</sup> *Okelola v Boyle* (supra) at 556.

<sup>43[43]</sup> *Falomo v Onakanmi* [2005]11 NWLR (pt 935) 135.

<sup>44[44]</sup> Megarry and Wade, p. 590

<sup>45[45]</sup> Hower D.R: Wills, Trust and Administration of Estate for the Paralegal (US) West Publishing co, 1979, p. 99

<sup>46[46]</sup> Subject to Wills Laws of some states (for example, s.3(1) of Wills Laws of Lagos and states created out of the former Western and Midwestern Regions, disinheriting members of testator's family may not necessarily be a ground for invalidating a will or gift made thereunder: *Balonwu v Neziyanya* (1959) 3 ERLR 40.

<sup>47[47]</sup> *Ezenwere v Ezenwere* (supra) 249-250.

<sup>48[48]</sup> In *Ezenwere* (supra) itself, for instance, the 1<sup>st</sup> appellant had testified in the court of first instance that none of the other children of the deceased had visited him even they knew where he was hospitalized.

when the will ought to take effect and the material time to query the validity, invalidity, or worthlessness of a will and gifts made thereunder.<sup>49[49]</sup> When this happens, the bequest or devise is said to have been adeemed, meaning that the gift has failed due to the non-existence of the property or the testator's loss of ownership of it.<sup>50[50]</sup> If the court in *Ezenwere* had directed its mind to this principle, it would not have come to the conclusion that the devise under the will and the *inter vivos* sale were inconsistent acts raising suspicion. After all no court has held and no one has argued that a subsequent will or codicil revoking a prior will even impliedly raise suspicion as to the validity of the earlier will. The later will simply supersedes the earlier one.<sup>51[51]</sup>

The principle of ademption has been applied to both realty<sup>52[52]</sup> and personalty<sup>53[53]</sup> choses in action such as shares<sup>54[54]</sup> and even to an option to purchase.<sup>55[55]</sup> It does not matter that the eventual purchaser of the property or the person to whom it is transferred *inter vivos* is the same as the beneficiary entitled to the same property under the testator's will.<sup>56[56]</sup>

In *In re Edwards, Macadam v Wright*,<sup>57[57]</sup> the principle was applied to realty and the *inter vivos* dealing was a mere oral agreement to transfer property. In that case, a testatrix by her will dated February 8, 1952 directed that her freehold property (No.78 Albion Road) together with her residuary realty and personalty, should be divided among seven named persons including the 1<sup>st</sup> defendant W. In May 1952, by an oral agreement the testatrix promised *inter alia* to convey No 78 Albion Road to W in consideration of W agreeing to reside with the testatrix and perform certain household duties for her. After the testatrix death, her will was proved by her executors and by an order of Dankwerts J. the oral agreement was declared to be a binding contract between the testatrix and W and accordingly No. 78 Albion Road was conveyed to her.

The executors took out a summons before Upjohn J. to determine whether W was bound to elect between the 1/7 share of the property (No. 78 Albion Road), together with the testatrix residuary estate bequeathed to her by the said will and the said property or whether she was entitled to take both. Upjohn J held that W was bound to elect. It was held, on appeal, that W was not bound to elect and that in the events which happened after the making of the will, the specific devise had been adeemed and no question of election arose. The testatrix could not be said to have manifested an intention to devise No.78 Albion Road, since she had in effect disposed of it during her lifetime.

The above ratio accords with law and common sense. The court in *Ezenwere* would have queried why the same testatrix would contract to convey the same property devised to the appellant alongside others. The court in *Re Edwards* did not construe the devise and the contract to convey as inconsistent acts raising suspicion on the validity of the will nor did it void the contract to convey on the ground that there was nothing to transfer to the purchaser. The *inter vivos* disposition manifests a contrary intention on the part of the testator that the devisee(s) under the will cannot take.

Where a testator does that which his executors are directed to do under his will or transfers such property while alive to the same beneficiary named under the will to be

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<sup>49[49]</sup> *Okelola v Boyle* (supra)

<sup>50[50]</sup> Bailey, *Wills*, 109, 113; cited in Harpum, *Real Property*, 617.

<sup>51[51]</sup> Abayomi, *Wills*, 180-181.

<sup>52[52]</sup> *In re Edwards, Macadam v Wright and Ors* [1958] Ch 168.

<sup>53[53]</sup> *In re Sikes, Moxon v Crossley* [1927] 1 Ch 364.

<sup>54[54]</sup> *Re Quibells Wills Trust, White v Reichert and Ors* (1956) 3 All E.R 679

<sup>55[55]</sup> *Re Carrington* [1932] 1Ch 1; *Re Rose* [1948] Ch 78.

<sup>56[56]</sup> *Re Quibells Wills Trust* (supra).

<sup>57[57]</sup> (Supra)

entitled to it, the act is not inconsistent with the devise or bequest under the will, but it is merely anticipatory of the course which he had intended his executors to take.<sup>58[58]</sup>

In *Re Sikes, Moxon v Crossley*<sup>59[59]</sup> concerned a personalty. In her will of 1921, a testatrix bequeathed 'my piano' to one B.E Leigh. At the time she made the will the testatrix possessed a player piano. In May 1923 she sold it for £5 and about the same month, she purchased another piano known as electric motor piano which was in her possession when she died in 1926. A summons was taken out by her trustees to determine the question whether the piano passed to the defendant under the bequest 'my piano' Clauson J held that the testatrix referred to a particular thing and intended to give the particular piano then in her possession and no other. The court held that that constituted a contrary intention sufficient to take the bequest out of section 24 of Wills Act, 1837 with the result that the piano which she possessed at her death did not pass under the bequest 'my piano'.

In the same vein even if the propounders of the *Ezenwere* will proved it and the court found for it, it also ought to have held that by selling SVE during his lifetime the testator had manifested a contrary intention that the property will not pass to whoever was beneficiary of it under the will on his death. It made no difference that the purchaser was also the beneficiary under the will. As in *Re Edwards* shows, such purchaser need not be subjected to election as the specific device had been adeemed.

## Conclusion

More and more Nigerians are making wills and will do so in the future as literacy rates increase and the value of having a will is better appreciated. The desire to exclude statutory or customary laws of intestate succession, to appoint trusted and capable executors, to make adequate provision for cherished wives and infant children including dependents, to appoint reliable guardians and to forestall disputes, maintaining peace within families constitute strong drive to make wills today. Sadly several social-cultural factors make inroads into the healthy climate of making wills. The polygamous composition of many families in Nigeria, the extended family system still very much present, are factors which may weigh heavily on the mind of a property owner in his exercise of his one right of freedom of testation and disposition. Add to this, the economic depression in this country with its attendant poverty which bites hard on many families forcing property owners to sell, mortgage, pledge their properties to raise funds to meet present needs, including properties which may be subject of wills. Elderly parents suffer neglect at the hands of their own due sometimes to unemployment. They are compelled to express their gratitude to well-to-do benefactors who offer needed monetary assistance by making gifts of their properties, especially landed properties, to them. Alternatively they may dispose of such properties at give-away prices even in the face of protests by their children who hope to benefit under their will.

It appears therefore that the *Ezenwere* situation would continue to occur. This situation is not healthy as it breeds rancour, discord and avoidable litigation. An attempt has been made above to demonstrate what the attitude of the court should be when faced with such situations. While we look forward to the time when there will be no bottlenecks to the full execution of a testator's wishes as expressed in his will it is hoped that the principles will attract the court's nod of approval namely:

- 1 That a will is ambulatory and therefore the apropos time to query the validity, invalidity or worthlessness of a will is at the time of the testator's death.

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<sup>58[58]</sup> *Re Quibells Wills Trusts* (supra)

<sup>59[59]</sup> (Supra)



- 2 That a lifetime disposition of a property subject of a prior will is valid in the absence of any vitiating factors and supersedes the gift under the will so that the gift fails.
  - 3 That an *inter vivos* sale or other disposition of property subject of a prior will is not an inconsistent act which raises suspicion on the validity of a will as to render the will invalid. The will should stand in the absence of other factors which may invalidate it together with other gifts which may be made under it.
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