CASENOTES

DEVOLUTION OF IMMOVABLES UNDER THE NIGERIAN CONFLICT RULES: THE DILEMMA OF LEGAL PLURALISM

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This essay is a reaction to the recent decision of the Supreme Court in the case of Kharie Zaiden v. Fatima Khalil Mohssen, (11 S.C.P. 1, 1973). The plaintiff mother of the deceased, Y.K. Zaidan, who had died when domiciled in Lebanon, sought a declaration that the defendant widow was not entitled to a share in the residual estate under Lebanese Moslem law. The estate in question was land situated in Warri (Bendel State). The trial court held that Lebanese Moslem law was applicable (Unreported Suit No. S/70/66, December 15, 1975). On appeal, the Supreme Court (Elias, C.J.) held that

> having regard to our built-in rules in section 20 of the Customary court law governing the choice of law in the application of the lex situs to the succession to the intestate estate of a deceased person in Warri, the applicable law is not the Administration of Estate Law ... but the (Moslem) Customary law of Lebanon which is the binding law between the parties...

Before reaching this conclusion the Supreme Court had earlier observed:

> Just as the court in Lagos is entitled to apply as between the parties before it a system of Tapa customary law in respect of immovable property in Bida so can a Midwestern Nigerian High Court apply Lebanese law to succession to immovable property in Warri in the case of Lebanese parties.

The High Court of Lagos had earlier decided that the Statute of Distribution, and not Moslem law, should govern the devolution of land situated in Lagos, belonging to a Syrian Moslem who died intestate while domiciled in Lagos (Absi v. Absi, CCHCJ/1/73 at p. 39, Serage, J.). The Supreme Court observed that the learned judge did not take into account the combined effect of s.12 of the High Court Law of Lagos State and s.20 of the Customary Court Law of that State. It therefore held that the decision was given per incuriam, adding:

> The uncontradicted evidence throughout the whole case in the trial court is that the Moslem law that is applicable is the same everywhere, whether in Lebanon or in Nigeria or elsewhere.

In view of the tremendous influence of this decision on the future development of the Nigerian conflict rules, and the fact that the Supreme Court has itself described the case as one of "first impression," it will be necessary to discuss this decision against a background of the Nigerian conflict rules as contained in the received English law as well as in the Nigerian local statutes.

I. The Domain of Lex Situs under the Anglo-Nigerian Conflict Rules

One of the most deeply-rooted principles of the received English conflict of law rules is that all questions relating to immovables are governed by the lex situs, with few exceptions. The lex situs, for example, determines the various forms of capacity for the disposition or acquisition of immovables, the formal requirements for conveyance of immovables, and matters of material validity of a disposition of interest in land either inter vivos or causa mortis. These include the question of what estate can be legally created, (Nelson v. Bridport, (1846) 8 Beav. 547), the incidents of these estates, (Re Miller [1914] 1 Ch. 511), whether the interests given infringe the rule against perpetuities, (Freke v. Carbery (1873) 16 Eq. 461), whether the testator is bound to leave a fixed part of the estate to his wife or family, (Re Ross [1930] 1 Ch. 377), whether gifts to charity are valid, (Duncan v. Lawson (1889) 41 Ch. D. 394), how immovables may be distributed, Re Berchtold [1923] 1 Ch. 192 (emphasis supplied), and so on. It would be pointless to enumerate further instances. Suffice it to say that the scope of the lex situs in this regard is very wide and far-reaching.

According to Dicey and Morris, the few exceptions to this rule are as follows:[1]

The formal validity, interpretation and effect of contract, and capacity to contract, with regard to movables, are governed by the proper law of the contract (Waite v. Bingley (1882) 21 Ch. D. 674). The terms of a marriage contract or settlement govern the mutual rights of husband and wife in respect of all interests in the forum land within its terms (De Nicols v. Curlier [1900] A.C. 21). Under the Wills Act, 1963, S.11, a will bequeathing interests in land may be valid as to form, though not made in accordance with the formalities required by the lex situs.

An assignment of a bankrupt's property to the representatives of his creditors under Bankruptcy Act is an assignment of the Bankrupt's immovables wherever situated.[2] Limitation of an action or other proceedings with regards to foreign immovables is probably governed by the lex fori.[3] A bequest of immovables is, in general, interpreted with reference to the law intended by the testator (Phillipson - Stow v. I.R.C. [1961] A.C. 727).

The question whether a will of immovables has been revoked by a subsequent marriage of the testator is determined by the law of

the testator's domicile at the moment of the marriage (Re Martin [1900] p. 211 (C.A.)). Lastly, the question whether a legatee of movables under a will must elect between the legacy and foreign immovables is determined by the law of the testator's domicile (Trotter v. Trotter (1824) 4 Bligh 502).

Meaning of Lex Situs

With the above introductory remarks it will not be necessary to explain what is meant by the lex situs. Usually this term means the law in force in the area where the immovable in question is situated. When used with reference to foreign immovables the term often connotes the totality of the law in the jurisdiction where the land is situated, in which case the conflict rules of the situs may refer the issue back to the lex fori, by way of renvoi, or transmit it to a third system. However, when reference is made to forum immovables the term lex situs refers only to the domestic law of the forum.

This view has been judicially adopted by Bellow, J., in Yinusa v. Adesubokan where the learned judge said:

> The law of the situs means, for an English court dealing with land in England, domestic English law, and means, for an English court dealing with land abroad, whatever system of domestic law the lex situs would apply (1970 J. of Afr. L. 58).

The reason for this discrepancy is simple. In the case of foreign immovables the intention is to achieve uniformity with the lex situs since in any case the land can only be dealt with in a manner permitted by that law. But once the conflict law of the forum has pointed to the application of forum law for the disposition of forum immovables, it would be incongruous to refer to forum conflict of law rules and revive the question anew.

The lex situs in Warri (Bendel State)

Clearly, then, the lex situs in Warri can only consist of the system of law in force within that jurisdiction, that is, the general law together with the separate system of customary laws. It is pertinent to point out that in the Southern States Muslim law is applicable only as a variant of customary law. Only in the Northern States are courts empowered to apply Islamic law as a distinct system.[4]

This, in fact, was the view of the Supreme Court itself in the case of Adesubokan v. Yinusa:

> There is no provision, to our knowledge, of any law which makes Moslem law, whether of the Maliki sect or any other sect, enforceable, either on its own, as such, or as part of any customary law, in any of

the courts in the Southern States (1972 J. of Afr. L. 82, 88, Ademola, C.J.).

Thus Islamic law is observed generally in the Southern States merely as a religious precept and legally enforced only as a sort of equitable exception. For example, in Molode v. Ogunmola[5] it was held that the personal law of a Yoruba Muslim was the Yoruba customary law. However, Islamic law is nonetheless often observed if it would cause injustice were it ignored. For instance, the validity of an Islamic marriage contracted by a Yoruba Muslim was upheld in Asiata v. Goncallo (1 N.L.R. 41, 1900). Even in this exceptional situation Islamic law is applied as the customary law on the particular issues in question. As rightly observed by Ames, J., "Mohammedan law has no privileged position in Nigeria; it prevails where it does prevail because it is there the local law and custom."[6]

It follows therefore that no "native" of the Southern States could have Islamic law as his personal law. This leads us to the crucial issue, which we shall now consider.

Law Governing the Devolution of Intestate (Immovable) Estate of a Foreigner in Warri (Bendel State)

Perhaps, it is now clear that the lex situs in Warri can only include the general law and the system of customary laws in force within that jurisdiction. The problem as to which of these laws governs any particular issue can only be resolved by invoking the statutory rules for choice of laws. The relevant High Court Law[7] provides as follows:

> (1) The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such customary law.
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> (2) Any such customary law shall be deemed applicable in causes and matters where the parties thereto are Nigerians and also in causes and matters between Nigerians and non-Nigerians where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rule of law which would otherwise be applicable.
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> (3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have

> arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

It follows from these provisions that the applicable law will, in the main, depend on the nationality of the parties concerned. However, there is no provision for a transaction between two foreigners. Understandably, the underlying assumption is that the general law will apply. In fact, some writers have even suggested that there is "no provision permitting a non-native voluntarily to submit to customary law."[8] However, it is difficult to support this view in the light of sec. 13(1) of the High Court law (cited above), which provided that nothing in this law "shall deprive any person of the benefit of any such customary law" (emphasis added).

Clearly, then, any person of whatever race or creed can lawfully transact under the customary law. One must therefore ask whether the parties involved in the case under discussion have transacted under the customary law. Obviously they have not. Intestacy is not a transaction, but the failure of the deceased to make a will. It is the prerogative of the legislature, not that of the parties to a suit, to determine the distribution of estate upon intestacy. Except where foreigners deliberately transact under customary law it seems unlikely that any system of customary law in force in Nigeria can be applied to them.[9] It follows, therefore, that the applicable law governing the devolution of the land situated in Warri and belonging to a foreigner who dies intestate should be the general law.

A similar view has been expressed by Kasunmu and Salacuse:[10]

> Provided other conditions are satisfied, the Administration of Estate law will apply to the estate of a person who is not subject to customary law, that is, a non-Nigerian.

The Dilemma of Legal Pluralism

The problem confronting the Supreme Court in this case is revealed in the following passage:

> Where, therefore, a person dies leaving immovable property in Warri and is subject to a system of customary law which does not obtain in Warri, the law to govern the succession to his estate is not the Administration of Estate law, because section 1(3) of the Administration of Estate law is clearly against it, but the Moslem law which is binding between the parties.

Section 1(3) of the statute in question[11] provides:

> Nothing in this law affects the administration of the

estates of deceased persons by or under the authority of any customary court nor unless expressly provided the distribution, inheritance or succession of any estate where such distribution, inheritance or succession is governed by customary law whether such estate is administered under this law or by or under the authority of a customary court.

Furthermore, counsel for the plaintiff drew the court's attention to section 49(1) of the same statute which provides for "a husband," "a wife," "a surviving husband," and so on, and argued that the statute did not contemplate spouses of potentially (or de facto) polygamous marriages. The argument no doubt is logically sound. Moreover, even on grounds of commonsense and fairness one would prefer to apply Muslim law, under the guise of customary law, rather than general law. This, then, is one of the many problems confronting the court in a situation where it has to administer two or more systems of law that co-exist in the same jurisdiction without any spatial separation. However, the answer to the problem does not depend on logic, commonsense or fairness, for the legislature has laid down guiding rules. The error of the Supreme Court was to have invoked the content of a domestic statute in considering its spatial application, where the statute in question does not provide for such a situation. Surely the statutes of most European legal systems provide for "a wife" and "a husband," but the courts of these countries have not, because of such provisions, disinherited children or spouses of polygamous marriages where their own laws become applicable.

What, in any case, precludes two or more wives from sharing equally what is meant for one wife? Is it not part of our rules of statutory interpretation that singular terms include the plural where the context so permits?

Furthermore, it is not correct to say that section 1(3) of the Administration of Estate Law excluded persons subject to customary law from its purview. It merely excludes the administration of an estate under the authority of a customary court and, to some extent, an estate whose distribution is governed by customary law. The fact is that the parties in the present case are not subject to the jurisdiction of customary courts nor is the distribution of the estate governed by customary law. The Supreme Court appears to have assumed what has to be established.

Furthermore, the conclusion of the Supreme Court that the deceased was subject to a system of customary law is hardly tenable. There is no evidence in the judgment that Islamic law is treated as a system of customary law in Lebanon.

Tapa v. Kuka Analogy

The Supreme Court appears to have assumed that the case of Tapa v. Kuka (18 N.L.R. 5, 1945) is on all fours with the present

case. It may be sufficient to point out that in Tapa v. Kuka the court was concerned with a choice between systems of customary law. In the present case it seems clear that customary law was not applicable. Furthermore, Tapa v, Kuka was decided at a time when the court was required to choose either the law of its own jurisdiction or the law binding the parties, in all issues of conflict between systems of customary law.[12] On the contrary, the court is now expressly required to apply the lex situs in all land matters. The analogy, therefore, is obviously untenable.

It should be added that since customary law is not applicable in the present case it was not necessary for the Supreme Court to have invoked s.20 of the Customary Court Law, which merely provides for choice of law rules in relation to conflict between systems of customary law. It should be pointed out, however, that even if the statute were applicable the particular subsection s.20 (3)(1)--relied upon by the Supreme Court was irrelevant. Succession to land is expressly provided for under s.20(1) which when read with s.20(2), clearly points to the lex situs as opposed to the law "binding between the parties."

Universality of Islamic Law

It now remains to consider the pronouncement of the Supreme Court that:

> The uncontradicted evidence throughout the whole case in the trial court is that Moslem law that is applicable is the same everywhere.

This observation is strange in view of the fact that one of the grounds of appeal contained in the judgment is:

> 10. The learned trial judge misdirected himself in law and on facts in accepting the universality of Moslem law relating to succession without adverting his mind to the legal authorities and legal works to the contrary cited on behalf of the appellant in this case.

Further, the Supreme Court knew (or ought to have known) that the statutory provision[13] permitting the application of Islamic law as a distinct system in the Northern States provides:

> The court, in the exercise of the jurisdiction vested in it by this law as regards both substantive law and practice and procedure, shall administer, observe and enforce the observance of, principles and provisions of -
>
> (a) Moslem law of the Maliki School as customarily interpreted at the place where the trial at first instance took place.

It is clear that only the Maliki version of Islamic law is applicable in these states and furthermore that there may be local variations from one district to another depending on local modifications of the pure Maliki text. It may be informative to point out that the defendant/appellant in the case under review had sought, in her counter-claim, that she be entitled to a one-fourth share of the movable estage situate in Lebanon in accordance with the "Lebanese Moslem Law of the School and/or sect known as Jaafarite." Moreover, if Muslim law is the same everywhere why was it necessary for the Supreme Court to hold that the applicable law was the "[Moslem] customary law of Lebanon"? To claim that the "Moslem law that is applicable is the same everywhere whether in Lebanon or in Nigeria or elsewhere" in the face of this evidence is merely to avoid the issue.

Conclusion

The conclusion compelled by the foregoing discussion is that the decision of the Supreme Court in the present case is legally unsupportable. Having decided that the parties to the suit are subject to a system of law "which does not obtain in Warri" it was no longer open to the Supreme Court to apply that law in the process of applying the lex situs of Warri. Moreover, on the authority of s.20 of the Customary Court Law the Supreme Court was not empowered to apply any system of law not in force in Warri. It seems to follow, therefore, that the Supreme Court decision should be deemed to have been taken per incuriam. Consequently, the decision of Savage, J., is to be preferred.

Notwithstanding the foregoing comment, I do not wish to be understood as favoring the statutory rule which refers succession to land to the lex situs even in inter-state and inter-local situations. It is an unwarranted importation of rules meant for the international situation into an inter-local context. Even at the international level the predominance of the lex situs rule in matters affecting foreign land has been the object of continuous criticism.

However, if any aspect of our statutes is absurd or unsatisfactory it would be proper for the court to draw the attention of the legislature to it and call for its repeal, rather than to embark on a muddling-up operation. In addition to concealing the current defects of the law, and therby precluding its modification, such an approach hinders legal certainty and a rational analysis of the law. For the law to be meaningful and respected it must be reliable. In the interest of better administration and teaching of the law the decision in Zaidan v. Khalil should be overruled.

NOTES

1. Dicey and Morris, Conflict of Laws, pp. 532-533 (1973).

2. Bankruptcy Act, 1914, ss. 18 & 167 [British].

3. If the foreign statute only bars the right of action it will be ignored by virtue of the principle that all matters of procedure are governed by the lex fori.

4. See, for example, s. 14 of the Sharia Court of Appeal Law (Cap. 122, L.N.N., 1963 ed.).

5. (Unreported) Suit No. 231, High Court of Lagos 1944, cited in the Estate of Animota Alayo, 18 N.L.R. 88. See also the decision in the latter case, where it was held that Yoruba customary law governs the distribution of the intestate estate of a Muslim of Ijebu origin.

6. Bornu N.A. v. Abarcha Magudana (1964) (Unreported) cited in J.N.D. Anderson, Islamic Law in Africa, p. 198. (This statement was made before the enactment of the Sharia Court of Appeal Law.)

7. See Sec. 13, High Court Law (Midwestern State), No. 9 of 1964.

8. See, for example, Park, Sources of Nigerian Law, p. 114.

9. See Agbede, "Legal Pluralism and the Problem of Ascertainment of Personal Law: A Consideration of Yinusa v. Adesubokan (1971) Nigerian Bar Journal 39, for a solution where such foreigners are domiciled in Nigeria.

10. Nigerian Family Law, p. 275 (1966).

11. Administration of Estate Law (Cap. 1., L.W.N., 1959 ed.).

12. See, for example, Native Court Law (L.N.N., 1963 ed.).

13. Sec. 14, Sharia Court of Appeal Law (Cap. 122, L.N.N., 1963 ed.).