

Incurring the Ghost of a Dissatisfied Testator: Expostulation on the Derogation of Testamentary Capacity in Nigerian Law of Succession

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Abstract

A Will is a disposition or declaration by which the person making it, among other things, provides for the distribution and administration of his estate after his death. It is ambulatory. The testator's expressed wish is said to be sacrosanct. Some provisions of the law have however divested the testator of this glorious position. This work examines these restrictions and submits that they negate the real purport of a Will and that the restrictions are unnecessary because they deny the power of the testator.

Keywords

Testamentary Capacity, Wills, Restrictions, Customs, Courts

1. Introduction

When a person expresses his will as to how his property would devolve, his words are words of command and the word "Will" as so used is mandatory, comprehensive and dispositive in nature¹. KoleAbayomi² in his book, defines a Will as

A will is a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his

¹Henry, *Black's Law Dictionary*, 5th edn. p. 1433.

²Kole Abayomi, *Wills: Law and Practice*, (Lagos: Mbeyi and Associates (Nig.) Ltd., 2004) p. 6.

personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the will”.

A testator may by a valid Will dispose of all real and personal estate he is entitled to, either in law or equity, at the time of his death. The general rule is that any property vested in the testator at his death may be disposed of by his Will. A testator of full age and capacity may dispose of his equitable interest in any property by his Will. Since ownership of property represents individual success, achievements, security and power; contemplating a Will involves, for the individual, not only the fact of mortality but the passing of security, power and the control represented by wealth.³ No doubt a person has the unlimited power to dispose of his legal property *inter vivos* in any way or manner he chooses. He may decide to give out his estate to total strangers or friends at the expense of his immediate family members. Upon his death, the law tends to limit this freedom. If a testator could dispose of his property to anyone he wishes *inter vivos*, there is no justification for any legal provision that will inhibit the testamentary capacity of that testator.

The general power exercisable by an individual in the disposition of his property should be unqualified. This power is the power in which the person such as the donee can exercise in favour of such person or persons as he wishes. **Sec. 22(2)**⁴ states that; “the expression ‘general power’ includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by Will or both...” And **sec. 7** states that for the purposes of the rule against perpetuities, a power of appointment is a general power if it is expressed to be exercisable by one person only and it can at all times during its currency, when that person is of full age and capacity, be exercised by him so as immediately to transfer the whole interest governed by the power without the consent of any other person or compliance with any other condition not being a formal condition relating only to the mode of exercise of the power.⁵ If the general power exercisable by an individual over the disposition of his property either by Will or *inter vivos* involves the power not subject to any person or compliance with any other condition except the condition as to the mode of the exercise of the power of disposition, the generality of the power is destroyed if it is exercisable subject to exceptions. It is not general where it must be exercised for the benefit of special persons.⁶

If a Will is simply defined as the way, means and measure by which a person wishes or intends the sum total of his property, liabilities inclusive to be distributed and allotted amongst persons dear to him, not necessarily his family or

¹S. Caroline, *Succession, Wills and Probate*, (London: Cavendish publishing Ltd.) p. 335.

³Finance Act, 1894, 12 Halsbury statutes, 3rd Edn. 492 cited by C. H. Sherrin, and R. F. D. Barlow, *Williams’ Law Relating to Wills*, (London: Butterworth and co. publishers Ltd., 4thedn.) p. 350.

⁴The Perpetuities and Accumulations Act, 1964, 25 Halsbury’s Statutes, 3rd edn. 11.

⁵Ibid at 351.

relatives,⁷ these wishes should be considered sacred if contained in a document as a Will because it is an expression of a person's desire after his death and since the person could give those properties to persons unrestricted, his wishes should be allowed to stand. Hence, the limitations imposed by law and custom, are negations to a testator's sacred freedom of disposition. If one is said to be able to dispose of his properties by Will to anybody, and equally able to give his properties *inter vivos* to anybody, the limitation of that freedom after his death negates the essence of Will making and in the process discourage people from making Wills, if the wishes of the testator will after all be dabbled with after death. The courts should desist from making new Wills for people irrespective of the justifications in which this work disagrees with and states that a Will should be allowed to be a Will which states the wishes of the testator as regards the destiny of his property and nothing more. This is because if the courts depart from the words of the testator, it upsets the basic rule that the testator is himself entitled to determine the destiny of his estate.

Viewed against this background, this work provides an account of the limitations placed by law and custom and the implications of these limitations to the real essence of Will making. It becomes necessary to discuss the law right in this area, especially in the wake of succession tussle going on families which affects the society adversely.

2. Statutory Restrictions

As earlier stated, testamentary freedom may be restricted either by preventing persons from leaving their property entirely as they wish on death, or by making it possible for their dispositions to be altered after death. The two identifiable statutory restrictions in Nigeria are the custom based and dependants based restrictions.

2.1. Custom Based Restrictions

The proviso to Sec. 1(1) of the Wills laws of Akwalbom and Lagos states⁸ provides

“The provision of this law shall not apply to any property which the testator had no power to dispose of by Will or otherwise under customary law to which he was subject.”

There is a similar provision in Sec. 3 of the Wills law of the old Western Nigeria, which is incorporated into the Wills law of all the states created from that part of Nigeria, including Delta state and Edo state.

The Wills laws of many other northern states equally provide.

“It shall be lawful for every person to bequeath or dispose of by his Will ex-

⁷C. C. Chineye, “Realities about the Practice of Wills in Nigeria.” Seen at <http://www.compassnewspaper.org/index.php/features/law/11139> (access date: Thursday, 27 Dec. 2012)

⁸Wills law of Akwalbom state 1991 Cap.143 and Wills law Cap.149 of Lagos state 1994.

ecuted according to the provisions of the law, all property to which he is entitled, either in law or in equity, at the time of his death. Provided that the provisions of this law shall not apply to the Will of a person who immediately before his death was subject to Islamic law.”⁹

These provisos are contrary to the main provisions which states that it shall be lawful for every person to bequeath or dispose of by Will executed in accordance with the provisions of this law, all property to which he is entitled, either in law or in equity at the time of his death.¹⁰

The restrictions to testamentary freedom of disposition by giving credence to native law and custom have led to much litigation in Nigeria. This work also seeks to examine judicial pronouncements on the restrictions to testamentary freedom of disposition imposed by law under native law and custom.

Depending on the language of the relevant Wills law applicable in the state where the testator is domiciled at the time of death, every adult can make a Will subject to entrenched native law and custom. Before making a Will, it becomes necessary for a testator to bear in mind his customary disposition. Therefore, a testator is by law subject to the laws of his locality in the dispose of his properties. In the case of *Thompson Oke & anor v. Robinson Oke & anor*,¹¹ the plaintiffs sued in the Warri High Court, claiming to inherit their father’s house, as the eldest son and eldest daughter, as against the defendant. The father died, having devised to the defendant a house in which he lived and died. The land, on which the house stood, was allocated by the father of the plaintiffs’ mother who was his daughter. The plaintiffs’ mother had permitted the testator, her husband, to erect the house on her allotted portion. The question that arose was whether the testator, an Urhobo man, could devise the house by will to the defendant who was the testator’s son by another woman or whether the Itsekiri customary law which is the same as Urhobo law of succession should govern the transaction, so that the testator’s eldest son should be the sole beneficiary of the house

It was contended by the defendant that under the Wills law, the testator had testamentary capacity to devise the house to him, and that the transaction was governed by the English law. The trial court held in favour of the plaintiff. On appeal, the Supreme Court held that the customary law and not the English law or the wills law should govern the transaction to the testator’s estate. The court equally held that the plaintiff was entitled to the house as the testator’s eldest son under the Itsekiri/Urhobo customary law.

From the case above, it is noted that a testator cannot dispose of by Will any

⁹C. C. Section 4 (1) (b) of the Kwara State Wills Law, CAP.168 Laws of Kwara State 1991. This law is similar to the Wills Laws of the Northern States of Nigeria. For example section 2 of the Wills Law Cap. 163, Laws of Kaduna State of 1991; the Plateau State Wills Edict, No. 2 of 1988; the Bauchi State Wills Law, CAP. 168 Laws of Bauchi State 1989; and the Jigawa State Wills Law, CAP. 155 Laws of Jigawa State, 1998.

¹⁰Section 1(1) of the Wills law of AkwaIbom state 1991 Cap. 143 and Wills law Cap.149 of Lagos state 1994.

¹¹(1974) 1 ALL NLR (pt. 1) 401.

property to which he had no right over under native law and custom. Similarly, under Bini customary law of inheritance, the eldest son of a deceased person does not inherit the deceased's property until after the completion of the second or secondary burial ceremonies. The completion is marked by a ceremony by members of the family called *Ukpomwan*. This ceremony is performed by the members of the deceased's family for the eldest son at the latter's request. It is only after this ceremony of the *Ukpomwan* that the distribution, all property of the father, that is all the property owned by the deceased, automatically becomes that of the eldest. Some of the personal effects are distributable to the other children but that only takes place after the principal personal effects have been given to the eldest son. The principal house in which the deceased lived and died is called *Igiogbe*, which always passes by the way of inheritance on distribution to the eldest son. However, until the exercise of distribution under customary law has been performed, the eldest son retains all the property of the deceased in trust for himself and children of the deceased.¹²

Hence, any devise of the *Igiogbe* to any person other than the eldest son, would be declared null and void by the court irrespective of the fact that such was made under a valid Will¹³. The Supreme Court of Nigeria also considered the native law and custom of Benin, with regards to the *Igiogbe* in which the deceased testator lived and died in *Agidigbi v. Agidigbi*.¹⁴ The court considered the provision of Section 3(1) of the Wills law of Bendel state, which states thus:

Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his Will executed in manner hereinafter required, all real estate and personal estate which he shall be entitled to, either in law or equity, at the time of his death and if not so devised, bequeathed and disposed of would devolve upon heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator.

The facts of this case are similar to that of *Idehen v. Idehen* and the Supreme Court of Nigeria held that under the Benin native law and custom, the eldest son of a deceased person or testator is entitled to inherit the *Igiogbe* in which the deceased/ testator lived and died. Thus, a testator cannot validly dispose of the *Igiogbe* by his Will except to his eldest surviving male child.

In *Lawal-Osula v. Lawal-Osula*,¹⁵ the testator, a Benin chief, being an Arala of Benin made a Will in English form, the Will, completely omitted the plaintiff and some other children including the 3rd defendant. Also by Benin native law

¹²C. C. *Idehen v. Idehen* (1991) 6 NWLR (pt.198) 387.

¹³In *Idehen v. Idehen* the deceased testator devised his houses, which constitute his *Igiogbe* to his eldest son in the Will who predeceased him. In the circumstances, the testator attempted to devise his *Igiogbe* to the children of his eldest son, Dr. Humphrey Idehen, who predeceased him, in the lifetime of the first plaintiff/respondent, who is now the eldest son. The device was declared void by the Supreme Court because according to the Bini customary law by succession, the *Igiogbe* which is the house where a deceased lived in his lifetime is inherited by his eldest surviving son.

¹⁴(1996) 6 NWLR (pt.454) 301.

¹⁵(1995) 3 NWLR (pt.328) 128.

and custom, the eldest son succeeds a Benin traditional chief at death. The issue was whether the testator could by his Will exclude the first plaintiff from inheritance of the *Igiogbe* which by custom goes to the eldest son? The Supreme Court of Nigeria also had to construe section 3(1) of the Wills law of the former Bendel state, which outrightly limits the right of the testator's power of disposition. The provisions of section 4(1) of the Wills law of Kwara state and many other states in Nigeria have the same provisions.

Some questions have arisen from the above provisions as to whether a person subject to Islamic law can make a Will. In *Ajibaiye v. Ajibaiye*,¹⁶ the deceased testator from Kwara state made a Will which was only known by the third and youngest wife of the deceased. The youngest wife who happens to be the appellant in the instant case at the court of appeal, relied on the dispositions made in the Will, which the respondents objected to, contending that the testator, being a Muslim could not make a Will. On trial at the High Court, the learned judge found that the Will purporting to be the Will of a Muslim, governed by personal Muslim law, disposing all his property in accordance with the Wills Act 1837 of England, having regards to section 4(1) of the Wills law of Kwara is invalid, null and void. On the issue whether a testator having validly made the Will could contend that he preferred his estate to be regulated otherwise than by the Wills law of Kwara state? The court answered this question by holding firstly that the Will is *ab initio* void for being contrary to the Wills law of Kwara state; and thus the testator could not have validly made a Will under the Wills Act 1837, a Statute of General Application which is no longer applicable in Kwara state. The court further held that the properties of a Nigerian Muslim in Kwara state after his death are subject to the Islamic law of inheritance which does not allow a Muslim to dispose of his properties outside Islamic injunction.

It is axiomatic from the above that a deceased testator in Nigeria who is governed by state Wills laws cannot freely dispose of his properties the way he or she wishes because they are limited by and subject to native law and custom of their locality.

2.2. Dependants Based Restrictions

In Nigeria, testate succession is governed by Wills Act 1837 and the Wills Laws of different states.¹⁷ Sec. 2(1) of the Wills law of Akwalbom state reads, Notwithstanding the provisions of sec. 1 of the law, where a person dies and is survived by any of the following persons:

- 1) The wife or husband of the deceased;
- 2) A child of the deceased;
- 3) A parent, brother or sister of the deceased who immediately before the death of the deceased was being maintained either wholly or partly, by the deceased.

¹⁶C. (2007) ALL FWLR (pt.359) 1321.

¹⁷Some states in Nigeria have enacted their own state based laws of testamentary disposition. However, many of the Wills Laws are *in pari material* with the Wills Act 1837.

That person may apply to the court for an order on the ground that the disposition of the deceased estate effected by his Will is not such as to make reasonable financial provision for the applicant. Reasonable financial provision depends on the applicant's lifestyle, and the applicant must bring his application within six months of the date of probate. The Wills law of Lagos state does not recognize the provision of section 2(1) (c).

Generally, where a testator does not make reasonable provision for the maintenance of his dependants, the court may order payment for that purpose out of his estate. It is noted that despite the statutory right of dependants to reasonable provision from the estate of the deceased, the testator may disentitle any of the family members or dependants by stating the reason(s) for so doing.¹⁸ Only reasonable reasons supported by facts will be sufficient to displace the statutory right of a disappointed family member or dependant from benefiting from the testator's estate. It is also noted that the court will discountenance erroneous and frivolous reasons. This posture of the law places a huge restriction on the testamentary capacity of the Testator. A Will is supposed to express the wishes of the testator. Where the law allows a derogation for reasons inserted by mere operation of the law, with total disregard for the stated bequeathal of the testator, the law is invariably curtailing the sacrosanct testamentary capacity.

3. Negative Effect of Restrictions of Testamentary Capacity

The combined effect of the principle laid down in *Idehen* and the like cases and the various statutory provisions of the various states present an unjust erosion of the powers of the testator. The sanctity of testamentary capacity is watered down by this posture of the law. Those limitations of testamentary freedom of disposition are contrary to the essence of Will making and they merely derogate the intention and wishes of the testator.

In some parts of Nigeria where the Wills Act of 1837¹⁹ is still applicable testamentary capacity still enjoys the pride of place. The Wills Act has no restrictions as regards disposition of property apart from the formalities of execution as laid down by the Act itself. In these states, the practical effect of the provisions of the law is absolute freedom on the testator to dispose of his property in the way and manner he chooses. Restriction of testamentary capacity has various negative effects on family law.

3.1. Discouragement from Will Making

The attempts by the courts and statutes to restrict the testamentary freedom of

¹⁸S. O. Imhanobe, *Legal Drafting and Conveyancing*, 3rd edn. (Abuja: Temple Legal Consult, 2010) p. 668.

¹⁹The Wills Act of 1837 was applicable to the whole of Nigeria being a received English law. However some states enacted their indigenous legislations on Wills. The old Western Region of Nigeria first passed a Wills law, Western Region Law No. 28 1958 which subsequently became Cap 113, Laws of the Western Region of Nigeria 1959. Since the region became defunct, each state enacted the provisions of Cap 113 as their respective laws. Mostly, the states under the old western region are no longer under the Wills Act 1837 regime. Most northern states are still under the Wills Act 1837.

disposition have the implication of deterring people from making testamentary disposition. Generally a testator is assured of life after his departure once he has made his disposition through a valid Will. He disinherits who he deems fit and bequeaths his property on who he wills. The effect of undue restrictions will give effect to a dissatisfied testator, who actually can no longer speak after his death. The ambulatory nature of the Wills is jeopardized. The idea of restricted testamentary freedom seems to discourage people from making a Will; after all, their dispositions would be altered by the court. Because of the uncertainties surrounding the making of Wills, Nigerians in particular, see nothing special in Will making due to the restrictions limiting their power of disposition which defeats the essence of Wills.

A testator cannot dispose of a property that is owned communally or by the family as a communal or family property because he does not have allodial title over such property. Thus, the power of a testator is restricted to individually owned property which he cannot freely give out during his lifetime and in the absence of a Will, it would have devolved on his heirs at law.²⁰ In *Ogunmefun v. Ogunmefun*,²¹ a testatrix made a gift of family land allocated to her under her Will to her relation; it was held to be ineffective and void. Similarly, in *Oke v. Oke*,²² the court held it to be ineffectual for a testator to pass a property which belonged to the wife's family and which according to the customary law of the Urhobo and Itsekiri could not be disposed of even by the wife. In the same vein, a testator cannot in his Will alter the rules relating to succession to headship, control and management of family property because it is not personally owned. In *Adebiyi v. Sogbesan*,²³ the testator exercised his power of testation to modify the customary rules of succession among the Yorubas by enlargement of the membership of the family and appointment of his brother to the headship of the family, vested with the power of control and management of the family for the benefit of the group.

Aside these points, a testator should be allowed to exercise his freedom of disposition in as much as the properties are properties that are personally acquired by him or partitioned to him. This flows from the fact that private property fosters a sense of personal responsibility in the owner and constitutes in fact a very effective stimulus for the dedication, initiative and readiness to accept risks that promote the production of goods and services in a capitalist society as ours. It is unreasonable and unacceptable that a person who has dedicated his time, resources, initiative, and has taken the risks towards the accumulation of his wealth without the contribution of the state, community, family or relatives, should be compelled to make provisions for such persons he does not desire to and even if he was alive, he would not have given his wealth to them, or such a person should be expected to devise certain properties to certain persons ac-

²⁰S. O. Taylor v. Williams (1935) 12 NLR p. 67.

²¹(1931) 10 NLR p. 82.

²²supra.

²³16 NLR 26.

ording to custom or law.

3.2. Outright Derogation from the Wishes of the Testator

In other jurisdictions, every testator in the disposition of his property is at liberty to adopt his own nonsense.²⁴ It is also noted that²⁵ “whether or not the Will contains nonsense, in principle the motive behind a provision is also irrelevant. Testators are not bound to have good or any reasons for what they do.” It was summarized by Wigram V.C. in *Bird v. Luckie*²⁶ in the following terms:²⁷

No man is bound to make a Will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily. Though this position of the law has been modified by statute, it is submitted that this ought to be the correct position applicable today.

In Nigeria, the position seems to be tilted towards the position where a person who intends to exclude a family member is expected to state his or her reason for doing so, and even if such reasons are given and it appears to the court to be unreasonable, erroneous and frivolous, the court is always ready to alter. It appears to be an outright derogation from the wishes of the testator in Nigeria.

The question as to the effect of an express directions and declarations of the testator who states that he wants a particular law to govern or not to govern his disposition has been left unanswered by the Supreme Court. In *Ajibaiye v. Ajibaiye*,²⁸ the testator stated as follows: “*I also direct and want my estate to be shared in accordance with the English law and as contained in my life time notwithstanding the fact that I am a Muslim.*”²⁹ What is the implication of such an express repudiation of applicable law in a Will? Can such declaration dislodge the restriction in the Wills law of Kwara State? A similar declaration was contained in the case of *LawalOsula v. LawalOsula*³⁰ where the clause stated thus: “*I declare that I make the above demise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this Will. It is my will that the native law and custom of Benin shall not apply to alter or modify this Will.*” All the supreme court of Nigeria said with regard to these was that

“*I do not express any opinion as to whether this declaration is sufficient to*

²⁴ *Vaughan v Marqueso fHeadfort* (1840) 10 SIM. 639, per Shadwell, v.c. at p. 641, cited by Anthony, *The Law of Succession*, (London: but terworths) 3rd edn. at p.47.

²⁵ *Hart v. Tulk* (1852) 2 De G. M & G. 300 per knight Bruce LJ, at p. 313.

²⁶ (1850) 8 Hare 301.

²⁷ *Ibid* at pp. 306 to 307.

²⁸ *supra*.

²⁹ Note 2.

³⁰ *supra*.

lead one to hold that the deceased had changed his personal law from the Bini customary law to the common law, or any other type of law.”³¹ These express declarations should be sufficient enough to displace any applicable customary law to be applied in the disposition of a testator’s property since the court is reluctant to declare its implication. But in spite of this, the courts go ahead to alter the Will and thereby subject his testamentary disposition to the wishes of the society or community, rather than the testator!

A testator should not be expected to give reasons for not providing for a particular person in his Will provided that it is his personal property and has the right to determine the future of the property. The testator should not be compelled by native law and custom to give his Igiogbe to the eldest surviving son of the deceased because Igiogbe is not a communal or family property but the house built out of the labour and resources of the deceased. There should be an outright distinction between testate succession and intestate succession. By the attitude of Nigerian courts derived from the restrictive provisions this distinction has become blurred. By testate succession, a testator can and should be allowed to dispose of his property as he wishes because a Will is said to be sacred. Intestate succession should be allowed by law to govern the distribution of the property of a person who has not made a Will. It should not be made to influence the Will of a person who has clearly stated how it should be distributed.

The function of the court is to interpret the words in which the testator has used, and not to make the Will itself. The attempt by the Benin High Court of Nigeria to make a new Will for the testator in the case of *Igboidu v. Igboidu*³² and the refusal of such attempt by the court of Appeal is a welcome development in the law of Wills in Nigeria. In that case, the testator, late Christian Igboidu died on 28/8/1990 and had made a Will on the 1/5/1980 and appointed two executors in the Will. One of them however predeceased him. The surviving executor was summoned to Benin for the purpose of proving the Will. At the Benin High Court where it was read, the executor was told of his functions by the registrar of the court. However, the appellant told the executor not to perform his functions under the Will as he intended to challenge the validity of the Will in court. The appellant thereafter challenged the Will on number of grounds at the court below and the decision was not favourable to him and he consequently appealed to the Court of Appeal. At the lower court, the appellant prayed the court to set aside the Will on grounds of irregularity and that it would work injustice on the children of the testator if implemented. The trial court held that the Will was unimpeachable but however made some modifications which raised a lot of questions as to whether it was the Will of the court or that of the testator that was contained in the Will. The modification was related to the Well in the compound given to the 1st respondent, belonging to all the 12 beneficiaries in the Will and not to the 1st respondent exclusively. Though the court aimed at doing

³¹Vaughan Ibid at p. 281.

³²(1999) 1 NWLR (pt. 585) p. 27.

justice to the 12 beneficiaries by modifying the will to suit them, but this ended up doing injustice to both the person to whom the well was devised to and the testator who wished that the well should be held by the lone beneficiary. It was the wish of the testator with all amount of reasonableness that the Well should be owned and held by the appellant and by him alone, if not, the testator would have done differently. Hence, the lower court ought to have respected the last wishes of the testator. On appeal, the court of appeal considered the provisions of S.3 (1) of the Wills Law, cap 172, Law of Bendel state of Nigeria, 1976. The court fortunately restored the liberty of the testator to dispose of his properties when Achike J.C.A³³ stated:

This posture of the learned trial judge is clearly indefensible having regard to S.3 (1) of the Wills law of Bendel state of Nigeria, 1976, applicable in Delta state. The import of S. 3(1) is to give the testator a free hand to devise, bequeath or disposed of his properties by Will. No doubt, it would have been desirable for all the beneficiaries to use the Well communally, but the testator thought otherwise. The law is clear that in the absent of ambiguity, the testator wishes must prevail. A Well is not one of the properties that a testator is restricted to be disposed of in is Will since the testator is entitled to dispose of his real and personal estate as he wishes, the modification of that right by the learned trial judge is unjustified misconstruction of the Will.

The court also held that the grounds for setting aside a Will include fraud, mental incapacity of the testator and undue influence on the testator. In the absence of any of these factors, a testator is at liberty to dispose of his property.

3.3. Derogation of Property Right

In northern Nigeria, a testator is not expected to device his property as he deems fit. A certain percentage is not expected to be given out according to his wishes. The question to be asked is, whose Will is it? However, in the case of *Adesubokun v. Yunusa*³⁴ the court protected the wishes of a testator, who devised his property contrary to the Muslim law of inheritance in spite of various attacks to derogate the wishes of the testator. In that case, the testator from Lagos state subject to the Islamic law of Maliki School made his Will according to the Wills Act 1837. The Will was challenged for not making certain dispositions to the heirs of the testator. The trial court held that the testator in accordance with the Islamic law could not dispose more than one and a half percent to persons who are not his heirs and that the Wills Act of 1837 cannot override the religious code, namely, the Islamic law of inheritance. The Supreme Court of Nigeria saved the Will by reversing the decision of the lower court and held that since the testator intended to distribute his estate according to the Wills Act, the Act

³³At p. 39 para. C-E.

³⁴(1973) U.I.L.R (pt. 3) 22.

prevailed over any native law and custom. Therefore, the testator has an unbounded freedom to dispose of his property to any person he likes. The implication of the case above is that if the decision of the lower court were to prevail, the people who attacked the wishes of the testator would have hidden under the guise of native law and custom to limit the dispositions of the testator.. The court should have defended the Will of the testator in the case of *Ajibaiye v. Ajibaiye*³⁵ not minding the fact that the applicable law was the Wills law, This work asserts that the decision in the case of *Adebosunkun v. Yunusa*³⁶ should be seen as a locus classicus on this point of the law to the effect that the court will always protect the wishes of the testator, however unreasonable they may appear, except where his wishes are impossible to implement. It is pertinent to point out that it was easier for the court to arrive at that laudatory decision because the Wills Act does not contain the outright restrictive provisions inserted into the local Wills laws.

In the recent case of Edward *Uwaifo v. Stanley Uwaifo & ors*,³⁷ the appellant as plaintiff sought to void the Will of the testator because *Igiogbe* was bequeathed to another person other than the eldest son of the deceased. It took the help of the trial court up to the Supreme Court to save the Will from being voided. The appellant as plaintiff considered unfair treatment meted out to him by his late father in his Will by which he shared his estate to his children but disinherited the appellant thereby denying him his right to inherit his father's *Igiogbe* as his first son according to S. 3(1) of the Wills law of Bendel state of Nigeria 1976. Galadima JSC stated:

“The entire Will cannot therefore be voided simply because the *Igiogbe* was bequeathed to someone else. In this case, the deceased had bequeathed his property, including the *Igiogbe* to other beneficiaries in his Will. As the trial judge rightly observed, there is no customary law against devising the *Igiogbe* by Will to the rightful beneficiary; the first son but it is against Bini-custom to disinherit the eldest son of the *Igiogbe* as was done in this case or to share it to others.”

Consequently, the court held that the appellant was entitled to the declaration she made that the Will is invalid only to the extent that the house No. 4 OhuobaStreet, declared as the *Igiogbe*, was devised to persons other than him; and that the entire Will cannot be voided on the sole ground that the *Igiogbe* was so devised.

Though the court protected the Will of the testator from being voided in the instant case, the holding of the court that the devise of the *Igiogbe* to another person other than the eldest son of the deceased renders the devise void, is contrary to the intentions of the testator and raises the question; whose Will is in the testator's Will? Could it be the Will of the court, the family or the wishes of the

³⁵At p. supra.

³⁶supra.

³⁷(2013) LPELR 20389 (SC).

maker that is in the Will? This work holds that if a Will is said to be what it ought to be, it should be held and treated with utmost respect because it represents the wishes of the testator on how the affairs of his property on earth should be carried out. The implication of the stance of the Nigerian courts in this matter is that the right, in which an individual has over his property in a capitalist society as ours, is being drastically derogated. This derogation is not without negative implications.

3.4. It Encourages the Law to Be Used as an Instrument of Fraud

Native law and custom should not be used as an instrument of fraud. Equity follows the law at all times, but equity will not allow the law to be used as an instrument of fraud. When a testator has decided the destiny of his property, it is absolutely unacceptable that the law or custom should be used as an engine of fraud in order to derogate him from his wishes. Some customs should be rejected and expunged from our legal system. There is no justification whatsoever for the wishes of the testator to be limited, thereby preventing persons to whom properties have been bequeathed to in the Will from getting what is due to them and vesting same on persons, whom even the testator in his right senses would never have thought of giving his properties to even if he were to be alive.

3.5. The Encouragement of Idleness on the Part of the Beneficiaries

Two objections have also been raised³⁸ against unrestricted inheritance of property subjected to customary law. The principle is said to be economically objectionable. Unrestricted inheritance has been seen as a dominant factor in the evolution of extravagantly unequal incomes and a class society and in the encouragement of idleness on the part of the beneficiaries.³⁹

The application of S. 3(1) of the Wills law may therefore lead to inefficient location of resources in a capitalist society such as ours. It is also argued that not less objectionable is the fact that the section may also reduce charitable devises and bequest. A life that is fulfilled goes beyond its immediate family to impact upon others. Members of the society, who have been richly endowed, should be encouraged to do the work of charity outside their immediate family so that society may go round.⁴⁰ In this regard, the existing regime of testamentary restrictions is highly condemned. The courts must always resist any attempt to rewrite the Will of the testator. Will is not an *inter vivos* disposition, it speaks from death.

4. Conclusion

This work advocates for the sacrosanctity of a Will that is made without an un-

³⁸Utuama, "Evaluation of Wills", a seminar paper, delivered at Sheraton Hotels, Ikeja on June 1997 under the Ibru Seminar series.

³⁹Loc cit. at 144.

⁴⁰Ibid at 144.

due influence, and mental disorder. When a Will has met all the conditions that are required for it to be made, that Will should be allowed to represent the wishes of the maker, without the interpolation of the law as to the persons that are provided for, and or those that are not provided for because the Will is a representation of the intentions of the maker, considering his efforts towards their accumulations. The court should protect the Will of a testator and prevent any culture that is repugnant to natural justice from being used to perpetuate injustice.

The word “Will”, is becoming a misnomer. It no longer expresses the wishes of the testator. The current trend of restricted freedom of disposition is antithetical to the original notion of Will making. There should be a clear distinction between the rules of intestate succession and testate succession. The trend which allows the rules of intestate succession to interfere or influence the power of testate succession is legally unhealthy and unacceptable. Such laws should be expunged from Nigerian legal system. The different restrictions imposed by law in order to limit absolute freedom of disposition have always been predicated upon various reasons; ranging from social responsibility, law, tradition, custom or religion. These palliations are not sufficient to allow the limitation of testamentary freedom of a testator. This derogation by the law is a violation of the ambulatory nature of Wills.

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