

REAFFIRMING THE RIGHT OF AN ADOPTED CHILD TO INHERIT PROPERTY UNDER NIGERIAN LAW: A REVIEW OF ADUBA V. ADUBA

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Abstract

In Nigeria and in most parts of the world, children are regarded as the offshoot of marriage. The law in Nigeria, permits without biological children (or for some other reasons even when they do) to adopt a child (ren) who upon adoption, become theirs legally. Adoption thus confers on a child; all the legal rights and privileges birth confers, including entitlement to inherit properties from the adoptive parents upon their demise. Despite this, there has been contention by the biological children as to the entitlement of adoptive children, to share from the estate of their parent upon death intestate notwithstanding the Constitutional prohibition of discrimination based on circumstances of birth. This paper reviews the Court of Appeal decision in Anthony Aduba & Ors v. Titus Aduba where the Court affirms the right of adoptive children to inherit jointly with the biological children, the estate of their father upon death intestate. It examines statutory and selected customary adoption practices in Nigeria. It assesses the impact of the decision on Nigeria's inheritance and adoption jurisprudence, and argues that this decision is a welcome development. It recommends that adopted children should be accorded the same rights and privileges as other biological children in the family. It concludes by identifying this decision as a welcomed development in reaffirming the rights of an adopted child.

Keywords: Adoption, Children, Discrimination, Inheritance, Jurisprudence, Nigeria.

1. INTRODUCTION

Apart from companionship, another reason for marriage is procreation.¹ However, it is not uncommon, for several reasons, for couples not to procreate.² Even where they do, they may desire a particular sex than the one they have. Meanwhile, day-in, day-out, there is an increase in cases of children being abandoned after birth at various ages, some of these children, if found, are taken to government approved orphanages where they are cared for and given up for adoption by suitable members of the public who take parentage roles and responsibility over the child (ren). Thus, couples who have no child or a prefer

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¹ The Book of Genesis Chapter 1:28 King James Version of the Holy Bible.

² O. O. Adetoro, & E. W. Ebomoyi, The prevalence of infertility in a rural Nigerian community. (1991) 20(1) *African Journal of Medical Sciences*, 23-27

sex, could resort to adoption as an alternative to the socio-cultural malaise which is predominant in Nigeria particularly in the Southeastern Region of Nigeria where male children, are treated with special care and attention over and above their female counterpart.

Accordingly, once a child is adopted, the act of adoption, effectively extinguishes the parent-child relationship that hitherto, existed between the child and the biological father and unqualifiedly confers same, on the adopter.³ Customarily, where a man, brings a child into his household, and acknowledges same as his, foster the child by treating him/her in the same way and manner as his biological children, the fostering is deemed as informal adoption of the child which act, cannot be validly challenged by the biological children upon the demise of their father.⁴ Such an adopted child, upon the demise of the adopted parent intestate, alone or with the biological child (ren), is entitled to inherit from the estate of the deceased parent.⁵ The circumstances of his/her birth or the status of being an adopted child, cannot be used as a basis for disinheritance as that would amount to discrimination based on the circumstances of birth contrary to the express provisions of section 42 of the 1999 Constitution of the Federal Republic of Nigeria.⁶

This article examines the Court of Appeal decision in *Anthony Aduba & 2 Ors. v. Titus Aduba*⁷ wherein the Court held that an adopted child, has the unfettered right to inherit the estate of his deceased parent alongside the biological children upon their intestate demise. It foregrounds the impact of this decision on the law and practice of adoption in Nigeria as well as examines customary and statutory adoption under Nigerian law. It argues that the decision is a welcomed development and reinforces the inviolability of Section 42 of the 1999 CFRN. The paper also inquires whether the issue of discrimination, particularly based on the circumstances of one's birth can be effectively addressed through law. The ambits of section 42 of the 1999 CFRN is also examined to ascertain whether the issue of discrimination, has been exhaustively addressed.

The paper is divided into four parts. Part one contains the introduction. Part two examines the law and practice of statutory and customary adoption and inheritance under Nigeria howbeit, based on selected predominant customs. Part three focus on the case under review by highlighting its impacts on the law and

³ E. N. U. Uzodike, "Law and Procedure for Adoption in Nigeria" (1991) 4, *Nig. J. Contemp. Law* 67

⁴ E.I. Nwogugu, *Family Law in Nigeria*, 3rd Edn, (Ibadan, HEBN Publishers Plc, (2014) 326.

⁵ D. I. Dimkpa, "Marital adjustment roles of couples practicing child adoption" (2010) 13 *European Journal of Social Sciences* 194-200.

⁶ 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004.

⁷ (2018) LPELR-45756 (CA).

practice of adoption in Nigeria as well as dichotomises between fostering and adoption. Part four, contains the conclusion and recommendations.

2. FOSTERING AND ADOPTION PRACTICES UNDER STATUTE IN NIGERIA

A child, can either be fostered or adopted as these practices, are legally permitted and therefore, practiced in Nigeria under customary and statutory procedures. This section of the paper examines fostering and adoption practices under Nigeria law and the various system in it as well as the rights, obligations of the parties, challenges confronting adoption in Nigeria and how to overcome them. Fostering involves giving parental care to a child who is not someone's natural or legally adopted child.⁸ Adoption is the procedure by which people legally assume the role of parents in respect of a person who is not their biological child, it vests the parental rights and obligation over a minor on a person (s) other than the biological parents pursuant to an order of court and from the date of the order, legally and permanently, in the absence of no legally vitiating element, severed the natural ties of the biological parents from the child (ren).⁹ It entails the assumption of parental responsibility permanently over a child other than the biological child of the person assuming such responsibility.¹⁰

However, in certain instances, there are children who are unable to live with their biological parents but not necessarily desirous of severing the bond of parent and child relationship.¹¹ In such situation, the best option, is permanent fostering or special guardianship arrangement which will ensure that the child is put under the care and control of a suitable person through childhood to adolescent or whatever necessary age to develop without legally extinguishing the ties with the parents.¹² In Nigeria, the practice of child adoption is growing with improved public awareness through media, personal testimony, social research and other sources. Government and non-governmental agencies are also promoting child adoption as

⁸ Nwogugu (n 4) *Op cit.* 326.

⁹ O. I. Tajudeen, "Adoption Practice in Nigeria: An Overview" (2013) 19 *Journal of Law, Policy and Globalisation*

¹⁰ A.L. Gay, "The law of Adoption: A Time of Change" (2010) 2(12) *Journal of Inquiries*. Retrieved from <http://www.inquiriesjournal.com>. Accessed 4 June 2021. O.O Onayemi and A.A. Aderinto. "Child adoption investigation in Nigeria: challenges and options" (2017) 15(2) 1 *Nigerian Journal of sociology and Anthropology*; A.O. Awoyemi. "Child fostering and adoption in Nigeria: Case study of Kwara State and literature review" (2006) 13(2) 1 *The Tropical Journal of Health Sciences*; O.C. Obioma et al "The challenges of child adoption and the emergence of baby factory on Southeastern Nigeria. (2015) 3(8) 3 *International Journal of education and Research*; M.C. Agbo. "Socio-cultural challenges of child adoption in eastern Nigeria in West Africa". *Journal of Humanities and Social Sciences Review*. 291) 86-93;84.

¹¹ O.A. Ojelabi, P. E. Osamor, and B. E. Owumi, "Policies and Practices of Child Adoption in Nigeria: A Review Paper" (2015) 6(1) *Mediterranean Journal of Social Sciences* 76.

¹² T. Ibraheem, "An Appraisal of Child Adoption in Nigeria" (2008) 1(2) *Akungba Law Journal* 23.

a substitute to abortion in unintended/unwanted pregnancy.¹³ Adoption is important in society because it touches on status and therefore affects the rights and obligation of an adopted person. In most legal systems of the world, adoption is a statutory creation¹⁴. Thus, for example, it was unknown to the English Common Law.¹⁵ Likewise, the practice is not recognised under Islamic law.¹⁶ Adoption is a common practice throughout the world and throughout history. However, the laws regulating it vary from country to country.¹⁷ Adoption as well as fostering, if not properly managed, could lead to abuse or exploitation of the children contrary to its intended purpose therefore, both at the federal and state level, there are laws, regulating adoption and fostering in Nigeria.

Several laws, both domestic and international, recognize and regulates adoption practices in Nigeria. It is worthy to note that the universally accepted standard is that, in any action pertaining to a child, the welfare of the child, is the paramount consideration and adoption practice, is not an exception. For instance, Article 24 of the African Charter on the Rights and Welfare of the Child, which deals with domestic and cross border adoption, enjoins member States to prioritize the welfare of the child, who is a person not more than eighteen years in every case of adoption.¹⁸ Member State must take all measures necessary to ensure that, in inter-country adoption cases, it does not result in trafficking or improper attraction of financial gain for those who adopt children. In fostering cases, any child who is temporary or permanently separated from his/her parents, shall be entitled to special protection and assistance. Article 19 of the United Nations Convention on the Right of a Child enjoin State members to ensure the safety and welfare of any child in whose best interest, cannot be left to remain in the custody of its parents by exploring fostering or adoption. By virtue of Article 21 (a) thereof, competent authorities or bodies, shall be set up to administer the process of adoption to avoid unintended consequences that can prejudice the welfare of a child. Any child under inter-country adoption, the state where the adopter lives, shall take all necessary measures, to ensure that the child enjoys safeguard and standard of life equivalent or better than what is obtainable if it were a national adoption.

The Child Right Act¹⁹ (CRA) of Nigeria, contains copious provisions on fostering and adoption. By virtue of Section 100 of the CRA, a person who is desirous of

¹³ O. O. Adetoro, and E. W. Ebomoyi, “The prevalence of infertility in a rural Nigerian community” 1991

¹⁴ Ibraheem, T.O “Adoption Practice in Nigeria-an Overview”, 2013, *Journal of Law, Policy and Globalization*. 19, 1-8:1.

¹⁵ Myers, E.D, *The English Adoption Law (1930)* 1(1) Review pp 53-63. Retrieved May, 31 2020 from <http://www.jstor.org/stable/30009455>.

¹⁶ Olowu, D. *Children’s Rights, International Human Rights and the promise of Islamic Legal theory*. Retrieved 31 May, 2021 from [https://www.ajol.info>view](https://www.ajol.info/view).

¹⁷ Ibraheem, (n 11) *Op. cit.* 7.

¹⁸ Article 24 , *The African Charter on Rights and Welfare of the Child (ACRWC)*.

¹⁹ *Child’s Right Act, 2003*.

fostering a child, shall make an application to the court within the jurisdiction where he/she and the child reside. A child, is qualified for fostering where it is abandoned by its parents, is an orphan, deserted by its relatives; voluntarily presented by its relatives; or is voluntarily presented to for fostering where no relative can be found.²⁰ A person shall not at any time, foster more than three children unless there are exceptional conditions in existence permitting that.²¹ Sections 102 and 104 prescribes the conditions under which a fostering order shall be granted and denied. For an order to be made, the applicant (s), must not be less than twenty years old and at least, twenty-one years older than the child to be fostered, the applicant (s) must demonstrate the means to take good care of the child; the applicant (s) must be certified by a qualified medical practitioner that they are medically fit to foster the child and the applicant (s) must be persons of unquestionable integrity. All these requirements are put in place to protect the interest of a child after the grant of an order of fostering. Where a married person is the sole applicant for a fostering order, the application shall be accompanied with the consent, in writing of the other spouse that the order should be made.²² However, where it is shown that the person to consent, cannot be found or is incapable of giving same, or has abandoned or persistently ill-treated the child, or the consent is unreasonably withheld, the court can dispense with it. Upon the making of a fostering order, the foster parents, have certain rights and obligations towards the child.²³

Therefore, a child shall, in respect of his custody, maintenance and education, stand to the foster parent exactly in the position of a child born to the foster parent in lawful marriage. The foster parent (s) shall have and exercise powers just like biological parent towards the child. The government agency charged with the duty of administering fosterage, shall maintain a foster register for all the children under foster care and shall pay regularly visits, to verify the condition and welfare of the child.²⁴ In the event that, it is proven to the satisfaction of the court that, a person (s) to whom a child is under foster care, have abandoned or fundamentally breach their obligation under the arrangement to the detriment of the child, the court, shall revoke the foster order made in their favour.²⁵ It is an offence for anyone to aid or abate the taking outside of Nigeria, without the prior permission of the court, first sought and obtained with respect to a fostered child fostered child.²⁶ Where a person has given his consent for a fostering order to be made and

²⁰ See section 101 CRA, 2003.

²¹ Section 103 CRA, 2003.

²² Section 105 CRA, 2003.

²³ *Ibid.* Section 110.

²⁴ *Ibid.* Sections 112 and 113.

²⁵ *Ibid.* section 114.

²⁶ *Ibid.* Section 116.

while the application is pending in court, shall withdraw the child or caused the child to be withdrawn from the care and possession of the applicant without the leave of Court.²⁷

Prior to 1965, there was no legislation regulating adoption in Nigeria. This *lacuna*, created enormous hardship in determining the relationship between the adopter (s) and the adopted child or persons who erroneously believe that they have validly effected an adoption.²⁸ What was mainly practiced, was child fostering under the guise of adoption. The earliest attempt at enacting an enabling legislation were made in 1958 both at the then Eastern House of Assembly and the Federal Government in respect of the then Federal Capital Territory, Lagos.²⁹ However, both efforts did not yield the expected result but subsequently, the Eastern Nigeria Adoption Law, 1965 was enacted.³⁰ Other States subsequently enacted their adoption laws.³¹

Section 125 of the CRA, specifies a child that can be adopted. An adoption application shall be made to the court in the prescribed manner and shall be accompanied by the birth certificate or sworn declaration of the applicant (s), if married couple, their certificate or sworn declaration of marriage; two passport photographs, and a medical certificate of fitness from a government hospital. Upon receipt of the application, the court shall cause investigation to be carried out on the application by a child development officer or any other person charged with such responsibility.³² The court, shall, in placing a child for adoption, have regard, as far as is practicable, to the wishes, if any, of the parents or guardian of the child as to the religious upbringing of the child.³³ In granting or denying an adoption application, the court, shall be guiding by the need to safeguard and promote the welfare and the best interest of the child throughout the childhood of that child; and ascertaining as far as possible, the wishes and feelings of the child, having regard to the age and understanding of the child.³⁴

Not all children can be adopted, Section 128 specifies the category of children that can be legally put up for adoption. They include children who do have any surviving parents, and the guardian of the child, consents to the adoption, a child that is abandoned, neglected or persistently abused or ill-treated and there are

²⁷ *Ibid.* Section 117.

²⁸ E.I. Nwogugu (n 4) *Op. cit.* 333.

²⁹ See the Eastern Region (Welfare of Illegitimate Children) Adoption Bill, 1958.

³⁰ Eastern Nigeria Adoption Law, No. 12 of 1965.

³¹ For instance, Adoption Law of Oyo State, No. 3 of 1983; Bayelsa State Adoption Law, 2006; Cross River State Adoption Law Laws of Cross River State Cap. A4 Laws of Cross River State, 2004; Adoption Law of Rivers State, Cap. 3 Laws of Rivers State, 1999.

³² Section 126 CRA, 2003.

³³ *Ibid.* Section 127.

³⁴ *Ibid.* Section 126 (3).

compelling reasons, in the interest of the child, why he/she should be adopted. The court has the unfettered power, to impose conditions while making an adoption order and can make an *interim* adoption order.³⁵ On an adoption order being made, all rights, duties, obligations, and liabilities, including any other order under personal law applicable to the parents of the child or any other person in relation to the future custody, maintenance, supervision and education of the child, including religious rights, right to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished; and there shall vest in; and be exercisable by and enforceable against the adopter.³⁶

Every institution in charge of adoption, shall maintain an adoption register where all adoptions, shall be duly recorded. An adoption order, brings the child within the prohibited consanguinity with the adopter and the biological children hence, they cannot get married.³⁷ A person who marries an adopted child in violation of the prohibition, commits an offence and upon conviction, is liable to a term of imprisonment not exceeding fourteen years. The Director of Child Development or a designated officer, shall from time-to-time, visit to ascertain the welfare of a child who has been adopted.³⁸ Inter-state adoption is restricted in the best interest of the child unless exceptional conditions which are to the interest of the child demands otherwise.³⁹

It is worthy to note that, although the CRA is a federal legislation, its application is limited to the Federal Capital Territory, Abuja since the issue it deals with, is not under the exclusive legislative list. Since 2003 when it was enacted, several constituent States, have domesticated it with minor variations although, most of the States in the North, are yet to do the needful which is not only desirable but expedient. Various States, also have their Adoption Laws. For instance, the Lagos State Adoption⁴⁰ regulates adoption practice within the State. The law is applicable only to the adoption of person under the age of seventeen years who have been abandoned, or whose parents and other relatives are unknown or cannot be traced after due enquiry certified by a juvenile court.⁴¹ Section 12 thereof, deals with the effect of an adoption order which is *pari passu* with what is obtainable under the CRA. As always, the welfare of the child, is the paramount consideration for the grant or denial of an order under the law. It is apposite to note that under the

³⁵ *Ibid.* Sections 134 and 135.

³⁶ *Ibid.* Section 141.

³⁷ *Ibid.* Section 147.

³⁸ Section 148 CRA, 2003.

³⁹ *Ibid.* Section 143.

⁴⁰ Lagos State Adoption Law Cap. A5 Laws of Lagos State, 2004

⁴¹ *Ibid.* Section 1.

Islamic law, adoption is prohibited as it is not permitted for the child of a man to be given to another.⁴²

3. ADOPTION PRACTICE UNDER CUSTOMARY LAW

By its characteristic nature, customary law (excluding Islamic law), is generally unwritten but a mirror of consistent usage that has gained notoriety.⁴³ Adoption as it is statutorily practiced, is different from what is obtainable under customary law. As a matter of fact, under customary law, adoption is rare because, parents are generally unwilling to relinquish their rights over their children. Aside this, there is the general reluctance of making a child a member of the family other than through the natural process of birth.⁴⁴ Fostering and guardianship is usually treated as synonymous to adoption under customary law as same has not developed to the extent that, its incidences are clearly identifiable like what is obtainable under statute. In fact, what is usually obtainable in practice is for a relation who is well to do, to take custody and guardianship over a child of a relation and train the child like his/her own child without necessarily severing the tie with the biological parent. All through the period, the foster parent or guardian, exercises some parental rights over the child, but there are certain decisions that, recourse must be had to the biological parent. For instance, where the child is getting married, the biological parents unless otherwise agreed, must agree to the union, and perform certain rites at the ceremony.

However, in situations where the parents of the child are unknown, like in the case of an abandoned child, the foster parent (s), after obtaining requisite approval of the appropriate customary authority, like the Chief, King, or village head, becomes the parent of the child in place of the biological parents. Under such circumstances, the biological relationship between the concerned child and its parents, is permanently severed just like in statutory adoption. Customary adoption could be effected formally and informally.

In the formal adoption, the representatives of the two families meets, the prospective adoptive parent (s) and the natural parent or guardian to deliberate on the adoption proposal. At the meeting, where same is agreed, there is transferred and acceptance of parental rights and obligations from the natural parents (guardians) to the adopter (s) which is sealed by the agreement. The approval of the natural parents (guardians) of the adoptive parent intention, culminates in

⁴² Ladan, M.T. *The Child Rights Act 2003 and the Challenges of its Adoption by State Governments in the 19 Northern States*. (2007) Paper presented at the Interactive forum for Sokoto State House of Assembly Legislators, Sokoto, Nigeria.

⁴³ *Lewis v. Bankole* (1908) 1 NLR 81.

⁴⁴ E.I. Nwogugu (n 4) *Op. cit.* 343.

making the child, a member of the adoptive family permanently.⁴⁵ In *Plange v. Plange*⁴⁶ the Ghana Court of Appeal held that, the essential requirements of a valid customary law adoption are the expression of the intention to adopt by the adopter (s) and the consent of the child's natural parent (or anyone in *loco parentis*) and family to the proposed adoption.⁴⁷

In informal adoption, there is no meeting of the families to discuss and agree on the proposed adoption *per se*. a child, maybe an orphan or a relation, is accepted by the adopter into his family and treated as his/her natural child, and the child reciprocates by treating the adopter as his/her natural parent and this continues for a long period of time in which the child, is fully integrated into the family of the adopter as a biological child with rights and obligation. For instance, where a widow remarries, or a single mother marries and take her child to the home of her husband who assumes fatherly role over the child for a long period of time. The child, would be virtue of the long period and the overt act of acceptance and integration, be transmuted into the biological child of the wife and her husband. In fact, in due course, the child can take the surname of the step-father and is fully assimilated into the family unless the family of the natural parent objects.⁴⁸ The only challenge with this arrangement is, defining the status of the relationship if it is fostering or guardianship parentage however, upon the child attaining the age of majority, it is only then that it can be conclusively determined whether it is adoption or fostering based on his acceptance or rejection of same.⁴⁹

In Nigeria, informal adoption is practiced in the various tribes and is prominent amongst the Yako tribe of Plateau State⁵⁰, Okrika of Rivers State⁵¹ and amongst the Igbo⁵² predominantly in the South East and the Yoruba⁵³ in the South Western part. In *Akinwande v. Dogbo*⁵⁴ where the Respondent took over the son of his deceased sister into his household and was fully responsible for his maintenance and upbringing over a long period of time. The High Court of Ogun State Coram Thomas J held that the child was validly by the Respondent under customary law. From this decision, there seems to be conclusive evidence that fostering, guardianship and adoption could be erroneously regarded as the same. The act of maintenance and upbringing of a child, could well qualify as either

⁴⁵ *Re Martin v. Johnson* (1936) WACA 93.

⁴⁶ (1977) IGLR 312.

⁴⁷ E.I. Nwogugu (n 4) *Op. cit.* 344.

⁴⁸ S. N. C. Obi, *The Customary Law Manual* (Enugu, Government Printer, (1977) 319.

⁴⁹ E.I. Nwogugu (n 4) *Op. cit.* 344.

⁵⁰ D. Ford, *Yako Studies* (London, International African Institute, (1964) 72-73.

⁵¹ K. Williams "Changes in the Marriage System of Okrika Ijo" (1962) 32 *Africa* 56.

⁵² S. N. C. Obi, (n 42) *Op. cit.* 319-321.

⁵³ *Akinwande v. Dogbo* Unreported Suit No. AB/26/68 Judgment delivered on 14th July, 1969.

⁵⁴ Unreported Suit No. AB/26/68 Judgment delivered on 14th July, 1969.

fostering or guardianship however, the length of time and depth of relationship involved, is the determinant whether the relationship is adoption or not and where the length of time and depth of relationship is long, it will qualify as adoption.⁵⁵

4. CONTEXTUALISING ADUBA V. ADUBA

The facts of this case are that the Respondent was received vide a Foster Child Agreement by the parent of the Appellant in 1972 from the Ministry of Health and Social Welfare of East Central State when he was just five years old. This was as a result of the death of the male child of the Appellants father Ohagwam Nwaemere Aduba and their stepmother, Felicia Nwugo Aduba. The Respondent name as at the time of receipt was Anyanwu Titus Uchendu. Ohagwam Nwaemere Aduba and his wife Felicia Nwugo Aduba changed the Respondent name Titus Aduba, integrated him into the family, cared for him like their son and grew up and got married in 1990 until the demise in of both Ohagwam Nwaemere Aduba and Felicia Nwugo Aduba in 2000 and 1999 respectively.

Prior to demise of Ohagwam Nwaemere Aduba and Felicia Nwugo Aduba, there was no challenge to the status of the Respondent as a member of the Aduba's family by anyone including the Appellants. However, after the demise of their parents, the Appellants, came up with the argument that the Respondent was not a member of the Aduba family. The 3rd Appellant in particular, wrote a letter to the police to the effect that the Respondent was a stolen child brought to the family by their sister, Comfort Aduba. They subsequently met to distribute the estate of their father who had died intestate. The Respondent and the female children were excluded from the distribution of the estate of Ohagwam Nwaemere Aduba on the ground that the custom that regulates the distribution, forbids a female child and a non-biological child from inheriting from the estate of their father.

As a result, the Respondent commenced a suit at the High Court of Imo State challenging the action of the Appellants excluding him from the estate on the basis that he was an adopted child and therefore not entitled to inherit. He contended that the act of exclusion violated his right of freedom from discrimination based on the circumstances of his birth enshrined in Section 42 (1) of the 1999 Constitution of the Federal Republic of Nigeria. he also sought the court to declare that he is entitled to a right of customary tenancy over the house which all the parties were living before the Appellants left to theirs leaving him there as the only occupant.

⁵⁵ E.I. Nwogugu (n 4) *Op. cit.* 344.

In a well-considered judgment, the learned trial judge held that it was unlawful and illegal for the Appellants to exclude the Respondent from inheriting the estate of their father under the guise that he is an adopted child as such amounts to discrimination against the Respondent based on the circumstances of his birth. Hence, the fact that he is an adopted child, does not preclude him from sharing in the estate of their deceased father who had treated him for all purposes and intent, as a child while alive. The court also declared that the Respondent is entitled to a customary right of occupancy over the house which he was living since his half-sister, who is the owner, is not adverse to his continuous occupation.

Being dissatisfied with the judgment, the Appellants, appealed same to the Court of Appeal. The parties filed and exchanged their briefs. The Court of Appeal, from the issues presented by the parties for determination, distilled two issues for determining the appeal. The first being whether the trial court was right when it held that the Respondent was an adopted son of Nwaemere Ohagwam Aduba and Felica Nwugo Aduba to entitle him to share in the landed property and estate of Nwaemere Ohagwam Aduba, given the evidence and the circumstances of the case while issue two was whether the trial court was right to have granted the Respondent a customary right of tenancy over the land and building which was said to belong to his half-sister PW 2?

On issue one, Appellants argued that the instrument of the purported adoption effected in 1972 by their father and stepmother, is actually that of fostering care and not adoption hence, the Respondent, was never adopted. A foster child, no matter how long the fostering and intimate the relation with the foster parent, does not metamorphoses to an adopted child whereby, same can access the rights and privileges conferred by adoption. They argued that the instrument of adoption i.e. exhibit “F” does not comply with the essential requirements of the Adoption Law of Eastern Nigeria placing reliance on the decision of *Olaiya v. Olaiya*⁵⁶ hence, at best, the relationship between the Respondent and their late father, was mere fostering which does not confer inheritance right.

They contended that the trial court finding and holding that the irregularity of the instrument of adoption ought to have been raised before the demise of the adopters, is of no moment and the fact that that upholding the requirement of the law would have harsh outcome, cannot persuade a court of law to play to sentiments as was decided in *Krans Thompson Organisation v. National Institute for Policy and Strategic Studies*.⁵⁷ The fact that the Respondent, has grown into

⁵⁶ [2002] 8 NWLR (Pt. 782) 652 at 671.

⁵⁷ [2004] All FWLR (Pt. 218) 797 at 809.

adulthood, gotten married with children, before his membership of the Aduba family was challenged, could not be a barrier to challenging his adoption as a member of the family and not calling the maker of exhibit “F” to tender same, being a public document although invalid, puts its authenticity to question based on the decision in *Chitex Industries Ltd. v. O. B. I. Nigeria Ltd.*⁵⁸ as a result, there was no credible and convincing evidence, before the trial court, supporting the case of adoption set up by the Respondent as a result, the judgment of the court, was against the weight of evidence.⁵⁹

On the issue of entitlement to a declaration of customary tenancy, they argued that, not being a member of the father, the Respondent, although, living in the property concerned, is not entitle to the declaration. That the duty to proof that he was in exclusive possession of the building which they had all lived in it, was on the Respondent based on the decision in *Oba Samuel Adenle v. Oyenbade*.⁶⁰

The Respondent on the other hand, on issue one, contended that, he was rightly adopted by Nwaemere Ohagwam Aduba and Felica Nwugo Aduba and integrated into the family as one of the children based on the undertaking contained in exhibit “F”, he was never discriminated against during the lifetime of their parents by anyone including the Appellants. He further contended that his case was anchored on adoption and not fostering and any shortcoming in the process, was not his fault nor that of the adopters but certainly, that of the Ministry of Health and Social Welfare which cannot be used to his prejudice. Besides, equity, considers as done, that which ought to have been done.⁶¹ He further contended that the case of *Olaiya v. Olaiya*⁶² relied upon by the Appellants, was distinguishable from the instant case as the case deals with statutory adoption, which tendering of the register, was essential for prove under the Lagos State Adoption Law which was in issue.

Having been accepted by Nwaemere Ohagwam Aduba and Felica Nwugo Aduba during their lifetime as a member of their family and given the family name, it will be, inequitable, and unconscionable to now assert that the Respondent is not an adopted child and therefore, not entitled to share in the estate of their deceased father. To do so, will be contrary to the provisions of Section 42(1) and (2) of the 1999 CFRN which prohibits discrimination of a person based on the circumstances of his birth particularly under circumstances which the person, had been treated as a brother.

⁵⁸ [2005] 14 NWLR (Pt. 945) 392 at 399.

⁵⁹ *Jolayemi & Ors. v. Albaji Alaoye & Ors.* [2004] All FWLR (Pt. 217) 584 at 603.

⁶⁰ (1967) NMLR 136 at 139; *Meka & Ors. v. Aniafulu* [2006] All FWLR (Pt. 309) at 1472.

⁶¹ *61 Owerri Municipal Council v. Onuoba* [2010] 8 NWLR (Pt. 538) 896; *Re-R v. Vender Well Trust No. 2* (1974) KB 295 at 322.

⁶² [2002] 8 NWLR (Pt. 782) 652 at 671.

On issue two, the Respondent contended that there was evidence before the trial court that all the parties, had lived in the house, which is at present, being occupied, exclusively by him after the Appellants built their own houses and parked out. Hence, being the one in exclusive possession and the owner not being adverse to his continuous possession, he is entitled to a declaration for customary tenancy. Besides, whoever is in possession, aside that possession is nine tenth of possession, is deemed to be the owner unless and until the contrary is proven.⁶³ He therefore urged the court to dismiss the appeal as it is lacking in merit.

On issue one, the court held that the Respondent was duly adopted and is an adopted son of Nwaemere Ohagwam Aduba and Felica Nwugo Aduba and therefore entitled to share in the distribution of their estate upon their demise, intestate. It held thus:

I think this case is at the root of National Public Policy and constitutional rights of persons/citizens in our jurisprudence. Where a child, taken from an orphanage or Social Welfare Department, is adopted or received and integrated into a family setting and given a name or allowed the name of the family of the adopter (s), or person who shows love and benevolence to the unfortunate child, he should not and cannot be left at the vice or mercy of the other beneficiaries of the estate of the adopter (s). It will be wrong, in my view, to remind and play back the sad ugly circumstances of the child's birth, taunt, mock and discriminate against him, and subject him to ridicule, just because somebody wants to deny him the benefit (s) of the estate of his adopter. And whether the word **adoption** of a child, is used in the strict, legal and statutory sense, or loosely, I think, once it is shown that the child was intentionally adopted and integrated into the family, and made to feel a sense of belonging by the adopting parent (s) or person (s), nobody should or can rise up and deny the child (now a grown adult) share in the covering, gains, benefits or liabilities, accruing from the common patrimony or estate of the adopter (s), who adopted the child. To that extent, I do not think the Appellants would have the vires to reject the Respondent and strip him of the covering, protection and legacy which their parent (s) bestowed or transferred to the Respondent, by reason of his acceptance, adoption, training and nurturing as a son of the family. Appellants, in my opinion, lacked the power to overrule their father, in death. Of course, part of the legacies which the Respondent got from Aduba Nwaemere and Felicia Aduba was the family name "Aduba" which they donated to the Respondent, and which stuck to him, right from when he was 5 years old, and now gives him and his wife and children, identity. That, to me, is part of the befits of the estate of a parent to children, being their family identity.

⁶³ *Oyadare v. Keji* [2005] All FWLR (Pt. 247) 1583.

It does not lie in the other children (Appellants) to deny the Respondent that identity, or to strip him of the name given to him by their father.

By the above findings, the Court of Appeal, upheld the decision of the learned trial court that the Respondent, who is an adopted child whom his adopted parents, in their lifetime, had demonstrated covertly and overtly, various acts of parent-child relationship without any challenge from any quarters, could not be legitimately challenged, by the Appellants or any other person for that matter. The Respondent took the insignia of his adopted parents and has used it freely from the tender and innocent age of five years till now and adult and married, it will therefore be sheer wickedness and injustice, to seek to strip him of same, the name which is his identity and tag.

Per the Appellants contention that the adoption instrument was invalid having not been executed in compliance with extant provisions of the subsisting law, the court held that, although, the document is titled “Child Foster Agreement”, the content thereof, properly fits into the mould of adoption as the obligations it imposes on the adopters (which they lived up to prior to their demise), explicates adoption as opposed to fostering. In any event, any defect in the document, that affect it from being in accordance with the provisions of the Adoption Law of Eastern Nigeria and now applicable in Imo State, same cannot prevail to the prejudice of the Respondent as such defect, it not as a result of the fault of the Respondent or his adopter. Besides, the presumption of regularity in favour of official acts as contained under the Evidence Act 2011,⁶⁴ inures in favour of same unless and until the contrary is proven by the Appellants. The serial number contained on the adoption instrument, the court, held that it suffices as a trace to the existence of the Adoption Register which the law requires to be in existence. In addition to this, the fact of adoption recorded therein served as a proof that the Respondent was lawfully adopted by the adopters from the Ministry of Health and Social Welfare on the date appearing thereon. Aside this, it is trite principle of law that, equity looks at what ought to have been done as done and the courts of law and equity, are the keepers of the conscience of the society, hence, will prevent any person or authority from acting against the dictates of conscience as was held in *Gadzama & Anor v. Adamu & Ors.*⁶⁵

The reprehensible act of excluding the Respondent by the Appellants in the sharing of their father’s estate based on their purported custom, aside being repugnant to equity, natural justice, and good conscience, offends the pristine and hallow provisions of Section 42 of the 1999 CFRN. This repugnant practice has been lampooned and jettisoned by even the Supreme Court in *Ukeje & Anorv.*

⁶⁴ See Section 168, Evidence Act, 2011.

⁶⁵ [2014] LPELR-24363 CA; *Ameachi v. INEC & Ors.* [2008] 2 FWLR (Pt. 414) 1443.

*Ukeje*⁶⁶ where it was held that “... no matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her father’s estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father’s estate is in breach of Section 42(1) (2) of the Constitution, a fundamental rights provision guaranteed to every Nigeria...”⁶⁷

As noted above and rightly so, socio-cultural factors, particularly in the South Eastern part of Nigeria, where there is awareness about adoption but couple with ardent refusal to accept same as conferring the same rights, benefits and obligation on children just as biological birth does, remains a dissuading factor to the practice of adoption in Nigeria. It exposes adopted children to avoided ridicule and stereotyping which should be discouraged. It makes no sense at all, for an adopted child, especially one who has been integrated into the adopted family and shared the bond of family and friendship for decades, to be suddenly challenged as illegitimate or a stranger in the same family. The psychological trauma and emotional instability that such an act exposes a person to, is better imagined than experienced. This decision, as far as the issue of inheritance is concerned, is a welcomed development which if it is appealed, should be upheld by the Supreme Court as same accords with the requirement of justice, fairness, and equity.

The Court of Appeal on the issue of the Respondent being entitled to a declaration of customary tenancy over the building belonging to his half-sister that he had been in exclusion possession of, the court held that he was entitled to the declaration. The reason is that having been in exclusive possession after the exit of the other parties from the house, and the owner not being unwilling to let him continue occupying same, there was no inhibition to the grant which was sought. The attitude of the Appellants, to say the least, is not only, inhumane, callous but morally reprehensible and *mala fide*. The law must always seek to and protect the vulnerable in the society and not aid the callous to realise the ill intentions/desire like the Appellants sought to do. The requirement of fairness and equity must be aggressively advanced by our courts at all times.

5. CONCLUSION AND RECOMMENDATIONS

Based on the above analysis, it is trite that adoption confers parental right on the adopter with corresponding obligations to the adoptee. Once adoption is

⁶⁶ (2014) LPELR-2272 SC.

⁶⁷ See also the decision of the Court of Appeal in *Igborunike & Ors. v. Onuador* (2015) LPELR-25530 CA where it was held that the circumstances of birth of an individual is no ground to discriminate against him in sharing or succeeding to the property of a grandmother or mother.

completed, the hitherto relationship that existed between the biological parent and the adoptee, extinguishes permanently and same is transferred to the adopter. The adopted child comes within the prohibited range of consanguinity and has every right and privilege that inures a biological child including right to inherit the landed property and share from the entire estate of the adopter upon death intestate. It will amount to discrimination anchored based on circumstances of birth and a hurtful and wicked reminder of the adoptee's unpleasant past, for the biological children, to seek to exclude him/her from inheritance upon the demise of their parent.

The position taken by the Court of Appeal in the case herein reviewed, is *in tandem* with the dictates of equity, fairness, and good conscience. Thus, to do otherwise, would be repugnant to natural justice, good conscience, and every strand of sense of fairness. A person who has been exposed by circumstances of life which are beyond his/her control, to be salvaged by adoption, should be prevented the agony of recalling that past that ought to past and be forgotten which the Appellants, failed to do. The decision can emasculate the socio-cultural shackles that have prevailed against adoption as a solution to infertility or other challenges. It has affirmed and solidified the unfettered right and privilege of adopted children to inherit from the estate of their parent upon death therefore, a welcomed development despite the challenges that are confronting the practice of adoption in Nigeria notwithstanding the increased awareness and usefulness of same. This decision is a good precedent.

Based on the findings above, it is recommended that awareness about the practice and acceptance of adoption should be continuously carried out to repel the several identified challenges confronting same in Nigeria. In fact, adoption is not only necessary as a panacea to infertility or lack of birthing a child of a preferred sex but is an act of service to humanity to help a child who has found him/herself in a pitiful state. Also, if the decision is appealed against to the Supreme Court, the Supreme Court, should affirm the decision to make it a final and binding precedent as it stems the tide of brazen discrimination on based on the circumstances of one birth. There is prevalence of socio-cultural roadblocks on the path of adoption practice in Nigeria particularly in the South Eastern part of Nigeria where adopted children, are culturally considered as outcast and infidel. There is the need for rigorous enlightenment campaigns to be conducted by stakeholders such as the Government (especially ministries of Health and Social Welfare), religious organisations, civil societies, etc. to educate the people on the ills of discriminating against adopted children, this will help to stem these horrible tides and their concomitant negative consequences.