LEGAL PLURALISM: CONFLICT BETWEEN ISLAMIC AND ENGLISH LAW, IS THE CASE OF ADESUBOKAN V RASAKI YUNUSA STILL AN EXISTING LAW IN NIGERIA?*

Abstract
Conflict of laws is not a new phenomenon in Nigeria. The country that has three sets of laws namely; received English law, customary law and Islamic law, is bound to have such conflict in the application of the laws. Although there are rules for resolving such conflicts, they keep occurring at alarming rate. Most frequent and the one that concerns this paper is the application of Islamic law where it conflicts with English law. That is the Estate of Late Professor Isah Hashim. In the case it was a conflict between Wills Act and the principles of Islamic law that is in contention. In this case the deceased a professor lived and died a Muslim, but made a will under the Wills Act 1837. A dispute arose regarding the application of the said Wills Act rather than Islamic law. This is an obvious conflict of laws, which raises the question of jurisdiction of the court and the law applicable. The aim of this paper is to show the attitude of the courts in cases such as this. A Muslim who chooses a different law other than Islamic law, will have the law he chooses, except where the state amended its Will law and put restriction on his personal choice of law. A number of cases have been used to bring to light the said attitude of the courts. The paper therefore recommends that states that do not have Wills Law shall adopt and amend their Wills Law to suit the custom of the people in the state. It is also shown that the case of Adesubokan v Rasaki Yunusa portrayed a similar situation.

Keywords: Conflict of laws, Wills, English Law, Islamic Law

1. Introduction

Domination of the received English law in Nigeria makes all customs to be subjected to the test of validity. What is however being discussed was whether Islamic law could be considered as customary law thereby subjecting it to the same test considered for customary law. This question can only be settled if Islamic Law is considered a customary law, thereby satisfying all the features of an enforceable custom. It is settled though that Islamic law has features entirely different from customary law and therefore different from customary law. In addition, the Supreme Court in Alkamawa v. Bello stated how universal Islamic law is. This paper also added that if universality is accepted to be an undeniable feature of Islamic law, it cannot then be equated with customary law that is subject to different societies. But, if Islamic law is not the same as customary law because of its different features what happens to some of our statutes that uphold their similarity? The interest of this paper now is not about the differences between the two laws, but how Islamic law can be applied in the face of a clear conflict with English law.

This paper is a thought of the author regarding the decision of the Upper Sharia Court which was affirmed by Hon. Justice Nasiru Saminu of the Kano State High Court, that the Sharia Court has jurisdiction to entertain any question of Islamic personal law, although the deceased had opted for English law (Wills Act 1837). The implication of this ruling is that, it is invalid for a person who lived and died a Muslim to make a will under the Wills Act thereby denying the other heirs the chance to benefit from Islamic law in Kano State. Another implication of this decision is that Rasaki Yunusa is no longer the law in Kano and other northern states who have enacted or amended their Administration of Estate laws. Fundamentally the paper tries to find out whether making a will under the Wills Act by a Muslim will not mean taking the administration of his estate outside the realm of Islamic law. Fundamentally the paper looked at some of the salient cases in portraying

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the attitude of the court in the conflict between English law and native law and custom in relation with Islamic law.

2. Facts of the Case

The plaintiff filed her claim before the Upper Sharia Court Filin Hokey within the jurisdiction of Kano state Sharia Court. She wanted the Court to distribute the estate of her late father (Prof. Isah Hashim who lived and died a Muslim) according to the principles of Islamic Law. In her claim, she included the entire estate of the deceased including the one subject of a Will made under the Wills Act. Although, her late father made the Will under the Wills Act devolving a large sum of his property to some of his children and wives. The plaintiff asserted that by the principles of Islamic law all the beneficiaries of the Will are entitled to inherit which Islamic Law excludes them from benefiting from the Will. While the beneficiaries of the Will claimed that the Will was made under the principle of English law and registered at the probate division of the High Court, therefore, the Wills Act displaced the principle of Islamic law, and this represents the personal choice of the deceased. The judge ruled in favour of the plaintiff when an objection was raised regarding the jurisdiction of the court. The argument was that the court lacked jurisdiction to entertain matters under the English Law (Wills Act 1837), therefore, by assuming jurisdiction the judge disregarded the Will made outside the principle of Islamic Law. And the ruling is an obvious clash or conflict between Islamic law and English law. The judge further rejected the Wills and claimed that it has violated the general and specific principles of Islamic law and therefore void. In his ruling the trial judge referred to Section 26 of the Kano State Sharia Law 2000. The effect of the section is that it made all the text of Maliki school of thought be deemed to be law made by Kano State House of Assembly. Therefore, since the said text deemed to be law set standard and limit within which a deceased Muslim can make a Will anything to the contrary is void.

3. Point of Departure between Islamic Law and Customary Law

It is a matter of law that Islamic law is included in the definition of Native Law and Custom in Nigeria.[1] Although apart from this statutory definition, Islamic law has continued to be different from customary law as held by a number of decided cases. Although, both academic and judicial authorities have expressed divergent views regarding the similarities and difference between Islamic law and customary law. Karibi-White[2] expressed his opinion on the difference between the two in the following words:

> It is important to point out for our purpose that this equation of Muhammadan law with customary law is demonstrably wrong and clearly misleading. It is submitted that the two system of law are not distinguishably similar. And the fact that Maliki School of sharia has taken local custom into consideration and consequently modified some aspect of strict Islamic law is not sufficient justification for the assertion. Admittedly, native law and custom has been statutorily defined to include Muslim law their distinguishing features nevertheless remain.

The learned justice was making this comment because of the views of imam Malik who accepted the fact that custom is part of Islamic law because Islamic law accepted custom existing during

[1] Section 2 Native Court Ordinance Cap 33, 1948; Section High Court Law Cap 42 Laws of Northern Nigeria 1963

[2] AG Karibi-White, *The History and Sorce of Nigerian Criimnl Law* (Lagos: Spectrum Law Publishing, 1993).34

Jahiliyya Period[3] and incorporated it as part of Islamic law because it has not contradicted the general tenant of Islamic law. Malik said Custom is a behavior of a man which receive approval of the society in a particular period and age. This is notwithstanding the fact that Islamic was made to be similar with native and custom according to some Nigerian laws, yet they have so many point of departure. In fact, many scholars have expressed their dismay over the inclusion of Islamic law into native law and custom, despite all the glaring differences. Even Park who happens to side with the common law system agreed that Islamic law is remarkably different from customary law.[4]

Furthermore, in describing the Nigerian legal system many scholars say the system is tripartite. Tripartite in the sense that it is a combination of English law, customary law and Islamic law. This make each of the laws to have a distinct features, distinguishing them from one another. It is important at this stage to state some few features of the customary law to make this point.

An example of this is the flexibility of customary law. Customary law is very flexible as against Islamic law which is rigid by its nature. In *Lewis v Bankole*[5] Osborne CJ described customary law as having:

> One of the most striking features of West African native custom… is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to alter circumstances without entirely losing its character.

The fact that customary law changes with time make it very different from Islamic law. For example land matter is governed by customary law before colonization and beyond. The law prohibited any kind of alienation of the land as a property of the family. In the sense that no individual ownership is recognized.[6] But that custom has come to change with time, individuals were allowed to own land even the head of the family came to be recognized as the only authority that has power to alienate land under the custom.

The idea that custom is an accepted mirror of the people make it more fundamental to notice the difference between the two. In *Owonyi v Omotosho*[7] Bairamian FJ described customary law as "a Mirror of accepted usage" reason being that its validity depend on its acceptance by the community. Unlike Islamic law it is not the community that gives Islamic law legitimacy. It is the law that shapes the behavior of the community not community shaping the law. This is a strong departure between the two laws. Lord Atkins further explained that "it is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate"

Further to this, customary law is more often restricted and applied to a particular community or tribe. This is unlike Islamic law that is not restricted to any particular community or tribe. It is also not an indigenous law in Nigeria. It is very wide and unlimited to a particular tribe or community.[8] It has no language barriers or racial difference. Wali JSC has this to say in *Alkamawa v Bello*, "Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more

[3] Jahiliyya Period is the period before the establishment of sharia and the introduction of Muslim law in the Arabian Peninsula

[4] AEW Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963). 85

[5] *Lewis v Bankole* (1909) 1 N.L.R. 100

[6] AJ Beredugo, *Nigerian Legal System: An Introductory Text* (Zaria: Malthouse Press Limited, 2000). 144

[7] *Owoniyi v Omotosho* (1961) 1 All NLR 304.

[8] *Saka Salau v Aderibigbe* (1963) WNLR 80; *Obi v Obijindu* (1996) 1 NWLR (Pt. 423) 240.

universal than the English Common Law."[9] This erudite statement brought about the difference between all other laws in Nigeria. This decision n of the Apex Court remain the law today. Therefore the difference between Islamic law and customary law is clear and unambiguous. The essence of bringing this here is because in the paper is because the two laws are sometimes interchangeably.

4. Jurisdiction of Court over Choice of Personal Law

Conflict of laws suggest that a certain transaction occurred with foreign element. This create confusion as to which of the laws shall apply. The conflict of laws mostly occurred on private law or private transaction like succession and family issues.[10] The general rule is that the form of marriage determines the law that governs the succession, which also include the jurisdiction of the court. In the sense that where a person subject to native law and custom contract a marriage under the Marriage Act, it is the English law that will govern the administration of his estate where he died intestate.[11] By necessary implication he will be deemed to have ousted the jurisdiction of the native or customary court or even the native law and custom in the administration of his estate. For example Section 36 of Marriage Act states thus:

> where any person who subject to native law and custom contracts a marriage in accordance with the provision of this Act and such person dies intestate, subsequently to the commencement of this Act, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Act:-
> The personal property of such intestate and also any real property of which the said intestate might have disposed by will shall be the distribution of the personal estate of intestate, any native law or custom to the contrary notwithstanding…

The implication of the provision of this law is that any person who contracts a marriage despite the fact that he is a Muslim, in the event of his death the principle of Islamic law shall not be used to govern the administration of his estate. Reason being that he is presumed to have opted for English law rather than his native law and custom.[12] In other words, he made a personal choice of law in the event of his death. And by that singular action he has ousted the jurisdiction of any Customary or Sharia Court as the case may be. In *Olowo v Olowo*[13] the Nigerian Supreme Court was confronted with an issue for determination regarding choice of personal law. Stating that although the late Olowo was a native of Yoruba custom from Ijesha, he resided in Benin City and acquired considerable properties. He naturalized as a Benin of his own volition and hence the distribution was made according to Bini native law and custom. In his life, the late Olowo applied to the Oba of Bini for naturalization which was granted and that enabled him to acquire properties in the Bini city. Because of this fact, the Supreme Court held that the man has made a choice of his personal law as

[9] *Alhaji Ila Alkamawa v Alhaji Hassan Bello and Alhaji Malami Yaro* [1998] 6 SCNJ 127.
[10] Percy C Hubbard and JND Anderson, "Conflict of Laws in Northern Nigeria," *Notes and News* 3, no. 2 (1959): 85–90.
[11] *Cole v Cole* (1989) NLR 15.
[12] *Muhammad v Muhammad* Appeal No.: KWS/SCA/CV/AP/IL/14/2022)
[13] *Olowo v Olowo* (1985)3 NWLR (Pt 13) 372.

a result of his culturalisation. Hence upheld the holding of the Court of Appeal that the consequences of his choice is that Bini native law and custom is his personal law.

The Supreme Court further stated that change of personal law is a right in Nigeria and is not a new thing in the Nigerian jurisprudence. The classical case of *Cole v Cole*[14] which was accepted in many occasions by the Supreme Court is instructive on this issue. A man or a woman converts into English law for the purposes of distribution of his or her estate upon his or her death intestate irrespective of his or her customary law. That is to say that any where a person contracts a marriage under the English law or Christian rites it is implied that his estate shall be distributed according to English law. And the court said this has the backing of section 36 of the Marriage Act.[15]

Therefore by necessary implication one may assume that the case of the Estate of late Isah Hashim was wrongly decided by the lower Court. Reason being that although the deceased did not contracts his marriage under the Marriage Act or any English law, the fact that he made a Will under the Wills Act, implied that he preferred English law to govern the administration of his estate. Or rather he chose English law to be his personal law. And therefore by that single action he has taken away the jurisdiction of Sharia Court in respect of the properties he bequeathed to some of his children and wives. Therefore, one may conclude that the Upper Sharia Court erred in law to have assumed jurisdiction over the said property that is purported to be covered by the Wills Act. This argument is supported by the aforesaid cases of *Cole* and *Olowo*.

However, one can say that these cases can be distinguished from the present case. In the sense that apart from the Wills, there was nothing that indicated that the deceased intended English law to be the choice of his personal law. Especially because the Act said where a person contracts a marriage under the Marriage Act or English rites, while the deceased in this case did not contract his marriage under the Act. Although it may be argued that though the marriage was not contracted under the Marriage Act notwithstanding as decided in *Olowo*. The deceased only culturalised in Bini native law and custom and the principle of Bini native law and custom applied to his estate. Again the celebrated case of *Rasaki Yunusa v Adesubokan*[16] cannot be over emphasized in this paper, because the deceased live and died a Muslim but made a will under the Wills Act. The Islamic law was held to be incompatible with the Wills Act. This submission was argued to be because there was no local law at the time that is why the Wills Act of 1837 superseded the native law and customs.

Furthermore, the above submission in the case of Rasaki Yunusa can be distinguished from the case in the estate of late Professor Isah Hashim as ruled by the trial judge. This is in the sense that when Yunusa was decided there was no local legislation or law that regulate administration of estate not even sharia was made a statutory law. But now that in Kano State the Sharia Court Law 2000 was enacted as a local legislation and it invalidated the application of the Wills Act to be applied on the estate of the deceased who lived and died a Muslim within Kano state. The law is Section 29 (3) adopted all the Islamic law text from the Maliki school of thought to be deemed as law passed by the Kano State House of Assembly.

Recently, the case of *Muhammad v Muhammad*[17] came before the Kwara State Sharia Court of Appeal. The deceased contracted his marriage under the Marriage Act despite the fact that he lived and died a Muslim. He subsequently contracted another marriage under Islamic rites. Upon his death the first wife claimed the inheritance of his estate to the exclusion of the other wife and her children. Although the matter came before the court regarding the jurisdiction of the Sharia

[14] *Cole v Cole* (1989) NLR 15
[15] Marriage Act 1958 LFN Cap 115
[16] *Yunusa v Adesubokan* (1968) NNLR 97
[17] *Muhammad v Muhammad* Appeal No.: KWS/SCA/CV/AP/IL/14/2022)

Court to entertain the matter. The Court in its wisdom declined that it has no jurisdiction where the law under which the marriage was contracted was English law. It therefore ruled that English Law shall govern the distribution of the estate. The argument was that if he had distributed his estate under the Wills Act to the subsequent wife, the first wife married under the Act could not be able to deny them from benefiting. But he died without a Will.

This case is similar in fact and in law with the case at hand (Estate of late Isah Hshim). However, today in Kano there is a Law that is binding on all Muslims not to act contrary the rules laid down by the principle of Islamic law. Therefore, when a deceased made a personal choice of law, where his actions contradict the rules in the Sharia law his act will be declared a nullity. This law has done away with the need to enact a separate law to guide the administration of estate of a deceased in Kano. This will further be explained in the discussion regarding the rule governing conflict of laws.

5. Status of Islamic Law in Conflict with other Laws

Nigeria being a country with about three sets of different laws makes conflict of laws inevitable. English law in one hand, while Islamic law and customary law on the other make it difficult to operate without clash. As inevitable as it is, this clash occurred in several occasions in this country. Decisions were reached in resolving the said conflict, sometimes with a lot of disagreement and rancor. Prominent among the decisions is the case of *Rasaki Yunusa v Adesubokan*.[18] Let the fact of the case be reproduced and the decision of the courts to make it clear: The facts of the case were that the deceased a father of many children who is a Muslim, made a bequest before his death which contradicts the Islamic Law principle (wasiyyah) but conforms to the Wills Act of 1837 both in form and substance.[19] Under the Act the testator gave his eldest son £ 5.00 (about N10.00) and gave to each of his other two children a plot of land valued at £ 50.00 each. In addition, the testator gave the other two children his house jointly. The plaintiff who was the eldest son, challenged the validity of the will on the grounds that it was contrary to Islamic law. His contention was that under Islamic Law, a Muslim can only bequeath one-third of his property to persons who are not his legal heirs. This is an apparent conflict between English law and Islamic law principle. It was held by Bello J. (as he was then), *inter alia*:

> A testator as a Muslim native of Omuaran, Kwara State, was subject to the Muslim law in his locality viz. Omuaran. As there was no evidence as to particular Muslim Law of Omuaran, the presumption was that this was the law of Maliki School. Maliki law provides: Muslim may make a will, but may dispose of not more than one-third of his property to persons who are not his heirs and cannot by will affect the entitlement of his heir to the remaining two-thirds. Therefore the will in question was invalid under Maliki law because of the lack of equality of heirs.[20]

The implication of the decision of his Lordship is that the fact that the deceased is a Muslim he has no right to act contrary to Islamic principles. In other words, the question of choice of law by Muslim is not acceptable. However, the decision was overturned on appeal. Declaring the Islamic

[18] *Yunusa v Adesubokan* (1968) NNLR 97

[19] Isah Chiroma, "Conflict Between Islamic Law And Common Law on The Testamentary Powers [Waṣiyyah]: The Attitude of Nigerian Courts," *Islamic Research Institute, International Islamic University, Islamabad* 32, no. 3 (1993): 339–49.

[20] Ibid

law to be incompatible with the Wills Act of 1837. This is what most of the subsequent cases follow. Although arguing differently that it is an individual choice to select which law will govern his personal affairs. The recent decision of the Kwara Sharia of Appeal is instructive. That it is his personal choice to elect to contract a marriage under the Act and in the event of his death English Law regulate such estate in the absence of any will.

What is however, different with the case of the estate of late Isah Hashim is put into consideration. That is, what happens where there is a local legislation restricting the person from deviating from his native law or Islamic law? By virtue of the provision of section 45 of the Interpretation Act, received English Law could be overridden by any Federal Law. It also means that where there are any inconsistencies between a Statute of General Application and any state law under the concurrent or residual legislative list the English law shall prevail over that law. Because the section only referred to federal law not state or regional laws. The section provides thus:

> Subject to the provision of this section, and except in so far as other provisions is made by any federal law, the common law of England and the doctrine of equity, together with the statute of general application that were in force in England on the 1st day of January, 1900 shall be in force…

If by the provision of this law Islamic is made a law in any of the states of the federation, it cannot have overriding force over received English law. By implication a deceased person who made a Will under the Wills Act a Statute of General Application, the Will cannot be overridden by any local law made in Nigeria except if the law is the one made by the National Assembly as a federal law. Another implication of this scenario is that the attempt or call by some lawyers and other jurist to enact a law that will stop a Muslim from making a Will under the Wills Act save under Islamic law cannot have any legal consequences, because the law is not a federal law as provided in section 45 of the Interpretation Act.

This could further be the reason why Supreme Court in this case rejected the argument of the trial judge that Section 45 of the High Court Laws shall override the Wills Act.

> ….Muslim law of inheritance is not repugnant to natural justice, equity and good conscience. Also it is not incompatible either directly or indirectly or by implication with the Wills Act because the final words of section 34 (1) of High Court Law, "and nothing in this law shall deprive any person of the benefit of native law and custom",

The Supreme Court declared that the trial judge erred in law by holding that the testator was entitled to do as he did under the section of the Wills Act 1837. The trial judge felt that the testator's action must be in conformity with native law which violated the provisions of the Wills Act under which a testator can dispose of his property as he pleases. The provisions of the Maliki law were undoubtedly incompatible with Section 3 of the Wills Act 1837, as such the trial judge may be said to be clearly in error. And Section 34 (1) of High Court Law means that nothing in the High Court Law shall deprive any person of the benefit of native law and custom including Muslim Law which is incompatible directly or by implication with any law for the time being in force and in present case, the Wills Act 1837.

It is therefore submitted that if *Rasaki Yunusa* remain a living law in this country, it remain to be seen how the Appeal Courts will resolve this issue. It also means that a call by some associations to enact a law that will stop a Muslim from making a will under the Wills Act or any

other English law may not solve the problem. This being that even the provision of the Interpretation Act only made reference to federal law not state law as the case may be. However, this view may not represent the true position of the law in Nigeria in view of the following argument.

6. Legal Development in the Rules Governing Conflict of Laws in Nigeria in Relation to the Rasaki Yunusa

Conflict of laws in Nigeria is settled depending on the transaction and the status of the parties involved. Stating the rules here is important in order to have a basis for the argument in considering the case at hand. In Nigeria, all the wording of the rules are basically the same as provided in the law with the exception of High Court Laws of the former Northern Nigeria[21] that make a difference in the classification or the naming of the parties for the purposes of applying the rules. For example, native and none native, Nigerians and none Nigerians, etc. The general rule is that in any conflict between Nigerians or natives, customary law shall apply. Unless where the transaction is unknown to customary law or the parties decided otherwise. And in this regard, only law of northern Nigerian contains a residuary clause to the effect that where no express rules apply, "the court shall be governed by the principles of justice, equity and good conscience."[22] But in interpreting this, it was held to be English law.[23] The conflict in any case may be between Nigerians and non-Nigerians or between Nigerians as the case may be. Though a different name is used in other jurisdictions, like native and none native, the concern of this paper is where all the parties are Nigerians or subject to customary laws, or in this case subject to Islamic law. The general rule is that Islamic law or customary law applies between natives or Nigerians as the case may be.[24] Most of the conflicts happen on personal law, especially family issues like succession or inheritance. In this regard personal law of the deceased is the applicable law. Therefore, where the deceased died a Muslim Islamic law applies to his estate.[25]

There are exception where a different law will apply between Nigerians rather than native law and custom. That is where the parties expressly agreed that their transaction should be governed by English law. Or impliedly, the parties or party intends English law to be the applicable law. In other words, applying this rule, in the case under consideration, where the deceased made a Will under the Wills Act it implied that he wanted his estate to be governed by English law. In the case of *Labinjo v Abake*[26] the Court held that:

> The general rule is that if there is a native law and custom applicable to the matter in controversy, and if such Law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local ordinance, and if it shall not appear that it was intended by the parties that the obligations under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom.

[21] Section 34 High Court Laws of Northern Nigeria 1963 Cap 52
[22] Nwamaka Iguh, "Conflicts of Laws in Nigeria," *Journal of Nnamdi Azikiwe University*, (2017). 24
[23] Ibid
[24] *Labinjo v Abake* (1924). 5 NLR 33.
[25] S. 277 Constitution of the Federal Republic of Nigeria 1999 (as amended)
[26] Ibid

The emphasis in the above decision of the Court is intended. That is to say that the applicable law in any situation or matter between Nigerians, Muslim to be specific is that Islamic law shall apply unless where the parties intended English law to be applied. And in this case the disposition of the deceased clearly demonstrated that English Wills Act should be the law to apply in this transaction.[27] The decision in *Apatira v Akanke*[28] where a Muslim made a will in English form, but it had a technical error, which would make it invalid under the Wills Act. Counsel for the plaintiff nevertheless, contended that since the deceased had been a Moslem, the will should be admitted to probate under Islamic law, may be because a Will speaks from the grave upon death, but the trial judge disagreed. The testator had clearly intended his Will to take effect under English law and therefore it was by the standards of that law that it should be judged. This decision indicated the attitude of the court in cases like the one under consideration. That is not for the court or any other person to change the wishes of the deceased where he died testate.

However, what is in contention in the case under the estate of estate Isah Hashim is whether because the deceased is a Muslim he cannot dispose up his property according to another law other than the law that governed his faith. To this end reproducing the provision of the Wills Act is important. It says every person with a sound mind can make a will under Section 3 of the Wills Act, 1837 thus:

> It shall be lawful for every person to devise, bequeath, all properties or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law…

Clearly, with the above decision and the provision of the Wills Act the conflict as in this case seemed to be settled. What is however to be contended with is the fact that several decisions that followed *Alkamawa v Bello* have shown Islamic law to be different from customary law.

However, another point worth consideration is that several states have adopted and amended their Wills Law. By the general rule of the laws anybody who died within that state his estate will be governed by the administration of estate law of that state. However, the law exclude the application of the Wills Law of those states to matters where any deceased died and till his death Islamic law or customary law is the law that governs his affairs.[29] By implication as long as a person lived and died a Muslim, Wills Act, administration of estate Law of that state is the applicable law. By implication *Rasaki Yunusa v Adesubokan* is amended or rather overruled by the

[27] *Cole v Cole* (1989) NLR 15 *Olowo v Olowo* (1985)3 NWLR (Pt 13) 372,

[28] *Apatira v Akanke* (1944) 17 NLR 149

[29] "Administration of Estates Law Vol. 1 Cap A3, Laws of Lagos State 2003 Administration of Estates Law, Laws of Kaduna State , Administrate of Estates Law, Cap, 49, Laws of Kwara State 2007"

administrative laws of those states.[30] According to Prof. Bala Babaji[31] principles of Islamic law application is protected by those laws. He says:

> The implication of the above provision (Section 3 (3)) is that Customary, Area and Sharia courts in the relevant states vested with jurisdiction to handle questions of Islamic personal law of inheritance of a deceased person and any distribution of estate of a person bound at the time of his or her death by Customary or Islamic personal law are not to be governed by the administration of estate laws in such states. The sanctity and applicability of Islamic (customary) law of inheritance in the administration of a deceased Muslim is therefore protected and affirmed under this Statute.

A good example is the Kaduna State Wills Law where this problem is settled by the law itself. The law set aside the decision in *Adesubokan* thereby given Islamic law supremacy over any Wills law where the testator is a Muslim in case of any conflict. Section 2 of the Wills Law of Kaduna State (1999) reads as follows:

> It shall be lawful for every person to bequeath or dispose of by his 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, 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.

Several decisions have accepted the effort of the various states in their Wills Law. For example, the decision of the Federal Court of Appeal in *Ajibaiye v Ajibaiye*,[32] where the court was for the first time confronted with a case similar to the one under consideration in this paper, where Wills law provided for testamentary limitations on persons subject to Islamic (customary) law. In the case, the deceased who died testate, being a Muslim from Kwara state (Ilorin), made a will under the Wills law of the State, where he shared his properties in a manner beyond Islamic law principles. Similar to the case in the estate of late Prof Isah Hashim. The deceased even stated unequivocally that he wanted English law to guide his will despite the fact that he was a Muslim. In the said Will, his wife, (a legal heir) received the bulk of his estate. The Court of Appeal upheld the decision of the trial court and held that the Will was made contrary to Islamic law limitations as such it is void notwithstanding his decision to be governed by the English Law while being a Muslim. This is despite the fact that he made a choice of his personal law. Now applying this principle to the case at hand, we can safely say the will under consideration in this case is void. Although this is only if there is a law in Kano passed by Kano State House of Assembly

[30] Section 3 (1) of the Wills Law of former Western Region and adopted in the Wills Law of Old Bendel State Cap 172 of 1976, applicable in Edo State where the Supreme Court in *Lawal-Osula v Lawal Osula* (1995) 32 LRCN 291 upheld the Supremacy of Bini Customary law of inheritance against the Wills Law of Edo States Section 3(1) Wills Law of Lagos State also which made slight additional improvement on the Wills Law of the old Western Region Wills Law of Oyo State etc. the implication is that in those laws Custom or Islamic law as the case may be were made to be the applicable law where the deceased lived and died a Muslim.

[31] Bala Babaji, "Aministration of Estate under Islmaic Law: Practice and Procedure. Being a Paper Presented at The Annual Refresher Course For Judges and Kadis With the Theme: Promoting Public Confidence in the Administration of Justice" (Abuja, 2022).

[32](2007) All NWLR pt. 358, 132s1

making this restrictions. There is no specific law on the administration of estate passed by Kano state House of Assembly.

However, the trial Judge considered Section 29 (3) of the Kano State Sharia Court Law 2000 in his ruling. The said section provided that all the Maliki school books of jurisprudence are deemed to be law made by Kano State House of Assembly. He added that since the law deemed to be made by the State of House of Assembly made a clear restriction regarding a Muslim making a Will contrary to Islamic law it will be unlawful for anyone to go contrary to the stipulation of that law.

Therefore, by implication since these Islamic law books set limit for any act contrary to Islamic law principles the said Will having contradicted the provision of the Islamic principle is void. This reasoning has similar effect with the decision in *Ajibaiye v Ajibaiye* and many other juridical authorities.[33] Therefore, the Kano State Sharia Law 2000 is deemed to have amended the Wills Act of 1837 and even the decision in Adesubokan v. Rasaki Yunusa especially where the parties are Muslims and governed under the principles Muslim law. Therefore it be authoritatively stated that Adesubokan is not an existing law in any state that has its administration of estate law restricting Muslim for deviating from the rule of Islamic principles.

7. Conclusion

The submission in this paper is triggered by the recent issues regarding choice of law of a person subject to native law and custom or Islamic law in Nigeria. Particularly the case of *Muhammad v Muhammad*, *Oluwo v Oluwo* and the Estate of late Prof. Isah Hashim etc. The question is whether in the event of conflict between Islamic law of personal statute and English law which law shall prevail. Although parties have the right to make personal choice of law, however, several states have amended their administration of estate law, thereby setting limit for the right to make such choice. That is in any case where any deceased died a Muslim, Islamic law shall be the applicable law to govern his estate, or customary law where he is subject to native law and custom as the case may be. We have seen the example of Kaduna and Lagos States. However in Kano where this issue was recently raised the limit by Islamic law principles in various Islamic law text is adopted as part of the law passed by Kano State House of Assembly. The implication is that the Sharia Law 2000 is deemed to have amended the Wills Act of 1837. Therefore, the decision in Rasaki Yunusa is deemed to have been overruled by the Sharia Court Law 2000 as applied in some of the cases cited above. Therefore, the paper also closes the need to pass any law in Kano to restrict the choice of individuals to make will outside Islamic law.

[33] *Usman v Usman* (2005) NNLR p. 449, 50; *Garba v Abdu* (2006) 3 SLR (pt. 2) 118 C.A