

c.) N500,000.00 general damages for trespass in that the Defendant was discovered to have built the house in Year 2002/2003.

d.) Perpetual injunction restraining the Defendant, his privies or servants from trespassing further on the land in dispute.

The claimants' case opened on 4/11/13 with 1st claimant Idahosa Ogiemware in his adopted statement on oath stated that his late father died on 25th February, 1998. The family performed his burial ceremonies according to the Bini Native Law and custom with Pa. Iguisi as the Okaegbe who presided over the burial ceremonies. Of all the children of his late father only Mr. Owens Ogiemware (now late) was living in the family house known as No. 159, Upper Lawani Street, Benin City until his death. During the lifetime of their father, he (claimant's father) acquired a parcel of land measuring 100 feet by 100 feet at Ward 22J, Upper Lawani Street, Benin City on the 13th December, 1963 where he erected a storey building (where he lived till he died) on a part of the land now known as No. 159A, Upper Lawani Street, Benin City. The other part of the land measuring 50 feet by 100 feet remained undeveloped and it is where the defendant erected his building now known as No. 159B, Upper Lawani Street, Benin City. Their father's property has not been shared till date. The land on which the defendant built was sold to him by his late brother, Owens

Ogiemwanre without the consent and authority of his family members. The defendant was avoiding the family to the extent that the matter was reported at Okhoro Police Station but the charges were dropped.

The claimant further testified that sometime in 2002/2003, the Defendant packed into the house. There were several correspondences between the claimants' Solicitors and the Defendant particularly the letters dated 4/12/06, 29/9/06, 10/10/06 and 6/12/06 Exhibit A1, A2, A3 and A4. Letter 22/9/06 Exhibit A.

Owens Ogiemware transferred the said land to the Defendant via a certificate of transfer Exhibit B. He stated that the land in dispute did not form part of late Ogiemwanre's "Igiogbe" but his estate. That apart from the correspondence earlier stated there was no other correspondence between Osaretin and the Defendant. Any purported letter alleged to have been written by Osaretin is false and made for the purpose of this action. It is not correct that Osaretin Ogiemware came with the Community to bless the house when the Defendant opened the house. The claimant's action was never caught by the doctrine of standing by as the claimants' family took all necessary steps to stop the Defendant from further acts of trespass.

Under cross-examination, 1st Claimant testified that he is not the first son of his father but Osaretin Ogiemware. Osaretin is still alive. Igiogbe cannot be shared. He testified that when Owen sold the land to the defendant Osaretin was in Abuja. Osaretin stepped into the shoes of their late father when their father died. He took over the properties pending when the properties will be shared. The documents he found showed that Owen sold the property as his own. He did not have the authority of Osaretin to sell. The defendant bought the property with the authority of Osaretin and the rest of the family. The defendant completed his house on a date he did not know.

3rd claimant Ewemade Ogiemware, on 20/1/14 adopted her statement on oath that their late father married three wives in his life time, one is dead and the two wives remaining had children for him. Her mother gave birth to seven children and the 3rd wife gave birth to one child. Their late father's burial ceremonies have since been performed and Pa. Iguisi was the Okaegbe. She stated that her father's property has not been shared because her younger brother, Osaretin who is the 1st son and some of her siblings left for their respective places of work immediately after the burial ceremonies except Owens who remained at the family house. During the lifetime of her late father, he

acquired a parcel of land measuring 100 feet by 100 feet in 1963 at Ward 22J, Upper Lawani, Benin City.

She stated that her father developed part of the said land by erecting a storey building on a portion measuring 50 feet by 100 feet (now known as No. 159A) while the remaining portion of 50 feet by 100 feet is the land in dispute which Owens sold to the defendant without the knowledge and consent of the family. Her late father was buried in the storey building at No. 159A, Upper Lawani Street, Benin City.

She further stated that in 1997, she heard somebody had deposited sand (on the vacant portion which her father did not develop before his death) on the land in preparation for erecting a building on the land. She immediately went to Okhoro Police Station to lodge a complaint because she did not know who deposited the sand. Based on the complaint her late brother Owens who was then living in the family house was arrested and charged to the Magistrate Court while the defendant went into hiding. The case was subsequently struck out by the Court as the defendant could not be found. In 2003, the family discovered that the defendant was the trespasser when he moved into the house. It is not true that Owens Ogiemware had a letter of authority to sell the land as no

member of the family had any knowledge of the sale of the land in dispute to the defendant.

She stated that Osaretin did not write any letter to the Defendant neither did he come with the Community to bless the house built by the Defendant. That at no time did the family standby or acquiesced for the land to be sold to the Defendant and to continue his acts of trespass.

CW1, Godwin Bazuaye adopted his statement on oath made on 17/3/14 that late Ajayi E. Ogiemwanre has since been buried under Benin Native and Custom in his family house at No. 159A, Upper Lawani Street, Benin City. Late Pa. Iguisi was the Okaegbe at the burial ceremony and he also participated in the burial ceremony. The property of the deceased has not been shared because Osaretin the 1st son of the deceased left Benin soon after the burial and the property cannot be shared in his absence. He stated that under Benin native law and custom it is forbidden for any member of the family to sell family property when it has not been shared and or authorized by the family. The property of a deceased Benin man which is yet to be shared remains family property and in control of the family until it is shared and any member of the family has the right to protect such family property.

At the close of the claimants' case, the defendant opened his case on 16/4/14. DW1 Ehigieba Jonathan testified on 16/4/14 vide his statement on oath that he is the Odionwere of Upper Lawani, Benin City. That sometime in the year 1997, Mr. Owens Ogiemwanre came to meet him in his house with a letter written by his elder brother Osaretin Ogiemware authorizing him to sell 50 feet by 100 feet of the land which forms part of their father's Igiogbe inherited by their eldest brother who was residing in Zaria at that time to pay up the debt he was owing from where he borrowed money which he used to complete his house at Upper Erhumwuse Street, in Benin City. Owens came to show him the letter to inform him about it in case anybody showed interest in buying the property. The defendant after sometime came to inquire about the land and eventually bought the land. Defendant started building on the land. When the Defendant was laying the foundation of the house, DW1 and the rest of the Community were all present. When the defendant completed his house, DW1 and some Community people came to bless the house in the presence of Owens and they demanded for N7,000 (Seven Thousand Naira) for development levy and N3,000 (Three Thousand Naira) in place of food and drinks which the defendant paid as the custom of the Binis.

The Defendant, Ailenoator Abiodun on 16/4/14 vide his statement on oath testified that sometime in 1997, he acquired the land in dispute from Owens Ogiemware who had the authority to sell same at the time. The letter of authority is Exhibit D. The claimants in this case have no authority of the head of Ogiemwanre family Pa. Osaretin Ogiemwanre to file this suit. The property now in dispute forms a part of the ancestral home or Igiogbe of late Ajayi A.E. Ogiemwanre who died intestate in 1988 as a Benin man. The deceased was buried by his children headed by Osaretin Ogiemwanre, the eldest child, in accordance with the Benin customary law and after the burial ceremony the property was inherited by Osaretin Ogiemwanre as the eldest son. Igiogbe cannot be shared. After he purchased the property from Owens who had the right to sell the property, having been given authority, his eldest brother Osaretin Ogiemwanre wrote a letter dated 2/9/1997 Exhibit C to the defendant to pay more money for the land and was so informed and he did pay vide Exhibit C1. The claimants' were aware of the purchase and his building of the house. The claimants' conspired among themselves without the authority of Osaretin and arrested and charged Owens to the Magistrate Court for selling the property. The matter was dismissed. He completed and packed into the house in 2001. When he opened the house the elder brother of the claimants Osaretin Ogiemwanre

came with the Community to bless the house in the presence of the claimants which is the custom of the Binis. That when Owens Ogiemwanre died in 2006 the claimants took the liberty to file this suit. He stated that this suit was caught by the doctrine of standing by, laches and acquiescence. That at all material times he had always resided in his premises and never evaded any process. The claimants are not entitled to the reliefs they are claiming in their statement of claim and he urged the court to dismiss the suit as it is frivolous and an abuse of court process.

At the close of evidence, both legal counsel adopted their written addresses on 16/12/14. In his written address on behalf of the defendant, Learned Counsel G.E. Oaikhena Esq. raised four issues for determination to wit:-

- 1.) Is the land in dispute not an Igiogbe of late Ogiemwanre Ajayi which is not shareable.
- 2.) Do the claimants have locus standi to file this suit against the defendant.
- 3.) Is the land in dispute a family property.
- 4.) Is the claim of the claimant not caught by the doctrine of laches and acquiesces.

Issue 1

Mr Oaikhena submitted that from the evidence before the court the land in dispute now being claimed by the claimants is the Igiogbe of their late father which devolved on their eldest brother (eldest surviving son of their late father) Osaretin Ogiemwanre after the burial ceremony of their late father as the ancestral house of their father known in Benin custom as Igiogbe. There is no evidence of joint ownership of an Igiogbe under the Benin custom before this court or under any known law. The claimants have no right to the land in dispute which is the Igiogbe of their late father. Only Osaretin Ogiemwanre the first son has the right to the land and can deal with it as he likes as can be seen from Exhibit D. He relied on *Imade V. Otabor* (1998) 56/57 LRCN Pg. 3116; *Abudu V. Eguakun* (2003) Vol. 160 LRCN Pg. 1698; *Igbinoba V Igbinoba* (1995) 1 NWLR Pt. 371 Page 375 at 381. He urged the Court to resolve this issue in favour of the defendant.

Issue 2

Learned Counsel submitted that only a party who has an interest in a property can sue and can be sued to defend the property by himself or through his agent. It is an essential requirement in law for a party to have an interest in property before he can have locus to bring an action on it. He contended that there is a difference between an Igiogbe of a Benin man and other properties of a

Benin man. An Igiogbe of a Benin man is the exclusive ownership of the first son which passes to him after the death of his father, after performing the final burial. Igiogbe cannot be giving out by disposition, gift or sharing. An Igiogbe of a Benin man passes by inheritance to the first son, in this case Osaretin Ogiemwanre who has the right to institute this action. His siblings do not have such right. He relied on *Imade V Otabor* (supra); *Idehen V. Idehen* (1991) 5 LRCN 1590; *Agidigbi V. Agidigbi* (1996) 38 LRCN 907; *Ironbar V. Federal Mortgage Bank Finance* (2009) 46 WRN Pg. 146. Mr. Oaikhena posited that in order to ascertain whether plaintiff has disclosed sufficient interest in the subject matter recourse should be made to the statement of claim. He relied on *Anozie V. A.G. Lagos State* (2011) 4 WRN Pg. 150. He urged the Court to hold that the claimants have no locus standi in this case.

Issue 3

Mr. Oaikhena submitted that an owner of a property has a right to sell it or delegate his agent to do that on his behalf under the Benin Customary Law. According to him, there is evidence that Owens sold the property on the instruction of the owner of the Igiogbe, Osaretin Ogiemwanre. There is also evidence supported by Exhibit D. In Exhibit D, the owner of the property Osaretin demanded for extra money and the extra demand was paid by Exhibit C. This

evidence was not controverted by the claimants. He urged the Court to accept them and hold that No. 159 is the property of Osaretin and the part sold out of it was authorized by him and therefore legal and lawful. He argued that the authority of *Usiobaifo V. Usiobaifo* (2005) 4 MJSC 82 at 102 – 103 and *Teriba V. Adeyemo* (2010) 4 (Pt. 11) M.J.S.C. 48 at 65, does not apply to this case because those authorities relate to family property and not an Igiogbe of a Benin man. Those authorities relate to family property as practiced under the Yoruba custom and not the Benin custom.

Issue 4

Learned Counsel submitted that the action of the claimant is caught by the doctrine of laches and acquiescence. This defence is an equitable one which is available to the defendant based on delay and standing by on the part of the claimant. He contended that from the evidence before this Court, it took the claimants ten years after the defendant acquired the property to their knowledge and after the death of their elder brother to file this suit. Delay defeats equity and equity does not aid the indolent. The defence of laches and acquiescence will not allow a claimant to ascertain their strict legal right if there is an inordinate delay in asserting a right after becoming aware of the violation. He submitted that the claimants in this case have slept over their right if it ever existed and

cannot now exercise that right. He relied on the case of *Kayode V. Odetola* (2001) 87 LRCN Pg. 1995.

In conclusion, Mr. Oaikhena urged the Court to dismiss the case of the claimants in its entirety.

In his written address on behalf of the claimants, Learned Counsel L.O. Alenkhe Esq. raised three issues for determination to wit:

- 1.) Whether the land in dispute constitute Ogiemwanre family Property.
- 2.) Whether the alienation of the land in dispute by Owens Ogiemwanre to the defendant without the knowledge and consent of the members of the family is valid under under Benin Customary law and custom.
- 3.) Whether the claimants have the locus standi to file this action.

Issue 1

Learned Counsel submitted that the land in dispute constitute Ogiemwanre family property. Family property are created where the owner of the land dies intestate, or where the land is purchased by money belonging to members of the family, and where there is express provision in a will by the testator that a particular land be held as a family land. He relied on the case of *Olowosaga V. Adebanjo* (1988) 4 NWLR (Pt. 88) 275 at 287. He argued that the first

circumstance stated above fits the instant case. The evidence of the claimants' and their witness supports this argument. He urged the Court to resolve issue one in favour of the claimants.

Issue 2

Mr. Alenkhe submitted that the alienation of the land in dispute by late Owens Ogiemwanre to the defendant without the knowledge and consent of the principal members of the Ogiemwanre family is invalid under customary law. For the sale of family property to be valid under customary law, the principal members of the family must consent to the sale. Any alienation or sale of family property without such consent is void ab initio. He relied on *Usiobaifo V. Usiobaifo* (2005) 4 M.J.S.C. 82 at 102 – 103; *Teriba V. Adeyemo* (2010) 4 M.J.S.C. 48 at 65. Learned Counsel contended that in the instant case a careful perusal of exhibit B or C will show that the land was sold without the consent of the claimants and therefore the sale is void ab initio. On the contention of the defendant that the land in dispute form part of the Igiogbe of late Ajayi Ogiemwanre that the claimants have no interest in the property, he submitted that Igiogbe is inalienable. The concept of inalienability of Igiogbe under Benin Customary Law is well documented. Igiogbe under Benin customary law means the principal house(s) where a Benin man lived, died and was buried and not a

vacant land as in this case. See Idehen V. Idehen (1991) 4 NWLR (Pt.198) 382, Lawal Osula V. Lawal Osula (1995) 9 NWLR (Pt.419) 256; Ogiamien V. Ogiamien (1976) NWLR 245. He urged the Court to hold that the sale was invalid.

Issue 3

Mr. Alenkhe submitted that the claimants have the locus standi to bring this action. It is trite law that any member of the family has the right to bring an action to protect family. In Olowosago V. Adebajo (supra) at page 288 paragraphs G – H the Supreme Court held that a member of the family is competent to bring an action to protect the interest of the family in respect of family property even if he has no authority of the family to bring the action. See also Sogunle & Ors V. Akerele & Ors (1967) NMLR 58 at 60. He urged that the submissions of the defendant's Counsel in this regard should be disregarded.

In conclusion, Learned Counsel urged the Court to grant all the reliefs of the claimants following all the legal submissions adumbrated above.

I have carefully perused the evidence led in this case by both parties and the legal submissions of both Learned Counsel for both parties. The issues for determination are:

- (1) Whether the land in dispute is family property or Igiogbe.
- (2) Whether the claimants have the locus standi to institute this case.

Family property is that which belongs to the family or bought by the contribution of family members. The physical alter ego of his family is the head of the family. The head of the family is therefore the proper and competent authority to grant the ownership or occupation of the family land both to members and non-members. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. Any grant of family land made without his consent is absolutely void and not merely voidable. See *Alade V. Aborisade* (1962) W.N.L.R. 74. It does not matter whether the grant was approved by all the other members. The head of the family holds the family land in trust for the whole of the family. The law requires that any alienation of family land must have the concurrence of the principal members in order to be valid; however, although it is usual to make them parties to a conveyance this is not legally necessary if their consent could be proved otherwise. Execution by the Chief alone is sufficient. See *Nigerian land law* by B.O. Nwabueze Pg. 151 – 152.

The property does not belong to the head of family but the family as a whole he is just a representative. Property becomes family property upon the death intestate of the owner. See *Nigeria Land Law* by B.O. Nwabueze Pg.335. The right to have a voidable transaction set aside must be exercised within a reasonable time. See *Garuba V. The Public trustee* (1947) 18 N.L.R. 132 at 137. If,

with knowledge of the transaction, the non-consenting members stood by for many years without taking steps to set it aside, they will be taken to have waived their right to do so and to have acquiesced in it. See *Onyekonwu V. Okeke* (1961) 5 E.R.L.R. 48. A delay of thirty-five, twenty, fourteen, ten and even three years have been sufficient to bar the right to impeach the transaction. *Agaran V. Olushi* (1907) 1 N.L.R. 66 See *Nigerian Land Law* by B.O. Nwabueze Pg. 333 – 334. Although one year's delay might not ordinarily be considered unreasonable, it might in all probability be so construed if during that period the outsider had carried out improvements to the property to the knowledge of the non-consenting members.

Where a proposed transaction affecting communal property is properly brought to the prior knowledge of all competent members but is actively opposed by one or more of them will be voidable. Where some only of the members are consulted and consent to the transaction in question such a transaction is voidable. See *Aganran V. Olushi* (1907) 1 N.L.R. 66. Sale of family land without the consent of the head of the family is void. It is the head of the family and principal members that have the right to bring action.

Be that as it may, the concept of “Igieogbe” has been judicially noticed in *Uwaifo V. Uwaifo* (2013) 10 NWLR 189, the Supreme Court held that Igiogbe is a principal house where a deceased Benin man lived and died. This is an ancestral home. It is not vacant land whether or not adjacent. Under Bini Native Law and Custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as “Igiogbe” in which the deceased/testator lived and died. Neither testamentary disposition, nor family elders’ arrangement, can deprive the eldest surviving son of the Igiogbe, the house in which his deceased father lived and died. In other words, no one can derogate from the eldest son’s exclusive title to his father’s Igiogbe upon final rites of “Ukonwen”. The claimants agree that the burial rights have been concluded.

In *Igbinoba V. Igbinoba* (1995) 1 NWLR (Pt.371) 375, the Court of Appeal decided that under Bini Customary Law neither testamentary disposition nor family arrangement can deprive the eldest surviving son of Igiogbe. It did not decide that vacant land also constitutes Igiogbe under Bini Customary Law.

As for the case at hand, the argument of the claimants is that the land is a family property and as such the sale of the land without the consent of the

principal members is void. While that of the defendant is that the property is an Igiogbe and the eldest surviving son can dispose of it without the consent of the principal members. A look at the evidence before the Court shows that the parties are agreed that the land in dispute belonged to the deceased father of the claimants. It was the land adjacent to the house where he lived, died and was buried. I find that the land referred to as vacant land formed part of the land where the deceased house was built and therefore part of the "Igiogbe".

The above being said, the logical conclusion is that the land is not family property but "Igiogbe" since it devolved to the 1st son Osaretin Ogiemwanre after the death of his father. The concept of family property appears alien to Benin native law and has not be proved in this case. The next issue for determination is whether the claimants have the locus standi to institute this action.

In my respectful view, since it is my finding that the land in question is not family property but "Igiogbe" which is the exclusive right to own of the first son of the deceased one Osaretin as agreed by the parties, the claimants have no right to sue in this matter.

The Igieogbe "shared" or "unshared" does not belong to the claimants. The said Osaretin is well and alive and aware of the sale of the property after the

death and burial ceremonies of their late father. In the light of the above there is no merit in the claim of the claimants as they are mere interlopers. However, even if they are said to have some right to question the sale of that land to the defendant the ancillary issue that arises for determination is whether this action is not caught by the doctrine of laches and acquiescence.

From paragraph 12 of the statement on oath of the 3rd claimant. “That sometime in 1997, I heard that somebody has deposited sand (on the vacant portion which my father did not develop before his death) on the land in preparation to build on the land and immediately went to Okhoro Police Station to lodge a complaint because I did not know who deposited the sand” paragraph 15 of the same statement on oath stated thus.

“That it was about 2003 that it became clear to us (the family) that it is the Defendant who trespassed into the property when he moved into the house as the owner.” Paragraph 20 of the 1st claimant statement on oath stated the same thing as paragraph 15 above. Even if it is agreed (which is not the case) that the claimants have a right to sue, time is of the essence, any undue delay can affect the action. See *Garuba V. The Public Trustee* (1947) 18 N.L.R. 132 at 137; *Onyekonwu V. Okeke* (1961) 5 E.R.L.R. 48. I agree with the Learned Counsel to

the defendant that the doctrine of laches and acquiescence will apply in this case. The claimants in this case definitely stood by and allowed the defendant to build on the land in question.

From 1997 – 2003, the only action taken by the claimants is to take their brother to Court and abandon the case though there is no proof of this by the charge sheet. From 2003 – 2007 there is no evidence that the claimants did anything to stop the defendant from acquiring the land or building on it. I find that this action is caught by the doctrine of laches and acquiescence or estoppel by standing by. In *Ngwu V. Onuigbo* (1999) 73 L.R.C.N. Pg. 3226 at 3243 – 3244 Per *onu J.S.C.*

“Doctrine of estoppel by standing by is but a specie of estoppels by conduct indeed it is a kind of estoppel which is applied where because a party omitted to intervene in a pending action affecting his interest, he is precluded by the result of the action, although he was not a party thereto. See *Ojiakor V. Ogueze* (1962) 1 All N.L.R. 58”.

The actions of the claimants did not show that they took enough steps to prevent the defendant from acquiring and building on the land. They stood by and watched him. I believe the testimony of DWI, the odionwere of the Community who impressed me as truthful and credible when he testified that the whole community was aware of sale and building by the defendant.

In conclusion, I find that the case of the claimants is lacking in merit and they have not proved their case upon the preponderance of evidence. The claims in paragraph 21 (a – d) are hereby ordered dismissed.

E.F. IKPONMWEN
JUDGE
11/11/2015

COUNSEL:-

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L.O. Alenkhe Esq. for the Claimant