

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, THE HON. JUSTICE E.O. AHAMIOJE,
JUDGE, ON MONDAY THE 21ST DAY OF DECEMBER, 2015

BETWEEN:

SUIT NO. B/205/13

1. MR. AGHARIAHA AIDEYAN	}	CLAIMANTS
2. MR. ERHUMWUNSE AIDEYAN			
3. MISS IBIE AIDEYAN			
4. MRS. EHIOSU EMUMWEN			
(Suing by their Attorney Mr. Amadin Aideyan)			

A N D

1. MR. OSAYEMWENRE AIDEYAN	}	DEFENDANTS
2. MRS. OGHOGHO IRABOR NEE AIDEYAN			

J U D G M E N T

The Claimants commenced this suit on the 16/4/2013, by way of an Originating Summons which was vehemently challenged by the Defendants as being incompetent. On the 26/4/2013, this Court upheld the preliminary objection of the Defendants, and consequently ordered pleadings to be filed. Consequent upon the order of this Court, made on the 26/4/13, the Claimants filed a Writ of Summons and a Statement of Claim on the 30/4/13, wherein they claim in paragraph 21 of the Statement of Claim the following reliefs:

- a. A DECLARATION that the Claimants are co-owners along with the 2nd Defendant herein of the property known as No. 60, Sokponba Road, Benin City which they acquired vide a Deed of Transfer from Pa Samuel Aideyan on the 2nd day of August, 2010.
- b. A DECLARATION that the 1st Defendant has no interest whatsoever in the premises known as No. 60, Sokponba Road, Benin City, same having been transferred by Pa. Samuel Aideyan to the Claimants and the 2nd Defendant on 2nd August, 2010.
- c. A DECLARATION that the interment by the 1st and 2nd Defendants of late Pa. Samuel Aideyan on 26/4/2013 in the premises of No. 60, Sokponba Road, Benin City, did not confer any rights whatsoever in the said premises on the 1st Defendant herein.
- d. A MANDATORY ORDER of Court directing the Defendants to restore the premises of No. 60, Sokponba Road, Benin City to the condition it was before their interment of the corpse of late Pa. Samuel Aideyan in the said premises on 26/4/2013.
- e. A PERPETUAL INJUNCTION restraining the Defendants by themselves, agents and/or privies from engaging in any act or conduct of any sort inconsistent with the rights of Claimants in and over the property known as No. 60, Sokponba Road, Benn City.”

The Defendants having been duly served with the Court processes filed their Statements of Defence and set up Counter-Claims in their Statement of Defence. On the 28/5/14, the Claimants opened their case by calling C.W. 1, Amadi Iviehen Aideyan. He adopted his written statement on oath wherein he stated that he was given a Power of

Attorney, Exhibit 'A' to prosecute this action on behalf of the Claimants who are the children of late Pa. Samuel Aideyan inclusive of the 2nd Defendant. He further averred that sometime in the month of May, 2010, their father Pa. Samuel Aideyan summoned the Claimants herein, himself as well as Barrister Solomon Eghobamien (CW2) to his residence at No. 60, Sokponba Road, Benin City. At the said meeting, the father caused his Solicitor, CW2 to read out a document titled "Deed of Transfer" Exhibit 'B' to the hearing of everybody. He said that it was at that stage they all knew that their father had decided to dispose of his residence, No. 60, Sokponba Road, Benin City to the Claimants along with the 2nd Defendant. That as it turned out, those to whom their father chose to transfer the property were carefully selected by him from different mothers or gates (Urho) from whom he had children. He stated that their father informed them that he decided to transfer his said House to the Claimants for reasons best known to him. That the father insisted that each of the Transferees pay N1.00 (one naira) only as consideration for the transfer, and that he was giving all the Transferees immediate possession of the property except that he will appeal to them to allow him to continue to reside in the premises for the rest of his life. He averred further that their

father directed the Transferees that under no circumstances must he be buried in the premises for reason best known to him, and they agreed to the proposals and paid the N1.00 (one naira) each. He stated that Barrister Solomon Eghobamien, CW2 interpreted the Deed of Transfer, Exhibit 'B' from English to Bini dialect, while their father acknowledged that the document accurately reflected his wish, and because he was vision impaired, he was assisted by C.W. 2 to append his thumb print in the relevant portion of the document, while the Claimants signed their relevant parts along with the 2nd Defendant. That he signed as a witness while a solicitor from C.W. 2's chambers signed as the person who prepared the document. He said that after the execution of the Deed, their father handed the title documents of the property to the 1st Claimant. He further said that their father died on the 13/8/2011. That following his death, on the 25/10/2011, the 1st Defendant caused to be made, a publication in the Nigerian Observer where he referred to No. 60, Sokponba Road, Benin City as the "Igiogbe" of their late father. That on the 26/4/13, in defiance of the wish of their father, the 1st and 2nd Defendants interred their father at the property, No. 60, Sokponba Raod, Benin City. He finally urged the Court to enter judgment in favour of the Claimants.

Cross-examined by C. I. Giwa-Amu Esq., CW1 stated that Exhibit 'A' was signed by only the 1st Claimant. That the 1st Claimant is the 2nd son of the 2nd (Gate) wife of the deceased, and the 13th child of the deceased. That the 1st Claimant is older than the 2nd – 4th Claimants, and was in the U.S.A. when he gave him the Power of Attorney, Exhibit 'A'. That he is resident in U.S.A. He further stated that the father acquired the property in 1946, lived and died in the House. That the father was blind. That Exhibit 'B' was executed in May, 2010 and the date they paid the consideration of N1.00 each. He said that the father made a Will which has not been read and a Codicil, Exhibit 'E'. That the father referred to the property in dispute in Exhibit 'E'. That 26 children survived his late father and he is the 19th child in the order of seniority. He stated that he is not aware that under Bini Custom, a female child does not inherit the father's Igiogbe. That where there is a male child, a female child does not inherit the Igiogbe of a deceased Bini man. That where there are male children of a deceased Benin man, a grandchild does not inherit the Igiogbe. That under Benin Custom, it is the eldest surviving son of a Benin man that inherits the Igiogbe. That it is also the eldest son that arranges the burial rites in conjunction with the other children and the Okaegbe.

He admitted that the 1st Defendant is the eldest surviving son of late Pa. Samuel Aideyan, and the date of the burial rites was fixed by the 1st Defendant. That Benjamin Aideyan, the eldest son of Pa. Samuel Aideyan died in 2003. That a Benin man does not take part in the burial rites of his son. That he participated in some areas of the burial rites of their late father.

Cross-examined by Mr. Joe Aluyi of learned Counsel for the 2nd Defendant, C.W. 1 stated that he does not reside at No. 60, Sokponba Road, Benin City. That the Claimants and 2nd Defendant do not live at the property in dispute. That the Transferees allowed their father to live in the House after the execution of Exhibit 'B'. He stated that the 2nd Defendant paid for the property, while the 1st Claimant paid N5 on behalf of the other Claimants. That the 2nd Defendant is the immediate younger sister of the 1st Defendant. That he has no misunderstanding with the 1st Defendant. He stated that the documents of the late father's property are with the Solicitor, CW 2. That the mother is a cousin of CW 2.

The next witness is Mr. Solomon I. Eghobamien, CW 2. He adopted his witness statement on oath wherein he averred that late Pa. Samuel Aideyan was his client for many years. He stated that

sometime in the month of May, 2010, following instructions he had earlier given, Pa. Samuel Aideyan summoned him to his house where he met some of his children, the Claimants, the 2nd Defendant and CW 1. That Pa. Aideyan caused him to read aloud the contents of a Deed of Transfer, Exhibit 'B' which on his instructions, he had prepared. He said that he interpreted the document from English to Edo language to him which he acknowledged to be accurate. He said further that because of Pa. Aideyan being vision impaired, he assisted him to place his right thumb-impression on the relevant part of the document. That he signed the document as the interpreter and in his presence, the transferees signed one after the other, and C.W. 1 also signed as a witness. He stated that after the execution, Pa. S. Aideyan handed over the title document of the said property to the 1st Claimant. That Pa. Samuel Aideyan in his presence instructed the Transferees that upon his demise, he must not be buried at the said premises in dispute.

In answer to questions under cross-examination by Mr. C.I. Giwa, CW 2 stated that under Benin Custom, the Okaegbe of a family is not by appointment or election. That the family decides who becomes the Okaegbe. That a female nor a grandchild does not inherit Igiogbe where there is a male child of the deceased. He equally stated that it

is the eldest surviving son that arranges for the burial rites of the deceased Benin man. That the 2nd Defendant was present when the Deed of transfer, Exhibit 'B' was read and executed. That Pa. Aideyan was blind when it was executed. He denied the suggestion that Exhibit 'B' is not the act and deed of the deceased. That the deceased lived in the said premises during his lifetime, and had tenants on the ground floor of the storey building.

Cross-examined by Mr. Joe Aluyi, CW2 stated that the deceased stated that the Will should not be read until after the burial is performed. He stated that he and his chambers handled some cases and documentations for CW1. He denied the fact that the Codicils Exhibits "G and H" prepared by his chambers were made to deprive the 1st Defendant of his right to his property. He stated that Exhibit 'J' was made in August, 2010 and the deceased died in 2011. That the deceased was strong mentally at that time. He stated that the 1st Defendant who is the eldest surviving son of the deceased had some misunderstanding with the deceased. He stated further that some of the title documents of the deceased are in his possession. He said that he wrote a letter, Exhibit 'L' to one Engineer Aideyan about the conduct of the 1st Defendant.

At the close of the case for the Claimants, 1st Defendant testified through D.W. 1, Engr. Jim Aideyan. He adopted his sworn deposition wherein he stated that he is the Okaegbe of the Aideyan family, and the parties are the children of his late uncle, Pa. Samuel Aideyan. He said that late Pa. Samuel Aideyan was the owner of the property known as No. 60, Sokponba Road, Benin City where he lived, died and was also buried on the 26/4/13. He stated that late Pa. Samuel Aideyan was a Bini man of Aideyan family, and in 2006, he was already blind. He further averred that under the Bini Custom, where a Benin man lived and died is called the "Igiogbe", and only the eldest surviving son of such man can inherit the "Igiogbe" as of right. That No. 60, Sokponba Road is the "Igiogbe" of Pa. Samuel Aideyan and the 1st Defendant's right of inheritance upon the death of their father. He further stated that under Bini custom, a father or a Bini man cannot in his life time deprive his eldest son of the "Igiogbe" by transferring same by a Will or Deed whatsoever to another of his child or children whether by sale or as a gift. That where a Bini man transfers or give the Igiogbe to any other child other than the eldest son such a transfer is void and of no effect.

He stated that he presided over the burial ceremonies of Pa. Samuel Aideyan as the Okaegbe when he was finally interred at No. 60, Sokponba Road, Benin City on the 26/4/2013. That the CW 1 and the other children of the deceased who were around fully participated in the burial joyfully without objection on their part. He stated that the 1st Defendant is the rightful owner of the property in dispute by inheritance under the Bini custom.

Cross-examined by Dr. O.O. Obayuwana of learned Counsel for the Claimants, DW 1 stated that Aideyan family is not a branch of a larger family. That it has existed from time immemorial as Aideyan family. That the full name of their grand father is Irabor Osunde Aideyan. That the late Pa. Samuel Aideyan was never the Okaegbe of a larger family of Aideyan. He stated further that he was not aware of the Deed of Transfer, Exhibit 'B', but only heard or knew of its existence in this Court. He stated that he got a letter requesting him not to preside over the burial ceremony of late Pa. Samuel Aideyan which he ignored. He stated that the burial was in accordance with Christian burial. He maintained that the relationship between him and Pa. Samuel Aideyan was cordial, and he visited him often while he was alive to discuss family matters. That he hardly recognized him when he

visited before his death by reason of ill-health. He further said that the relationship between the deceased and the 1st Defendant was cordial before he died. That Pa. Aideyan complained about the 1st Defendant to him hence he knew that they had a misunderstanding, and he succeeded to some extent in reconciling them.

The 2nd Defendant testified by adopting her sworn deposition wherein she stated that the father, Pa. Samuel Aideyan who died on the 13/8/2011, did not willingly or freely dispose off his residence at No. 60, Sokponba Road, Benin City to the Claimants along side with her, but was done to deny the 1st Defendant of his customary right to inherit the Igiogbe being the 1st son. She further stated that on a certain day the deceased father phoned her through C.W. 1's cell phone and told her that C.W. 1 would bring some documents to her in Agbor to sign. That 3 days later, the deceased Driver Mr. Amovie came to her at Agbor with an envelope which she refused to accept from him. After about 2 months, her daughter Georgina Irabor visited the deceased in Benin City. That the deceased told her she refused to sign some documents he sent to her. She said that 13 days later, she visited the deceased father in Benin City and met DW 1. That the deceased also reported to DW1 and one Usunobun Aideyan that she refused to sign some

documents he sent to her in Agbor. DW 1 then called for the document which contained title document of No. 60, Sokponba Road, Benin City and the Deed of Transfer, Exhibit 'B'. She said that to allow temporal peace for the deceased and knowing that the act of the deceased was wrong in law and tradition, she signed Exhibit 'B'. She further said the deceased did not discuss the issue of his being a tenant to the Claimants and herself, and that he should be buried at No. 8, 1st Evborhan Lane, Benin City. That she did not pay N1.00 to the deceased as consideration for the property in dispute. That the deceased never lived at No. 8, 1st Evboran Lane, Benin City. She said that she was not present when the Claimants signed Exhibit 'B'. She stated that the deceased was signing documents even when he was blind vide Exhibit 'Q'. She stated that CW 1 and CW2 planned to deal and deprive the 1st Defendant of his rights and inheritance to his property by filing series of cases in Court against him vide Exhibits "N and P". She urged the Court to dismiss the claim of the Claimants and grant her counter claim.

Cross-examined by C.I. Giwa Amu Esq., the 2nd Defendant stated that the father lived and died at No. 60, Sokponba Road, Benin City and until he died, he did not surrender the property to anybody. That the

deceased was the person collecting rents from the tenants in the down floor of the property in dispute. That the 1st Claimant who resides in U.S.A. did not come to Nigeria in 2010. That the signature in Exhibit 'B' is not that of the Deceased. She said that DW 1 did not read Exhibit 'B', and he was not present when the father spoke with her. That nobody paid any sum of money in respect of the property to the Deceased to her knowledge nor on her behalf.

Cross-examined by Dr. O.O. Obayuwana of learned Counsel for the Claimants, the 2nd Defendant stated that her signature is on Exhibit 'B' and did not sign it in the presence of D.W. 1 and Mr. Usunobun. That DW1 called for Exhibit 'B', but did not look at the contents. She stated that she did not know the intention of the father for including her name in Exhibit 'B'. That the full family name is Irabor Osunde Aideyan and has no cousin who bears the name Osunde, Igiebor or Enabulele. That the relationship between DW1 and the father before his death was cordial. That in Exhibit 'B', on top of the Transferor there is a thumb-print impression.

At the close of the Defence and in line with the Rules of Court, the parties filed their written Addresses.

C.I. Giwa-Amu, Esq. of learned Counsel for the 1st Defendant, in his written Address filed on the 3/11/2014, after introduction and brief facts of the case formulated six issues for determination thus:

- “1. Whether the Deed of Transfer dated 2nd August 2010 is indeed the act and deed of late Pa. Samuel A. Aideyan, valid and admissible?
2. Whether under Bini Custom the property in dispute, 60, Sokponba Road, Benin City is the family Igiogbe upon the death of Pa. Samuel A. Aideyan?
3. Whether late Pa. Samuel A. Aideyan was competent under the Bini Customary Law to transfer the said property at 60, Sokponba Road, Benin City to the Claimants and divest the 1st Defendant of his right over the property?
4. Whether the 1st Defendant is the person entitled to inherit the property at 60, Sokponba Road, Benin City as the eldest surviving son of late Pa. Samuel A. Aideyan under Bini Customary Law.
5. Whether the 1st Defendant has established his claims over the property at 60, Sokponba Road, Benin City and therefore entitled to judgment as per his Counter Claim?
6. Whether the Claimants’ action before this Honourable Court is competent for adjudication?”

On issue one, learned Counsel submitted that the Deed of Transfer, Exhibit ‘B’ the basis of the Claimants’ action is inadmissible as it is prohibited by law. That Exhibit ‘B’ is an unregistered instrument affecting or transferring land. He relied on section 16 of the Lands

Instrument Registration Law Cap. 81, Laws of Bendel State as applicable to Edo State. He stated that the proper office specified in section 3 of the law is the Lands Registry of the Ministry of Lands and Housing. He submitted that since the Deed of Transfer, Exhibit 'B' relied on by the Claimants in this suit is unregistered as provided by the law, it does not qualify to be pleaded at all or admitted in evidence in this Court or any other Court of record. He relied on OGBEMI V. NIGER CONSTRUCTION LTD. (2006) 9 NWLR (PT. 986) 474 AT P. 493. He further submitted for three reasons, that this honourable Court cannot admit the Claimants' purported Deed of Transfer at all or as a receipt in proof of the fact that the purchase price in respect of the property was paid by the Claimants to their late father.

Firstly, that the Deed of Transfer, Exhibit 'B' tendered by the Claimants is not the Deed of Transfer pleaded and given in evidence by the Claimants. That the Deed of Transfer pleaded and led in evidence by the Claimants is the Deed executed by the parties thereto in May, 2010. He posited that Exhibit 'B' is a strange unpleaded Deed of Transfer executed in August, 2010. That unpleaded document cannot be admitted in Court to replace plead document. He submitted that the basic principle of pleadings is that it must be exact and precise, and

cited ALHAJI ABABAKAR V. ALHAJI MUSA YARADUA (2009) 166 LRCN P.I. AT P. 115.

Secondly, the instrument Exhibit 'B' is headed and pleaded as a "Deed of Transfer" not as a receipt of payment of money. That the Claimants did not state in their pleading or evidence that the document will be produced as receipt of payment of money to their father. He relied on COMMISSIONER FOR LANDS AND HOUSING V. MALLAM ATENDA (2007) 2 NWLR (PT. 1018) 360 AT P. 377. He submitted on the contrary, that it must be noted that the 2nd Defendant categorically stated that she did not pay any money to her father for the transfer and none of the Claimants, three of whom are in Nigeria, testified to say that they paid N5 to their father for the transfer of the land in dispute. That the 1st Claimant was not in Nigeria when the Deed of Transfer was purportedly executed.

He further submitted that the third reason why the Deed of Transfer, Exhibit 'B' cannot be admitted as a receipt or at all is that where a statute prohibits the admissibility of a document, the same cannot be admitted for any purpose at all. He cited SANATOR NWAOGU VS. HON. EMEKA ATUMA (2013) 221 LRCN (PT 2)1 at p.22 and 23; ALHAJI AMINU VS. ISIAKA HASSAN (2014) 231 LRCN 84 at p.121.

He submitted that the power to expunge from court record a document that is wrongly admitted is not confined to the appellate Court, but the trial court also has inherent jurisdiction to expunge such document, and cited NWAOGU VS. ATUMA (SUPRA), EGHOBAMIEN VS. F.M.B (2006) 7 SC (PT.1) 143 AT P.148.

On issue two, Learned Counsel cited TIJANI JOLASUN VS. NAPOLEON BAMGBOYE (2011) 190 LRCN 1 AT P. 30. He submitted that from the pleadings, oral and documentary evidence before the court, the Deed of Transfer is not authentic, valid, the act and deed of the purported transferor but a forgery for the reasons stated in page 6 of the written address.

He urged the court to hold that the Deed of Transfer, Exhibit B procured in a hurry by the Claimants, is not the act and deed of their father, Pa. Samuel A. Aideyan.

On issues 2, 3 and 4, Learned Counsel submitted that it is not disputed that the property at No. 60, Sakponba Road, Benin City was acquired by late Pa. Samuel Aideyan from Akenzua II, Oba of Benin in 1960 as per Exhibit A. That it was admitted that Pa. Samuel Aideyan lived and died in the said property from 1961 to 2010. He submitted that there is uncontradicted evidence led that under Bini Custom,

where a Bini man owned, lived until his death is the Igiogbe of the family, and cited UWAIFO V. UWAIFO (2013) 218 LRCN 1.

He further submitted that it has been established before this Court that under the Bini Custom the eldest surviving son of a deceased Bini man is the person entitled to inherit the Igiogbe absolutely. He stated that the 1st Defendant is the eldest surviving son of late Pa. Samuel Aideyan.

He also submitted that the purported Deed of Transfer, if it is admissible in law, is an incompetent instrument under Bini Custom to divest the 1st Defendant as the eldest son of late Pa. Samuel Aideyan of the property at No. 60, Sakponba Road, Benin City.

He submitted that the Okaegbe of the Aideyan's family, Jim Aideyan (D.W. 1) gave uncontradicted evidence when he said that under Bini Custom, a Bini man cannot by a Deed or Will deprive his eldest surviving son of the Igiogbe where he lived and died. He cited UWAIFO VS. UWAIFO (SUPRA), IDEHEN VS. IDEHEN (1991) 5 LRCN 1590, IMADE VS. OTABOR (1998) 56/57 LRCN 3116; AGIDIGBI VS. AGIDIGBI (1996) 38 LRCN 907.

He submitted that from the evidence by the Claimants, the Court is made to believe that the 1st Defendant was not in good rapour with

his father culminating in the transfer of the property to the Claimants.

That even though the Deed of Transfer is legally incompetent, the Court is urged to hold that it is also malicious, unlawful, contrary to customary law, good conscience, public policy and therefore null and void.

He submitted that the Court will not assist a party to an illegal or unlawful contract, and cited CHIEF AJAYI VS. TOTAL NIG. PLC (2013) 226 LRCN (PT.1) 65 AT P. 82; ALAO VS. ACB LTD (1998) 3 NWLR (PT. 543) 339 AT 346.

On issues 5 and 6, Learned Counsel submitted that the Claimants action is not competent for adjudication for the three reasons stated in pages 8-9 of his written address. He finally urged the Court to dismiss the Claimants' case and enter judgment for the 1st Defendant as per his Counter-Claim.

Joe Aluyi, Esq. of Learned Counsel for the 2nd Defendant filed his written address on 11/11/2014, and formulated four issues for determination, thus:

- (i) Whether a Benin man, for any undisclosed reason whatsoever, can sell and/or transfer his principal main House (Igiogbe) to his other children or other persons?
- (ii) Can a Benin man sell his property in his life time?

(iii) Was there actual sales?

(iv) Has the 2nd Defendant proved her Counter Claim?

On issue one, Learned Counsel on the meaning of Igiogbe, referred to IDEHEN VS. IDEHEN (1991) 5 LRCN 1590, AGIDIGBI VS. AGIDIGBI (1996) 38 LRCN 907, LAWAL-OSULA VS. LAWAL-OSULA (1995) 32 LRCN 29, IMADE VS. OTABOR.

He submitted that Igiogbe in Benin custom and tradition is the principal house or main house a deceased Bini man owned, lived and died and buried. That the emphasis is not where he is buried. That “Igiogbe” should not be misconstrued to mean where he is buried. That it is a co-incident if he is buried where he owned, lived and died.

He submitted that the Igiogbe belongs to the eldest surviving son of the deceased Bini man and in this case, the 1st Defendant, and cited MARK UGBO & ANOR VS. SUNDAY ASEMOTA Suit No. B/49/70 delivered on 30/3/1974 reported at pages 36 & 37 of the Hand Book, material and cases on Benin Land Law.

He submitted that there is a Will and three Codicils in this case made by the father of all the parties. That there is a Deed of transfer of No. 60, Sokponba Road, Benin City. Learned Counsel submitted that

the Will and Codicils did not expressly Will out No. 60, Sokponba Road to anybody.

He adopted the submission of 1st Defendant's learned Counsel on the issue of fraud, doubt and suspicion on the sale of No. 60, Sokponba Road, Benin City.

He submitted that it is the activity or the use of the property that determines Igiogbe. That the man must have lived and died in the house to constitute Igiogbe. He urged the Court not to declare No. 8 or No. 4 Evboran lane, Benin City as the Igiogbe of Pa. Samuel A. Aideyan as it negates the principles and concept of Igiogbe.

On issue two, Learned Counsel submitted that there is no doubt that a Bini man can sell or dispose of his property in his life time. But he cannot sell Igiogbe purposely to deny his eldest surviving son his right of inheriting it.

He stated that the principle is capacity, not the Will or decision of the testator or intestator. He cited IDEHEN VS. IDEHEN (SUPRA), where the Supreme Court examined Section 3(1) of the Wills Law., IMADE VS. OTABOR (SUPRA) AGIDIGBI VS. AGIDIGBE (SUPRA), LAWAL OSULA & ORS VS. LONGE & ORS (SUPRA).

He submitted that late Samuel A. Aideyan had no capacity to transfer No. 60 Sokponba Road, Benin City for a consideration of N1.00 to any other person other than the 1st Defendant as he has purportedly done. He urged the Court to declare the sales in Exhibit "B" void, and cited IGBINOBA VS. IGBINOBA (1991) 1 NWLR (PT.317) 375.

He submitted that this is an arrangement spare headed by CW1, taking his father (the late Samuel A. Aideyan) and his cousin Cum solicitor to his father to make Exhibit B to deprive 1st Defendant the inheritance of Igiogbe, and cited UWAIFO VS. UWAIFO (SUPRA).

He submitted that Exhibit "B", Deed of Transfer of No. 60, Sokponba Road, Benin City made by Pa. Samuel A. Aideyan to the Claimants and the 2nd Defendant was done solely to disinherit the 1st Defendant to inherit the Igiogbe.

On issue three, Learned Counsel submitted that Exhibit 'B' says Pa. Samuel A. Aideyan transferred No. 60, Sokponba Road, Benin City to the Claimants and the 2nd Defendant on the 2nd of August, 2010 for a consideration of N1.00. That the Claimants and the 2nd Defendant are some of the children of the late Samuel A. Aideyan and No. 60 Sokponba Road, Benin City was the dwelling house where the late Samuel A. Aideyan lived and died.

He argued that the 2nd Defendant who is listed as number one beneficiary said in her evidence that she did not pay the N1.00. That under cross examination, CW1, Mr. Amadin Aideyan who is the attorney of the Claimants Cum witness in Exhibit "B" for the Claimants also admitted that the 2nd Defendant did not pay the consideration, but he paid the money because there was no coin.

He contended that the 2nd Defendant testified that the Claimants and herself did not meet together to sign Exhibit "B" and that she heard her father asking CW1's sister if Aghariaha Aideyan (1st Claimant) has returned the agreement. CW2 who gave evidence that he was there when all the children (the Claimants and 2nd Defendant) signed Exhibit B admitted under cross examination that he did not know the Claimants and the 2nd Defendant.

He submitted that flowing from the evidence, and the ~~N~~1.00 consideration for the sale of the dwelling house, the alleged sale is pregnant with meaning. He submitted that the Claimants have failed to prove their claim on balance of probability or preponderance of evidence. He urged the court to hold that there was no valid sale or there is no sale at all.

He submitted that to determine a valid sale which is a legal contract, there must be valid offer, valid acceptance and valid consideration.

He further submitted that where an offer is doubtful, acceptance is doubtful and consideration is also doubtful, there cannot be valid sale. That the alleged sale or transfer of No. 60, Sokponba Road, Benin City by the late Samuel A. Aideyan to five of his children (the Claimants and 2nd Defendant) was done to deprive the 1st Defendant of the inheritance of his "Igiogbe".

He finally urged the Court to hold that there was no valid sale of No. 60, Sokponba Road, Benin City by the late Pa. Samuel A. Aideyan to the Claimants, and the 2nd Defendant.

On issue four, Learned Counsel submitted that general damages needs no specific proof; it is the court's assessment of damages/compensation for the Claimant flowing from available evidence and the ability of the Claimant to prove his/her case. That the Counter Claimant needs not prove injury. He argued that the Defence Counsel under cross examination insisted that she must prove injury sustained from the action of the Claimants. That the 2nd Defendant/Counter Claimant says that the action is malicious.

He submitted that the word “malice” is very wide, and the definition is limitless. He enumerated the various types of malice and same as defined by the Black’s Law Dictionary 9th Edition, by Bryan Garner.

He contended that Exhibit “B” shows that the 2nd Defendant is number one beneficiary, but when the other Claimants/beneficiaries were filing this action, they deliberately omitted her name. That when CW2 was asked why they did not include her as Claimant, he replied that she decided to follow her brother for the reason best know to her.

He submitted that none of the Claimants gave evidence in this suit and no reason was given for their inability to give evidence. He submitted that CW1 tendered Power of Attorney, Exhibit “A” given to him by the 1st Claimant. He agreed with the Counsel to the 1st Defendant that Exhibit “A” did not cover the authority of the 2nd, 3rd and 4th Claimants.

He final prayed the Court to award N50,000,000.00 general damages to the 2nd Defendant.

Dr. Osagie Obayuwana of learned Counsel for the Claimants, filed his written address on the 8/12/2014, gave a brief introduction and formulated seven issues for determination thus:

1. Whether the Constitutional Right to own property guaranteed under Section 44 of the Constitution of the Federal Republic of Nigeria (1999) does not extend to the right to deal with the property as the owner deems fit?
2. Whether the Constitutional right to own property is constrained under Benin Native Law and Custom as to deprive a Benin man of the right to alienate his property by way of a Deed of Transfer, **while alive**, to whoever he chooses?
3. Further to issue 2 above, where such a Custom is proved to exist, whether same would not be unconstitutional, contrary to natural justice and repugnant to public policy, equity and good conscience?
4. Whether Section 3(1) of the Wills Laws, Cap 172, Laws of Bendel State (1976) as applicable in Edo State applies to non-testamentary alienation or devises?
5. Whether under Benin Custom, a Benin man's property can be designated an Igiogbe, while the said Benin man is alive?
6. Does a Benin man's first son have any interest in any of his father's properties while his father is alive (Did the 1st Defendant own any interest in No. 60, Sokponba Road, Benin City, before his father's death)? and
7. Whether the Defendants have proved their respective Counterclaims as to entitle them to the reliefs they claim?

On issue one, Learned Counsel submitted that it is not in controversy that Pa. Samuel Aideyan, as the Constitution of the Federal Republic of Nigeria (1999) permits, owned the property better known

as No. 60 Sokponba Road, Benin City. That he acquired the property as far back as 1961, and referred to Exhibit C.

He further submitted that while alive, the right of Pa. Samuel Aideyan to deal with house No. 60, Sokponba Road, Benin City as he pleased, was an intrinsic part of his bundle of ownership right over the property, and cited ELF PETROLEUM (NIG.) LTD VS. UMAH (2007) 1 NWLR (PT.1014) 44 AT PGS 66-67.

He also submitted that the Property and Conveyance Law Cap 129 Laws of Bendel State (1976) as applicable in Edo State entitles Pa. Samuel Aideyan to enter into the Deed of Transfer with the Claimants. He cited UGBO VS. ASEMOTA Suit No. B/491/70 delivered on 30/3/74 where the Oba of Benin testified and page 15 of a Hand Book on some Benin Customs and usages.

He submitted that the Omo N'Oba is the repository of Benin native law and custom whose position the Court should accept. He urged the court to decide issue one in favour of the Claimants.

On issue two, Learned Counsel agreed that Pa. Samuel Aideyan was a Bini man who was subject to Benin native law and custom as his personal law in Nigeria's dual legal system.

He submitted that in the management of Nigeria's legal dualism, through statute, as interpreted by case law, there are instances when the Received English Law is subject to custom, but the general rule is that customary practices even though established are subject to the repugnancy or compatibility test of consistency with public policy, natural Justice, equity and good conscience, and cited section 13(1) of the High Court Law, cap 65, Laws of Bendel State 1976 as applicable in Edo State.

He argued that 2nd Defendant pointedly admitted in her pleading and testimony in Court and under cross examination that she signed Exhibit "B", a Deed. He submitted that this is proof that the 2nd Defendant, the Claimants and Pa. Samuel Aideyan agreed that the transaction should be exclusively regulated otherwise than by customary law. He submitted that it is well settled that section 3(1) of the Wills Law subject testamentary dispositions in a Will to Customary Law. That a major instance where this manifests is the Igiogbe principle under Benin native law and custom, by which the house wherein a Benin man lived, died and perhaps was buried, called his Igiogbe, is reserved for the 1st son who meets certain conditionalities,

and cited *IMADE V. OTABOR* (1998) 4 NWLR (PT.544) 20 AT P.31, and *LAWAL OSULA VS. LAWAL OSULA* (1995) 9 NWLR (PT.419) 259 AT P. 275, RATIO 5.

He submitted that where the house is disposed of in a Will to any other child, that Will to that extent of incompatibility with custom is invalid. That this flows from the statute which subjects the Wills Law, Cap 172 Laws of Bendel State as applicable to Edo State, to custom.

He submitted that the Supreme Court of Nigeria has had the opportunity to hold that the “Igiogbe” Customary law is not repugnant to public policy, natural justice, equity and good conscience in *OSULA VS. LAWAL OSULA* (SUPRA) AT P. 276.

He further submitted that the Wills law is not in contention in this case as the Claimants are not laying claim to the ownership of the subject property in-dispute by virtue of a Will or a testamentary devise of any sort. Rather, the Claimants interest derives from a Deed of Transfer made while Pa. Samuel Aideyan was alive.

He stated that the Claimants place reliance on the Constitution of the Federal Republic of Nigeria and the *EIF PETROLEUM (NIG.) LTD. VS. UMAH* (SUPRA) as urged in issue one above. He submitted that by virtue of section 133(2) of the Evidence Act, the burden now shifts to

the Defendants to show why Pa. Samuel Aideyan could not enter into inter vivos Deed of Transfer, admitted as Exhibit "B".

He submitted that the Defendants have not proved that this same Igiogbe principle extended to inter vivos transfers. And no witness was called to prove that there is in existence a Benin Custom that constrains or take away the right of a Benin man to alienate his property while alive.

He contended that customary law is a matter of fact that must be proven, unless it is of such notoriety that the court can take judicial notice of, and referred to section 16(1) of the Evidence Act, 2011 and RABIU VS. ABASI (1996) 7 SCNJ 53, ROMAINE VS. ROMAINE (1992) 4 NWLR (PT.238) 650 SC.

He submitted that what the Courts have taken judicial notice of is limited to cases involving devises in a Will and intestacy which is not the case at hand.

He finally submitted on this issue that that the Defendants have not proved that there is any Benin native law and Custom that forbids a Benin man from alienating his property inter vivos, and urged the court to so hold.

On issue three, Learned Counsel submitted that the Claimants do not concede that the Defendants have proved the existence of any Benin Custom that forbids alienation by a Benin man of any of his property. That if by any strange coincidence the Court finds same established, he argued that such will violate the right to own property guaranteed by section 44 of the Constitution as well as be against public policy, natural justice, equity and good conscience.

He further submitted that where a man chooses to die intestate, his option is to allow customary law to be applied to his estate. If he writes a Will, he knows or ought to know that the Will in some respect will be subject to customary law. But where a man while alive exercises his ownership right over any of his properties, it would be against public policy, equity, natural justice and good conscience to set same aside after his death because the transferees are among his children, and urge the Court to uphold Exhibit "B".

He submitted that upholding such a customary law would be incompatible directly with the Property and Conveyancing Law, cap 129 laws of Bendel State (1976) as applicable in Edo State as well as the Constitution of the Federal Republic of Nigeria 1999 as amended, and cited ADESUBOKAN VS. YINSUA (1971) NWLR 77.

On issue four, Learned Counsel submitted that the Wills law applicable in Edo State is a law to make provisions with respect to Wills, which empowers every person to devise, bequeath or dispose of all real estate and personal estate which he is entitled to at the time of his death in his Will, executed in a required manner. That the exercise of this power is expressly and statutorily in section 3(1) of the Law, subjected to any customary law relating to matters of inheritance at the time of the death of the testator.

He contended that by an established interpretation of this section, any devise made in the Will, which is contrary to customary law is invalid. That this is the foundation for upholding the Igiogbe principle which reserves the house where a Benin lived, died and was perhaps buried to the eldest son who survived his father after such a son has carried out the 1st and 2nd burial rites, and cited *IMADE VS. OTABOR (SUPRA)*.

He further contended that all the cases cited by the Defendants involved the devise in a Will of what unquestionably is the Igiogbe by the deceased to a child who is not the oldest surviving son. That the ownership of the house or houses which make up the Igiogbe have not been disputed. He stated that the issue in the present case is whether

the deceased owned the house where he lived and died, as of the time of his death.

He argued that the most important element that must be met in the definition of Igiogbe is ownership. That the deceased must be proved to own the property where he lived, died and was buried before that property can be called Igiogbe.

He submitted that Pa. Samuel Aideyan having transferred house No. 60, Sokponba Road, Benin City before his death, did not own that house as of his death. That the only way to suggest that Pa. Aideyan still owned No. 60, Sokponba Road, Benin City at death is to invalidate the Deed of Transfer.

He also submitted that the Defendant cannot rely on section 3(1) of the Wills Law to set aside the Deed of Transfer as what that statute subjects to customary law are devises made in a Will, not a Deed voluntarily made inter vivos. That the Wills law is not applicable to the facts of this case. He further submitted that it is not the customary Igiogbe principle, that of itself invalidated Wills made contrary to it, rather, it is the Statute that elevated the Igiogbe customary principle above that particular Received Law, the Wills law. That the Igiogbe customary law principle cannot be superior to all Received Laws or the

Constitution. He contended that the Defendants have not been able to show any other Received Law that subjects Deed of Transfer to the Igiogbe Customary Law principle which they rely on. He stated that what has elevated the Igiogbe Customary Law principle to a position of eminence in our jurisprudence through case law rests squarely on the applicability of section 3(1) of the Wills Law. That the sacrosanct status that the principle has come to enjoy was conferred by the Wills Law, but it is not a status that stands above a validly made Deed outside the scope of the Wills Law. He urged the Court to uphold that the Wills Law does apply to non testamentary devises like Deeds. That the benefits conferred by the Wills Law on Customary Law are not available to the defendants in this case.

On issue five, Learned Counsel submitted that under the established definition of Igiogbe, it is where a Benin man lived and died, and may have been buried.

He submitted that until a Benin man dies no one can be sure what his Igiogbe would be, as the house he occupies presently may not be his last and he may infact not have any as at the time of his death, either by way of sale of the house or loss through default in a loan transaction, the term of which he could not meet.

He finally submitted on this issue that a Benin man's Igiogbe cannot be designated until his death. Consequently, to designate No. 60, Sokponba Road, Benin City as Pa. Samuel Aideyan's Igiogbe at the time Exhibit 'B', the Deed of Transfer was made was speculative wishful thinking and as it turned out, he did not own the building at the time of his death.

On issue six, learned Counsel submitted that from the title documents to the premises known as No. 60, Sokponba Road, Benin City, Exhibit 'C' Pa. Samuel Aideyan owned the said property. That if the 1st defendant had any interest whatsoever in the property it was no more than an expectation, subject to certain eventualities; an inchoate hope of inheritance as the then eldest son, as he would not know whether he would predecease his father or that the particular property may remain part of his father's Estate at his father's death. He further submitted that the 1st defendant did not have any interest in that property sufficiently cognizable under any law, customary or otherwise, that could validly prevent his father from dealing with the property as he wished.

On issue seven, learned Counsel submitted that the 1st defendant did not make himself available to be subjected to the fire of cross-

examination. He opted not to testify in support of his defence and Counter-Claim. That he relied on the testimony of D.W. 1, Engineer Jim Aideyan. That DW 1 under cross-examination acknowledged that there were issues raised about the propriety of his serving as Okaegbe Irorinmwin. That DW 1 acknowledged the receipt of Exhibit 'M' to which he never replied. That the witness credibility is suspect as he stated under cross-examination that he heard or know about Exhibit 'B' for the first time in Court, whereas the 2nd defendant in her pleadings and evidence confirmed that the DW 1 was present when her father, Pa. Samuel Aideyan raised the issue of her signing Exhibit 'B' with her.

He submitted that DW 1 could not produce any evidence to back up his bare assertion that customary law forbids inter vivos transfer of property that may become Igiogbe. He submitted that DW 1 is not verse in Benin Customary Law, as he does not know what Ukomwen burial rite is, and pointedly owned up that he did not as Okaegbe ensure that the 1st Defendant performed same, and cited LAWAL OSULA V. LAWAL OSULA (1993) 2 NWLR (PT. 274) 181 PARAS D – E, RATIO 12; OVENSERI V. OSAGIEDE (1998) 11 NWLR (PT. 572) 1 AT P. 8 PARAS B – D, RATIO 1.

He submitted that they do not concede that No. 60, Sokponba Road is the Igiogbe of late Pa. Samuel Aideyan, same not being part of his Estate as of his death, also keeping in view, the comments of the deceased as to where he considered his Igiogbe, in Exhibits 'F and H'. That if for any reason the Court holds otherwise, he submitted that the 1st Defendant's counter-claim fails because, on the showing of his only witness, he did not perform the Ukomwen rite. He referred to a Benin Cultural Voyage, collated by Chief S.O. Igbe, Iyase of Benin, and Article titled "Traditional Burial Ceremony" by Engineer Chief Ima Igiehon.

He argued that the 2nd Defendant could not by evidence show the injury she suffered for which she claimed the sum of N50,000,000.00 (Fifty Million Naira). He submitted that reliefs 1 – 5 of her counter-claim, she showed herself to be a meddlesome interloper who ought not to have been joined as a Defendant in this case. That the Claimants had no claim against her, or sought any relief adverse to her interest. That there was a coincidence of interest between her and the Claimants, as co-transferees/owners of House No. 60, Sokponba Road, Benin City. That her involvement in the case was actually to repudiate her said interest in the property, even though she admitted that she voluntarily signed Exhibit 'B', the Deed of Transfer. He

submitted that 2nd Defendant has no *locus standi* to file a Counter-Claim to seek a relief for the benefit of another person (1st Defendant). That without *locus standi*, her Counter-Claim cannot be maintained; and cited UWAZURUONYE V. GOVERNOR, IMO STATE (2013) 8 NWLR (PT. 1355) 28 AT PP 51 – 52 PARAS G – A, P. 52 PARAS D – F, P. 54 PARAS, D – E. He urged the Court to dismiss reliefs 1 – 5 of her Counter-Claim.

He submitted that from the 2nd Defendant's Statement of Defence, testimony in Court and even the issues for determination formulated by the 2nd Defendant, the 2nd Defendant came to Court to fight the fight of the 1st Defendant who she believes deserve better treatment from their father and perhaps a greater share of his Estate. That she ascribes the misfortune of the 1st Defendant, to the malicious designs of the Claimants' Attorney Mr. Austin Amadin Aideyan, and her father's Solicitor, CW 2 who as Counsel was simply doing his job and carrying out the instructions of his client. He submitted that there is a contrivance and contradiction in 2nd Defendant's claim of having suffered N50, 000,000.00 (Fifty Million Naira) damages which according to her derives from the maliciousness of the Claimants. He stated that it is clear that it is for the claim of malice shown to the 1st

Defendant which in the main is her Defence, that she claims N50,000,000.00 (Fifty Million Naira). He stated that the account of the Claimants not including her as a Claimant when they instituted this action, is an afterthought that is not made out.

He submitted that there was nothing about this claim of malice against her either in her pleading or testimony. That the claim for N50,000,000.00 (Fifty Million Naira) in relief 6 which flows from reliefs 1 – 5 should suffer the same fate, dismissal for lack of locus standi. That she came to Court to repudiate what she did not have the courage and strength of character to oppose when her father was alive. She now comes to Court to relinquish to her uterine brother, the interest she acquired directly from her father and seeks to extinguish the interest of the 4 other Transferees (Claimants herein) and to crown it all, wants N50,000,000.00 (Fifty Million Naira) from them for bringing this action to defend their rights in the property. He urged the Court to hold that the 2nd Defendant cannot claim N50,000,000.00 (Fifty Million Naira) from the Claimants on account of the malice she claimed was perpetrated against the 1st Defendant, not by the Claimants, but by the Claimant's Attorney and CW 2. That 2nd Defendant failed to prove

malice done to her by the Claimants, and urged the Court to dismiss the Counter-Claim.

In reacting to issues raised in the Defendants written address, he submitted that an unregistered instrument is admissible to prove equitable interest and payment of money, and cited *ETAJATA V. OLOGBO* (2007) 16 NWLR (PT. 1061) 554 AT PP 601 – 602 PARAS H - B, *AGBOOLA V. UBA PLC* (2011) 11 NWLR (PT. 1258) 375 AT P. 407 PARAS G – H RATIO 9.

He submitted that Exhibit 'B' needs not be titled receipt for it to serve as proof that some consideration was paid for the transaction and referred to the *habendum* clause. He submitted that Exhibit 'B' was pleaded by the Claimant in paragraph 15 of the Statement of Claim to show that the transaction took place and that they acquired interest in the property and paid consideration. He submitted that Exhibit 'B' is admissible for the purpose for which it was pleaded.

On the argument concerning paragraph 2 of Exhibit 'E' to the effect that in Exhibit "E", a Codicil made in 2006, the testator stated that he had already transferred the property at No. 60, Sokponba Road, Benin City, to the Claimants. He submitted that the burden is on the 1st Defendant to produce the form or nature of such an earlier transfer.

That contrary to the position by Learned Counsel for the 1st Defendant, this is not proof that Pa. Samuel Aideyan did not make Exhibit "B" for Exhibit "B" could be the culmination or realization of an idea conceived by Pa. Samuel Aideyan in 2006 but actualized in 2010. That if the 1st Defendant thinks there is some fraud at play, the burden is on him to have pleaded such expressly in his statement of Defence and Counter-Claim and prove it at trial, and cited BABATUNDE VS. B.O.N LTD (2011) 18 NWLR (PT. 1279), 738 AT 749.

He submitted that pleadings not supported by evidence cannot be considered of any worth, and cited UNIVERSITY OF JOS V. IKEGWUOHA (2013) 9 NWLR (PT.1360) 478 AT P.497.

He further submitted that facts admitted need no further proof, and cited OGUANUHU VS. CHIEGBOKA (2013) 6 NWLR (PT.1351) 588 AT 606.

He contended that the 2nd Defendant having admitted the execution of the Deed of Transfer, Exhibit "B" and that she equally signed same as a Transferee, the due execution of Exhibit "B" is proved without any further burden on the Claimants. On the date of execution of Exhibit "B", he submitted that a Deed can bear a date different from

that on which it was actually executed or delivered, and cited A.S.H.D.C VS. EMEKUE (1996) 1 NWLR (PT.4260) 505 AT 539-540.

On the thumb impression on the Deed, Exhibit "B", he submitted that paragraph 12 of the Statement of Claim and the witness statement on oath of Amadin Aideyan, CW1 both stated that their father being vision impaired was assisted in appending his thumb impression.

He submitted that the 1st Defendant's Counsel was misconceived in attributing the signature of the interpreter, Barr. Solomon Eghobamien on Exhibit "B" to that of late Pa. Samuel A. Aideyan who they maintain only thumb printed Exhibit "B" just as he did in Exhibit "F", Exhibit "H" (2004) and Exhibit "E" (2006). He urged the court to hold that Exhibit "B" was validly executed by late Pa. Samuel A. Aideyan.

On the validity of the power of Attorney, Exhibit "A" and whether the action is competent for adjudication, he submitted that even if it is only one of the named Claimants that gave power of Attorney for the prosecution of this action, the action is still competent as any person having a joint interest with others in a subject matter can bring an action for the preservation of the subject matter without the consent of

the others, and cited NWOKAFOR VS. AGUMADU (2009) 3 NWLR (PT. 1129) 638 AT 655-656.

On the sufficiency of the filing fees, he submitted that the Writ of Summons was properly assessed and the filing fees paid as shown on the face of the writ. That the filing fees on the Writ was assessed as N900 as against N200 because of the additional reliefs.

He argued that if for any reason, which is not conceded, the filing fee is found to be insufficient, the Court can direct a fresh assessment and payment of such additional sum.

He submitted that the declaration sought was for the benefit of all the transferees. That the 2nd Defendant appear to have renounced her interest. He stated that her renunciation will not constitute a clog on the other transferees' interest in Exhibit "B" enjoying their property rights. He argued that the authority cited by the 1st Defendant is of no moment in this case.

He finally urged the Court to uphold the claim of the Claimants, and grant all the reliefs sought.

The 2nd Defendant filed a reply on point of law. On the issue of gift intervivos, that the Defendants did not prove that such gift intervivos is prohibited by Benin custom and tradition, he submitted

that these are issues Court can take judicial notice of, and referred to section 16(1) of the Evidence Act 2011.

He argued that the parties did not plead the effect of Exhibit "G". That the Claimants should not be allowed to enumerate the effect of Exhibit "G" in his address. On the issue of malice given in evidence by 2nd Defendant which came in as a result of cross examination, he submitted that evidence extracted or elicited during cross examination in answer to a question is admissible.

On Ukonmwun, he submitted that it is not a fact pleaded and not an issue canvassed before Court.

He urged the court to dismiss the Claimants' claim.

It is the principle of law that in all civil cases, the onus of proof is always on the party who asserts, and he has to prove his case on credible and cogent evidence. Where a party fails to discharge the burden, he cannot therefore be entitled to judgment.

See: *ATAKPA V. EBETOR* (2015) 3 NLWR (PT. 1447) 549, RATIO 9.

UMEANIA V. EMORDI (1996) 2 NWLR (PT. 430) 384.

LONGE V FBN PLC. (2006) 3 NWLR (PT. 967) 355.

The standard of proof required is proof on the balance of probability and not beyond reason doubt as in criminal cases.

See: OBIAZIKWOR V. OBIAZIKWOR (2008) 8 NWLR (PT. 1090) 551 AT 569.

It is pertinent to state that the pleadings and evidence of the parties have obviously narrowed down considerably the questions or issues in dispute between the parties.

Let me also quickly say that the learned Counsel for the Claimants formulated seven (7) issues for determination, whilst learned Counsel for the 1st Defendant distilled six (6) issues, and learned Counsel for the 2nd Defendant formulated four issues.

Before I proceed further, it is quite appropriate to first deal with issue 1 formulated by learned Counsel for the 1st Defendant which is whether the Deed of Transfer, Exhibit "B" is legally admissible in law. This is because Exhibit "B" is the basis or falcrum or central hub of the Claimants' action. Learned Counsel contended that Exhibit "B" is an instrument affecting or transferring land but unregistered, and therefore inadmissible by virtue of 16 of the Lands Instrument Registration Law of Bendel State 1976 as applicable in Edo State.

Now, by virtue of Section 2 of the Land Instruments Registration Law of Bendel State, instrument means a document affecting land in the State whereby one party usually called the grantor confers,

transfers, limits, and charges or extinguishes in favour of another party called the grantee any right or title to or interest in land in the State.

Admittedly, by virtue of 16 Section of the said law, no instrument shall be pleaded or given in evidence in any Court as affecting any land unless same shall have been registered in the proper office as specified in Section 3 of the law.

It is, settled law, that the registration of a registrable instrument is only a prerequisite for the purpose of admissibility in evidence if such document or instrument is tendered to establish title or interest in land.

See: OYEKOLA V. MARINHO (2000) 9 NWLR (PT. 671) 77,

OKOYE V. DUMEZ (NIG.) LTD. (1985) 1 NWLR (PT. 4) 783.

In the case of OBIENU V. OKEKE (2006) 16 NWLR (PT. 1005) 225

AT 239 – 241 the Court of Appeal held thus:

“The admissibility or otherwise of an unregistered registrable instrument depends on the purpose for which it is being sought to be admitted. If it is being sought for the purpose of proving or establishing title to land or interest in land it will not be admissible under the Act. If it is however tendered to show that there was a transaction between the lessor and the lessee it will be admissible. It will also be admissible if it is meant to establish a fact which one or both parties have pleaded. Under these two conditions such a document does not qualify as an instrument as defined in the land instrument Registration Law.”

See: ALELU V. EZE (2015) 13 NWLR (PT. 1475) 74 AT 95,

OLOWOLARAMO V. UMECHUKWU (2003) 2 NWLR (PT. 805) 537.

Further, in the case of ETAJATA V. OLOGBO (2007) 16 NWLR (PT. 1061) 554 at 601 – 602 RATIO 7, the Supreme Court poignantly stated thus:-

“where a purchaser of land or a lessee is in possession of land by virtue of a registrable instrument which had not been registered, and has paid the purchase money or the rent to the vendor or the lessor, the purchaser or the lessee has acquired an equitable interest in the land which is as good as a legal estate. In other words, a registrable instrument which has not been registered is admissible to prove an equitable interest and to prove payment of purchase money.”

See: AGBOOLA V. UBA. PLC. (SURPA);

TIJANI V. AKINWUNMI (1990) 1 NWLR (PT. 125) 237;

ONI V. ARIMORO (1973) 3 S.C. 163;

OBIJURU V. OZIMS (1985) 2 NWLR (PT. 6) 167;

OGUNBAMBI V. ABOWAB (1951) 12 WACA 222 just to mention but a few.

In the instant case, the Claimants pleaded in paragraph 15 of the Statement of Claim thus:

“Claimant pleads the Deed of transfer to show that the above mentioned transaction took place and that the

Claimants herein paid consideration and have interest in the premises known as No. 60, Sokponba Road, Benin City.”

It is demonstrably clear from the pleadings and evidence led that Exhibit “B” was tendered to show that there was a transaction between the parties, and that the Claimants paid the purchase price for the property in dispute to the late Pa. Samuel Aideyan, and not as evidence of title. It is, my respectful view, that Exhibit “B”, is clearly admissible and I so hold.

See: NSIEGBE V. MGBEMENA (2007) 10 NWLR (PT. 1042) 364.

Having disposed of the issue, let me quickly say that from all the issues formulated by learned Counsel for the parties, it is my view that the following issues are the main or central issues arising for determination:

- (1) whether a Benin Man during his life time can sell or transfer his house (Igiogbe) to his children or any other person?
- (2) Whether section 3(1) of the wills law of Bendel State applies to non-testamentary alienation or devises?
- (3) Whether the Claimants have proved their claim as required by law?
- (4) Whether the Defendants have been able to establish their counter-claim as required by law?

It is now firmly established by strings of judicial authorities that the eldest surviving son of a deceased Benin man is entitled without question to inherit the house in which his father lived and died. In other words, the principal house in which the deceased lived in his life time and died called “Igiogbe”, always passes by way of inheritance on distribution to the eldest son. See IDEHEN V. IDEHEN (SUPRA).

It is, also settled, that a Benin man can give out his property as gift inter-vivos or dispose of same by a Will. In other words, there is no limitation or restriction to the capacity of a Benin man giving out his property as a gift inter-vivos or in a Will. However, as shown by the case of IDEHEN V. IDEHEN (1991) 6 NWLR 382, a testator or a Benin man cannot, by a WILL, give the “Igiogbe” to any one else but the eldest surviving male child. Simply put, section 3(1) of the Wills Law of Bendel State now applicable in Edo did not state that a Bini man cannot make a Will, but that in making such a Will, he should not bequeath his “Igiogbe” to any person other than his eldest surviving male child.

See: OSULA V. OSULA (1995) 3 NWLR (PT. 382) 128,
AGIDIGBI V. AGIDIGBI (1992) 2 NWLR (PT. 221) 98.

In other words, it is well settle law, that a testamentary disposition should not run counter to the letter and spirit of Section 3(1) of the Wills Law. This section recognizes the supremacy of a

customary law when the issue of disposing of a deceased's estate by a Will is being considered.

Judicial interpretations have been given to the provisions of Section 3(1) of the Wills Law of Defunct Bendel State by the Supreme Court in plethora of authorities.

In the case of AGIDIGBI V. AGIDIGBI (SUPRA) AT 313, the Supreme Court held as follows:-

“The opening phrase “subject to any customary law relating thereto” in Section 3(1) of the WILLS Law of the Defunct Bendel State is only a qualification of the subject matter of the property disposed of or intended to be disposed by will, and is not a qualification of the testator's capacity to make a Will. See the following cases. OKE V. OKE (SUPRA), OLOWU VS. OLOWU (SUPRA), IDEHEN V. IDEHEN (SUPRA).”

In OSULA V. OSUAL (SUPRA) AT 276, Belgore J.S.C. held thus:-

“All that the Will Law seek to achieve, which I believe it amply achieved, is to make disposition in a Will a possibility for every citizen of former Western Nigeria of which Bendel State was part, every person can make a Will but that capacity is subject to the entrenched Native Law and Custom.”

It is demonstrably clear from the several judicial authorities of the Supreme Court aforementioned that Section 3(1) of the Wills Law apply only to testamentary devises. But in the instant case, the Claimants are laying claim to the ownership of the subject property, No. 60,

Sokponba Road, Benin City by virtue of Exhibit "B", a Deed of Transfer, by which Pa. Samuel Aideyan allegedly sold the property to the Claimants.

The question that naturally follows is: whether there is in existence a Benin Custom which prohibits a Benin man from selling or alienating his property whether Igiogbe or other property while alive to anybody he wishes? The 1st Defendant contends otherwise and maintain that Pa. Samuel Aideyan cannot sell his Igiogbe to his children to deprive the 1st Defendant from inheriting same.

In support of his pleading, the 1st Defendant called D.W. 1 to testify on his behalf. D.W. 1, Engr. Jim Aideyan testified that an Igiogbe can only be inherited by the eldest son of a deceased Benin man as of right. That No. 60, Sokponba Road, Benin City is the Igiogbe of late Pa. Samuel Aideyan and the 1st Defendant's right of inheritance upon the death of late Pa. S. Aideyan. He said further that under Benin Custom, a father or a Bini man cannot in his life time deprive his eldest son of the Igiogbe by transferring same by a Will or Deed whatsoever to another of his child or children whether by sale or as a gift.

Learned Counsel for the 1st Defendant has submitted that No. 60, Sokponba Road, being the Igiogbe of the deceased, he cannot disposed of same by Exhibit “B” under Benin Customary Law which is the inheritance of the 1st Defendant. On his part, learned Counsel for the 2nd Defendant submitted at page 6 of his address thus:

“There is no doubt that a Benin man can sell or dispose of his property in his life time. But he cannot sell Igiogbe “purposely” to deny his eldest surviving son his right of inheriting it.”

Continuing at page 7, he stated thus:

“Though the testator (late S.A. Aideyan) did not expressly bequeath, devise or dispose of his Igiogbe by Will, the principle there is that Igiogbe cannot be dispose of.”

He proceeded to cite the cases of *IMADE V. OTABOR (SUPRA)*; *AGIDIGBI V. AGIDIGBI (SUPRA)*; *OSULA V. OSULA (SUPRA)*; *IGBINOBA V. IGBINOBA (SUPRA)* AND *UWAIFO V. UWAIFO (SUPRA)*.

It is quite clear from the pleadings and the evidence led by the Defendants that they regarded No. 60 Sokponba Road, Benin City, the property in dispute as the Igiogbe of late Pa. Samuel Aideyan. They equally relied heavily on the various decisions of the Supreme Court on the interpretation of section 3(1) of the Wills Law of Bendel State as applicable to testamentary devises. In other words, all the cases cited by learned Counsel for the Defendants involved devises in a Will, which

admittedly by established interpretation of section 3 (1), by our Apex Court, any devise made in the Will which is contrary to customary law is invalid. This is the basis for upholding the Igiogbe principles that reserves such houses where a Benin man lived and died to the eldest surviving son.

In the instant case, at the risk of repetition, the crux of the Claimants' claim is Exhibit "B", a Deed of Transfer which is a non-testamentary devise, and therefore section 3(1) of the Wills Law is not applicable because what the statute subjects to customary law are devises in a Will.

However, I have earlier referred to the evidence of D.W. 1, Engr. Jim Aideyan who stated that under the Bini Custom, a father or a Benin man cannot in his life time deprive his eldest son of the Igiogbe by transferring same by Will or Deed whatsoever to another of his child or children whether by sale or as a gift.

Let me quickly say that the issue in this case is quite Novel. It has not been pronounced upon by the Supreme Court though I admit that my researches are limited. Learned Counsel for the parties also did not draw my attention to any decided case on the issue by our Apex Court.

Happily enough, learned Counsel for the Claimants and the 2nd Defendant graciously referred to the unreported case of UGBO V. ASEMOTA in suit No. B/491/79 delivered on 30/3/74, wherein the Oba of Benin, His Royal Highness, Oba Akenzua II testified on the issue. It is also reported in the Handbook, materials and case on Benin Land Law by Honourable Justice R.A.I. Ogbobine (Rtd.) at pages 36 – 37.

The Oba of Benin states under cross-examination thus:

“If a man shares his property before his death, the family could reverse it on his death. If the man leaves many houses, they could be distributed among the children but if it is only one house, the house belongs to his eldest surviving son absolutely. As absolute owner he does what he likes with it in his life time. He may therefore sell or make a gift of the Igiogbe in his life time.”

In the result, I accord the evidence of the Oba of Benin, Oba Akenzua II the greatest credence, being the repository of Benin Native Law and Custom. I find as a fact that the Benin Native Law and Custom permits a Benin man to alienate his property by a Deed of Transfer inclusive of Igiogbe while alive.

I therefore hold that late Pa. Samuel Aideyan has power both under the Benin Customary Law and the Constitution to transfer his property situate at No. 60, Sokponba Road, Benin City by a Deed of transfer, Exhibit “B” to the Claimants while alive.

It is instructive to note that the Defendants regarded No. 60, Sokponba Road, Benin City as the “Igiogbe” of Pa. Samuel Aideyan. This is a complete misconception of the Igiogbe concept or principle under the Benin Customary Law. It is well settled that the concept of “Igiogbe” does not arise under Benin Native Law until after the death of a Benin man. Put differently, a Benin man, while alive does not have a house or property called or known as “Igiogbe”. Further, by established definition, all existing authorities seem to agree that it is where a Benin man lived and died and may have been buried.

Mr. K.S. Okeaya-Inneh, (SAN) in his book titled “Benin-Native Law and Custom at a glance” at page 30 stated thus:

“It must be noted that the principal dwelling house of a Benin man only becomes his “Igiogbe”, after his demise.”

It is therefore settled under Benin Native Law and Custom that a Benin man’s “Igiogbe” cannot be designated until his death. I therefore hold that No. 60, Sokponba Road, Benin City is not the “Igiogbe” of Pa. Samuel Aideyan at the time Exhibit “B” was executed between the parties.

I now turn to issue 4 which is whether the Defendants have proved their respective Counter-Claim?

It is settled law that a counter-claim is a cross-action with the Claimant becoming the Defendant to the counter-claim. Therefore, the onus of proof of the counter-claim rests upon the Counter-claimant. He must lead evidence in support of the Counter-Claim in order to succeed.

See: OBMIAMI BRICKS & STONE (NIG.) LTD. V. A.C.B. LTD. (1992) 3 NWLR (PT. 229) 266, RATIO 16.

ZENITH BANK PLC V. VICKDAB & SONS (NIG.) LTD (2011) 2 NWLR (PT. 1231) 337.

ANOZIA V. A.G. LAGOS STATE (2010) 15 NWLR (PT, 1216) 207 AT 217.

The 1st Defendant in proof of reliefs (a) and (b) contained in paragraph 23 of the Statement of Defence testified through D.W. 1, Engr. Jim Aideyan. He testified that No. 60, Sokponba Road, Benin City, the property in dispute is the Igiogbe of Pa. Samuel Aideyan nuclear family and the 1st Defendant's right of inheritance upon the death of their father. He stated that a Bini man cannot in his life time deprived his eldest son of the Igiogbe by a Will or Deed whatsoever to another of his child or children whether by sale or as a gift. That the 1st Defendant is the rightful owner of the property at No. 60, Sokponba Road, Benin City by inheritance under Benin Custom being the eldest

surviving son of Pa. Samuel Aideyan having performed the final burial rites.

I have earlier in this judgment held that the property situate at No. 60, Sokponba Road, Benin City is not the Igiogbe of Pa. Samuel Aideyan at the time Exhibit "B" was executed between Pa. Samuel Aideyan and the Claimants and gave reasons which I do not intend to repeat. It is, also clear that under the Benin Customary Law as espoused sometime in the year 1994 by the Benin Traditional Council on the Authority of the Omo N'oba Erediauwa, Oba of Benin that if a person, be he title holder or not, make a grant of a gift to any of his children or other persons while alive, such property ceases to be part of the Estate of the person upon his death and is excluded from those to be shared. See Handbook on some Benin Customs and usages page 15.

It is also remarkable to not that in Exhibit "F", the last Will and Testament of late Pa. S.A. Aideyan, Exhibit "H", the 1st Codicil, Exhibit "E", the second Codicil and Exhibit "G" the 3rd Codicil of late Pa. Aideyan, there is nowhere the property at No. 60, Sokponba Road, Benin City, was referred to as the Igiogbe of the deceased testator.

I therefore hold that the property situate at No. 60, Sokponba Road, Benin City not being the Igiogbe of Pa. Samuel Aideyan, the 1st Defendant cannot inherit same as of right under the Benin native Law and Custom.

In respect of the 2nd Defendant, she claimed reliefs 1 – 6 in her Counter-Claim. It is pertinent to observe that reliefs 1 – 5 sought in the Counter-Claim are for the benefits of the 1st Defendant who also filed a Counter-Claim in the suit. I agree intoto with the submission of Dr. O. Obayuwana that the 2nd Defendant has no *locus standi* to claim the reliefs for the benefit of the 1st Defendant, and that she is a meddlesome interloper who ought not to have been joined as a Defendant in the suit. This is a classical case of a mourner weeping or crying more than the bereaved.

The 2nd Defendant also claimed N50 Million general damages for malice. It is worthy of note that the Claimants instituted the action against the 1st Defendant in the suit. It is, my view, that the mere fact that the Claimants omitted to include her as a party in the suit does not give her right to a cause of action against the Claimants. She has an option to be joined in the suit either as a Claimant or Defendant which she has already exercised by being joined as a Defendant. It is, my

view, that the 2nd Defendant is unable to show the wrongful act of the Claimants, and the consequent damage or injury to her person for which she seeks general damages of N50 million. It is also my view, that the claim is not only baseless but gold digging which ought to be dismissed in its entirety.

Let me pause here to make some comments on some issues raised by learned Counsel for the Defendants. Learned Counsel for the 1st Defendant argued that the Deed of Transfer Exhibit "B" is not authentic, valid and the act of the purported transferor but a forgery. He referred to Exhibit "F", Certified True Copy of the Codicil of Pa. Samuel Aideyan paragraph 2 made in 2006 where the testator stated that he had already transferred the property at No. 60, Sokponba Road, Benin City to the Claimants for consideration. The learned Counsel for the 2nd Defendant adopted the submission of the 1st Defendant when he stated that the 1st Defendant's Counsel has addressed on the issue of fraud, doubt and suspicion of the sale of No. 60, Sokponba Road, Benin City, at page 5 paragraph (iv).

It is important to note that the Claimants did not plead Exhibit "F" or any Codicil in their pleading. It was also not pleaded by the 1st

Defendant. Rather, it was the 2nd Defendant who pleaded it in paragraph 19 of her Statement of Defence and Counter-Claim.

It is, trite law, that he who asserts the existence of a fact must prove same. It is the duty of the Defendants to produce the Deed of Transfer of the property made in 2006, and not the Claimants if it exists. It is clear that Exhibit "F" could not be referring to Exhibit "B" which was not in existence as at that time. This, in my view is not a proof that Pa. Aideyan did not make Exhibit "B". It is also to be noted that the 1st Defendant who alleged forgery of Exhibit "B" did not expressly plead same with the particulars of the said forgery in his statement of Defence and Counter-Claim. It is worrisome and baffling that the 2nd Defendant could impugn or attack Exhibit "B" for lack of due execution. The 2nd Defendant in her statement on oath particularly paragraphs 9, 10 and 13, admitted the execution of the Deed, Exhibit "B" by their late father. What is more, she admitted that she signed Exhibit "B", but under pressure from their father, and to give him temporal peace.

It is, elementary law, that a party is bound by his/her admission and to the extent of the admission. It is also trite that fact admitted needs no further proof.

See: EZEMBA V. IBENENE (2004) 14 NWLR (PT. 894) 617 AT 690.

LONGE V. F.B.N. PLC. (2006) 3 NWLR (PT. 967) 228.

It is, my humble view, that the 2nd Defendant having admitted the execution of the Deed of Transfer Exhibit "B", and that she signed same as a Transferee, the due execution of Exhibit "B" is proved.

Learned Counsel for the 1st Defendant further contended that the Deed of Transfer tendered by the Claimants is not the Deed of Transfer pleaded and given in evidence by the Claimants. That the Deed of Transfer that was pleaded and led in evidence by the Claimants is the Deed made and executed by the parties in May, 2010.

Let me quickly point out that the Claimants did not specifically state in paragraph 15 that they intend to rely on the Deed of Transfer dated May 2010, though they pleaded in paragraph 3 of the Statement of Claim that their father summoned the Claimants, C.W. 2 to his residence at No. 60, Sokponba Road, to execute a Deed of Transfer. In paragraph 21, (b), the Claimant specifically stated that No. 60, Sokponba Road, Benin City was transferred by Pa. Samuel Aideyan to the Claimants and the 2nd Defendant on the 2nd August 2010. The Claimant listed the Deed of Transfer dated the 2nd of August 2010 in the

list of documents to be relied upon and went further to front load same.

Learned Counsel for the Claimants has argued that the date “sometime in May, 2010”, in paragraph 3 of the Statement of Claim is the date the Claimants, the 2nd Defendant met to execute Exhibit “B”. That a Deed can bear a date different from that on which it was actually executed or delivered. Learned Counsel for the 2nd Defendant in his Reply on point of law posited that a document is presumed to be executed on the date in the document is executed, unless the contrary is proved with convincing, compelling and genuine reason(s).

I have myself perused Exhibit “B”, there is nowhere in it that either the transferor or the transferees and their witnesses signed and dated the Deed, “May 2010”. The only date on Exhibit “B” is 2nd August, 2010.

It is, my view, that it was the document pleaded, listed in the list of documents to be relied upon, and frontloaded that was tendered and admitted as Exhibit “B”. In any event, the 2nd Defendant was shown Exhibit “B” and she admitted that she signed it.

On the validity of the power of Attorney, it is settled that even if it is only one of the named Claimants that gave Power of Attorney for the

prosecution of the suit, the action is still competent. It is also trite, that a person having a joint interest with others in a subject matter can bring an action for the preservation of the subject matter without the consent of the others.

Learned Counsel for the 1st Defendant submitted that the action is not competent because the Claimants did not pay fees for their reliefs (c), (d) and (e) which were additional to those paid for in the initial originating summons. I have myself examined the endorsement on the processes filed. It is clear that the Claimants paid the sum of N1, 600 on the 30/4/2013 inclusive of the reliefs and order of declaration sought. The Claimants did not claim any monetary relief in the Statement of Claim. They merely repeated the reliefs sought in the statement of Claimant that was paid for in the writ of summons. It is my view, that the submission is misconceived. At any rate, it is trite that where there is shortfall in the filing fees paid by a party, it does not render the processes filed incompetent. The Court will order for payment of the shortfall in the filing fees to be paid by the defaulting party.

In the final analysis, I hold that the Claimants have successfully proved their case as required by law against the 1st Defendant.

In the result, I hereby enter judgment in favour of the Claimants against the 1st Defendant in the term of the following orders:-

- (a) A DECLARATION that the Claimants are the owners of the property known as No. 60, Sokponba Road, Benin City which they acquired vide a Deed of Transfer from Pa Samuel Aideyan on the 2nd day of August, 2010.
- (b) A DECLARATION that the 1st Defendant has no interest whatsoever in the premises known as No. 60, Sokponba Road, Benin City, same having been transferred by Pa. Samuel Aideyan to the Claimants on 2nd August, 2010.
- (c) A DECLARATION that the interment by the 1st and 2nd Defendant of late Pa. Samuel Aideyan on 26/4/2013 in the premises of No. 60, Sokponba Road, Benin City, did not confer any rights whatsoever in the said premises on the 1st Defendant herein.
- (d) A MANDATORY ORDER of this Court directing the 1st Defendant to restore the premises of No. 60, Sokponba Road, Benin City to the condition it was before their interment of the corpse of late Pa. Samuel Aideyan in the said premises on 26/4/2013.
- (e) A PERPETUAL INJUNCTION restraining the 1st Defendant his agents, and/or privies from engaging in any act or conduct of any sort inconsistent with the rights of Claimants in and over the property known as No. 60, Sokponba Road, Benn City.

I further hold that the 1st and 2nd Defendants have failed woefully to prove their respective Counter-Claim against the Claimants as

required by law. Consequently, the Counter-Claim of the 1st and the 2nd Defendants are hereby dismissed in their entirety as lacking in merit.

I award costs of N30.000 in favour of the Claimants against the Defendants.

E. O. AHAMIOJE,
JUDGE.
21/12/15.

COUNSEL:

DR. O. O. OBAYUWANA FOR THE CLAIMANTS

C. I. GIWA-AMU, ESQ. FOR THE 1ST DEFENDANT

JOE ALUYI, ESQ. FOR THE 2ND DEFENDANT