

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE E. F. IKPONMWEN - JUDGE

FRIDAY 10TH JUNE, 2016

BETWEEN:

SUIT NO. B/63/2010

1. MR. DENNIS OSATOHANMWEN EDMOWONYI í

CLAIMANT

AND

1. REV. RICHARD I. ERHAHON
(SUED AS EXECUTOR OF THE WILL
OF LATE MR. JACOB EDMOWONYI IGBINOSUN)

2. MRS. ESOHE WOGHIREN IKUIGHO

3. MR. SAMSON IROGHAMA EDMOWONYI

4. MR. EKHORUTOMWEN OSARO EDMOWONYI

5. MR. TONY OSARENTIN EDMOWONYI

6. REV. IROWA EDMOWONYI

7. MR. OSARENKHOE EDMOWONYI

8. REV. JUDE OSARUGUEAGBON EDMOWONYI

9. MRS. AGHARIAGBONSE EKUASE
(NEE EDMOWONYI)

10. THE PROBATE REGISTRAR HIGH COURT OF JUSTICE

DEFENDANTS

JUDGMENT

The Claimant by a Writ of Summons filed on 26/1/2010 instituted this case and by paragraph 18 of the extant statement of claim filed on 25/11/10 the claimants claimed against the Defendants as follows:-

- A. A DECLARATION that the claimant who is the eldest surviving son of Late Mr. Jacob Edomwonyi Igbinosun having performed the funeral obsequies of his late father according to Bini Native Law and custom is entitled inherit to the exclusion of any other person including the Defendants, the Igiogbe known as N0 13 (formerly N0. 23) Oba Market Road, Benin City.
- B. AN ORDER to set aside and declare null and void clauses/paragraphs 4, 9, 11, 14, 16, 18, 20, 22 and 24 of the purported Will of Late Mr. Jacob Edomwonyi Igbinosun dated 28th December, 1999 as same violates Bini Native Law and custom and the Wills Law cap. 172 of the Bendel State Law as applicable in Edo State.
- C. An Order of perpetual injunction restraining the Defendants, their agents, servant and/or privies from interfering or meddling with the plaintiff's proprietary rights over and in the said property.

The 1st, 4th ó 9th Defendants by a further joint statement of Defence and counter claim on 13/7/11 per paragraph 55 thereof counterclaims from the claimant:-

- i) A DECLARATION that the Will of Pa. Jacob Edomwonyi Igbinosun dated 28th day of December 1999 and read in the

Probate Registry of the High Court of Edo State on 28th November, 2008 is valid and sustainable.

- ii) A perpetual Injunction restraining the claimant from disturbing or tampering with the Will of Pa. Jacob Edomwonyi Igbinosun dated 28th day of December, 1999 as shared and distributed by the late testator.
- iii) AN Order for accounts of all monies collected from the Defendants, other children of the late testator and other members of the family in respect of the burial ceremonies of late Pa. Jacob Edomwonyi Igbinosun.
- iv) AN Order for accounts and sharing of all rents the claimant collected from the tenants before and after the Will was read estimated at N2,000,00.00 (Two Million Naira) to be paid to all the beneficiaries of the Will.
- v) AN Order enforcing the provision of the Will by ordering the claimant to exhume their late father's remains from N0.13 Oba Market Road, Benin City for interment at their late father's Igiogbe at Iyanomon as instructed by the Will of Pa. Jacob Edomwonyi Igbinosun

vi. Cost of the suit.

The Claimant filed an amended reply to the further Joint Statement of Defence/Counter claim on 28/7/11.

The 10th Defendant's statement of Defence was filed on 8/8/11.

The Claimant opened his case on 1st of July, 2013 with CW1 Mr. David Enoghayi Imadomwonyi adopting his statement on oath filed on 23/1/13. He states that he was the 3rd in command in the family during the burial rites of Pa. Jacob Igbinosun Edomwonyi the claimant's father while Late Chief Obadiaru was the Okaegbe and Thomas Oliza was the second in command. The claimant informed him about the death of his father on 2nd August 2008. The family including himself held a meeting over the death of Pa. Igbinosun and resolved that he should be buried according to Bini Native Law and Custom. The claimant performed all the burial rites of his late father in accordance with the Bini Native Law and Custom. The 2nd to 9th Defendants joined the claimant to perform the burial ceremonies. After the burial, the Okaegbe fixed a date for taking inventory of the properties of late Pa. Igbinosun. After taking the inventory and before sharing the properties, the Okaegbe informed the family about the Will the deceased wrote.

According to him the claimant is entitled to inherit the Igiogbe as of right under Bini Native Law and Custom. Late Pa. Igbinosun (Claimant's Father) lived, died and was buried at NO. 13 Oba Market Road, Benin City and there was no opposition to bury him there.

Under cross examination by Mr. Olaleye CW1 testified that he is related to the parties paternally through Iso family. He is the head of Edomwonyi Family. He testified that he did not attend the burial ceremony at the church, as he was with late Obadiaru and the family. The eldest son did not go to the church. It was the family that buried late Jacob Igbinosun Edomwonyi not the church although the church members were present. He was present at the burial as the family buried the deceased but the church said the prayers. CW1 testified that the deceased and his late father originally came from Evbobenwen but Pa. Jacob Igbinosun Edomwonyi went to settle in Iyanomon where he built a house. That house was not his main house. He came to Benin after he had his first son, and in Benin he had his other children. He (CW1) is now the head of Iso family. The family did UKOR for the first son. The senior son did the UKONMWEN ceremony. Late Pa. Igbinosun Edomwonyi was not a chief. He does not know if the deceased inherited the UKHURE from his late father.

Under cross examination by Mr. Okojie CW1 testified that he became aware that Pa. Igbinosun made a Will after the burial and when the family was preparing to share the deceased's properties. Till date he has not seen the Will.

CW2 Prince Solomon Okundia Ezomo on 25/9/2013 adopted his witness statements on Oath filed on 23/1/13 and 3/5/13. According to him late Pa. Igbinosun died on 2nd of August 2008. He lived, died and was buried at N0. 13, Oba Market Road, Benin City. The deceased was buried according to the Benin Native Law and Custom. He lived in the said house with his wives and children. He was present during the burial rites for him with the active participation of all the children including the 2nd & 9th Defendants. After the burial of the late Pa. Igbinosun, the family wanted to share the property but they were told that there was a Will so they stopped.

He further stated that the claimant is the eldest son of Late Pa Edomwonyi Igbinosun and they are from the same family. The deceased married four wives during his life time and they all lived with him at his principal mansion called òIgiogbeö in Benin parlance at N0 13 Oba Market Road, Benin City. Late Pa. Jacob Edomwonyi Igbinosun lived at Iyanomo but relocated to the subject-matter in Benin City and lived therein till he died.

CW 2 stated that the claimant's father rented out a few stores in the said Igiogbe which he used to complement his income from his other properties during

his life time. The claimant and his siblings duly performed the òIzakhueö, òIsotonö and òIsueranfuaö ceremonies in accordance with Bini Native Law and Custom and the eldest son also performed the òUkomwen Ceremony after which the Okaegbe and the other members of the family gave him the òUkhureö and asked him to step into his father's shoes as the eldest son. The claimant and his siblings and some of the family members went to St. Matthew's Anglican Church, Benin City and attended a church service since their father was a prominent member of the said church.

Under cross-examination CW2 testified that he is related to the claimant's family maternally through the ISO family. He was not at the funeral service for late Pa. Igbinosun but he was at the burial ceremony. The family conducted the interment. The church came around to say the prayers. The family of the deceased is Iso family, Chief Obadiaru (now late) was the Okaegbe at the burial. He is a member of the Iso family. He was not at the meeting when the Will and the burial of the deceased Igbinosun were discussed. He was a witness at the native rites conducted for the late Igbinosun i.e. Isuerafua, Izakhue, Isoton e.t.c. for five days.

CW3 Ifaluyi Ohenhen testified on 25/9/13 adopted his witness statement on Oath filed on 23/1/13. He states that the claimant is the 1st son of late Pa. Jacob Edomwonyi Igbinosun. The 2nd ó 9th Defendants are the children of late Pa. Igbinosun. The deceased lived, died and was buried at N0. 13, Oba Market Road,

Benin City and he was his neighbor. The deceased died on 2nd August 2008, and was buried in accordance with Bini Native Law and Custom. He was present during the entire burial rites.

CW3 states that it is the first son that is entitled to inherit the Igiogbe exclusively after performing the òUKOMWENö ceremony which the claimant in this case duly performed during the burial ceremony of his father. When the claimant performed the UKOMWEN ceremony, he was given the staff of the family N0 13, Oba Market Road, is a single house facing Oba Market Road with one side facing Obakhavbaye Street and it has a courtyard.

Under cross examination by Mr. Olaleye CW3 testified that he does not know if the deceased was a Christian but he knows he was a native man. He does not know if the deceased had a house and big farm at Iyanomo. He does not know if the deceased purchased the property at Oba Market Road Benin City. He does not know if he had other properties apart from the house at Oba Market Road. There is no shrine in the deceased's house. The deceased was not a titled chief. The claimant brought this action because the Igiogbe is not to be shared. It is not true that the deceased lived through out with his wives and children at Iyanomo. He has never visited the house at Iyanomo. The deceased wife used one of the stores as a tailoring shop. He does not know if the deceased was a native of Iyanomo.

Under cross examination by Miss Isibor CW3 testified that he is a friend of the family. He is not aware of any existing Will before the death of the deceased.

The claimant Dennis Osatohnamwen Edomwonyi testified on 20/11/13 by adopting his statement on Oath filed on 23/1/13 and 3/5/13. He stated that the 2nd & 9th Defendants are his paternal and maternal younger brothers and sisters and they are named as beneficiaries of his late father's Will notably the principal house known and called N0. 13 (formerly 23) Oba Market Road, Benin City. His late father Mr. Jacob Edomwonyi Igbinosun lived, died and was buried at his Igiogbe or principal mansion known and called N0. 13 (formerly N0 23) Oba Market Road, Benin City in accordance with the Bini Native Law and Custom. His late father during his life-time married four wives who all lived with him with their children at his principal house at N0. 13 Oba Market Road, Benin City till he died on 2nd August, 2008. As the eldest surviving son, he along with his siblings and members of the family including the Okaegbe Chief Samuel Agbonifo Obadiaru, performed all the funeral rites (i.e the first and second burial rites) in accordance with Bini Native Law and Custom. Himself and his siblings only performed the -Izakhue, -Isoton and Isueranfua ceremonies in line with Bini Native Law and Custom. He as the eldest son performed the -Ukomwen ceremony after which the Okaegbe and other principal members of the family gave him the òUkhure and asked him to step into his father's shoes as the eldest son. According to Bini

Native Law and Custom as the eldest surviving son, he is entitled to inherit exclusively the house where his late father lived and died which is NO. 13 (formerly NO. 23) Oba Market Road, Benin City. The Igiogbe is a single building with two large sitting rooms, several rooms and a few stores and a court yard which accommodated his four wives. The testator rented out a few stores in the Igiogbe which he used to augment his income from his other properties during his life-time. At the conclusion of all the burial rites, inclusive of the Christian burial formalities, he approached the family and requested that this late father's estate which includes a house and many parcels of land should be shared among the children in line with Bini Native Law and custom. The Okaegbe after conferring with other members of the family advised him to be collecting the rents from the subject matter with a view to rendering detailed accounts to the family later pending the sharing of his late father's estate. He diligently carried out the above task until S.I. Urhoghide Esq., informed him that his late father executed a Will which was later read at the Probate Registry, exhibit A. Exhibit A purported to share/distribute portions of the Igiogbe among the 2nd to 9th Defendants who are his younger siblings. The 1st executor Mr. A. E. Obadiaru (now deceased) subsequently advised him to render an account of all rents paid to him which he did. The tenants were later instructed to stop paying rents to him because the Executors were going to appoint another person to do so. His late father owned

other landed properties which were given to his siblings by virtue of Exhibit A. The various stores and rooms apportioned to the Defendants as contained in clauses 4, 9, 11, 14, 16, 18 ,20 22 and 24 of the purported Will, will comprise the Igiogbe.

The Claimant further states that his late father Pa. Jacob Edomwonyi Igbinosun lived at Iyanomo until 1947 when he re-located to the subject-matter and never went back to Iyanomo till he died. He and his siblings went to St. Matthew's Anglican Church, Benin City where they attended a church service as their father was a prominent member of the church. He never took possession of the property at Iyanomo and he did not collect any rent from the property.

Under cross examination by Mr. Olaleye the claimant testified that his late father was a Christian and he attended St. Matthew's Cathedral (Anglican Communion). There was a church service for his late father at his death which he attended. The 6th and 8th Defendants are reverend gentlemen in the said church and met with the Anglican Bishop to organize the church services. He was held to ransom by the family to perform the burial rites according to Bini Native Law and Custom . The interment was in house N0. 13 Oba Market Road, Benin City. The church conducted the rites and left and he started the burial rites. The family did the lowering of the casket into the grave. There was a poster for the burial ceremony of his father done by his brothers. There was also a programme,

Exhibits B and C and his signature is not on them. He did not oppose them. They did both Christian and Native burial. His father has a house at Iyanomo and he does not know if the property at Iyanomo was the house his father first built. He was born at Iyanomo and his mother was the first wife of his father. He does not know if his father founded the village Iyanomo. He does not know if his father bought the house at N0. 13 Oba Market Road, Benin City. The house is his father's house. It was in 1947 his father relocated to Benin permanently after he was injured in the farm. He became a trader. He was not resident in Iyanomo through out, he used to go to and from there. The family house in Iyanomo was given exclusively to him in the Will. His father had other properties apart from the one at Oba Market Road. The property at Iyanomo is not bigger than that at Oba Market Road. It is cottage house for a farmer. His father was not a titled chief. There is no shrine in the house at Iyanomo or any of his other properties. His father as a first son had his Ukhure. He named an Okaegbe in his Will. He has his father's Ukhure as his first son. His father did not add wings to the building at N0. 13 Oba market Road.

The claimant further stated that before the demise of his father in 1994 he called on him as his eldest son and told him he was retiring from every job and that he was going to hand over everything to him to take care of him and the family and he asked him to renovate not only the house at Iyanomo but all his four houses.

He trained all his father's children. The property at Iyanomo was stated in his father's Will to be his but he objected to it hence he is in court. He has not gone to Iyanomo since he filed this action. It is not true that his late father before his death instructed him to bury him at Iyanomo. He did not insist that his father be buried at No. 13 Oba Market Road, Benin City but the family did and there was no disagreement from his siblings. His father was buried peacefully. Under Bini Native Law and Custom, the family has a right to determine where the deceased should be buried not the first son. It is not where he buried his father that makes it Ogiogbe but where he lived and died. His father left landed properties at Iyanomo. Since the executors asked him to stop he abandoned the properties and he does not know if the land has been sold. He does not know if there are people now on the land. It is not true that he sold the land. Since his father died he has not been to the land. He does not know where the land is situated. He contributed money and each set of children for each wife contributed N500,000 towards the burial of their father. The monies were given to him and they were used for the burial. He did not bury his father alone. He is in agreement with the Will except certain portions relating to the property at No. 13 Oba Market Road, Benin City. The present Okaegbe of his family is Pa. David Imadomwonyi of Iso Family. Obadiaru is the name of the Okaegbe at his father's burial and a member of Iso family.

Under cross examination by Miss Isibor, the claimant testified that he did not know that his father made a Will until after his burial. When he was told and invited to attend the reading of the Will.

The 1st, 4th ó 9th Defendants opened their case on 16/4/14 with 1st Defendant Rev. Richard Iyegbaye Erhahon testifying. He adopted his witness statement on Oath filed on 28/2/13. He states that the claimant and 2nd ó 9th Defendants are children of late Pa. Jacob Edomwonyi Igbinosun who is his uncle. The deceased died on 2nd August 2008. The deceased lived all his life and died as a Christian and leader in St. Matthew Anglican Cathedral Church, Benin City. He is an Executor of the Will of Late Pa. Edomwonyi Igbinosun dated 28th December, 1997 along with Mr. A.E. Obadiaru (deceased). He stated that CW1, CW2 and CW3 are not their relations neither are they members of the Iso/Obadiaru family and the facts contained in their witness statement on oath are not true. The principal mansion and òIgiogbeö of the late Pa. Igbinosun is the house at Iyanomo where he lived and had his farmland. The deceased lived, married his wives and gave birth to some of his children including the claimant at Iyanomo, the òIgiogbeö. The 1st Defendant stated that due to an accident that happened in 1947 to the deceased while working on his farmland at Iyanomo, he moved temporarily to the property at N0. 13 Oba Market Road, Benin City, to receive treatment. He later returned to Iyanomo after his recovery where he did thanksgiving in the church and continued

to farm for several years. At all times, the late Pa. Igbinosun regarded the house at Iyanomo as his òIgiogbeö and principal house for all his children. The testator only came to live at N0. 13 Oba Market Road, Benin when all his brothers assisting him on his farm left to get married and due to old age and ill-health.

He further stated that the property at N0. 13 Oba Market Road Benin, unlike the other properties he built was bought by late Pa. Igbinosun and it was used mainly for commercial purposes to be let out as shops from which he derived money to train his children and he had a shop there for himself. Shortly, before his father's death in August 2008, the claimant had asked him to accompany him to Iyanomo that his late father instructed him to renovate the Igiogbe at Iyanomo in preparation to return home and that the deceased instructed that he should be buried at Iyanomo. The claimant therefore went to Iyanomo to carry out the repairs and renovation as instructed by his late father. Unfortuantaely, the deceased died before he could return back to Iyanomo his Igiogbe. In his Will the late Pa. Igbinosun specifically instructed that his principal mansion and Igiogbe at Iyanomo be given exclusively to the claimant as his eldest surviving son, which instruction was carried out. He is surprised that the claimant is now claiming the property at N0. 13 Oba Market Road, Benin as the deceased principal house. Rev. Erhahon stated that in order to carry out his intention to claim the property at N0. 13 Oba Market Road, the claimant contrary to his father's instruction insisted the

father must be buried at Benin instead of Iyanomo, which the other children opposed. It is not true that the deceased was buried according to Bini Native Law and Custom. The Claimant's father was buried as a Christian by St. Matthew Cathedral Church, Benin by the Bishop under due observance of the Christian rites of passage only which the claimant authorized, planned and fully participated in. No Native burial ceremony was conducted by the late Chief (Sir) Samuel Agbonifo Obadiaru before his death as the òOkaegbeö of the Iso/Obadiaru family. No Iwareumi, Izakhue, Isoton, Isueranfua or Ukomwen ceremonies was done till date by the claimant or anyone in his favour or by the late Okaegbe or anyone acting on his behalf. He was a principal actor in the burial and fully participated in the burial ceremony of his late Uncle. None of the children of the deceased participated in any native burial with the claimant as the deceased sternly warned against it. He states that the property at N0. 13 Oba Market Road consists of shops and a few portion which the deceased had converted into rooms during his stay at Benin. The Claimant had been collecting the rents of the property at N0.13 Oba Market Road before his father's death and continued to collect the rents even after his father's death. Despite their instructions to him as Executors to stop collecting the rents he did not stop nor did he render any account to the Executors, the Okaegbe or the family. It is not true that the then òOkaegbeö Chief Samuel Agbonifo Obadiaru advised him to collect the rents of the property. Neither the late Mr. A.E.

Obadiaru, nor himself as Executor collected any rent in respect of the property, since the claimant was collecting the rents.

Under cross examination by Mr. Osemwenkha, the 1st Defendant testified that after the death of the deceased all the meetings concerning his burial rites were held at N0. 13 Oba Market Road, Benin City and he was buried there against the Will of the deceased. All the children contributed monetarily towards the burial of their late father. During this period of the burial members of the family were present including the Okaegbe. The traditional burial rites were performed for the deceased by the family but in a Christian way i.e. no rituals. The deceased was a trader, he had a store in N0. 13 Oba Market Road, Benin City. It is not true that his relationship with the claimant has been strained. It became strained when the claimant knew he was one of the Executors of his late father's Will.

6th Defendant Rev, Iriowa Osarieme Faith Edomwonyi testified on 16/4/14. He adopted his statement on oath filed on 28/2/13. He states that the claimant and 2nd, 3rd, 4th, 5th, 7th, 8th and 9th Defendants are his brothers and sisters and children of the late Pa. Jacob Edomwonyi Igbinosun. His family's principal house is at Iyanomo, where his father started his family life. Their father was the president of òItu-Iho of St. Matthew's Cathedral Church, Benin City, for 35 years till his death. From when he joined the church in 1930 till his death in 2008, family members and all around knew his father as a committed Christian who stayed away

completely from Idolatry and occultic practices. The type of burial and place of burial are contained in the video recording their late father made during his life time. Pa. J.E. Igbinosun was never a Chief or traditional title holder in Benin Kingdom, So there was no Ukhure or vacant traditional stool kept for anyone to inherit in any particular house.

6th Defendant states that his late father had other properties apart from the house at Iyanomo which were covered in Exhibit A and they are:-

- a.) The property at N0. 13, Oba Market road, Benin City
- b.) Two separate houses built on the same plot at N0. 24, 2nd East Circular Road, Benin City.
- c.) A landed property, measuring 50ft by 50ft ó 5.479 hectares situated at Ward 29A Benin/Sapele Road, Iyanomo
- d.) Some amount of money in Banks and safes.

It was the accident he had on the farm at Iyanomo in 1947 that necessitated his temporary movement to Benin City. After his recovery, he had a thanksgiving service at the church and continued shuttling between Iyanomo and Benin. The Claimant informed him, the other children and the extended family members as well as the St. Matthew Cathedral Church, Benin City of the demise of late Pa. J.E.

Igbinosun. In the series of meetings that followed, the family and St. Matthew's Cathedral approved the programme for the burial activities. The venue of the burial had become a serious source of contention for the family. 1st defendant and some of the family members wanted the deceased to be at Iyanomo as he instructed but the claimant insisted that he wanted their late father to be buried at N0. 13, Oba Market Road, Benin City. In order to give peace a chance and avoid destroying the family name, Pa J. E. Igbinosun was finally buried at N0. 13 Oba Market Road, Benin City. No tradition rites, Iwaeriumwin, Izakhue, Isoton, Isueranfua and Ukomwen ceremonies were performed for his father's burial nor was there any customary burial rites done for his late father. No money was given to the extended family members to carry out traditional burial rites for his late father by any of the children. It was the programme outlined that was used by the priests from the church. The claimant did not bury their father alone. All the children jointly contributed money to bury their late father based on the three òUrhörö (the number of wives and children). He states that till now the claimant has not accounted for how the money for the burial was expended. The property at N0. 13 Oba Market Road was purchased by his late father for commercial and income generation. He states that Exhibit A was validly executed and the 1st defendant and late Mr. A. E. Obadiaru were appointed executors of the Will. He states that even the claimant recognized the property at Iyanomo as his residence,

as he had renovated the house shortly before their father died based on their father's instructions and in preparation for the deceased to return there. The claimant inherited the property under the Will exclusively as the eldest surviving son. He states that the eldest surviving son of a deceased father even under Bini Native Law can only inherit the Igiogbe of the deceased father which is the house he built, lived and died in upon the exclusive performance of the second burial obsequies which was not the case here. In the instant case there was no second or native burial ceremonies as the testator's solicitor Dr. S.I. Urhoghide and other members of the family including the 1st Defendant told the claimant the wish of their late father to be buried at Iyanomo and having a Christian burial. The house at N0. 13 Oba Market Road, Benin City was bought and consists of several shops let out to tenants as a commercial concern their late father decided to share it among all his children, along with the claimant who was given half of the property in addition to the mansion at Iyanomo. The claimant has since taken possession of the Igiogbe at Iyanomo and he has been collecting the rent from the property, to the exclusion of all other children under the Will of the testator. The Claimant was informed of the Will written by their late father before the burial ceremony was commenced and no family member asked him to be collecting rent from the property as he has been collecting the rent before their father died. The plaintiff promised the solicitor to meet with his siblings to raise the solicitor's fees for

proving the Will and that the solicitor should set in motion the process of proving the Will. He tendered exhibits D and D1.

Under cross-examination by Mr. Osemwenkhai 6th Defendant states that he is not sure his father married four wives. His mother was the third wife. After his mother, his father did not have any child by any woman after his mother. He was born on the 8/7/56 at his father's house at Oba Market Road, Benin City. His siblings born after him were born at 13 Oba Market Road, Benin City where their father lived. His mother lived with his father at No. 13 Oba Market Road, with other wives and his mother also lived at Iyanomo. His father died in his house at NO. 13 Oba Market Road, and he was buried there contrary to his wish. The Okaegbe and family members were present for the burial rites in the church and on Saturday the family cooked for all and no traditional rites were performed. It is not true that it was only at the thanksgiving and outing service the family went to the Anglican Church, rather on 28/8/2008 they had a service of songs, on 29/8/2008 they had an outing service in church. After which his late father was interred at NO. 13 Oba Market Road, two Bishops were present. On 30/8/2008, the family was given a feast. On 31/8/2008 they had a thanksgiving service. He knows Rev. Richard Erhahon, he is his Uncle. He participated in the Christian burial of his father, there was no traditional rites. It is not true that he left Benin to Lagos before the conclusion of his father's traditional burial rites.

Under cross examination by Mr. Airende, the 6th Defendant states that his father wrote a Will. He is aware the Will was lodged with the Probate. The Will has been read.

DW1 Samuel Idehen Urhoghide testified on 1/7/14 by adopting his witness statement on oath filed on 7/3/14. He states that he knows the claimant and the Defendants in this case, they are all children of late Pa. Jacob Edomwonyi Igbinosun except 1st and 10th Defendants. He grew up to know late Pa. Jacob Edomwonyi Igbinosun as a devout Christian. He was a member of Otu-Iho. In July 1999, when he paid him a visit, the deceased told him that he will want him to write his Will for him which he did. The deceased specifically instructed him that his Igiogbe, principal house and mansion at Iyanomo where he lived all his life and where he had his children and got married to his wife should be given exclusively to his son Mr. Dennis Osatohanmwun Edomwonyi. The deceased specifically instructed also that he will want to die and be buried in his Igiogbe at Iyanomo as the principal house and mansion of the family. None of the children should conduct any native burial in respect of his death. Based on the deceased instructions, in the Will, the said property at Iyanomo was given exclusively to the claimant. Being satisfied with the Will on the 28th August, 1999, he executed the Will in the presence of Mr. S.O. Egharevba and Mr. Omodamwen Osaize. The Will was then lodged in the Probate Registry of the High Court of Justice, Benin

City. On the demise of the deceased he visited the family at N0. 13 Oba Market Road to pay condolences and informed them that their father wrote a Will, instruction on how he should be buried and where he should be buried. The Claimant was there with some of his siblings. The claimant later refused to obey their father's instructions that he should be buried at his mansion (Igiogbe) at Iyanomo, he then invited the claimant and his siblings to his chambers and re-stated their father's instructions. He also visited Chief Obadiaru, the Okaegbe of the family to ensure that the instruction regarding the burial of the testator were carried out and he promised to carry them out. He states that before the testator's demise, he made a recorded speech of his life history with particular reference to how he adopted the Christian faith exhibit D and D1. The Claimant did not perform the burial ceremonies of their late father under Benin Native Law and Custom alone as he was present at the burial. In spite of the protest by some members of the family and the claimant's siblings not to bury their late father at No. 13 Oba Market Road, Benin City, the claimant went ahead to bury the testator in one of the rooms already devised to one of the testator's children. The interment of the testator was done by the priest of St. Matthew's Cathedral Church Sakponba Road, Benin City in his presence. There was no second burial rites of wake keeping, no Izakhue, no Isoton, no Isurerharfua and no Ukomwen or handing over of any ancestral staff to him by the family as their late father had no

Urkhure.” After the burial in accordance with the tenets of the Anglican Communion he proved the Will of the deceased testator. No sooner the Will was read by the Probate Registrar of the High Court of Justice, Benin City than the claimant rushed to the estate and took possession of No. 13 Oba Market Road, Benin City and the Igiogbe at Iyanomo and started to sell the parcel of land in their demised father’s land. The claimant told him that it was the Okaegbe who ordered him to take possession of the properties to the detriment of the other beneficiaries. When he confronted the Okaegbe, the Okaegbe said that he never instructed the claimant to collect the rents from the properties nor asked him to take possession of the properties.

Under cross examination by Mr. Osemwenkha DW1 stated that he is aware that Pa Jacob Igbinosun had four wives and many children. It is not true that his wives and himself were living at No. 13 Oba Market Road, Benin City. He usually comes in at weekends from Iyanomo Village for their meetings which took place fortnightly on Saturdays and he would stay over for Sunday service. His wives were not living with him at Oba Market Road, Benin City. The deceased died in his house in Benin. He is not a member of the family. He used to visit Pa Jacob Igbinosun at Iyanomo. In 1956, 1957, 1958 he used to go with his father to buy rubber from Pa Igbinosun at Iyanomo. He had only one room he was staying in

the house at No. 13 Oba Market Road where he stayed whenever he came to Benin. The Will was executed in December 1999.

Under cross examination by Mr. Okojie DW1 stated that he prepared the Will for Pa Jacob Igbinosun. He lodged the Will in the probate Registry of the High Court Benin City. He wrote for the Will to be read and on 28/11/2008 the Will was read. On 26/1/2009 he applied for letters of administration and they were issued to him. Thereafter there was a Writ of Summons taken out.

DW2 Chief Godswill Osa Obadiaru testified on 15/12/15 by adopting his witness statement on oath filed on 13/11/14. He states that he is the current Okaegbe and head of Iso – Obadiaru family. The deceased Pa Jacob Igbinosun Edomwonyi whose will is the subject matter of this suit is a member of their family. During his lifetime and after his death, the Okaegbe of the family was his late elder brother, Chief Samuel Agboifo Obadiaru who died on the 15th of April, 2011. After his death the next Okaegbe was his immediate eldest brother – Prophet Edward Obadiaru who died in April 2013. After the death of Chief Edward Obadiaru he was immediately appointed as the next-Okaegbe-of the family. He stated that Mr. Imadonwonyi who gave evidence in this case is not the Okaegbe or member of the Iso-Obadiaru family. Neither is he the third or second

in command in their family, so any evidence to that effect is false and meant to mislead the Court.

Under cross examination by Mr. Osemwenkha DW2 stated that he is not a Chief. He did not write his deposition especially the Chieftaincy issue. The Claimant's father died in 2008, then he was working in Enugu. He did not participate in the burial rites of the claimant's father because he was in Enugu. An 'Okaegbe' in Benin is usually the eldest male in the family. In November he was 80 years. He does not know the claimant. He met the deceased before he died. He was not close to him before he died. He does not know Mr. Imadomwonyi.

DW3 Rev Benjamin Osarenmwindia testified on 15/12/15 by adopting his statement on oath filed on 12/3/14. He stated that the claimant and 2nd – 9th Defendants in this case are all children of late Pa Jacob Edomwonyi Igbinosun. The deceased was a devout Christian throughout the period of his years and lived under the Christian tenets of the Anglican Communion until his death. He was a member of Out-Iho, a society founded in 1914 in the Church of which he was president from 1956 until his death. Upon his death on the 2nd of August 2008, the claimant and some of his siblings officially informed the church of his death

and their intention to organize a Christian burial ceremony for their late father as instructed by the deceased. The claimant specially liaised with the church throughout to plan, arrange and organize all the burial programmes and order of church service for the Christian funeral rites which held from 28th , 29th and 31st of August 2008. The claimant led his siblings and the corpse into the church for the burial ceremonies on the 29th of August 2008 during the burial ceremony and participated in the church services throughout. The interment service and committal of the deceased to the earth was done by the Lord Bishop and himself in full attendance. No traditional or native rite was conducted for the burial of the late Pa Jacob Edomwonyi Igbinosun by the family or anyone to their knowledge. According to DW3, The Bishop attempted to settle the matter between the children of the deceased but the claimant did not sufficiently co-operate to ensure that it was settled. There was never a time to the knowledge of the church any traditional rites was performed by the claimant or any of the children, since the testator died a devout Christian. There was no second burial rites of wake keeping, no Izakhue, no Isoton, no Isuerhanfua and no Ukomwen or handing over of any ancestral staff to the claimant by the family.

Under cross examination by Mr. Osewenkhai DW3 stated that he knew the deceased. He was his parishioner at St. Matthew's Cathedral Benin City. He

knows the deceased's house at No. 13 Oba Market Road Benin City. That was where he lived and died. He is not a member of the deceased's family. He is in a position to know that traditional burial was not done for the deceased.

10th Defendant's case opened on 22/1/16 with DW6 Mrs. Prudence Uwaifo testifying. She adopted her statement on oath filed on 11/3/13. She stated that on the 4th day of November 2008, the solicitor to the estate of Mr. Jacob Edomwonyi Igbinosun (deceased) applied for reading the of the Will of the testator. The Will was read on the 28th day of November, 2008. On 26/1/2009 an application for letters of administration was submitted by the executors of the Will. On 28th day of January, 2009 the forms for the letters of administration was issued. The forms were being processed when the Writ of Summons in this suit was filed by the claimant and served on the 10th Defendant.

At the close of evidence all learned counsel adopted their respective written addresses on 10/5/16. M.O. Airende Esq. of counsel to the 10th Defendant in his written address filed on 9/3/16 submitted that the role played in this matter by the 10th Defendant is that of a statutory body which accepted the Will of late Pa J.E. Igbinosun, Exhibit A. The Will was read to the beneficiaries by

the 10th Defendant upon the receipt of a letter Exhibit E to that effect. The claimant and the 1, 4th – 9th Defendants contest the Will.

The issue before the court, is whether or not some clauses of the Will offends the Benin Native Law and Custom and the Wills Law of Bendel State. He posited that whichever way the court determines this issue as to whether clauses 4, 9, 11, 14, 16, 18, 20, 22, and 24 of the Will offends the Wills Law or Benin Native Law, the parties including the 10th Defendants will be bound by the decision of the court.

Deji Olayele Esq. of Counsel to the 1st, 4th – 9th Defendants in his written address filed on 6/4/16 raised four issues for determination to wit:-

- 1.) Whether the claimant has proved his claim by credible, cogent and reliable evidence at the trial to be entitled to any of the reliefs claimed.
- 2.) Whether having devised the 'Igiogbe' (i.e. Principal House) of the testator at Iyanomo to the claimant exclusively under the Will, the testator has not complied with section 3 (1) of the Wills Law of Bendel State 1976 as applicable in Edo State.
- 3.) Whether the claimant who has not buried his deceased father exclusively under the Native Law and Custom can claim any right to the property under the Bini Customary Law notwithstanding the provisions of section 3 (1) of the Wills Law of Bendel State 1976 as applicable to Edo State.

- 4.) Whether section 3 (i) of the Wills Law affects the testamentary capacity of the testator to devise his property in his discretion after compliance with the provisions of section 3 of the Wills Law.

Learned counsel submitted an issue 1 that the reliefs for declaration and injunction are usually granted in the exercise of the court's discretion or equitable jurisdiction where a party had adduced cogent and convincing evidence to establish its entitlement to the reliefs claimed at trial. See *Peter Obi V INEC* (2007) 7 SCNJ 316. The general principle of civil adjudication requires a claimant must prove his case at the trial by direct, positive, credible, cogent, convincing and reliable evidence to entitle him to the reliefs sought. The onus of proof is on a claimant who alleges facts to prove it. See section 131 of the Evidence Act 2011 and the case of *G & T Investment Ltd V Witt & Buch Ltd* (2011) 8 NWLR (Pt. 1250) 500. The burden of proof must be established on the balance of probability by the claimant or on the preponderance of evidence adduced at the trial. Where a claimant fails to discharge the legal burden the case must be dismissed. He relied on the cases of *Babalola V Rufus* (2010) All FWLR (Pt. 515) 309; *Ishola V U.B.N.* (2005) 6 MJSC 34 at 52 and Sections 132 – 133 of the Evidence Act 2011.

Mr. Olaleye submitted that from the evidence before Court the claimant has not discharged the burden of proof placed on him and that the claimant and

the 1st, 4th – 9th Defendants have joined issues on whether there was any native burial. It is trite that the proof of Custom is established by fact or judicial notice. Concrete evidence of the fact must be adduced in evidence. See the case of *Owonyin V Omotosho* (1961) 1 All NLR 304 at 309 and sections 16 – 19 of the Evidence Act 2011. Although the higher courts have taken judicial notice of Benin Custom of primogeniture in a line of judicial authorities like *Idehen V Idehen* (1991) 6 NWLR (Pt. 198) 382; *Oke V Oke* (1974) 1 All NLR 443.

He submitted that all these facts are necessary to conclusively establish the manner of conduct of each of the customary burial rites. This court cannot assume compliance or speculate in the absence of facts and evidence on what and how it was done, neither can the court take judicial notice of compliance with customary practices as to Bini burials. The onus is on the claimant to prove these ingredients before he can claim any of the reliefs sought in this case.

He submitted that the claimant has failed to discharge this onus by cogent and convincing evidence. He maintained that the mere general statement of the claimant and his witnesses that there was a native burial ceremony without more is not sufficient evidence which can satisfy the strict requirement of the law of evidence on the proof of Bini Custom on burials.

Learned Counsel submitted that the entire evidence of CW1, CW2 and CW3 cannot reasonably be believed by this court for serious material contradictions and falsehoods contained therein. According to Mr. Olaleye it is the general principle of the law that contradictions by witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole by the party or as to the reliability of such witnesses. Where material contradictions cast serious doubts on the evidence of a party as in this case, the court will reject the entire evidence of the witness. See *Ogun V Akhinyelu* (2005) 2 MJSC 92. He submitted that the contradictions in the evidence of the witnesses are substantial and weighty enough for the court to reject their evidence. See *Ayeola V Pedro* (2014) 13 NWLR (Pt. 1424) 409. He urged the court to reject their evidence as they are not witnesses of truth.

Mr. Olaleye submitted on issue 2 that the provision of section 3 (1) of the Wills Law of Bendel State 1976 allows a testator the right to devise or bequeath his property "Subject to customary Law".

This provision has been interpreted by the Supreme Court in several cases to mean nothing other than that the deceased testator under a Will cannot devise his principal mansion or family house where he lived during his life time known under Benin Native Law and Custom as the 'Igiogbe' to anyone other than his

eldest son. See *Lawal – Osula V Lawal – Osula* (1995) 9 NWLR (Pt. 419) 259; *Idehen V Idehen* (1991) 6 NWLR (Pt. 198) at 382. According to leaned counsel the unchallenged evidence led at the trial and admitted under cross examination by the claimant himself is that the family house or principal house at Iyanomo where the testator lived during his lifetime was given exclusively to him as the first son. This admission by the claimant was further supported by virtue of paragraphs 3 and 43 of Exhibit A. The intention of the testator that this property be treated as his 'Igiogbe' is clear from the language of these two paragraphs of the Will. Where the ancestral house or principal house is clear as in this case where the deceased regarded his house at Iyanomon as Igiogbe and devised same exclusively under paragraph 3 of his Will to the claimant as the eldest son, the Igiogbe is clear and certain whether or not the deceased died or was buried there is immaterial.

He submitted that by the definitions in the cases of *Idehen V Idehen* (supra); *Lawal – Osula V Lawal – Osula* (supra) of Igiogbe a deceased may die or be buried in a property that is not his principal mansion or family seat. This does not make the place an Igiogbe. The family house as testified and admitted by the claimant is the property at Iyanomon. This is the seat of the family. Even the claimant referred to the house at Iyanomon as family house under cross

examination. This admission is material and conclusive. He maintained that the property at No. 13 Oba Market Road, Benin City cannot be the Igiogbe because it comprises mainly of shops and what constitutes Igiogbe is the property the testator is resident. The testator lived in this property temporarily and still lived at Iyanomon after the accident on his farm in the 40s and 50s and had instructed the claimant to renovate the house and bury him at Iyanomon.

He submitted that the fact that the testator died at No. 13 Oba Market Road does not constitute the property into Igiogbe since the principal mansion and family house of the testator is clearly Iyanomon as admitted by the claimant. It is trite that what is admitted do not required further proof. See section 123 Evidence Act 2011.

The devise of the property at Iyanomon absolutely to the claimant as the eldest son under the Will has satisfied the requirement of section 3 of the Wills Law Bendel State 1976. The fact that the deceased testator hails from Iyanomon was not challenged or contested. He urged the court to hold that the Igiogbe is the principal mansion at Iyanomon and not the one at No. 13 Oba Market Road, Benin City notwithstanding that the deceased died there.

Learned Counsel submitted on issue 3 that the claimant failed to call evidence or give any cogent, convincing or credible evidence of compliance with

the requirement of custom. It is trite a claimant in order to inherit under Bini native law and custom must have completed a native or traditional burial of his late father as a pre-condition for inheritance or succession under the custom. He submitted that in a plethora of cases that it is a condition precedent (1) that the eldest son in order to inherit must have buried his father exclusively, (2) must have completed the native burial ceremonies (second funeral obsequies) according to custom. An eldest son who has not buried his father alone, or has not performed the native burials is not entitled to inherit the property of his deceased father under the custom. See *Ovesieri V Osagiede* (1998) 11 NWLR (Pt. 572) 1; *Arase V Arase* (1981) 5 S.C. 33; *Olowu V Olowu* (1985) 3 NWLR (Pt. 13) 372, *Lawal – Osula V Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259 at 274. He submitted that the claimant who has been unable to prove that the second burial was performed or that he was handed any 'Urkhure' is not entitled to inherit the property subject matter of this suit for noncompliance with the dictates of the custom. The claimant who claimed he performed the 'Ukomwen' alone could not show any tangible proof neither could his witnesses give any credible evidence as to what burial ceremonies were conducted, how, when and where. He submitted that not having performed the native burials in line with the pre-condition of Bini Custom the claimant cannot inherit the Igiogbe or Family house.

Mr. Olaleye submitted on issue four that under section 3 (1) of the Wills Law of Bendel State 1976 a testator has the right to dispose of his properties real and personal irrespective of any encumbrances of native law and custom on the property. See *Adesubokun V Yinusa* (1971) 1 All NLR 225; *Idehen V Idehen* (1991) 6 NWLR (Pt. 198) 382. He posited that the testator duly executed and validly lodged a Will dated 28th December 1999 (Exhibit A) pursuant to the testamentary capacity and powers vested under the law. It is common ground between parties that the Will in its form was validly executed and lodged at the probate Registry. The claimant did not join issues on the due execution or validity of the Will. Once the provision of Section 6 and 7 of the Wills Law as to form and formalities for making a Will are complied with, the Will is regarded as valid, where the testator possesses testamentary capacity. This is different from the validity of the dispositions under the Will, which had equally been proved in full compliance with the provisions of the Wills Law Bendel State 1976. On the interpretation of paragraphs 3 and 43 of the Will, the manifest intention of the testator which is to constitute or transfer the property at Iyanomon to the claimant as his first son absolutely. This provision of the Will must be construed strictly as the manifest intention of the testator which is to constitute or treat his property at Iyanomon as his Igiogbe. According to learned counsel the necessary effect of the phrase “ ...

which I now give to my first son” is clear that the deceased intends it as his principal mansion and gives it to the claimant. He submitted that this is in line with and satisfies the requirement of customary law that the Igiogbe be given exclusively to the first son. He urged the court to so hold. Learned counsel contended that the Supreme Court had held in *Idehen V Idehen* (supra); *Lawal-Osula V Lawal – Osula* (supra) that there is nothing in section 3 (1) of the Wills Law that affects, qualifies or restricts the testamentary capacity of a Testator to distribute his properties as he desired except after due compliance with the customary law. The contention of the claimant that the provisions of the Will dealing with the distribution of the shops and rooms shared at No. 13 Oba Market Road rendered the Will null and void as in their view the property is ‘Igiogbe’ is one that is frivolous and baseless in view of the definition of Igiogbe by the Supreme Court as ‘Principal house’ or ‘family seat. He submitted that since the claimant is not contending the testamentary capacity of the testator and by virtue of paragraph 3 and 43 of the Will the requirement of custom on Igiogbe being given to the first son has been fully complied with, the Will itself is valid.

He submitted that the claimant is taking advantage of the definition of Igiogbe as where a Benin man lived and died without taking cognizance of the rule that Igiogbe is just the main house of a deceased testator. The exception or

proviso in section 3 (1) of the Wills Law of Bendel State does not affect the testamentary capacity of the deceased testator to sign or execute the Will or to make valid disposition of his property in so far as the custom of giving his main house to his eldest son has been complied with as the deceased did under paragraph 3 and 43 of the Will. This suit is therefore mischievous and constitutes an attempt at fortune seeking. He submitted that the claimant in proof of the 1st, 4th – 9th Defendants counterclaim admitted under cross examination that he was collecting rents but he stopped. According to learned counsel the court can still make an order to account for what rents had been collected and how expended.

In conclusion, learned counsel urged the court to dismiss the claims of the claimant and grant all the reliefs in the counterclaim of the 1st, 4th – 9th Defendants.

P.O. Osemwenkhai Esq. of counsel to the claimant in his written address filed on 11/4/16 raised three issues for determination viz:-

- i.) Whether the house known and called No. 13 (formerly No. 23) Oba Market Road, Benin City is the Igiogbe of Late Jacob Edonwonyi Igbinosun to be inherited exclusively by the claimant, the eldest son.
- ii.) Whether clauses 4, 9, 11, 14, 16, 18, 20, 22 and 24 of the Will of late Mr. Jacob Edonwonyi Igbinosun dated 28th December, 1999 were made in violation of Benin Native Law and custom and if answered in the affirmative what

is the legal consequence.

- iii.) Whether the claimant established on the preponderance of evidence that he buried his deceased father in consonance with Benin Native Law and Custom to enable him inherit as of right his late father's Igiogbe.

Learned counsel submitted on issue 1 that the claimant led evidence in consonance with his pleadings that his late father Pa Jacob Edomwonyi Igbinosun lived and died in the house known and called No. 13 (formerly 23) Oba Market Road, Benin city and that he was also buried there. This evidence was corroborated by CW1, CW2 and CW3. Evidence was also led that all the traditional burial rites were duly performed according to Bini Native Law and Custom. The Defendants in their written statement on oath adopted as their evidence in this court denied that their late father lived and died in the subject matter. However they corroborated the afore-said crucial facts under cross examination thus lending credence to the case of the claimant. He submitted that it is settled law that a party can rely upon the evidence of the Defendants and their witnesses if same support or lends credence to his case. See *Onosaodu V Elewoju* (2006) 13 NWLR (Pt. 998) 517 at 532; *Gaji V Paye* (2003) 8 NWLR (Pt. 823) 583 at 603 and 611.

According to learned counsel, from the evidence before court it is clear that the No.13 Oba Market Road, Benin City is the house where the testator lived and died and not Iyanomon as contended by the 2nd – 9th Defendants.

Learned counsel further submitted that Exhibit A the Will of the testator clearly fortifies the case of the claimant that the deceased lived and died in his house situate at No. 13 Oba Market Road, Benin City and not Iyanomon as claimed by the defendants. This document is an un-equivocal attestation by the testator to his place of residence. The opening portion gives the address of the testator as “No. 13 Oba Market Road, Benin City” and clause 16 of Exhibit A. He submitted that it is now common place law following a chain of judicial dicta that where documentary evidence supports oral testimony, such oral evidence becomes more credible and he urged this court to so hold. This is so because documentary evidence serves as a hanger to asses oral testimony. He relied on the cases of *Aiki V Idowu* (2006) 9 NWLR (Pt. 984) 47 at 65; *Obiazikwor V Obiazikwor* (2008) 8 NWLR (Pt. 1090) 551 at 575.

He urged the court to hold that the oral and documentary evidence leads to the fact that the testator lived and died in the subject matter which is his Igiogbe. He submitted that it is a salutary principle of law that under Bini Native Law and Custom the eldest son is entitled to inherit without question and exclusively the

house known and called Igiogbe in which the deceased lived and died. This custom has been so notoriously established before the courts of law in a plethora of cases that judicial notice has been taken of same and needs no further proof. See Idehen V Idehen (1991) 6 NWLR (Pt. 198) 382 at 421; Agidigbi V Agidigbi (1992) 2 NWLR (Pt. 221) 98 at 124; Imade V Otabor (1998) 4 NWLR (Pt.544) 20 at 33 – 34. He submitted that there is no contradiction in the evidence of the claimant as contended by the 1st , 4th – 9th Defendants counsel relying on paragraph 3 of the claimant's written statement on oath in reply to the Defendant's statement of Defence and counter-claim.

Mr. Osemwenkhai submitted on issue 2 that a perusal of clauses 4, 9,11, 14, 16, 18, 20, 22 and 24 of Exhibit A purports to share the Igiogbe among the Defendants (the younger ones of the claimant). In other words, the said clauses in the Will divest the claimant of his right to inherit same exclusively contrary to Benin Customary Law. He submitted that section 3 of the Wills Law, Cap. 172 of the Laws of Bendel State now applicable in Edo State, no doubt places a limitation on the testator's powers to dispose of his Igiogbe to any person other than the first son since Benin Native Law and Custom makes it mandatory for a senior son to inherit his late father's house to the exclusion of any other child. He submitted that the afore-mentioned clauses in Exhibit A which seek to dispossess the eldest

son (the claimant) of his right to inherit his late father's house (Igiogbe) exclusively is null and void and he urged the court to nullify the said clauses. The law which has been restated in a plethora of authorities is that any clause or clauses in a Will made by a Benin man which disposes the eldest son of the principal house where his late father lived and died is null and void and of no effect. See *Agidigbi V Agidigbi* (1996) 6 NWLR (Pt. 454) 300 at 312; *Uwaifo V Uwaifo* (2013) 10 NWLR (Pt. 1361) 185 at 206. *Imade V Otabor* (1998) 4 NWLR (Pt. 544) 20 at 33 – 34. Thus the Supreme Court was very emphatic on the consequence of making a testamentary disposition which violates Bini Native Law and Custom when it held that same renders such device bequest or disposition subject to customary law void. See *Idehen V Idehen* (1991) 6 NWLR (Pt. 198) 382 at 421; *Lawal – Osula V Lawal – Osula* (1995) 9 NWLR (Pt.419) 259 at 280 – 281.

Learned counsel submitted that the definition of Igiogbe by the defence counsel relying on *Agidigbi V Agidigbi* (supra) is an absurd attempt to rewrite the law which is now settled on Benin Native Law and Custom and same is no doubt at variance with a long line of judicial authorities on the definition of an Igiogbe and same should be jettisoned. The facts in case of *Agidigbi V Agidigbi* (supra) relied upon is radically different from that in the extant case.

He further submitted that the existence of a few shops in the subject-matter does not derogate from the status of the subject-matter as an Igiogbe since the Testator lived and died there as admitted by all parties and their witnesses. He urged the court in view of the fore-going state of the law to answer issue 2 in favour of the claimant and hold that the afore-said clauses which seek to dispossess the eldest son, the claimant of his right to inherit his late father's Igiogbe exclusively is null and void.

Mr. Osemwenkhai submitted on issue 3 that based on the state of the pleadings issues were not joined on the fact that the claimant and his siblings including members of the family performed all the traditional burial rights in accordance with Benin Native Law and Custom. The position of the law is that facts admitted need no further proof and urged the court to hold the admission of the 1st , 4th – 9th Defendants in paragraph 1 of their further joint statement of defence filed on 17/6/11 against them. He relied on Order 15 Rule 5 (1) and Order 8 (2) of the High Court of Edo State (Civil Procedure) Rules 2012. Learned Counsel submitted that if the court holds otherwise, that the claimant led cogent and compelling evidence through himself and his witness as that he performed all the traditional burial rites according to Bini Native Law and Custom giving details of the traditional burial rites that were performed. He relied on paragraph 8 of

the claimant's statement on oath and paragraph 6 of his further witness statement on oath.

He submitted that the defence counsel never confronted the claimant nor CW1 and CW2 on this issue by way of cross-examination. It is settled law that failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness. He urged the court to so hold and discountenance the submission of defence counsel. He relied on the cases of Gaji V Paye (2003) 8 NWLR (Pt. 8230 583 at 605; Uwah V Akpabio (2014) 17 WRN 61 at 778.

Learned counsel submitted that the defence counsel dwelt heavily on the issue of proof of Benin Custom and that the mere ipsi dixit of the claimant and his witnesses were insufficient proof is a misconception of the law because they never denied the existence of Benin custom relating to burials and therefore needs no proof and moreover the claimant discharged the onus of proof in consonance with the law. He submitted that most of the so-called excepts alluded to were not given in evidence during the trial hence the court is urged to discountenance same since it is trite law that counsel's address cannot take the place of evidence. See Unity Bank Plc V Owie (2011) 5 NWLR (Pt. 1240) 273 at 288. Some of the so-called contradictions (which is vehemently denied) are not

material but minor discrepancies which are of no moment and did not dislodge the solid, irrefutable evidence adduced during the trial. See *Nwankwo V Ofomata* (2009) 11 NWLR (Pt.1153) 496 at 514 – 515.

He contended that counsel to the defendants tried to discredit CW1 whom he said was not a member of the family and relied on the evidence of DW4 (DW2), the said evidence of DW4 has no probative value based on the admissions of DW4 under cross-examination and it does not in any way dent the evidential value of CW1's evidence.

Mr. Osenwenkha submitted that the defence of the defendants collapsed under cross-examination as they made crucial admissions which buttressed the case of the claimants that the traditional burial rites were performed hence the court is urged to disbelieve the Defendants and their witnesses. He submitted that the 6th defendant is not a witness of truth and the court should not attach any probative value to Exhibits D and D1. He maintained that a witness such as DW2 who testifies falsely or tells bare-faced lies under oath on a matter within his personal knowledge leaves no room for any court to credit him or her with the issues before the court. See *Igbojmadu V Ibeabuchi* (1988) 1 NWLR (Pt.553) 179 at 201; *Ayanwale V Atanda* (1988) 1 S.C. 1 at 3 and 5; *Daggash V Bulama* (2004) 14 NWLR (Pt. 892) 144 at 250. He submitted that no evidence was led as to the

circumstances under which Exhibit D1 was made and neither was the recorder (Rev. Jude) brought to testify. The pre-conditions as stipulated under section 83 (1) (b) and 84 (4) of the Evidence Act 2011 having not been satisfied no probative value can be attached to same. See Orji V Ugochukwu (2009) 14 NWLR (Pt. 1161) 207 at 308; NIMASA V HENSMOR LTD (2015) 5 NWLR (Pt. 1452) 278 at 312 – 313. When the VCD was played in the open court same was in audible hence the interpretation of Exhibit D as per Exhibit D1 is also worthless. Exhibits D and D1 are of no putative or probative value and same should be discountenanced. He submitted that in view of the material discrepancies on critical points of the evidence of all the defendants and their witnesses notably DW 1, 2, 3 and 4 this court should hold that the defence has collapsed like a pack of cards since this court cannot pick and choose which of their witnesses to believe or put in other words the court cannot accredit one witness and discredit the others. See Adjudua V Nwogu (No.2) (2004) 16 NWLR (Pt. 898) 79 at 88 – 89. He submitted that the Defendants thus failed to rebut the evidence of the claimant that he performed the final burial rites of his late father in consonance with Benin Native Law and Custom. He urged the court to answer in the affirmative issue 3 in favour of the claimant.

He submitted on the counterclaim that the arguments in their address has sufficiently dealt with the counterclaim. However the defendants are deemed to have abandoned the reliefs stated in paragraphs 55 (iii) and (iv) since no scintilla of evidence was led in proof there of. He urged the court to dismiss the counterclaim in its entirety as same is devoid of any merit whatsoever.

In conclusion, Mr. Osemwenkha urged the court to grant all the reliefs being sought by claimant and dismiss the counter-claim of the 1st , 4th – 9th Defendants.

On 20/4/16 Deji Olaleye Esq. of Counsel to the 1st , 4th - 9th Defendants filed a reply to claimant's address in relation to the written address of the claimant. He buttressed his points in the address and urged the court to grant their counterclaim and dismiss the claims of the claimant.

I have very carefully perused the facts of this case as given in evidence by all the witnesses and exhibits tendered. The written final addresses by all counsel have been very helpful as they spared no detail.

Before proceeding to tackle some other issues I wish to firstly comment on the evidence of Dr. S.I. Urhoghide DW1 who prepared Exhibit A. It is intriguing to note that through he kept stating in his evidence that he was instructed by the testator that for example he would want to die and be buried in his Igiogbe at

Iyanomon, he never once wrote in Exhibit A the Will the word igiogbe. He never wrote that the deceased wanted to die at Iyanomon house and took no steps to ensure his relocation there. In short the instructions he orally stated were not written in Exhibit A he prepared.

It is my finding that the facts in this case are straight forward and limited although the counsel tried to make them seem complicated and elaborate. The parties are not in dispute on the following facts viz:-

- (1) The deceased, the late Mr. Jacob Edomwonyi Igbinosun died testate.
- (2) The claimant is the 1st son of the late Jacob Edomwonyi Igbinosun.
- (3) The late Jacob Edomwonyi Igbinosun has houses in Iyanomon and Benin City.
- (4) The testator was buried at his house in Oba Market Road, Benin City.

From the claim it is evident that the claimant insists that the bequests in his father's Will of parts of the property at Oba Market Road, Benin City which he regards as the Igiogbe to some of his siblings and that those bequests in clauses/paragraphs 4, 9, 11, 16, 18, 20, 22 and 24 of the said Will be set aside being contrary to the Benin Native Law and Custom.

The claimant being the eldest son is entitled to inherit the principal house where their father, lived and died and was buried exclusively. The 1st, 4th – 9th Defendants maintains that their father the late Jacob Edomwonyi Igbinosun was a devout Christian and at his burial two Bishops were in attendance, the burial ceremony was not in accordance with Benin native law and custom and they want the Will sustained while asking the court to order the exhumation of the body of the deceased to give effect to the Will for the interment of their deceased father at the house at Iyanomon termed by them the Igiogbe.

It is noted that the parties are ad idem that there is a will made testator. The provisions of sections 3 (1) of the Wills law of Bendel State 1976 applicable to Edo State has the phrase “subject to any customary law relating thereto” which has been interpreted by the Supreme Court in the case of Idehen V Idehen (1991) 5 LRCN 1590 to mean “the testamentary capacity conferred on every Bini Citizen as it affects the property to be disposed of” and

...“The Wills Law of Bendel State cannot be interpreted to mean that nobody can make a will, the limitation in respect of the will is that it cannot brush aside the custom of the people with regard to disposition of their property in accordance with their custom...”

The first issue for determination is whether the claimant and his siblings 2nd – 9th Defendants performed the burial ceremony of the testator and whether it was purely Christian ceremony as contended by the 1st, 4th – 9th Defendants or Christian and native law and custom burial as contended by the claimant. In deciding this issue the pleadings of the said parties have been examined by me.

I find that by paragraph 6 of the claimant's amended statement of claim wherein it is averred thus:-

“The plaintiff further avers that he as the eldest surviving son together with the 2nd – 9th Defendants and other children and members of the family (Egbe) including the Okaegbe, Chief Samuel Agbonifo Obadiaru, performed all the funeral obsequies (that is the 1st and second burial rites) in accordance with Benin native Law and custom.”

The 1st, 4th – 9th Defendants in their further joint statement of defence and counterclaim in paragraph 1 thereof admitted the said paragraph 6 of the statement of defence and this if a mistake has not been amended either orally or in writing. The import of this admission in this case is that the facts admitted need no proof as it is no longer a fact in issue. See *Olufosoye V Olurunfemi* (1989) 1 NWLR (Pt. 95) Page 26; *F.B.N. Plc V Oniyangi* (2000) 6 NWLR (Pt. 661) 501 at 509. The other averments in the statement of defence have turned out to be

mere stories in the light of the admission in paragraph 1 of the statement of defence. It is trite that parties cannot blow hot and cold in the same case.

Parties are bound by their pleadings. See *Nsirim V Nsirim* (2002) 3 M.J.S.C. 23 at 33. The admission of the 1st, 4th – 9th Defendants in their statement of Defence paragraph 1 thereof binds them and makes nonsense of the rest of their averments therein. The 1st, 4th – 9th Defendants counsel made no move to amend the pleadings. The admission also lends credence to the averments of the claimant in his statement of claim and strengthens his case. I therefore find and hold that having performed all the burial rites for his late father in accordance with Benin Native Law and custom as stated in paragraph 6 of his statement of claim which the 1st, 4th – 9th Defendants in their statement of defence and counter claim admitted vide paragraph 1. That question is therefore settled and even established by evidence led by the CW1, CW2, CW3 and claimant which I believe as credible. The only witness called by 1st, 4th – 9th Defendants DW1 who claimed to have been present during the burial ceremony is not a member of the family to know if the native ceremonies were carried out and 1st Defendant also said the burial under native law and custom was done though with no rituals.

The next question is which of the houses of the testator is the “Igiogbe”. The 1st, 4th – 9th defendants conceded that their father was buried at the property

at No. 13 Oba Market Road Benin City. Their argument that he was buried there against the provision in his will, is belated and contrary to the facts before the court by all the parties. Reading through the Will, Exhibit A, the testator did not state that he is not a Benin man and that he will be bound by English law. He did not allude to his Christian faith. In fact he gave a role to his family head to distribute residual properties. The testator in paragraph 43 of Exhibit A states as follows:-

“I desired to be buried in the front of my building at Iyanomon, Benin City which I now give to my first son, Mr. Osatohanwe Edomwonyi” (underlining mine) From the above it is clear that the testator had a desire to be buried in the front of his building at Iyanomon which he refrained from classifying as his Igiogbe. I also note that in Exhibit A paragraph 4, the testator recognized the claimant as his first son and in the devise of the property in dispute gave half of it to the claimant and proceeded in paragraphs 9, 11, 14, 16, 18, 20, 22, 24 to make some bequest to his other children.

It is clear from the above that the testator in his last Will did not classify any of his houses as Igiogbe. It behoves on this court to make a finding on which house is the “Igiogbe” The Igiogbe concept has been judicially noticed by the decisions of the Supreme Court as stated by the Supreme Court in the case of

Uwaifo V Uwaifo (2013) 10 NWLR (Pt. 1361) 185 at 202 where Galadima JSC stated inter alia thus :- “In Bini Native Law and Custom, an “Igiogbe” is a custom of general application and it is judicially noticed as such. See Egharevba V Orunghae (2001) 11 NWLR (Pt. 724) 318, Lawal – Osula V Lawal – Osula (1995) 9 NWLR (Pt. 419) 259, Agidigbi V Agidigbi (1996) 6 NWLR (Pt.453) 300 and Imade V Otabor (1998) 4 NWLR (Pt. 544) 20”.

The learned JSC cited with approval the case of Ogbahon V Registered Trustees CCC by the Court of Appeal (2002) 1 NWLR (Pt. 749) 675 at 713.

“Under Benin 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 ... “ These plethora of authorities have left no one in doubt that “Igiogbe” in Benin customary law is a principal house where a deceased Benin man lived and died. This is an ancestral home.”

It is therefore important in the case at hand to determine which of the houses of the testator qualifies as his Igiogbe from the evidence adduced. A cursory look at Exhibit A which is the voice of the testator as it were speaking from his grave describes No. 13 formerly 23 Oba Market Benin as his house and from a bequest at clause 16 the testator confirmed thus:

“ My bedroom where I now sleep ... at my house at 13 (formerly 23) Oba Market Road Benin City”.

The evidence is firm on the fact that the testator lived in the aforesaid house with his wives and children for many years before he died there. Contrary to these facts is the claim by the 1st , 4th – 9th Defendants that the house in Iyanomon is the Igiogbe, however though they showed he lived there it is not contested that he died there. This definitely rules out the house at Iyanomon as the testator's "Igiogbe". If the testator had desired it to be, he would have relocated there before his death to live there. To further confirm the said house at Oba Market Road, the deceased was interred there. See Exhibits B and C which put all the Christian burial rites in the residence of the deceased at Oba Market Road Benin City.

It is preposterous that the 1st , 4th – 9th defendants would seek the court's order to exhume the body of their father from its present resting place to satisfy their greed to inherit shops in the "Igiogbe". Not only is the counterclaim for an order for exhumation belated it does appear to me to be unconscionable and selfish. I do not believe that the testator meant the Iyanomon house to be the Igiogbe in that he gave half of the house at Oba Market to the claimant and unadvisedly purported to have shared the other half which by Benin Native Law and Custom and section 3 (1) of the Wills Law he had no right to bequeath.

The argument by 1st, 4th – 9th defendants that no native burial has been carried out is self defeatist because none of them can lay claim to the adjudged Igiogbe as it is the exclusive preserve of the first son which the claimant is. The evidence of CW1 – CW3 and the claimant that the “Ukomwen” ceremony was performed by the claimant for the final burial rites of the testator appears credible to me and I believe the witnesses which tallies with the admission of same by the 1st, 4th – 9th defendants in paragraph 1 of their statement of defence and 1st defendant when he said under cross examination that “the traditional burial rites were performed for the deceased by the family but in a Christian way i.e no rituals”. It therefore follows as in the case of *Abudu V Eguakun* (2003) 12 MJSC 27 at 31 where the Supreme Court per Belgore JSC found that:-

“By the customary law of Benin upon the death of a father the eldest son takes over his estate as a trustee for all the deceased children pending the performance of the second (final) burial rites. After performance of these rites, the eldest son automatically inherits the main seat of the deceased father that is to say the house where the deceased lived, died and was buried. This house is called “Igiogbe” and does not vest unless the second burial rites was performed by the eldest child” Now the argument of the 1st, 4th – 9th defendants that the Igiogbe is the Iyanomon house and the claimant should inherit it as such

presupposes that they agree that the final burial rites had been performed for him to inherit it as such. However it is found by me that the Iyanomon house is not the Igiogbe.

In view of the findings by me that the deceased a Benin man lived and died and was buried in his house at No. 13 Oba Market Road Benin City after the full burial ceremonies by the family in accordance with the Benin native law and custom and his Christian faith, accordingly, the claim of the claimant is successful. I therefore give judgment in favour of the claimant against the defendants.

It is declared that the claimant, being the first son and having buried his father according to Benin native law and custom is entitled to inherit to the exclusion of any other person including the 1st – 9th defendants the house at No 13 (formerly 23) Oba Market Road Benin City adjudged the 'Igiogbe'.

Consequently I order that clauses 4, 9, 11, 14, 16, 18, 20, 22, and 24 of the WILL of late Mr. Jacob Edomwonyi Igbinosun dated 28th December, 1999 be set aside being contrary to the Will Law 1976 Laws of Bendel State applicable to Edo State.

The 1st – 9th defendants their agents, servant, privies are restrained perpetually from interfering or meddling with the claimant's rights over and in the

said property adjudged the “Igiogbe” i.e No. 13 (formerly 23) Oba Market Road, Benin City.

Conversely, the counterclaim is unsuccessful and it is ordered dismissed in its entirety.

E.F. IKPONMWEN
JUDGE
10/6/2016.

Counsel:-

P. o. Osemwenkhai Esq. with Miss O. Ehioghiren	For Claimant
Deji Olaleye Esq.	For 1 st , 4 th – 9 th Defendant
M.O. Airende Esq. (Assistant Director) with Ama Iyamu Mrs. (Senior State Counsel)	For the 10 th Defendant