

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP HON. JUSTICE EFE IKPONMWONBA – JUDGE
SITTING AT CRIMINAL DIVISION COURT NO. 2, BENIN CITY ON FRIDAY THE 15TH DAY OF
DECEMBER, 2016

BETWEEN

SUIT NO. 340/13

1. Dr. Solomon Ikponmwonsa Omorodion
2. Dr. (Mrs.) Helen Edouwaye Imolode
3. Mrs. Osaro Ogbeide (for herself and on behalf of the two junior sisters of the late Edwin Ada Iyare Omorodion and their children) - Claimant

and

1. Zenith Bank Plc
2. Francis Esemuede Omorodion - Defendants

JUDGMENT

The claim against the defendants is as follows:-

1. A declaration that the purported sale and transfer by the second Defendant to the first Defendant of the properly known as No. 135 Uselu-Lagos Road, Benin City measuring 100ft x 200ft and registered as 15:15:217 at Lands office, Benin City is fraudulent, invalid and therefore null and void.
2. A declaration that a purported Deed of gift made on 31st day of October, 1979 by late Edwin Ada Iyare Omorodion to an infant child Master Francis Esemuede Omorodion and registered 27 years thereafter, precisely on the 21st day of April 2006 as 14:14:966 at the Lands Office, Benin City is a bare-face forgery and therefore a nullity.
3. An order setting aside the purported Deed of Gift registered as 14/14/966 at the Lands office Benin City as a forgery and therefore, null and void.
4. An order on first Defendant to vacate and surrender the said property to the Claimants forthwith.
5. An award of Two Hundred and Fifty Million naira (N250,000,000.00) in favour of the Claimants as general damages for gross trespass.

The Claimant called 2 witnesses in proof of their case. The first witness was brought to Court on subpoena. He is an Assistant Chief Deeds Registrar from the Ministry of Lands and Survey. He sought and tendered 2 documents as Exhibit A

and A1. The 1st is an instrument registered 15 -15 ó Vol. 217 between the Oba of Benin and Edwin Ada Omorodion. The 2nd is a deed of transfer between Edwin Omorodion and Francis Omorodion registered as No. 14 at 14 in Vol. 966. PW2 is the 3rd Claimant. She adopted her statement on oath dated 25/6/13. She testified that the late Edwin Omorodion was her uncle while the 1st and 2nd Claimants, his children are her cousins. She said the 2nd Defendant is also her late Uncle's son. She testified that she lived with her uncle from the age of 3 years till she got married in 1997 and even then was always in touch with him till his death. She revealed that sometime in the 1970's her uncle had an encounter with one Margaret, the 2nd Defendant's mother, which resulted in the birth of the 2nd Defendant. Her uncle then rented a house for Margaret at Lawani Street but she later moved to her uncle's house to live. She described the period she lived with her uncle as being characterized by persistent turbulence which resulted in her uncle writing several petitions to the Police and he later forcibly ejected Margaret from his house in November 1980.

She testified that her uncle worked and retired from the Ministry of Lands and Survey and insisted that he would not have made a deed of gift to 2nd Defendant without taking steps to regularize same. She recalled that when the 2nd Defendant and others filed a suit at the High Court, Benin City, the land was listed as part of the Estate of her uncle and that they would not have done that if the property had been transferred to the 2nd Defendant as at 31/10/79 when he was still an infant. She insisted that her uncle was never married to Margaret either under customary law or the Act. She said that the purported deed of Gift being paraded by 2nd Defendant is a complete forgery drawing the Court's attention to the caveat placed by Chief C. O. Okpiabhele at page 14 of the Vanguard Newspaper of Thursday 18/9/2008 warning speculators to stay clear of the property. She revealed that banners were also printed

and hung on the land but the 1st Defendant proceeded to engage in the illegal purchase of the land. She said she was very conversant with the signature of her uncle and identified it on a letter she tendered.

When Learned Counsel for the Claimants attempted to tender a photocopy of the Vanguard publication, Counsel to the Defendants objected. The Court ruled that they address on it later. The witness insisted that the signature of her uncle on the deed of transfer was a forgery. She said that the title documents with which the 2nd Defendant sold the land were those taken away by him when her uncle died in connivance with his mother, Margaret. She revealed that after the death of her uncle, the 2nd Defendant did not challenge the Claimants on the collection and enjoyment of proceeds from the said property. She urged the Court to grant their relief as per the statement of claim.

Under cross examination by the 1st Defendant the witness said she was a joint owner of the property. She agreed that she was not the only niece. She said half of No. 135 Uselu ó Lagos Road was given to the 1st and 2nd Claimants while the other half was given to the Testators sisters and her children.

She insisted that she had the authority of the 1st and 2nd Claimants to testify on their behalf and said she was not aware that the 2nd Defendant gave all the original documents to the Bank. She insisted that the Deed was a forgery. She said she knew her late uncle's signature as she was with him for a long time and she was there when he signed Exhibit G.

She insisted that Margaret was not married to her uncle. She said she was not with him when he got sick and died but added that while she lived with her uncle the 2nd

Defendant and his sister were living with their mother. She insisted that her uncle left a Will and said she was not aware that her uncle gave No. 135 to the 2nd Defendant in his lifetime. She denied that the Bank later settled with the tenants on the land.

On being cross examined by the 2nd Defendant, she denied being the one who briefed Counsel to file this suit. She agreed that she was married with children, but She denied that it was because they know that the Claim is frivolous that the family is not concerned with this matter. She denied that she was too little to know about the traditional marriage between her uncle and the 2nd Defendant's mother and also denied that it was because of malice and hatred that she was casting aspersion, insisting that they were always fighting. She insisted that 2nd Defendant was not on good terms with his father and denied hating the 2nd Defendant. The Claimants closed their case.

For the 1st Defendant two witnesses were called. The 1st is on subpoena. He is a representative of the Asst. Director of the High Court. He tendered the written statement on oath of Victor Oviosun Esq. who is now late.

DW2 works with the 1st Defendant's Bank. He testified that the 1st Defendant through its Solicitors Giwa-Amu & Co conducted a legal search at the Ministry of Lands and Survey, Benin City and the search revealed that the 2nd Defendant was the rightful owner of the land by a registered deed of gift *intervivos* registered as 14/14/966 at the Deeds Registry, Benin City.

On being satisfied as to proof of ownership the witness said the 1st Defendant went into negotiation and eventually purchased the property on 15/7/08 for N39 million and the original copies of title deeds were handed over to the 1st Defendant. Continuing, he said when the 1st Defendant was about to take possession of the property, she encountered tenants and squatters on the land as a result of which she proceeded against the 2nd Defendant in the Magistrate Court to evict the squatters and

tenants. With the order of Court, they were all evicted and the 1st Defendant took possession of the property to commence the erection of the branch building. He testified that the said building was 99% completed when the Claimants instituted their earlier suit. He added that the 1st Defendant had bought the property before the caveat was published by the Claimants and revealed that there was another suit against them by one Emmanuel Anegbogu alleging forceful eviction by agents of the 2nd Defendant and claiming damages and that the matter was amicably resolved.

He also revealed that the 1st Defendant had spent over N900 million in the construction of its branch and has since opened for operation. He urged the Court to declare that the 1st Defendant as the rightful owner of the property at No. 135 Uselu-Lagos Road on dimension of 100ft x 200ft having purchased same from the 2nd Defendant vide a Deed of Agreement. (2) To make an order of injunction restraining the Claimant from laying adverse claim against the property.

Under cross examination, the witness agreed that he knows the land in dispute and agreed that it is very prime and well located. He said he did not know when construction started or whether it had an underground strong room but agreed that it was a big branch. He denied that the property was fraudulently acquired. He revealed that the original of the title documents are with the land Registry. On examining the document, he denied that the signature was different or that the signature was forged. On being cross examined by the 2nd Defendant, he said it was after the building was completed that the 3rd Claimant and others started raising issues. The 1st Defendant closed its case.

DW3 gave evidence for the 2nd Defendant. She is his mother. She said the 2nd Defendant was not in the best of health presently. She testified that the 1st and 2nd Claimants are the children of her late husband who married her under Esan native law

and custom in 1977. But denied that the 3rd Claimant had a father daughter relationship with her husband or that she even lived with her late husband adding that she only sought refuge there when she had problems with her own husband. She insisted that her husband died intestate and that the 3rd Claimant had earlier fraudulently lodged a Will at the Probate Registry in 1982 when her husband was ill. She said the Will was forged and purports to disentitle her children from their inheritance. She revealed that the Will is currently being challenged in suit no. B/41/2004 pending in High Court 11.

She testified that sometime in 2006 she ran into Victor Oviosun Esq. a lawyer and when he was informed that her husband had died he asked her to bring 2nd Defendant to his Chambers and informed her of the Deed of Gift. When she had collected it, she later applied for the certified copy of the title documents. Subsequently the deed of gift was registered at the Lands Registry. It is registered as No. 14 page 14 vol. 966. She also revealed that the 2nd Defendant sold the property at No. 135 Uselu-Lagos Road which was gifted to him, to the 1st Defendant for valuable consideration.

She pointed out that at the time the property was listed as part of the estate of her late husband, Victor Oviosun had not informed the 2nd Defendant of the gift to him. She said the 2nd Defendant had the right to evict the wood sellers and denied that the deed of gift was a forgery or invalid insisting that it was signed by her husband. She said the disagreement with her husband was engineered by 3rd Claimant and did not affect the gift made before then. She added that the caveat published was done to mislead as the property had already been sold. She urged the Court to dismiss the claim as it was brought in bad faith.

Under cross examination by the Claimants' Counsel she agreed that Mr Edwin Omorodion passed on in 2002. She denied that there was any reading of the Will after the burial and she said the Will read was forged so they went to Court to challenge it in 2004 and that the suit is pending in High Court 11.

She agreed that she complained that the signature on the Will was forged. She said her customary marriage took place in Emuhi in Ekpoma not Igueben. She agreed that her late husband wrote a petition against her to the Police for threat to life but insisted that it was engineered by the 3rd Claimant and denied that he disputed the paternity of 2nd Defendant.

On being cross examined by 1st Defendant she agreed that 2nd Defendant sold to 1st Defendant and the property was given to 2nd Defendant by his father. She agreed that she signed the transfer as witness. She said she was familiar with her late husband's signature and identified it on Exhibit K5. She said her husband never disowned her children in his life time and added that no one challenged the building when it was going on. At the close of evidence, both parties filed written addresses as directed.

For the 1st Defendant, Dr. J. O. Odion adopted their written address dated 20/6/16.

He formulated 3 issues for determination:-

- 1) Whether the 1st Defendant is not a bona fide purchaser who acquired a valid title to the property in dispute from the 2nd Defendant.
- 2) Whether the Claimants have proved beyond reasonable doubt their criminal allegations of fraud and forgery made out in respect of Exhibit K3.
- 3) Whether the Claimants have made out a good case for the nullification and setting aside of the sale of land in dispute by the 2nd Defendant to 1st Defendant.

For issue one, Learned Counsel submitted that from the facts and circumstances of the case, the 1st Defendant is a bona fide purchaser for value

without notice of any encumbrance on the property in dispute. He referred to the case of **Ibiyeve vs. Fojule** (2006) 3 NWLR (pt.968) page 640 and **Jiwul vs. Dimlong** (2003) 9 NWLR (pt.824) page 154 for the legal principle surrounding a bona fide purchaser for value. He added that the 1st Defendant has satisfied all the standard requirements to qualify as a bona fide purchaser for value. He referred to the following cases:- **Okonkwo vs. Coop & Commerce Bank (Nig.) Plc.** (2003) 8 NWLR (pt. 822) 347; **ACB Ltd. vs. Ihekwoaba** (2003) 16 NWLR (pt. 846) 249; **Ibiyeve vs. Fojule** (supra). He contended that the evidence of 1st Defendant witness was not contradicted or discredited nor were issues joined on the conduct of a search by 1st Defendant. He submitted that the 1st Defendant has proved that it acted diligently and in good faith in the purchase of the land in dispute.

On the issue of the forgery of signature he submitted that no evidence was led to show the 1st Defendant was complicit in the alleged forgery or that the 1st Defendant procured the said Deed of Gift. He urged the Court to resolve issue 1 in 1st Defendant's favour.

For issue 2, Learned Counsel submitted that from the preponderance of evidence on record the Claimants have failed woefully to prove the criminal allegation of fraud and forgery made against the Defendants especially 2nd Defendant. He submitted that it is trite law that where criminal allegations are pleaded by a Claimant in any civil proceedings, the standard of proof is that of proof beyond reasonable doubt. He referred to the following cases amongst others:- **Dantiye vs. Konya** (2000) 4 NWLR (pt.1136) 13; **Haruna vs. Modibo** (2004) 16 NWLR (pt.900) 487; **Anazodu vs. Audu** (1999) 4 NWLR (pt600) 530.

He referred the Court to paragraph 25 a ó c and submitted that the Claimants could not prove the allegations in all the subsection insisting that such allegation cannot be

proved by speculation and opinion. He referred to the following cases on the parameters for proving any allegation of forgery of signature. **Adenle vs. Olude** (2002) 18 NWLR (pt.799) 413; **Ikedigwe vs. FAI** (2010) 10 NWLR (pt.1308) 375. He urged the Court to compare the signature in Exhibit A1 and K3 with other documents. He submitted that the purported Will tendered was wrongfully admitted because it was

- 1) A photocopy of a CTC of public document. He referred to **Araka vs. Egbue** (2003) 17 NWLR (pt. 848) 1 SC at 20 and **Ministry of Lands Western Nig. Vs. Nnamdi Azikiwe & Ors.** (1969) 6 NSCC 31.
- 2) Not relevant because the validity or authenticity was not an issue before the Court.
- 3) The Will was a subject matter of another suit before another Court.
- 4) The said Will has not been admitted to probate therefore this Court cannot attach any probative value to it.

He therefore urged the Court to expunge the exhibit from record or in the alternative attached no weight to it. He referred to **Buhari vs. INEC** (2008) 4 NWLR (pt. 1078) 546 at 608.

Learned Counsel submitted that upon the registration of the deed of gift without any objection or caveat, it enjoyed a presumption of regularity in line with Section 150 of the Evidence Act 2011. He added that presumption can only be rebutted with direct and credible evidence and referred to Section 155 of Evidence Act 2011. He referred to the following cases:- **Ayanwale vs. Odusami** (2011) 18 NWLR (pt. 1278 page 328; **Dabo vs. Abdullahi** (2005) 7 NWLR (pt. 923) 181. He submitted that the Claimants have failed to discharge the burden of rebutting the presumption and urged the Court to resolve this issue in favour of the 1st Defendant.

On issue 3 Learned Counsel adopted all the preceding arguments and submitted that the Claimants have failed to make a good case for the nullification and setting aside of the sale agreement of the land in dispute. He submitted that the

deed of gift is a valid and subsisting document which gives the 2nd Defendant the right to sell. He urged the Court to decline the request of the Claimants to set aside the sale.

Learned Counsel urged the Court to disregard all the narration of PW1 on the animosity between DW3 and her husband and all other domestic matters and resolve issue 3 in favour of the Defendants. He urged the Court to dismiss the Claimants suit with crushing costs.

For the 2nd Defendant, M. O. Okhuarobo adopted their address dated 20/6/16. He distilled 3 issues for determination to be :-

- 1) whether the Claimants have the locus standi to bring this action.
- 2) Whether the Claimants have proved their case.
- 3) Whether the 2nd Defendant had title to the property which he transferred to the 1st Defendant.

Learned Counsel submitted that the Claimants have no locus standi to institute this action as the basis of the claim rests on their claim of being beneficiaries of the Will of E. A. I. Omorodion. He submitted further that the Will cannot be looked at or acted upon by the Court unless same has been proved by producing the letter of probate. He referred to the following cases. **Fasakin vs. Siwoku** (2009) 16 NWLR (pt.1167) page 305 ; **Emuchete vs. Ogueri** (1997) 8 NWLR (pt. 516 323 at337 ó 338.

On issue 2, Learned Counsel submitted that the Claimants had not proved their case. He submitted further that the land in dispute was given to the 2nd Defendant 23 years before his father died and the gift is irrevocable by the Donor. He referred to **Imeh vs. Okogbe** (1993) 9 NWLR (pt316) 159. On the evidence of the acrimonious relationship between DW3 and her husband, Learned Counsel contended that the

Court cannot act on speculation and referred to **Agip Ltd. vs. Agip Petrolic Int.** (2010) 5 NWLR (pt.1187) 348 at 413.

He referred the Court to paragraph 13 of the 3rd Claimant's statement on oath and urged the Court to strike it out as being hearsay. He also referred to some paragraph of her evidence which cannot be backed by any pleading in the statement of claim and urged the Court to discountenance same. Counsel contended that the law is settled that parties are bound by their pleading and that evidence on facts not pleaded go to no issue and must be disregarded referring to the case of **Mbanefo vs. Molokwu** (2014) 6 NWLR (pt.1403 page 377).

He submitted that the Will upon which the Claimants found their case is unproved and by law empty. He submitted that the Claimants must rely on their own case and not on what they perceive as the weakness of the Defendant's case. He referred to **Dumez Nig. Ltd. vs. Nwakobia** (2008) 15 NWLR (pt.1119) 361. He urged the Court to resolve issue 2 in favour of the 2nd Defendant.

On issue 3, Learned Counsel submitted that the allegation of forgery made by the Claimants that Exhibit K5 was forged is an allegation of a criminal nature which must be proved beyond reasonable doubt. He refer to **ACN vs. Lamido** (2012) 8 NWLR (pt.1303) 560 at 591 and contended that the Claimants have failed to discharge the onus. He referred the Court to Section 101(1) of the Evidence Act empowering the Court to compare signature on documents and referred to the case of **Odumewu vs. Martins** (2011) 8 NWLR (pt.1250) 574.

Counsel submitted that the Claimants have failed to make out of the allegation of forgery against 2nd Defendant. He concluded by contending that the Claimants have failed to prove the case and urged Court to dismiss same.

Learned Silk for the Claimants Pat Onegbedion (S.A.N.) formulated one issue for determination to be whether the 2nd Defendant had any legal and valid title in the property known as No. 135 Uselu Lagos Road Benin City which he fraudulently sold to the 1st Defendant?. He contended that the purported sale of the property in dispute by the 2nd Defendant to the 1st Defendant is void ab initio because the entire transaction is afflicted by triple tragedy or legal cancer.

He submits that the Deed of Gift is void abinitio because it offends Section 17 (B) of property and conveyance law Cap 129 vol 5 laws of Bendel as applicable. He asserted that the deceased could not make a deed of gift to an infant son and forget or ignore to perfect the gift in his place of work in the Land registry.

Secondly he contended that the sale was a contract ab initio and the sale was vitiated on the application of the principle of nemo dat quod non habet. He relied on the following cases among others.

1. **Dantata Jnr vs. Mohammed** 2012 14 NWLR (pt. 1319) page 122.
2. **Okelola vs. Adeleke** (2004) 13 NWLR (pt. 890) page 307.

Learned Silk contended that the 2nd Defendant never had any legal or equitable title obtained either through valid conveyance nor by Will or by a customary inheritance so nothing passed from him to the 1st Defendant.

Thirdly he contends that the purported document of transfer of the land from 2nd Defendant to 1st Defendant is a forgery. He referred the Court to particulars of fraud as pleaded in paragraph 25 (c) to (j) of Statement of Claim.

He referred the Court to the meaning of forgery in Blacks Law Dictionary 5th Edition and the case of **Babalola vs, State** (1989) 4 NWLR (pt.115) page 264. **Nigeria Airforce vs. James** (2002) 18 NWLR (pt. 798) page 295.

On the proof of forgery he referred to the following cases:- **Tomtee (Nig.) ltd. vs. F.H.A** 92009) 18 NWLR (pt. 1173) page 358 at 381. AG. Fed. Vs. Abubakar (2007) 10 NWLR (pt. 1041) page 1 at 182. **Odutola vs. Mabogunje** (2003) 7 NWLR (pt.1354) page 522.

Counsel also referred the Court to the evidence of 3rd Claimant asserting familiarity with her late uncle's signature. He urged the Court to hold that the 2nd Defendant had no legal and valid title in the said property in dispute which could be transferred to the 1st Defendant and urged the Court to enter judgment for the Claimants as per their 5 heads of reliefs, bearing in mind that where trespass is proved and general damages claimed, the Court must assess, quantify and award appropriate damages.

On point of law, Learned Counsel for the 1st Defendant referring to Counsel's reference to Section 17(3) of Property and Conveyance law submitted that by Section 35 (1) of that law an infant can take benefit of the property. He referred to **Ughutevbe vs. Shonowo** (2004) 10 NWLR (pt.899) 300 and **Saunders vs. Vautier** (1841)(1835 - 42) AER page 58 ó 60 and submitted that Section 17(3) does not invalidate the gift. He submitted further that an equitable right or interest over land coupled with possession is as good as a legal estate on the land. He referred to **Ikonne vs. Wachukwu** (1991) 2 NWLR (pt. 172) 214.

He submitted that the Claimants have failed to establish and prove their case and should be dismissed.

For the 2nd Defendant, Learned Counsel on point law submitted that where an adverse party fails to react to a point in contention, he is deemed to have conceded the point and relied on the case of **Nwankwo vs. Yaradua** (2010) 12 NWLR (pt.1209) 518.

He also said that the Claimants failed to distinguish the case of **Fasaki vs. Siwokan** and Emecheta's case cited and relied on by the 2nd Defendant.

Further more, he submitted that a statement made by a person is admissible where the person is dead and cannot be conveniently called as a witness. He referred to Section 39 (1) and 41 of the Evidence Act.

It is basic that in claims relating to declaratory reliefs, as herein, it is for the Claimant to establish his claim on the strength of its claim and should not rely on the weakness of the defence, if any. In the case of **Dumez Nig. Ltd. vs. Nwokolobia** (2008) 18 NWLR (pt.1119) page 36 at 373, it was held that the burden of proof on the Claimant in establishing declaratory reliefs to the satisfaction of the Court is quite heavy. Such declaratory reliefs are not granted even on admission by the Defendant where the Claimant fails to establish his entitlement to the declaration by his own evidence. See also **AG Rivers State vs. AG Bayelsa and another** (2012) vol. 52 NSCQR page 239 at 270 ó 172 per F. A. Fabiyi JSC.

The orders sought by the Claimants are dependent on the success or otherwise of the declaratory reliefs sought. It is trite that a party who asserts must prove. See Section 135 of Evidence Act. See also the following cases:- **Okubule vs. Oyagbola** (1990) 4 NWLR (pt.144) 72; **Osawaru vs. Ezeiruka** (1978) 6 ó 7 SC page 135 at 145; **Odukwe vs. Ogunbiyi** (1998) 8 NWLR (pt. 561) 339 at 352.

The crux of the matter in this suit is the property at No. 135 Uselu Lagos Road, Benin City. While the Claimants claim it by inheritance via a Will, the 2nd Defendant says it was gifted him by their father, the original owner. The issues to be determined in this suit are:-

- 1) Whether the gift to the 2nd Defendant is valid.
- 2) Whether the sale by 2nd Defendant of the land to the 1st Defendant is valid.

A gift *inter vivos* is an act whereby something is voluntarily transferred from the true possessor to another person, with full intention that the thing shall not return to the donor and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.

In the instant case, the Claimants are questioning the Deed of gift purportedly made by their father to the 2nd Defendant of the property in dispute. One of the reasons is that the purported gift offends Section 17 (3) of Property and Conveyance law Cap 129 vol. 5.

That section states that:-

“A conveyance of legal estate to an infant alone or to two or more persons jointly, both or all of whom are infants on any trusts, of trusts, shall not be effectual to pass any legal estate.”

Clearly from the above the 2nd Defendant could not have acquired any legal estate in the property. In the book *Registered Conveyance No 5* by Curtis & Ruoff at page 455 it states as follows:-

“A purported disposition by deed or Will in favour of an infant does not entitle the infant to be registered as proprietor of the registered land or charge until he attains full age. In the meantime, it operates only as a declaration binding on the proprietor or personal representative that the registered land or charge is to be held on trust to give effect to minor interest in favour of the infant or infants corresponding with the interest which the disposition purports to transfer or create.”

Section 35(1) of the Property and Conveyance law which Learned Counsel to the 1st Defendant referred to in his reply would come into play here and gives credence to the above text. It provides thus:-

“A conveyance of a legal estate in land to an infant alone or to 2 or more person jointly, both or all of whom are infants, for his or their own benefit shall operate only as a declaration that such legal estate is vested in the person who made the conveyance upon trust to convey the same to trustees for sale for the benefit of the infant or infants.”

According to Learned Counsel this implies that though the infant cannot be vested with legal estate or title, any conveyance made in an infant's favour becomes a trust held by the conveyer of the land as trustee for the infant. I could not agree more. Clearly it is possible to give a gift of landed property to an infant as in the instant case, whether the gift is valid is a different matter.

A gift *inter vivos* is one that is perfected and takes effect during the life time of the donor and donee and is irrevocable when made. It is a voluntary transfer of property during the normal course of the donor's life. In the case of **Imeh vs. Okogbe** (1993) SC 10 it was held that once a gift has been validly executed it cannot be revoked in the absence of fraud, mistaken misrepresentation or other invalidating cause. Halsbury's Laws of England 3rd Edition Vol. 18 at page 364, paragraph 692 states that a gift *inter vivos* is an act whereby something is voluntarily transferred from the true possessor to another person, with full intention that the thing shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.

In **Dewar vs. Dewar** (1975) 2 AER 788 at 732 it was held that the essential thing to consider is that the gift is complete when the donee has accepted it. If that condition is satisfied the donor has no right to revoke the gift. See also *Anyaegbunam vs. Osaka* (2000) Vol. 1 NSCQLR page 403.

In the instant case, the evidence is that the land in dispute belonged to Edwin Ada Iyare Omorodion. Sometime in 1979, two years after he allegedly married the 2nd Defendant's mother under customary law, he transferred a parcel of land as a gift to the 2nd Defendant. There is no evidence as to his exact age at the time but I have deduced that he was about 2 or 3 years old and clearly an infant.

2nd Defendant got to know about the gift in 2006, which was about 26 years later and it was at that point he accepted the gift and went ahead and registered it at the Lands Registry. This was 4 years after his father died. At this point one wonders why his late father did not tell him or anyone else about the gift as he had already attained majority before he died.

Another issue that bothers the Court is why the lawyer held on to the deed. In Paragraph 5 of his statement on oath which was tendered in evidence he stated:-

“that upon preparing the afore-mentioned transfer document, I handed over the copies to the Transferor/Donor Mr Edwin Ada Iyare Omorodion after same was duly executed.”

Duly in Blacks law Dictionary 8th Edition page 540 is defined as:-

“in a proper manner, in accordance with legal requirements.”

While execution for this purpose is defined at page 609 as:-

“validation of a written instrument, by fulfilling the necessary legal requirements.”

The above definition signifies that the action has been done legally and according to the provisions of the law. But we know as a fact from the evidence, that 2nd Defendant was the one who executed the document legally by registering it. Unfortunately Mr. Victor Oviosun, who is now late could not give evidence in this case nor could he be cross examined. It is my view that this statement on oath is of no moment and I cannot lay any credence to it.

However despite all these questions or gaps that have arisen in the Defendants' case, it is the Claimant on whom the burden first lies under our laws of evidence, that must prove that the gift was a forgery and as a result the sale a nullity. It is only after sufficient evidence has been adduced to prove this that the burden will shift to the Defendant to show the contrary. See Section 137 and 139 of the Evidence Act. The Claimants must lead sufficient evidence in proof of their case.

Bare and empty assertion is not enough. *Kalgo JSC in Onwuka Ajero & Anor vs. Ugorji & Ors.* 1999 10 NWLR (pt.621) 1, 19 made the point clearly when he held thus:-

“It is well established and in my view based on common sense that a mere assertion or statement should not be accepted with out proof thereof. In the same way an averment in pleadings cannot be accepted as evidence simpliciter without calling evidence to prove it” .

Learned Counsel for the 2nd Defendant has submitted that it is not important that the 2nd Defendant’s father still collected rent from the occupiers after 1979 and before his death as an outright gift of land *intervivos* is good even in the absence of actual delivery of the land. But the question that arises is why he did not formally hand over after the 2nd Defendant had attained majority which was before he died. Does this however nullify the gift? I think not.

I must state here that I do not think that the claim is founded on the Will because looking at the claim the issue of the Will is completely absent. The issue is, with the Gift to the 2nd Defendant.

The Claimants have given evidence that the signature on the deed of gift is a forgery.

Forgery is a criminal offence and under the law, the burden of proof is that of proof beyond reasonable doubt. The 3rd Claimant gave evidence in this direction. Her evidence is that “the special and peculiar feature of my late uncle’s signature is missing on the fake deed; which is the usual downward contour or tail after the initial of E. A.

According to *Fabiyi JSC* at page 259 of **Olalomi Industries Ltd. vs. Nig. Industrial Dev. Bank Ltd.** (2009) 39 NSCQR page 240, “Allegation of fraud must be prove beyond reasonable doubt. It requires proof in the realm of probability not fantastic. It is trite that it is the party who alleges a forgery that has the onus to

prove same beyond reasonable doubt as dictated by Section 138 (1) of Evidence Act. I have examined the signature on all the exhibits before this Court. They all look quite similar to me. Apart from the fact that 3rd Claimant says so, there is no proof that the signature on Exhibit A1 is a forgery. Be that as it may I have looked at the Will of Edwin Omorodion. There is nothing there to show that the property in dispute was given to anyone. In fact there is no property listed in the Will. If the land in dispute had been referred to then a doubt would have been created in my mind. But as it is there is nothing to show that the land was part of the Estate of the Testator at the time he wrote the Will. I am not unmindful to Learned Counsel's submission that the Will ought not to be admitted in evidence. But the Will was pleaded by the Claimants and it is also relevant as that is what the Claimants are relying on. It is therefore admissible in evidence. The weight to be attached to it is a different matter.

Learned Counsel for the Claimant in his address submitted as to how the 1st Defendant knew that it was buying a lawsuit. Unfortunately there is no evidence of the use of thugs and armed Policemen by the Claimants witness in her evidence before the Court.

After considering the evidence before the Court I find the Claimants have not shown that the sale by the 2nd Defendant to the 1st Defendant is invalid. The Claimants have not also shown that the 2nd Defendant has no legal and valid title to the said land at No. 135 Uselu ó Lagos Road, Benin City or shown that the Deed of Gift was a forgery.

The suit is accordingly dismissed.

**EFE IKPONMWONBA
JUDGE**

PAT ONEGBEDAN (S.A.N.) FOR THE CLAIMANTS
DR. J. O. ODION FOR THE FIRST DEFENDANT
M. O. OKHUAROBO FOR THE SECOND DEFENDANT