

**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA**  
**IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY**  
**BEFORE HIS LORDSHIP, THE HON. JUSTICE E.O. AHAMIOJE,**  
**JUDGE ON TUESDAY THE 14<sup>TH</sup> DAY OF FEBRUARY, 2017**

**BETWEEN:**

**SUIT NO. B/568/2013**

**JOSEPH IDAHOSA IGHODARO .....**

**CLAIMANT**

**A N D**

- 1. OSAROBO IDAHOSA IGHODARO**
- 2. AKUGBE IGHODARO**
- 4. THE ADMINISTRATOR GENERAL AND  
PUBLIC TRUSTEE OF EDO STATE**
- 5. THE PROBATE REGISTRAR HIGH  
COURT OF JSUTICE, BENIN CITY**
- 6. JOHN ASEMOTA**
- 7. SUNDAY ASEMOTA**
- 8. SAMUEL ASEMOTA**
- 9. MRS. MABEL UWUIGBE**
- 10. PATRICK ORIAKHI**
- 11. OGBEMUDIA ORIAKHI IDADA**

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**DEFENDANTS**

**J U D G M E N T**

The Claimant's claim against the Defendants jointly and severally is as formulated in paragraph 59 of the Amended Statement of claim dated and filled on the 14/4/16 which reads as follows:

- i. A declaration that the undated purported last WILL and testament of Deaconess (Madam) Alice Asemota (deceased) is invalid and of no effect whatsoever in that it is tainted with fraud for not being the act of the testator.
- ii. An Order setting aside the purported last WILL and testament of late Deaconess (Madam) Alice Asemota having being founded on fraud and misrepresentation.
- iii. An Order re-instating all the Claimant's personal property

purportedly bequeathed in the Will back to the Claimant and directing the Defendants to account for all the rents/proceeds received and/or collected from tenants in all the properties listed in the Will.

- iv. An Order directing the return of the Claimant's deceased mother's personal effects including gold jewelries and coral beads and all the title documents in possession of the Defendants or their agents back to the Claimant as the only child of the mother.
- v. A Perpetual Injunction restraining the Defendants, their agents, servants and privies or whatsoever from further giving effect to the purported last WILL and testament of late Deaconess (Madam) Alice Asemota.
- vi. General damages of N100, 000,000.00 (One Hundred Million Naira only).

Pleadings were duly filed and exchanged by the parties along with their front loaded processes. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants set up a Counter-Claim in their Statement of Defence. The Claimant testified, called a witness and tendered several Exhibits.

The case put forward by the Claimant can be summarized as follows: The Claimant adopted his sworn depositions on the 11/2/16, and stated that the late mother Alice Asemota purportedly made a Will dated the 24/1/2011 wherein she purported to bequeath her real properties to her grand children i.e. 1<sup>st</sup> – 3<sup>rd</sup> Defendants, and CW1. He averred that the genuineness of the properties purportedly bequeathed to the aforementioned beneficiaries by the late mother are his personal properties. That the two (2) flats devised to Akugbe in the said Will was built by him, and he lived there before he relocated to G.R.A. Benin City. That the property at No. 1, Ojo Street, Off Sapele Road, Benin City was built by

him and devised to his (Claimant's Children) in the said Will, Exhibit "C". He further said that the property at No. 80, Goody Goody Road, Benin City was the house he built for his late father, and the father lived and died in the said house which is his father "Igiogbe" was devised to the 1st Defendant in Exhibit "C". He said that he traveled out of Nigeria in 1977 to the USA, and was blessed and resourceful and as such he was regularly remitting money to the late mother for her up-keep and also to acquire property for him. That as a result, the late mother acquired various properties for him both in his name and her name including all the properties mentioned in the purported Will, Exhibit "C". He further said that his estranged, wife (10<sup>th</sup> Defendant) who is the biological mother of his children (1<sup>st</sup> – 3<sup>rd</sup> Defendants) masterminded the purported Will and testament of the late mother in connivance with the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants to reap where they did not sow. That these persons mentioned above are directly benefiting from the rents accruing from the properties purportedly given to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants and the CW1, and the children are just being used as mere fronts to serve as cover for the secret and illegal activities of the aforementioned Defendants. He stated that there was never a time the late mother briefed any lawyer including Mr. E. E. Apeh to prepare a Will for her, and that Mr. E. E. Apeh did not directly obtain instructions from the late mother. He further stated that he had a blossom and robust affections and intimacy for his mother and this informed the reason why his late mother asked him to return home in 2005 when her health condition started deteriorating so that he could attend to her. That upon his return to Nigeria in 2009, he met the mother

critically ill. He took her to several Hospitals (both private and public) as well as UCH, Ibadan. That the mother was in and out of Hospital and did several surgical operations including a major operation between 2009 and 2013 before she finally died at UBTH, Benin City on the 2/5/13, and he paid all the medical Bills vide Exhibits "A1 – A13". He stated that the Defendants fraudulently orchestrated the purported Will, Exhibit "C" within the period of 2011 when the late mother was already mentally deficient resulting from her protracted ill-health as he was the one taking her around all the Hospitals both in Benin City and Ibadan. That after the death of his late mother, he obtained the certificate of cause of death, Exhibit "B". He said that after the death of his mother, the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants broke into his apartment and that of the late mother situate at No. 25, Obasuyi Street and removed all valuable house documents and properties belonging to him and the mother. That they also removed the title documents of the properties listed in the Will, Exhibit "C" and the mother's gold jewelries and coral beads. He stated that being the only child of the late mother, he single handedly performed her burial rites on 30/5/2013 without any form of assistance from anybody, and she was interred at No. 25, Obasuyi Street, Benin City. He stated that the late mother was an illiterate who never went to school and could not read and write in English. That by the reason of the fact that the mother was an illiterate, she could not have signed the signature on the Will. That the late mother gives out receipts to tenants, Exhibits "D1 – D7", and there is none she writes or signs her self, but the receipts are either written by the tenants themselves or someone literate enough to write after due consultation with and

sufficient explanations to her. The Claimant gave particulars of fraud at paragraph 65 of the sworn deposition. He finally urged the Court to grant his reliefs and dismiss the Counter-Claim.

In answer to questions under cross-examination, the Claimant stated that the late mother acquired the four flats situate at 43, Aiguokhian Street, Benin City on his behalf. He stated that he married the 10<sup>th</sup> Defendant under Native Law and Custom, but he is no longer legally married to her. That in 2010/2011, he was in Nigeria and resided at his house in G.R.A., Benin City. That during the period, he was constantly visiting the late mother, and he knew that DW 1 did not take instructions from her concerning the Will. He admitted that he executed Exhibit "J" in conjunction with his late mother. He stated that he was not issued any medical Report of the late mother mental illness. He stated that he will be surprised to hear that the late mother obtained a Diploma Certificate from a Bible College.

CW 1, Mrs. Stella Esohe Amuda Salami (Nee Ighodaro) adopted her sworn deposition on the 11/2/16 wherein she stated that she is the eldest child and daughter of the Claimant. She stated that late Madam Alice Asemota is her paternal grandmother, and that her purported last Will is a fraud and its genuineness is in doubt being not a product of the late grandmother and gave reasons in paragraphs 7 and 8 of the Statement on Oath. She said further that the Claimant remitted money regularly to his mother both for her up-keep and to purchase property for him, and the house situate at No. 43, Aguokhian Street,

Benin City is one of such properties. That the Will, Exhibit "C" was masterminded by the 10<sup>th</sup> Defendant in connivance with the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants to dis-inherit the Claimant and rob him of his hard earned properties. She said that when the late grandmother was critically ill, the Claimant took her to several Hospitals including UCH, Ibadan and paid the medical bills. That she took care of her when the Claimant brought her to UCH, Ibadan for treatment. That the grandmother was an illiterate who never went to school and could not read and write in English. That she disassociate herself from the said Will, Exhibit "C", and all the properties in the Will are directly owned by the Claimant.

Under cross-examination, CW 1 stated that when the corpse of the grandmother was brought from UBTH to No 25, Obasuyi Street, Benin City, the Claimant was not present. That the entrance to the living room was locked when the corpse arrived. That the reason for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants breaking into the apartment was not to secure a place for the lying in state of the corpse of the grandmother. That the corpse was kept outside, but there was another room provided for that purpose. That the 1<sup>st</sup> – 3<sup>rd</sup> Defendants slept in the house for about 2 weeks; and they came from the USA for the burial ceremony. She stated that she was not aware that the grandmother attended Bethel Bible Institute and was issued a Certificate on Completion of Studies. That the late grandmother was very industrious and had a big shop at Balogun Market, Lagos. That the grandmother told her that the properties were bought for the Claimant through the money sent to her by the Claimant and took her to the properties.

At the close of the Claimant's case, the Defendants opened their Defence. The 8<sup>th</sup> Defendant, Mr. Samuel Asemota adopted his 69 paragraphs sworn deposition on the 23/3/2016 wherein he stated that on the 24/1/2011, Madam Alice Asemota called him to witness the Will, Exhibit "C" because he is her elder within the family. That before he accepted witnessing the Will, he asked the testatrix how she could make a Will for only one son. That she instructed him to read the Will first to see how she distributed her property and appreciate why she did so. That she could not give the property to the Claimant because he is a squandermania. The testatrix told him of how she helped the Claimant to buy properties in Lagos which the Claimant sold and gave the money to women. She also told him how the Claimant sold another property worth N23 Million and gave N6 Million to his girlfriend, Atinuke in UNIBEN, and one Joy he snatched from the husband living in testatrix's house. He stated further that the testatrix told him that the Claimant took her Gold Jewelry and gave same to his girlfriend, and how the lady returned the Jewelry 3 months after and told her that since the Claimant gave her the Gold she never had peace. He stated that with the foregoing instances he believed that the Claimant will squander all that the Testatrix laboured for and agreed to witness the Will, Exhibit "C". He further said that the testatrix signed the Will in his presence and also in the presence of Owens Nathaniel, the Claimant's cousin. He said that both himself and Owens Nathaniel sat together when the testatrix signed the Will in their presence and they signed as witnesses to the Will. He said further that the testatrix was a person of perfect testamentary capacity as demonstrated by her reasons for making the

Will and that she was literate and a person of great means. That he stayed with the testatrix in Lagos when she attended Adult School and Driving School, and she was driving herself in 504 GL Air Conditioner Car, which she later gave out to her mechanic. That the testatrix went to Bethel Bible School of Christ Apostolic Church of God Mission Int. Inc. and was awarded a Certificate of Leadership, Exhibit "K". He stated that on the day fixed for the burial of the testatrix, CW 1 told the family that she had the death Certificate and receipts of fees paid and she was going to bring the corpse of the testatrix. The family sent a delegation to meet her at the mortuary and bring the corpse to No. 25, Obasuyi Street, Benin City. The family asked CW 1 to call the Claimant that they want to lay her in her house, and CW 1 told them that the Claimant said he was not coming. They equally asked the 2<sup>nd</sup> Defendant to call him and if he refuses to come, the family will break the door to commence the burial rites. The Claimant phoned the 7<sup>th</sup> Defendant that he wanted the testatrix buried at Omoregbe Street, but the family told him that the testatrix made it clear that she should be buried at No. 25, Obasuyi Street. He stated that the Claimant is not the owner of the house at No. 80, Goody Goody Road, Benin City, and so could not be his father's Igiogbe. That the testatrix allowed the father of the Claimant to stay in the house as she refused him coming to stay with her at No. 25, Obasuyi Street. That after his death, the testatrix allowed the Claimant to bury his father in the compound. That the testatrix is the owner of the uncompleted building behind the house. That he never knew DW 1 until the day of reading the Will.



In answer to questions under cross-examination, the 8<sup>th</sup> Defendant stated that he knew the contents of the Will. That the Solicitor (DW 1) who prepared the Will was present when they executed the Will. That the people present were DW 1, Owens Nathaniel, testatrix and himself. That the Claimant was in Nigeria when the Will was executed. That the Testatrix was not sick when the Will was executed. That she was on admission in UBTH, Benin City after the execution of the Will for a very long time. That the Claimant paid the medical bills. He said that the testatrix did not attend any formal school, but denied the fact that she was unable to read and write in English. That he would not know if she was issuing receipts to her Tenants. That the Claimant's father lived at No. 80, Goody Goody Road, Benin City before he died, and was buried there. That the house belonged to the testatrix. That he knew DW 1 on the day he signed the Will and not on the day the Will was read.

The 7<sup>th</sup> Defendant, Sunday Asemota adopted his 98 paragraphs sworn deposition on the 19/4/16 wherein he stated that the testatrix was her sister. That when the Claimant returned from the U.S.A., the mother gave him a flat to stay in No. 25, Obasuyi Street, Benin City. She took the Claimant to her Bank so as to jointly operate her account, and handed the Claimant a passbook with over N1 Million since the Claimant returned to Nigeria without anything. After a month, the testatrix was surprised that the Claimant had withdrawn the whole money. He said that the Claimant gave his property in G.R.A., Benin City on rent and continues to live in the property of the testatrix at No. 1, Ojo, off Godwin Abbe Road, Benin City. That the Claimant sold the 7 plots of land the mother

helped him to acquire in Lagos and squandered the money on women. He further said that the Claimant is not the owner of the house situate at No. 80, Goody Goody Road, Benin City and the mother only allowed the Claimant's father to live there. That the Claimant's father was buried in the compound, and that is not the Igiogbe. That the Igiogbe is at Urhonigbe village. That the property where the Claimant is running a School at No. 7, Igbineweka Street, Off Upper St. Saviour Road, Benin City belong to the testatrix which she bought from the Enogie of Ihinmwirin in the 1980's, and he accompanied her to buy same. He stated that the Claimant sent money to the testatrix to build his house at G.R.A., Benin City, a duplex with a Boys Quarter which he gave out on rent, and he supervised the project. He further said that the testatrix was a person of perfect testamentary capacity, and attended Adult School, Driving School in Lagos, and Bethel Bible School in Benin City and was awarded a leadership Certificate. He urged the Court to grant the Defendants reliefs A and F of the Counter-Claim and abandon reliefs B, C, D & E.

DW 1, is Elaigwu E. Appeh, a legal Practitioner. He adopted his sworn deposition on the 19/4/2016 wherein he stated that he is the legal Practitioner that prepared the Will of late Deaconess (Madam) Alice Asemota dated the 24/1/2011 and lodged with the 5<sup>th</sup> Defendant on 6/4/2011, who died on the 2/5/2014. That he went to the testatrix's house to obtain instructions from her at No. 25, Obasuyi Street, Off Sapele Road, Benin City in 2010 to 2011. He said that the testatrix took him through her sitting room to a small room on the right hand side to give him instructions. After giving him the instructions, she took

him to the expansive bedroom and showed him the bed that she was bequeathing to the Claimant. That when giving him instructions, she described the property at Ojo Street, Off Godwin Abbe Way, Off Sapele Road, Benin City but was not sure of the exact street number. Based on the description, she sent him to the street and he confirmed that it is No. 1, Ojo Street. That later, when he went to deliver the Notice of reading of the Will to the Claimant, he discovered that a water factory has been built on it by the Claimant. He stated that the testatrix can read and write in English and had a writing pad where she recorded phone numbers with the name of the owners of the phone numbers. That she personally gave him instructions which were detailed and sensible. That she was of sound mind, memory and understanding at the time she gave him instructions and at the time she executed the Will, Exhibit "C". He said that the Testatrix expressed her unhappiness with CW 1 for not treating her as her grandmother, yet she bequeathed the property at No. 25, Omoregie Street, Off Dumez Road, Benin City to her. That she told him that her reasons of making a Will even though the Claimant is her only son, is that the Claimant is a squandermania, prodigal, womanizer and his abandonment of his wife and children for irresponsible life. That she feared that her hard earned assets would be frittered away if not secured through a Will. He said that after the Will was signed by the testatrix and duly witnessed by the 8<sup>th</sup> Defendant and Owens Nathaniel, the testatrix called him for collection and eventual lodgment with the 5<sup>th</sup> Defendant. That he lodged a copy with the 5<sup>th</sup> Defendant, and returned two counterparts of the Will to the testatrix for her keep. That he never knew of the beneficiaries of

the Will. He said that the Will was the sole and independent act of the testatrix, and the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants did not make any input in the Will.

Cross-examined by Mr. A. U. Osunde, DW 1 stated that he prepared and filed the processes in this case on behalf of the Defendants. He denied the fact that the 8<sup>th</sup> Defendant signed his witness statement on oath in his office. That he knew the testatrix in the course of her engaging him in the preparation of the Will. He stated that she has never signed any document in his presence before the Will. That he witnessed the signing of the Will by the testatrix.

The 9<sup>th</sup> Defendant, Mrs. Mabel Uwuigbe adopted her sworn deposition on the 23/3/16. Her sworn statement is substantially the same with that of the 7<sup>th</sup> Defendant which needs no reproduction.

The 10<sup>th</sup> Defendant, Mrs. Patricia Oriakhi adopted her sworn deposition on the 18/2/16, wherein she averred that the Claimant married her in 1977 in accordance with Bini Customary Law and converted the marriage to Statutory Marriage in the United State of America in 2008. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are their biological children from the marriage. She stated that during the period of the Claimant study in Yugoslavia and London, the testatrix was sending money to him through one Mr. Godwin Osagie for his feeding, accommodation and tuition. That when she joined the Claimant in London, the testatrix was still taking care of them by sending money through Mr. Godwin Osagie. That in 1981, the Claimant got admission to study in the U.S.A., the Claimant left her and the new born baby in London. After the death of the baby,

she joined the Claimant in U.S.A. in 1982, and the testatrix stopped sending them money. That in U.S.A. both of them started to work. She said that the Claimant was always beating her in the U.S.A. and when the Testatrix visited them, the Claimant equally beat her up. That the testatrix was a successful trader in Lagos with a big store in Balogun market and importing goods from Cotonou. She said that the Claimant is notorious for domestic violence, a squandermania and sexual escapades. That the Claimant did not care for the children education and the children had to source for loan from the Government to complete their education. She stated that the Claimant was convicted in the U.S.A. for Tax fraud for 6 months and placed on probation. After about 2 months, he wrote for permission to attend to the sick mother, which was granted and ever since he refused to return to the U.S.A. She stated that the Claimant does not live at No. 25, Obasuyi Street, but at No. 1, Ojo Street, Benin City. That when herself, 1<sup>st</sup> – 3<sup>rd</sup> Defendants came for the burial of the testatrix, the 2<sup>nd</sup> Defendant called the Claimant to inform him that they were around, the Claimant refused to come. That the family had to break the key to No. 25, Obasuyi Street, Benin City for them to stay. That herself, the 1<sup>st</sup> – 3<sup>rd</sup> Defendants never knew of the existence of any Will until when they wanted to return to the United States after the burial ceremony. That it was the family who informed them about the Will. That the 1<sup>st</sup> – 3<sup>rd</sup> Defendants did not wait to witness the reading of the Will because of their education. That the testatrix was a person of perfect testamentary capacity and attended Bethel Bible School.

In answer to questions under cross-examination, the 10<sup>th</sup> Defendant stated that she is still legally married to the Claimant, and it is not true that the Claimant parted ways with her since 2006. That all the children (1<sup>st</sup> – 3<sup>rd</sup> Defendants) were born for the Claimant. She denied collecting rents from the buildings. That L.B. Associates does so on behalf of the children. She stated that the testatrix was literate and attended Adult School in Lagos. That she can read and write in English. That she was not living with the testatrix and would not know if she was issuing receipts to tenants. That the Will did not refer to any existing school.

At the close of the Defendants case and in compliance with the Rules of Court, Counsel for the parties filed their written Addresses. The 1<sup>st</sup> – 3<sup>rd</sup>, 6<sup>th</sup> – 11<sup>th</sup> Defendants' written Address was filed on the 6/6/2016 vide a Motion on Notice. O. Onokpachere, Esq. of learned Counsel for the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants in his written address gave an introduction, background facts, the state of pleadings and evidence adduced and formulated six issues for determination thus:

1. Whether from the totality of the evidence of the Claimant before this Court, a case of forgery of the signature of the testatrix; Deaconess (Madam) Alice Asemota in the Will dated the 24<sup>th</sup> day of January, 2011 has been proved beyond all reasonable doubt as required by law?
2. Whether from the provision of the Wills law of Bendel State (as applicable to Edo State), as it relates to a testators powers of disposition of his or her properties, a testator is not at liberty to dispose off his or her properties (real or personal) to any person or object of her choice?
3. Whether the Claimant, from his evidence before this

Court has established by credible evidence that he is the true/legal owner of the real properties devised by the late testator (sic) to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants?

4. Whether the Claimant from the totality of his evidence before this Court has established lack of mental capacity (on grounds of ill health) on the part of the late testatrix, Deaconess (Madam) Alice Asemota to render the Will dated the 24<sup>th</sup> day of January, 2011 null and void?
5. Without conceding, whether the fact that a person is an illiterate precludes one from writing his name or signing a document?
6. Whether the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants, as propounders of the Will made by late testatrix; Deaconess (Madam) Alice Asemota, dated the 24<sup>th</sup> day of January 2011, have all discharged the onus placed on them by law?

Arguing issue 1, learned Counsel submitted that from the totality of the evidence of the Claimant before the Court, the Claimant has failed to establish/prove a case of forgery of the signature of the testatrix on the Will dated the 24/1/2011, Exhibit "C". That in civil matters, the standard of proof required of a Claimant to succeed in this suit is proof on preponderance of evidence or proof on balance of probability, and referred to Sections 132 and 134 of the Evidence Act, 2011 and FIRST INLAND BANK PLC. V. ZANEN VERSTOEP & CO. (NIG.) LTD. (2016) ALL FWLR (PT. 814) 6 AT 31 – 32 RATIO 7 PARAS. F – A.

He further submitted that in civil cases, where there is an allegation of crime, the standard of proof required to establish same is proof beyond reasonable doubt, and referred to Section 135 of the Evidence Act, 2011, AJAYI V. BOSEDE (2015) ALL FWLR (PT. 778) 960 AT 976 RATIO 4 PARAS. E – F AND MOBOGUNJE V. ADEWUNMI (2006) 11 NWLR (PT. 991) 230 AT 251 PARAS. E.

He contended that the Claimant stated severally that the 6<sup>th</sup> – 8<sup>th</sup> and 10<sup>th</sup> Defendants forged the signature of the testatrix who was an illiterate on Exhibit “C” and could not have signed Exhibit “C”. That the essence of the forgery of the testatrix signature on Exhibit “C” was to defraud the Claimant of his real properties. He referred to CW 1 evidence under cross-examination.

He posited that the general position of the law is that he who asserts any fact in his pleadings, must lead evidence in proof thereof, and cited DUMEZ (NIG.) PLC. V. ADEMOYE (2015) ALL FWLR (PT. 791) 1459 AT 1476 RATIO 7 PARA. C. That throughout the entire length and breath of CW 2 (sic) evidence before the Court, there was no other credible evidence tendered before the Court in proof thereof other than his mere ipse dixit that the 6<sup>th</sup> – 10<sup>th</sup> Defendants masterminded the forgery of the signature of the late testatrix (Deaconess (Madam) Alice Asemota) on Exhibit “C”. That the Claimant relied heavily on Exhibits “D1 – D7” as a basis for urging the Court to hold that the signature of the Testatrix on Exhibit “C” was forged. That none of the tenants or someone who wrote Exhibits “D1 – D7” on behalf of the testatrix were called to testify in proof of the assertion that they were given such instructions by the testatrix to issue house rent receipts on her behalf because she was not literate to do so. He submitted that had the Claimant called these very vital witnesses, their evidence would have been favourable to the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants, and cited AGBI V. OGBEH (2006) 139 LRCN 1751 AT 1787 RATIO 19 PARAS. P – Z.

He contended that the evidential value that can be attributed by this Court to Exhibits “D1 – D7” purportedly issued by the tenants or the so called someone



on behalf of the testatrix is that they are agents of the testatrix for the purposes of issuing house rent receipts on her behalf and under her instructions, and cited OGBOYAGA LTD. V. NNEBE (2016) ALL FWLR (PT. 820) 1312 AT 1323 RATIO 3 PARA. G, BAMGBOYE V. UNIVERSITY OF ILORIN (1999) 10 NWLR (PT. 622) 290 and Black's Law Dictionary, 7<sup>th</sup> Edition Page 64.

He submitted that the tenants and the someone else who issued Exhibits "D1 – D7" did so as agents of the testatrix and not because the Testatrix was an illiterate who could not sign her name. That illiteracy must be proved by evidence of the Claimant. That it cannot be presumed by the Court, and cited AGBARA V. AMARA (SUPRA) 731, PARAS. G – H.

He posited that the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants in support of their assertions that Exhibit "C" was not masterminded nor forged by the 6<sup>th</sup> – 11<sup>th</sup> Defendants stated the circumstance surrounding the taking of instructions from the testatrix for the preparation of the Will by Barr. Apeh, the execution of the Will by the testatrix in the presence of the two attesting witnesses, the attestation of the Will by the two witnesses in the presence of the testatrix and the eventual lodgment of the Will with the 5<sup>th</sup> Defendant, and referred to paragraphs 78, 87, 98, 99, 213, 214, 215, 219, 221, 224, 225 and 230 of the Joint Statement of Defence, paragraphs 2, 13 – 15 of DW 1 witness deposition and paragraphs 1 – 4, 6, 10, 12, 14 and 19 of DW 5 witness deposition. That in further proof by the Defendants, that Exhibit "C" was duly executed in accordance with the WILLS Law of Bendel State as applicable to Edo State, he referred to Exhibits "J" (Deed of Agreement dated 9/7/2001), "L" (Quit Notice dated

28/2/2006) and "M" (Building Plot Transfer Agreement dated 24/12/2001).

That Exhibits "J, L and M", all bear the signature of the testatrix. That Claimant admitted under cross-examination that he signed as a witness for the Testatrix who was the Transferor at the material time of execution of Exhibit "J" . That the Claimant tried desperately in vain to deny the authenticity of the signature of the late testatrix in Exhibit "J" , and referred to Claimant's evidence under cross-examination.

He submitted that the Claimant is estopped by law from denying the signature of the testatrix on Exhibit "J" having appended his signature as a witness for the testatrix. That the implication of the Claimant appending his signature on Exhibit "J" is that at the time of execution of Exhibit "J", the Claimant acknowledged the testatrix as the Transferor in Exhibit "J", and cited OBIAKOR V. USAID (2005) 3 FWLR (PT. 270) 205 AT 218 RATIO 4 PARAS. C – D.

He argued that the Claimant having stated under cross-examination that he did not see the testatrix signing as the Transferor on Exhibit "J", the onus at that stage shifted on him to establish by credible evidence whose signature was on Exhibit "J" as the Transferor. That the Claimant failed to do so. That it is trite law that he who asserts must prove, and cited DUMEZ (NIG.) PLC. V. ADEMOYE (2015) ALL FWLR (791) 1459 AT 1476 PARA. C.

With regard to Exhibits "J, L and M", he urged the Court to compare the testatrix's signatures with Exhibit "C", the Will, and referred to Section 101 (1) of the Evidence Act, 2011. That a comparison of Exhibits "J, L and M" against Exhibit "C" will reveal that the signature on all these Exhibits were endorsed by

one and the same person, and cited MOBAGUNJE V. ADWUNMI (2006) 11 NWLR (PT. 991) 230 AT 249 RATIO 5 PARAS. D – G.

He stated the grounds for setting aside a Will, and cited ODUTOLA V. MABOGUNJE (2013) 7 NWLR (PT. 1354) 522 AT 561 PARAS. C – D, and referred to paragraph 59 of the Amended Statement of Claim, and Exhibit “N”.

It was submitted that the evidence of Mathew Airhuoyor and C. Ogbe could have been vital evidence in this suit that would have resolved the issue of forgery in favour of the defence. That the Claimant failed to call vital witnesses in proof of the allegation of forgery of the testatrix’s signature by the 7<sup>th</sup> Defendant on Exhibit “N” beyond reasonable doubt. That had the Claimant called Mathew Airhuoyor and C. Ogbe, their evidence would have been favourable to the 7<sup>th</sup> Defendant and exonerated him, and referred to Section 167 (d) of the Evidence Act, 2011, and STATE V. NNOHIN (1994) 5 NWLR (PT. 345) (SIC) AND STATE V. AZEEZ & ORS. (2008) 14 NWLR (PT. 1108) (SIC). He also referred to paragraph 59 of his amended Statement of Claim. He argued that it is the Claimant’s assertion that the farm land at Urhonigbe belong to his late mother (testatrix), then evidence should have been led in support thereof. That it is trite that he who asserts must prove. That there is no evidence in support of such assertion before this Court.

He finally submitted on this issue that the Claimant has failed to prove a case of forgery of Exhibits “C and N” beyond reasonable doubt as required by law, and urged the Court to resolve issue 1 in favour of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants.

On issue 2, learned Counsel referred to Section 3 (1) of the Wills Law of Bendel State, 1976 as applicable to Edo State, paragraphs 1, 2 and 51 of the Amended Statement of Claim. He submitted that Section 3 (1) of the Wills Law of Bendel State 1976 is subject to any customary law relating thereto. That it is lawful for a Testatrix to devise, bequeath, or dispose of by her Will, executed in accordance with the Wills Law all her real properties/estate at the time of her death. That it is only those real or personal properties that were not devised, bequeathed or disposed of under a Testatrix/Testator's Will that can devolve by inheritance on his or her heir (child).

He further submitted that applying Section 3 (1) of the Wills Law of Bendel State, 1976, as applicable in Edo State, the testatrix is at liberty to devise her real estate to either her immediate child, grand children (1<sup>st</sup> – 3<sup>rd</sup> Defendants) or family relations or even friends if she so desires, and cited FEDERAL ADMINISTRATION-GENERAL V. JOHNSON & ANOR. (1960) LLR 290, AND ITA V. DADZIE (2000) 4 NWLR (PT. 652) 168. It was submitted that there is no Section of the Wills Law of Bendel State where a restriction is placed on the testamentary disposing powers of a testatrix. That the only restriction placed on the testamentary disposing power of the testator is as it relates to the disposition of an Igiogbe under the Benin Native Law and Custom, and cited that IMADE V. OTABOR (1998) 56/57 LRCN 3121 AT 3122 RATIOS 7 & 8, and IDEHEN V. IDEHEN (1991) 5 LRCN 1590.

He contended that the real and personal properties devised by the testatrix to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants under Exhibit "C" not being a subject of an Igiogbe is

valid and lawful in law. He urged the Court to hold that the devise is valid and legal having been done in compliance with the Wills Law of Bendel State, 1976, as applicable in Edo State. He further urged the Court to resolve issue 2 in favour of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants.

On issue 3, learned Counsel submitted that the Claimant has not proved by credible evidence before the Court that he is the owner of the real properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants in Exhibit “C” by the testatrix. That he who asserts must prove, and cited DUMEZ (NIG.) PLC. V. ADEMOYE (SUPRA).

He argued that the Claimant asserted that he is the owner of all the real properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants by the testatrix, and referred to paragraphs 9 – 12 and 15 of the Claimant’s Amended Statement of Claim and paragraphs 10 – 13, 15, 16, 58 and 59 of his disposition. That in the entire length and breath of the Claimant’s evidence before the Court, not a single piece of evidence (documentary or otherwise) was tendered in support of the claim that he is the lawful owner of all the real properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants by the testatrix in Exhibit “C”. He posited that it is the law that pleadings must be supported by evidence, otherwise it is deemed abandoned, and cited the cases of ADAKE V. AKUN (2003) 112 LRCN 2225 AT 2231 RATIO 1 PARA. K; AGBI V. OGBE (2006) 139 LRCN 1753 AT 1797 RATIO 24 PARAS. F – K; ATAGBOR V. OKPO (2013) ALL FWLR (PT. 680) 1366 AT 1376, RATIO 3; AND Section 143 of the Evidence Act.

He contended that the testatrix in her life time was, and had always been in possession of the real properties willed out by her in Exhibit “C” either by actual

or constructive possession, and referred to Exhibits “D1 – D7” and cited ITA V. DADZIE (2000) 4 NWLR (PT. 652) 168 AT 188 PARAS. F – H.

He further contended that the Claimant’s personal properties at the GRA, Benin City is well known to every member of the Claimant’s family, and referred to paragraphs 192 of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants’ Statement of Defence and paragraphs 17, 43 and 45 of Sunday Uyi Asemota’s deposition on oath. It was submitted that the Claimant has put the issue of title to the real properties devised by the testatrix in issue. That it is the law that a Claimant who asserts ownership or title over a land or building is required to prove such title, and enumerated ways to prove title, and cited NRUAMA V. EBUZOEME (2013) ALL FWLR (PT. 681) 1428 RATIO 1; LAMBE V. AREMU (2014) ALL FWLR (PT. 729) 1078 RATIO 3; AND OHA V. UZOMA (2015) ALL FWLR (PT. 790) 1234 AT 1247 RATIO 2 PARAS. B – D.

That the Claimant in discharging this burden of proof of his title to the land or property is to rely on the strength of his case and not on the weakness of the Defendants’ case, and cited IGHIWIYISI V. IGBINERE (2016) ALL FWLR (PT. 819) 1059 RATIO 4; OHA V. UZOMA (SUPRA) AT 1235 RATIO 3 AND LAMBE V. AREMU (SUPRA) 1077 RATIO 1. He urged the Court to resolve issue 3 in favour of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants.

In relation to issue 4, learned Counsel submitted that the Claimant has failed to establish lack of mental capacity (on grounds of ill-health) on the part of the testatrix at the time of executing Exhibit “C” to render it null and void.

He further submitted that a Will can only be set aside on ground of fraud, mental capacity of the testatrix/testator or undue influence. That where a Claimant fails to advance any credible legal reasons for the setting aside of a Will, the Will will be given full effect, and cited ODUTOLA V. MABOGUNJE (2013) 7 NWLR (PT. 1304) AT 522 AT 561 PARAS. C – D. He also referred to paragraphs 39 and 40 of the Amended Statement of Claim and paragraphs 44 and 45 of his deposition on oath. On proof of testamentary capacity, he cited OKELOLA V. BOYLE (1998) 5 NWLR (PT. 119).

He argued that for the Claimant to discharge this burden, his oral evidence before the Court will not suffice. That medical evidence from a medical expert ought to be adduced by the Claimant in this regard. He referred to Claimant's evidence under cross-examination. He submitted that for a Will to be set aside or declared null and void on ground of lack of mental/testamentary capacity, the Claimant must not only plead such in the statement of claim or in his deposition on oath, he is required to lead credible evidence in proof of the assertion of the mental deficiency or lack of mental/testamentary capacity. That the Claimant has failed or neglected to do so.

He submitted that the position of the law is that the law presumes a state of things shown to exist continues to exist unless the contrary is proved. That where a Claimant is challenging the validity of a Will on grounds of absence of testamentary capacity held out the deceased as being of sound testamentary capacity, the law presumes the state of the deceased mental capacity to continue

until the contrary is proved, and cited MABOGUNJE V. ADEWUNMI (2006) 11 NWLR (PT. 991) 230 AT 264 RATIO 3 PARAS. D – F.

He argued that in the absence of any medical evidence emanating from the Claimant that the sound mental state of the testatrix which the Claimant acknowledged in 2002 had vanished or disappeared, he urged the Court to hold that the testatrix sound mind/sound testamentary capacity was still intact and in existence at the time she executed Exhibit "C" in 2011.

He further argued that Exhibit "C" was executed on the 24/1/2011, and that the testatrix was rushed to the University of Benin Teaching Hospital on the 21/12/2012 on ground of ill-health where she was admitted and subsequently discharged only for the illness to resurface again which necessitated the testatrix re-admission at UBTH where she eventually died on the 2/5/2013. He submitted that there is a time deference of almost 2 years between the execution of the Will on the 24/1/2011 and the testatrix admission at UBTH in 2013 where she eventually died on the 2/5/2013. That there is no evidence before the Court that the testatrix was hospitalized over any serious illness capable of affecting her testamentary capacity prior to the writing/execution of the Will on the 24/1/2011. He further submitted that in absence of any such evidence before the Court, he urged the Court to hold that the testatrix had a sound testamentary capacity on the 24/1/2011 when she executed her Will. He referred to paragraphs 213, 214, 215, 218, 219, 221 and 230 of the Joint Statement of Defence. He urged the Court to resolve issue 4 in favour of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants.



On issue 5, learned Counsel submitted that without conceding that the testatrix was an illiterate, that the fact that one is an illiterate does not prevent nor preclude one from writing his or her name or signing same on a document, and cited OTITOJU V. GOV. ONDO STATE (1994) 4 NWLR (PT. 340) 521 AT 529 RATIO 1; AND AGBARA V. AMARA (1995) 7 NWLR (PT. 410) 717 AT 731 RATIO 4 PARA. G.

He posited that the law on proof of illiteracy is that it must be proved by evidence and cannot be presumed by the Court, and cited OTITOJU V. GOV. ONDO STATE (SUPRA) AT 529 PARA. G.

He further posted that this burden has not been discharged by the Claimant. That other than the mere *ipse dixit* of the Claimant that the testatrix was an illiterate not capable of signing Exhibit "C", the Claimant did not present any cogent, compelling or convincing evidence/exhibit to discharge this burden. He urged the Court to so hold.

In proving the assertion by the Defendants that the testatrix was literate enough to endorse her signature on documents, he referred to paragraphs 101, 102 of the Joint statement of Defence, paragraphs 36, 52, 53 and 55 of DW 3's deposition on oath and Exhibits "K, L and M". That it is worthy of note that all these pieces of Exhibits tendered by the Defendants were never challenged nor discredited in any way under cross-examination by the Claimant. He urged the Court to hold that Exhibit "K" is sufficient proof of the defence assertions that the testatrix was literate enough to executed Exhibit "C", and cited AGBARA V.

AMARA (SUPRA) AT 731 RATIO 7 PARA. H. He urged the Court to resolve this issue in favour of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants.

On the last issue, learned Counsel submitted that the burden placed on the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants, as propounders of Exhibit “C” has been discharged by them. On the duty on persons propounding the validity of a Will, he cited ITA V. DADZIE (SUPRA) AT 184 PARAS. G – H, OKELOLA V. BOYLE (SUPRA) AT 548 PARAS. D – F.

On due execution of a Will, he referred to Section 6 of the Wills Law of Bendel State 1976, as applicable to Edo State, paragraphs 98 – 100, 225 and 226 of the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants’ Joint Statement of Defence, paragraphs 2 – 4, and 13 – 15 of DW 2’s deposition on oath and Exhibits “K, L, M and J”.

He submitted that the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants have adduced *prima facie* evidence in support of fact that the testatrix signed the Will, Exhibit “C” and that the testatrix signature on the Will is not forged as contended by the Claimant. That what the propounders need to adduce is *prima facie* evidence that the testatrix signed the Will.

On the whole, he urged the Court to grant reliefs A and F of the Counter-Claim and dismiss the Claimant’s claim with substantial costs.

The Claimant’s written address was filed on the 15/7/16. A. U. Osunde, Esq. of learned Counsel for the Claimant gave an introduction, synopsis of Claimant’s case and formulated five issues for determination thus:

1. Whether from the evidence before this Honourable Court it could be said that Deaconess (Madam) Alice Asemota briefed Elagiwu E. Apeh, Esq, to prepare the

purported last Will and Testament of late Deaconess (Madam) Alice Asemota?

2. Whether from the evidence (particularly documentary) before this Honourable Court, can the testatrix in this instant case be said to be the same person who wrote her name as signature on the Will?
3. Whether the fact that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants having conceded to the fact that they actually break into the apartment of late Deaconess (Madam) Alice Asemota, fact after her demise and in the absence of the Claimant is not sufficient fact that they equally stole or removed all the title documents of the properties listed in the Will?
4. Whether assuming without conceding that late Deaconess (Madam) Alice Asemota made a Will, can the devise of properties not directly owned by the said Deaconess (Madam) Alice Asemota be held to be valid?
5. Whether in the absence of a valid Will made by late Deaconess (Madam) Alice Asemota, is the Claimant not entitled to his mother's properties solely as the only child?

Arguing issue 1, learned Counsel stated that Claimant's case is that his late mother Deaconess (Madam) Alice Asemota did not have any formal education. That as an illiterate, his mother did not brief any lawyer including Elaigwu E. Apeh, Esq. to prepare the purported Will of late Deaconess (Madam) Alice Asemota. He referred to paragraph 25 of the Statement of Claim. That the Claimant contended strongly that the said purported Will was forged. That the Claimant consistently maintained that his late mother could not read and write all through her life time, and referred to Exhibits "D1 - D7". He submitted that throughout the length and breadth of the Defendants' pleading and evidence, this facts was

never denied or traversed. He further submitted that facts not denied are deemed admitted, and cited SALAMI V. AJADI (2012) ALL FWLR (PT. 615) 242 AT 302 PARA. F. He referred to DW 3's evidence under cross-examination and Exhibit "K".

He posited that the said Bible Institute that issued Exhibit "K" is a place where illiterates are taught Christian Doctrine in local dialect such as in Benin language. That Exhibit "K" is not a prima facie evidence that the late Deaconess (Madam) Alice Asemota can read and write. That the maker of Exhibit "K" is Bethel Bible Institute. That the law is that the maker of a document should be the person to produce/tender same at trial in order to be tested through the furnace of cross-examination, and cited ABUBAKAR V. MARK (2010) ALL FWLR (PT. 531) 1578 AT 15 82 RATIO 2; AND ALAO V. AKANO (2005) 11 NWLR (PT. 935) 160 AT 178.

He contended that in the absence of any oral evidence from the maker of Exhibit "K", he urged the Court to discountenance Exhibit "K" as no explanation has been given to explain the purport of Exhibit "K". He also referred to DW 5's evidence under cross-examination.

He submitted that there is contradiction in the evidence of DW 5 *vis a vis* his Statement on Oath. On when evidence contradicts evidence, he cited ODUNLAMI V. NIGEIRA NAVY (2014) ALL FWLR (PT. 720) 1205 AT 1227 PARAS. F – H. That the signing of the purported Will by the testatrix is a material point for consideration by this Honourable Court. That the Court cannot pick and choose

between these two versions of evidence as to whether the testatrix signed in the presence of DW 5 or the legal Practitioner who purportedly prepared the Will.

He posited that DW 5 is not a credible witness worthy of believe by the Court in view of his contradictory statement before the Court and urged the Court to treat his evidence as unreliable. He further posited that for a contradiction to affect the credibility of a witness, it must be a material contradiction, as in the instant case. That it must go to the essentiality of the material fact in issue, and cited *AJIBARE V. AKOMOLAFE* (2013) ALL FWLR (PT. 672) 1689 AT 1741 PARAS. D – E. He also referred to DW 3's evidence under cross-examination. Learned Counsel highlighted the contradictions between DW 3 and DW 5's evidence and submitted that the Court cannot pick and choose as between DW 5 and DW 3's evidence. That it is obvious that the lawyer (Eliagwu E. Apeh) who purportedly wrote the Will did not witness the testatrix signing the purported Will. That this goes to demonstrate the monumental fraud perpetuated by the Defendants particularly 6<sup>th</sup> – 11<sup>th</sup> Defendants, under the guise of writing a Will for an illiterate woman. That the Claimant's evidence at paragraph 59(h) was not challenged or contradicted by the Defendants. He submitted that where evidence given by a party to any proceeding is not challenged by the other party who had the opportunity to do so, it is always open to the Court seized of the matter to act on such unchallenged evidence before it, and cited *PASCULTO V. ADECENTRO (NIG.) LTD.* (1997) 11 NWLR (PT. 529) 467 AT 487, *BELLO V. EWEKA* (1981) 1 SC 101; AND *LEADWAY ASS. LTD. V. ZECO (NIG.) LTD.* (2000) 9 NWLR (PT. 673) 480 AT 487.

He argued that arising from the foregoing contradictions, Elaigwu E. Apeh, Esq. was never briefed by Claimant's mother (testatrix) to prepare the purported Will. He urged the Court to resolve issue 1 in favour of the Claimant.

On issue 2, learned Counsel submitted that from the evidence before the Court, the Claimant has been able to show that his mother never went to school and could not read and write including her name. That Exhibits "D1 – D7" demonstrably showed that the Claimant never signed on them or wrote any of the receipts because she was not lettered or literate to do so. That the signature on the purported Will that is ascribed to the testatrix is a forgery perpetrated by the 6<sup>th</sup> – 11<sup>th</sup> Defendants to defraud the Claimant.

He contended that assuming without conceding that the signature on Exhibit "C" (Will) was signed by the testatrix, he urged the Court to compare the said signature in Exhibit "C" with the signature on Exhibit "N" also ascribed to the Testatrix as one of those who carried out the transaction in Exhibit "N", and referred to Section 101 of the Evidence Act, 2011. That the two signatures are the handiwork of Uyi Sunday Asemota, 7<sup>th</sup> Defendant, and referred to paragraph 59 of the Amended Statement of Claim and paragraphs 54 – 57 of the Claimant's evidence on oath. That the above pieces of evidence were never discredited throughout under cross-examination. That they remained unshaken and urged the Court to rely on same, and cited PASCULTO V. ADECENTRO (NIG.) LTD. (SUPRA). It was submitted that learned Counsel's address cannot take the place of evidence, and cited CHIME V. EZE (2009) ALL FWLR (PT. 470) AT 748 PARAS. B – D. He urged the Court to resolve this issue in favour of the Claimant.

In relation to issue 3, learned Counsel referred to paragraph 35 of his Amended Statement of Claim, and submitted that the Claimant and CW 1 led credible evidence to that effect. That their evidence was unassailable throughout the proceedings. That DW 1, DW 2, DW 3 and DW 4 all agreed that they broke into Claimant's apartment without his permission. He argued that it could be presumed that they broke into the apartment to steal those title documents for the properties listed in the Will, more particularly so that some of the missing documents were tendered by them as Exhibits "K, L and M", and referred to Section 167 (a) of the Evidence Act 2011. That Exhibits "K", L and M" are supposedly the property of the Deaconess (Madam) Alice Asemota. That how they find their way into the hands of the Defendants was not explained. That the title documents to the properties listed in the Will which the Claimant alleged has been stolen may have found their way into the hands of the Defendants like Exhibits "K, L and M" as they were all kept by Deaconess Alice Asemota. He urged the Court to so hold. He also referred to CW 1's evidence under cross-examination.

He argued that Exhibits "K, J, M and L" are properties of late Alice Asemota which now found their way into the hands of the Defendants when the house was illegally entered. That it stands to reason that other missing documents complained about including the house documents must have found their way into the hands of the Defendants in the same manner but would not want to produce them because of their intentions to defraud and disinherit the Claimant *ab initio*, and because the (title documents) bear the name of the Claimant on them. He

urged the Court to invoke Section 167(d) of the Evidence Act, 2011. That it is in evidence that after the Will was read, the 4<sup>th</sup> Defendant was given a document not in the purported Will by the Defendants signifying that the testatrix has the sum of N400,000.00 (Four Hundred Thousand Naira) with Trust Fund Bank. He urged the Court to resolve this issue in favour of the Claimant.

On issue 4, learned Counsel submitted that no person is capable of making a Will who is not of sound mind, memory and understanding. That the testator/testatrix's mind must be sound to be capable of forming the testamentary intentions in the Will, his/her memory must be sound to recall the several person who ought to be considered as his/her possible beneficiaries. That his/her memory must be sound to recall and identify all the assets/properties he/she is bequeathing. That there could be no better evidence of the testatrix's loss of memory at the time of making Exhibit "C" (assuming she did) than the naming of a property that belong to the Claimant's father whom she parted way with when the Claimant was just 10 years old as forming part of her properties bequeathed in the disabled Will, and cited OKELOLA V. BOYLE (SUPRA) AT 559.

He contended that it is in evidence that late Madam Alice Asemota, between 2009 and 2013 when she eventually died, has been in and out of several hospitals with different surgical operation (including a major one) carried out on her, a period when the purported Will was written, and referred to Exhibits "A1 – A13" and paragraph 45 of the Claimant's Statement on Oath.



He urged the Court to hold that the testatrix was not mentally capable to have made the purported Will given her ill health culminating in her death at the UBTH in the year 2013.

On the last issue, learned Counsel submitted that the Defendants have failed woefully to prove the validity of Exhibit "C". That the law remains immutable that in an action that touches on the validity of a Will, the *onus propandi* rest squarely on the proponents of the Will to establish its validity and due execution. Learned Counsel highlighted the contradictions in DW 3 and DW 5's evidence.

On the definition of execution, he referred to the Webster's New Encyclopedic Dictionary, the Black Law Dictionary 8<sup>th</sup> Edition page 609.

He submitted that the above evidence stating the way and manner Exhibit "C" was executed cannot confer validity on Exhibit "C" assuming without conceding the said Will was made by the Claimant's mother. He urged the Court to hold that all that is purportedly contained in the Will is nothing but a sham. That from the foregoing, it cannot be said that there was due execution of Exhibit "C" against the backdrop evidence of DW 3 and DW 5. That the onus of proving due execution is on the Defendants to prove same, and referred to Order 54 Rule 14 of Edo State High Court (Civil Procedure) Rules, 2012. He urged the Court to annul Exhibit "C" as being invalid and not a true testamentary disposition of the testatrix.

He submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a Joint Statement of Defence and witness Statement on Oath vide a motion dated and filed on

30/9/2014.: That at the end of the trial, Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants declined to call any witness in their defence and also abandoned the only witness Statement on Oath filed on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

He further submitted that where a party either by sheer inadvertence or intentionally neglects to respond to submissions of an adversary on a matter, he is taken as having admitted those submissions, and cited *FRCN V. NWANKWO* (2012) ALL FWLR (PT. 641) 1546 AT 1565 PARAS. D – E. That in the instant case, the Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants failed throughout the length and breath of his pleadings to lead evidence to buttress the facts pleaded therein neither did he deny issues raised in the Claimant's Statement on Oath in reply to his Statement of Defence, and cited *AIYEOLA V. PEDRO* (2014) ALL FWLR (PT. 744) 17 AT 39.

He argued that the 4<sup>th</sup> and 5<sup>th</sup> Defendants have compromised with the 6<sup>th</sup> to 11<sup>th</sup> Defendants to defraud the Claimant without due recourse to the provision of the Law and the Rules of this Honourable Court. On the need to formally apply for a letter of administration over the Estate of the late Madam Alice Asemota before acting on the purported Will, and he referred to Order 53 Rule 8 of the Edo state High Court (Civil Procedure) Rules, 2012. This, the 4<sup>th</sup> and 5<sup>th</sup> Defendants failed to do before doling out money to the 10<sup>th</sup> Defendant and her collaborators, and referred to Order 53 Rules 19 and 44 of Edo State High Court Rules, 2012 and paragraphs 30 – 33 of their pleadings. He posited that it is trite law that a Court can *suo motu* make reference to the case file before it and make

use of any document it found necessary, and cited FUMUDOH V. ABORO (1991) 9 NWLR (PT. 214) 210 AT 220.

He referred to the Claimant's reply and additional witness Statement on Oath filed on the 16/12/14 wherein he raise the issue of fraud in the administration of his late mother's Estate by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. That the Claimant's evidence regarding the fraud was never controverted or denied. That they are deemed admitted by the 4<sup>th</sup> and 5<sup>th</sup> Defendants and urged the Court to so hold.

On the whole, he urged the Court to grant all the reliefs of the Claimant and dismiss the Defendants' Counter-Claim with substantial costs.

On the 22/7/16, the 1<sup>st</sup> – 3<sup>rd</sup> and 6<sup>th</sup> – 11<sup>th</sup> Defendants filed a Reply on points of law, I shall refer to it where necessary in the course of the judgment.

It is pertinent to state that in every civil action, the burden of proof falls squarely upon the Claimant alleging it, as he who asserts must prove. In other words, the burden of introducing evidence otherwise known as evidential burden squarely rest on the Party who will fail if no further evidence is produced.

Where this is done, the burden of proof shifts on the other party to introduce evidence, if accepted, will defeat the claim of the Claimant. This principle is enunciated in Section 131 of the Evidence Act 2011.

See: IMANA VS. ROBINSON (1979) 3 SC 1 AT 9;  
AGAGU VS. MIMIKO (2009) 7 NWLR (PT. 1140)  
342 AT 431 RATIO 24.

It is instructive to note that learned Counsel for the Claimant formulated five (5) issues for determination, whilst learned Counsel for the 1<sup>st</sup> – 3<sup>rd</sup>, 6<sup>th</sup> – 11<sup>th</sup>

Defendants formulated six (6) issues. It is, my view, that arising from the eleven issues formulated by learned counsel for the parties, the following issues can be distilled there from thus:

- (1) Whether the Will, Exhibit "C" made by late Madam Alice Asemota is valid?
- (2) Whether the Claimant has established a case of forgery of the signature of the testatrix in the Will, Exhibit "C"?
- (3) Whether the Claimant has established by credible evidence that he is the legal owner of the real properties devised by the testatrix to the 1<sup>st</sup> - 3<sup>rd</sup> Defendants;? and
- (4) Whether the Defendants have established their Counter-Claimant as required by law?

Let me now deal with issue 1. It is pertinent to note that the Claimant has stoutly challenged the Will of the testatrix on the ground that the signature was forged and that she lacked the mental capacity to make the Will, Exhibit "C" on ground of ill-health.

As earlier stated, in civil cases, the party who asserts must prove, but the rule operates in the reverse in Probate cases. Therefore, where there is a dispute as to the validity of a Will, the burden of proof rests on the party propounding the Will before it shifts to the other party. In other words, the party who propounds a Will must clearly show by evidence that *prima-facie* all is in order. Once they have satisfied the Court, *prima-facie*, the burden is then cast upon those who attack the Will, and they are required to substantiate by evidence the allegation they have made as to lack of capacity, undue influence and so forth.

See: EYO V. INYANG (2001) 8 NWLR (PT. 713) 533;

OKELOLA V. BOYLE (1998) 2 NWLR (PT. 539) 533,  
NSEFIK V. MUNA (2007) 10 NWLR (PT. 1043) 502.

In the instant case, the onus is therefore on the 1<sup>st</sup> - 3<sup>rd</sup>, 6<sup>th</sup> – 11<sup>th</sup>  
Defendants who are propounding the Will to show or prove due execution.

It is settled law, that once the formalities and the formal requirements for  
making a Will prescribed in Sections 6 and 7 of the Wills Law of the Defunct  
Bendel State as applicable in Edo State are complied with, the Will is regarded as  
valid. And Section 6 provides thus:

”No Will shall be valid unless it shall be in writing executed in a  
manner hereinafter mention, that is to say it shall be signed at  
the foot or end thereof by the testator or by some other  
person in his presence and at his direction, and such signature  
shall be made or acknowledged by the testator in the presence  
of two or more witnesses present at the same time, and such  
witnesses shall attest and subscribe the Will in the presence of  
the testator, but no form of attestation shall be necessary.”

In the instant case, in their bid to prove due execution of the Will, the 1<sup>st</sup> –  
3<sup>rd</sup>, 6<sup>th</sup> – 10<sup>th</sup> Defendants called and relied on the evidence of Mr. E. Apeh,  
(DW 1) the solicitor who allegedly prepared the Will, and the 8<sup>th</sup> Defendant, one  
of the witnesses who signed the Will.

D. W. 1, Mr. Apeh gave detailed account of how the testatrix gave him oral  
instruction to prepare a Will for her which he did. He stated that he went to the  
house of the testatrix to obtain instructions from her at No. 25, Obasuyi Street,  
Benin in 2010 – 2011. He stated that the testatrix personally gave him the  
instructions which were detailed and sensible. That she was of sound mind,  
memory and understanding at the time she gave him the instructions and at the

time she executed the Will, Exhibit "C". He said further that the Testatrix can read and write in English and had a writing pad where she recorded phone numbers with the names of the owners of the phone numbers. He said that after the Will was signed by the testatrix and duly signed by the 8<sup>th</sup> Defendant and Owen Nathaniel, she called him for collection of same and eventually lodgment with the 5<sup>th</sup> Defendant. The 8<sup>th</sup> Defendant equally stated that on the 24/1/2011, Madam Alice Asemota called him to witness the Will, Exhibit "C". She gave him reasons why she opted to make a Will when she had only a son, the Claimant which was satisfactory to him. He said that the testatrix signed the Will in his presence and also in the presence of Owens Nathaniel, the Claimant's cousin. That both himself and Owens Nathaniel sat together when the testatrix signed the Will in their presence, and they signed as witnesses to the Will. He stated that the testatrix was a person of perfect testamentary capacity as shown by the reasons for making the Will. That she was literate and a person of great means. His evidence was corroborated by the testimonies of the 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants.

On his part, and in a bid to show that the Will, Exhibit "C" was not executed by the testatrix, the Claimant relied on his evidence and that of CW 1. The Claimant stated that there was never a time, the late mother briefed any lawyer including Mr. E. Apeh, DW 1 to prepare a Will for her. He stated that upon his return to Nigeria in 2009, he met the mother critically ill, and he took her to several hospitals both private and public as well as UCH, Ibadan. That she did surgical operations including a major operation between 2009 and 2013 before

she finally died at UBTH, Benin City on 2/5/13. That the purported Will was fraudulently orchestrated by Defendants within the period when the late mother was already mentally deficient resulting from her protracted ill-health.

CW 1 stated that the grandmother's Will, Exhibit "C" is a fraud and its genuineness is in doubt being not a product of the late grandmother. That when she was critically sick the Claimant brought her to UCH, Ibadan and she took care of her.

I have carefully and painstakingly considered the evidence adduced by the parties and their witnesses in line with their pleadings as to the validity or otherwise of the Will, Exhibit "C". On the issue of the mental capacity of the testatrix to make a Will, Exhibit "C", it is pertinent to note that the disputed Will was made on the 24/1/2011. It is settled law that this is the relevant time in considering the testamentary capacity of late Madam Alice Asemota, the testatrix.

In the case of KWENTO V. KWENTO (2010) 5 NWLR (PT. 1188) 543 AT 566, the Court of Appeal (Enugu Division) held that the proper time for a testator (in this case testatrix) to possess sound disposing mind is firstly, when he gave instructions for the drafting of his Will, and secondly when he executed the Will.

Let me hasten to say that after a calm consideration of the entire evidence adduced by the parties, I unhesitatingly prefer and believe the evidence of DW 1, Mr. Apeh, the solicitor who prepared the Will, Exhibit "C", that the testatrix gave him instructions concerning the drafting of the Will in her house at No. 25,

Obasuyi Street, Benin City, which were detailed and sensible. That she was of sound mind, memory and understanding when she gave him the instructions and, at the time she executed the Will in 2011. I also believe the evidence of the 8<sup>th</sup> Defendant that the testatrix signed the Will in his presence and that of Nathaniel Owens. That both himself and Owens Nathaniel who sat together with the testatrix signed as witnesses in her presence. I equally believe his evidence that the testatrix was a person of perfect testamentary capacity as shown by the reasons for making the Will, Exhibit "C". I have no reason whatsoever to doubt the credibility of his testimony.

On the other hand, I do not believe the evidence of the Claimant that the, testatrix at the time she made the Will in 2011 was mentally deficient as a result of her protracted ill-health. There is no doubt that the testatrix had health challenges and was taken to UBTH, Benin City and UCH, Ibadan and she had a major operation. Curious as it may seem, the Claimant never tendered before the Court any Medical Report to prove that as a result of her health challenges or protracted ill-health and the major operation she underwent, that it resulted to her mental deficiency or impaired her mind. The Claimant also failed to call any of the Medical Doctors who treated her either at UBTH, Benin City or UCH, Ibadan to testify in this case that her physical ailment compromised her mental faculties. It is my view, that in the absence of any medical evidence to corroborate the evidence of the Claimant of the mental deficiency of the testatrix, I therefore hold that the mental capacity of Madam Alice Asemota (testatrix) was not affected by the physical ailment she suffered, and therefore of sound disposing mind at the



time she made and executed the Will, Exhibit "C", on the 24/1/2011. After all, it is not uncommon to find people very ill but nevertheless remain mentally alert and stable and capable of giving rational instruction and advise. See: ADEBAJO V. ADEBAJO (1973) 1 ANLR 361.

In the result, I hold that the Claimant has failed to prove by credible evidence that the physical infirmities of the testatrix necessarily affected her mental capacity.

Let me say and quickly too that learned Counsel for the Claimant made a heavy weather about the alleged contradiction in the evidence of DW 1, Mr. E. Apeh in Court and his sworn deposition as regards his presence or non presence during the execution of Exhibit "C" by the testatrix.

With profound respect to learned Counsel for the Claimant, Section 6 of the Wills Law of Bendel State earlier reproduced did not say that for a Will to be valid, the Solicitors who prepared the Will or the drafter of the Will must be present during the execution of the Will. The Law specifically provided for the persons who must be present at the time of the execution of the Will to wit:

(a) the testator/testatrix and (b) the attesting witnesses to the Will. It is, my view, that the alleged contradiction in the evidence of DW 1 as to his presence or non-presence at the time of the execution of the Will is not material to vitiate the Will, Exhibit "C".

Let me now deal with issue 3 which is whether the Claimant has established a case of forgery of the signature of the testatrix on the Will, Exhibit "C"?

In the instant case, the Claimant pleaded in paragraph 25 of his Amended Statement of Claim and gave evidence to the effect that the late mother never attended any school or had any formal education and, therefore could not read and write including writing her name in English.

And in paragraphs 9, 48, 49 and 58 of the Amended Statement of Claim, and paragraphs 19, 54, 55 and 65 of the witness deposition, he equally averred that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants forged the signature of the testatrix who was an illiterate on Exhibit "C" and as such she could not have signed Exhibit "C". In other words, the signature on the purported Will, Exhibit "C" ascribed to the testatrix is a forgery perpetrated by the 6<sup>th</sup> – 11<sup>th</sup> Defendants.

It is, trite law, that by virtue of Section 139 of the evidence Act, 2011, an allegation of fraud must be proved beyond reasonable doubt. Such must not leave room for speculation. It is proof in the realm of probability and not fantastic possibility that is required. Thus, the standard of proof of commission of crime in civil cases as alleged in the instant case, is the same as in criminal cases, beyond reasonable doubt. See: YAKUBU V. JAUROYEL (2014) 11 NWLR (PT. 1418) 205 AT 226, RATIO 1; UKEJE V. UKEJE (SUPRA); RILWAN & PARTNERS V. SKYE BANK PLC. (2015) 1 NWLR (PT. 1441) 437 AT 461, RATIO 11. OMOBORIOWO V. AJASIN (1984) 1 SCNLR 108.

It is, also the law, that forgery as alleged by the Claimant is a criminal offence and when it is an issue in any proceeding, it must be proved beyond reasonable doubt. Forgery is the noun form of the verb "forge", and to forge

means, *inter alia*, to make a copy or imitation of something in order to deceive people. It means to fabricate by false imitation.

In order to prove forgery, or that a document is forged, two documents must be produced, viz:

- (a) the document from which the forgery was made, and
- (b) the forgery or the forged document.

See: APC V. PDP (2015) 15 NWLR (PT. 1481) 1 AT 66, RATIO 21.

In this case, the 6<sup>th</sup> – 10<sup>th</sup> Defendants gave evidence in proof of the fact that the Testatrix was literate. The 8<sup>th</sup> Defendant testified that he stayed with the testatrix in Lagos when she attended adult school and driving school. He stated further that the testatrix was driving herself in 504 GL car which she later gave out to her mechanic. That the testatrix attended Bethel Bible School of Christ Apostolic Church of God Mission Inc. and was awarded a Certificate of Leadership, Exhibit “K”. He stated under cross-examination that though the testatrix did not attend any formal school, she was able to read and write in English. The evidence of the 8<sup>th</sup> Defendant was amply corroborated by the testimonies of the 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants that the testatrix was literate and attended Adult School in Lagos and Bethel Bible School in Benin City. The Defendants, except the 5<sup>th</sup> Defendant in further proof that the testatrix duly executed the Will, Exhibit “C” by signing same, tendered Exhibit “J”, a Deed of Agreement she executed in 2002 with her signature, a Quit Notice, Exhibit “L” dated the 28/2/2006, and Exhibit “M” building Plot Transfer Agreement dated 24/12/2001 containing the

signatures of the testatrix. The Defendants urged me to compare same with the testatrix signature on Exhibit "C".

On the other hand, the Claimant in proof of his claim and rebuttal of the evidence of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants and DW 1 stated that the testatrix did not give DW 1 any instruction to prepare the Will, Exhibit "C" and that her signature was forged on it. The Claimant maintained that the mother (testatrix) could not read and write during her life time, and tendered Exhibits "D1 – D7". He stated that Exhibits "D1 - D7" showed that the testatrix never signed on them or wrote any of the receipts because she was not lettered or literate to do so. The Claimant stated that Exhibits "D1 – D7", the receipts were either written by the Tenants themselves or someone literate enough to write after due consultations with and sufficient explanations to his mother. The Claimant also tendered Exhibit "N" and urged me to compare the signature therein with the testatrix signature on Exhibit "C".

Let me quickly say right away that after due consideration of the oral and documentary evidence adduced by the parties, that the Claimant failed woefully to prove the assertions contained in his pleading. Apart from the mere *ipse dixit* of the Claimant under cross-examination that he was in Nigeria in 2011 and was always visiting the mother (testatrix), he gave no cogent and credible evidence that the testatrix never gave DW 1, the solicitor instructions to prepare the Will. He equally gave no evidence of the how the persons he stated in paragraph 18 of his sworn witness deposition master minded the signing of the Will, Exhibit "C". The Claimant also failed to call the tenants or persons who wrote and signed

Exhibits “D1 – D7” on the instruction of the testatrix after consultation and sufficient explanation to her.

It is, settled law, that the question whether a person is an illiterate or not is a question of fact, which cannot be presumed. It must be established by evidence, the burden of proof being on the party who asserts. See: UBA V. MUSTAPHA (2004) 1 NWLR 9PT. 855) 443 AT RATIO 3.

In other words, the onus is on the person who objects to a document to prove that the maker was an illiterate person.

In the instant case, I therefore disbelieve the mere *ipse dixit* of the Claimant that the testatrix was an illiterate who could not read and write her signature on Exhibit “C”. Contrariwise, I believe the candid and compelling evidence of the 8<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants that though the testatrix did not attend a formal school, nonetheless, she attended Adult School in Lagos, and also attended Bethel Bible School where on completion was conferred with an award of Certificate of Leadership in 1996, vide Exhibit “K”.

It is, trite law, that documentary evidence is more reliable than oral evidence and is the yardstick or hanger for testing the veracity or credibility of oral evidence. See: EZEMBA V. IBENEME (2004) 14 NWLR (PT. 894) 617; OBIAZIKWOR V. OBIAZIKWOR (2008) 8 NWLR (PT. 1090) 551 AT 575.

In the instant case, Exhibit “K, which is a documentary evidence of the award of Certificate of Leadership to the testatrix corroborate the testimonies of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants that though the testatrix did not attend any

formal school, she attended Adult School and Bethel Bible School and was literate enough to read and write in English. I, therefore hold that the testatrix was able to read and write in English, and that she signed her signature on Exhibit "C" by writing her names. The 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants to further buttress the fact that the testatrix signed Exhibit "C", tendered Exhibits "L and M", the previous documents signed by the testatrix between 2001 – 2006. Interestingly, Exhibit "J" is a Deed of Transfer allegedly executed by the testatrix on the 9/7/2002 and witnessed by the Claimant. In other words, the Claimant signed same as a witness to the mother, the testatrix where she signed her signature by writing her names. It is curious to note that the Claimant stated that he signed Exhibit "J" first, and that the mother did not sign in his presence. It is strange to note that the Claimant could witness a Deed of Transfer not signed by the mother, the testatrix. I must say that I disbelieve the evidence of the Claimant in this regard, and reject it as completely untrue. The Claimant appears to me a blatant liar who has no regard for any iota of truth.

Learned Counsel for the Defendants except the 4<sup>th</sup> and 5<sup>th</sup> Defendants has urged me to compare the signatures on Exhibits "J, L and M", the previous signatures of the testatrix with her signature on the Will, Exhibit "C". Further, learned Counsel for the Claimant has equally urged me to compare Exhibit "N" with Exhibit "C".

It is, now firmly settled, that by virtue of Section 101 (1) of the Evidence Act 2011, a trial Judge is entitled to examine and compare a signature which is being

disputed, and is in issue. See: EZECHUKWU V. ONWUKA (2006) 2 NWLR (PT. 963) 151.

I have taken a careful look at the signatures on the aforesaid Exhibits "J, L and M" and compared them with the signature of the testatrix on Exhibit "C", the Will. Upon a calm comparison, I find apparent similarity in the character of the signature in all the Exhibits. I find and hold that the signatures were signed by one and the same person, the testatrix. I further hold that the testatrix signed the signature on Exhibit "C".

With regard to the Exhibit "N", it is important to note that the Claimant pleaded in paragraph 59 of the Amended Statement of Claim thus:

"The Claimant avers that the 7<sup>th</sup> Defendant fraudulently sold her mother's five (5) acres of land at Urhonigbe in Orhionmwon Local Government Area, Edo State and forged signatures in her mother's name, photocopy of the document for transfer shall be relied upon at the trial and the 7<sup>th</sup> Defendant is hereby put on Notice to produce same."

In paragraph 5 of the Amended Statement of Claim, the Claimant pleaded that the 7<sup>th</sup> Defendant is the sibling of the mother, Madam Alice Asemota, the testatrix.

With the greatest respect to learned Counsel for the Claimant, there is no credible evidence before this Court that it was the 7<sup>th</sup> Defendant who forged Madam Alice Asemota, the testatrix's signature on Exhibit "N". It is difficult to surmise how learned Counsel and the Claimant came to the conclusion that it was the 7<sup>th</sup> Defendant that forged the signature on Exhibit "N". No hand writing Expert was called to testify to the effect that the 7<sup>th</sup> Defendant forged the

signature of the testatrix on Exhibit "N". The parties to the Deed of Transfer did not testify before this Court that the signature of a witness (testatrix) was forged on Exhibit "N". The submission of learned Counsel in this regard is speculative and devoid of any substance.

Worse still, in paragraph 59(g), the Claimant pleaded thus:

“That the signature of late Madam Alice Asemota in the purported WILL is quite different from that on the document with which she was said to have purportedly transferred her parcel of land at Urhonigbe, Orhionmwon Local Government Area, Edo State along with the 7<sup>th</sup> Defendant.”

It is demonstrably clear, that the averments in paragraph 59 of the Amended Statement of Claim radically contradicts the facts contained in paragraph 59(g). If one may ask: is it the purported forged signature of the testatrix by the 7<sup>th</sup> Defendant as alleged by the Claimant, that learned Counsel for the Claimant wants the Court to compare with the signature of the testatrix in the Will, Exhibit "C"? It is, my view, that the alleged and unproved forged signature of the 7<sup>th</sup> Defendant on Exhibit "N" is not in issue in this case. The implication of the pleading in paragraph 59 and the submission of learned Counsel is a tacit admission that it was not the testatrix who signed the purported signature on Exhibit "N", and therefore, there is no legal basis for this Court to compare the signature on Exhibit "N" with the signature of the testatrix in the Will, Exhibit "C". It is, my view, that the issue of comparison of the signature in Exhibit "N" with Exhibit "C" is irrelevant and baseless.

Lastly, let me take the issue of forgery of the signature of the testatrix on Exhibit "C" as alleged by the Claimant.



I have earlier stated that for the Claimant to succeed that the signature of the testatrix was forged, he has to produce and tender before the Court, the genuine signature of the testatrix and the alleged forged signature. In other words, there must be a specimen signature of the testatrix and the forged signature. The Claimant in this case, did not tender such signatures before the Court. Rather, his pleadings and evidence before the Court is that the testatrix did not give instruction to DW 1 to prepare a Will and that she did not sign the Will, on the one hand, and on the other hand, he stated that the signature on the Will was forged by the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants. It is, my view that what was alluded to as evidence by the Claimant cannot be classified as evidence in proof of fraud or forgery which has been properly proved.

It is not enough for the Claimant to plead fraud or that the Will, Exhibit "C" was forged, when the evidence in support shows no such thing, and this is all the more necessary where the forgery at the base of the fraud alleged is a crime which has to be proved on correct standard, that being beyond reasonable doubt. In the result, I hold that the allegation of forgery of the signature of the testatrix on the Will by the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Defendants has not been proved by the Claimant.

I now turn to issue 3, which is whether the Claimant has established by credible evidence that he is the legal owner of the real properties devised by the Testatrix to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants? The Claimant pleaded in paragraphs 9, 10, 11, 12 and 15 of the Amended Statement of Claim that he is the owner of all the real properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants by the testatrix in the Will,

Exhibit "C". It is curious and interesting to note, that throughout the entire gamut of the evidence adduced, the Claimant failed to lead credible documentary evidence in support of his claim. The Claimant did not tender before this Court any title document(s) relating to his ownership of the aforesaid properties. He merely asserted that he sent the mother, the testatrix money to build the houses on his behalf. He did not also tender any document with which he transferred such money from the U.S.A. to the testatrix to build the houses. Worse still, the Claimant even failed to produce and tender the title documents or any document of ownership of the purported house situate at No. 80, Goody Goody Road, Benin City which he alleged he built for his father when he grew up as an adult.

Contrariwise, there is abundant evidence from the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants that the testatrix owned all the real properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. The 7<sup>th</sup> Defendant testified that the only house the Claimant built is a Duplex in the G.R.A. through the testatrix and was supervised by him. That the testatrix was a woman of great means and a philanthropist who bought and gave parcels of land to different persons vide Exhibit "M". The 7<sup>th</sup> and 8<sup>th</sup> Defendants gave evidence that the house at No. 80 Goody Goody Road, Benin City was built by the testatrix who only permitted the father of the Claimant to live there after much plea from the Claimant to the mother. The 10<sup>th</sup> Defendant gave evidence to the effect that the testatrix was a successful trader in Lagos with a big store in Balogun Market and importing goods from Cotonou. That it was the testatrix who was responsible for their upkeep while in London and U.S.A. when the Claimant was a student. The evidence of the 8<sup>th</sup> Defendant was corroborated by

the testimony of CW 1 under cross-examination when she stated that the testatrix was very industrious and had a big shop at Balogun Market, Lagos.

It is, my view, that the entire evidenced adduced by the aforementioned Defendants lend credence to the fact that the testatrix was an industrious woman who was capable of acquiring various landed properties and indeed owned the real properties she devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. In the result, I hold that the Claimant has not been able to prove ownership of the properties devised to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants by the testatrix by documentary evidence.

I note that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants set up a counter-claim in paragraph 242 of the Joint Statement of Defence.

It is, trite law, that a Counter-Claim is a cross-action with the Claimant becoming the Defendant to the Counter-Claim. Therefore, the onus of proof rests upon the Counter-Claimant. See: RAPHAEL V. EZE (2015) 12 NWLR (PT. 1472) 39. ANOZIA V. AG, LAGOS STATE (2010) 15 NWLR (PT. 1216) 207 AT 217.

The 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants testified in this case in defence of the suit and in support of the Counter-Claim. The Claimant also testified and called CW 1. I have earlier reproduced the evidence adduced by the aforesaid Defendants, the Claimant and CW 1. I do not intend to reproduce same again. I have earlier held that the Will, Exhibit "C" made by the testatrix is valid and that the testatrix had testamentary capacity to do so at the time it was executed. In this case, I note that the CW 1, one of the beneficiaries of the Will in paragraph 26 of her sworn deposition, dissociated herself from the property devised to her in

the Will, Exhibit "C". Therefore, the aforesaid property reverts to the testate Estate of the testatrix by virtue of clause 8 of the Will, which provides for the distribution of the residual Estate.

On the whole, and after due consideration of the entire evidence adduced by the parties, I hold that the Claimant has failed woefully to prove his case on the balance of probability as required by law, that is to substantiate the allegations of lack of mental capacity of the testatrix to make the Will and that the Will is invalid. Accordingly, I hereby dismiss the Claimant's claim in its entirety as devoid of merit. Further, I hold that the 1<sup>st</sup>, 3<sup>rd</sup>, 6<sup>th</sup> – 10<sup>th</sup> Defendants have by the credible evidence discharged the primary duty of establishing the testamentary capacity of late Madam Alice Asemota to make the Will at the material time. I therefore hold that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants/Counter-Claimants have successfully proved their Counter-Claim against the Claimant/Defendant.

Accordingly, I hereby enter judgment in the favour of the 1<sup>st</sup> – 3<sup>rd</sup> Defendants/Counter-Claimant in the following terms:

- (1) A declaration that the last Will and Testament of late Deaconess (Madam) Alice Asemota date the 24/1/2011 is valid.
- (2) A declaration that the property at No. 25, Omoregbe Street, Off Dumez Road, Benin City bequeathed to Mrs. Stella Esohe Amuda Salami in the Will, having been rejected by her reverts back to the Estate of late Deaconess (Madam) Alice Asemota for redistribution by the Executors to any or among the 1<sup>st</sup> – 3<sup>rd</sup> Defendants in accordance with the clause 8 of the Will.
- (3) Perpetual injunction restraining the Claimant his agents,

servants from obstructing, interfering and disturbing the 1<sup>st</sup> – 3<sup>rd</sup> Defendants from exercising and enjoying all the rights and privileges arising from and based on the Will of Deaconess (Madam) Alice Asemota dated the 24/1/2011.

I make no order as to costs.

E. O AHAMIOJE,  
JUDGE.  
14/2/2017

**COUNSEL:**

A. U. OSUNDE, ESQ. .... FOR THE CLAIMANT

O. ONOKPACHERE, ESQ. .... FOR THE 1<sup>ST</sup> – 3<sup>RD</sup> AND 6 – 11<sup>TH</sup>  
DEFENDANTS