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 7TH DAY OF FEBRUARY, 2017

BETWEEN: **SUIT NO. B/607/2012**

MR. OMOBUDE OMONUWA ……. CLAIMANT

A N D

1. **MR. BENSON EDEGBE**
2. **ELDER MATTHEW E. OGBEBOR** **……. DEFENDANTS**
3. **MR. OSAMUYI S. IRENUMA**
4. **GUARANTY TRUST BANK PLC.**

J U D G M E N T

The Claimant's claim against the Defendants jointly and severally is as formulated in paragraph 23 of the Statement of Claim filed on the 20/11/12 which reads as follows:

(a) An order directing the Okaegbe of Omonuwa Family of Benin, 2nd Defendant, to immediately convene a meeting of the Elders of the family and the children of late Pa. Wilfred Aimiyekagbon Omonuwa for the purpose of sharing in accordance with Bini Native Law and Custom the following properties of the late Pa. Wilfred Aimiyekagbon Omonuwa, that is to say:

(a) No. 173, Uselu Lagos Road, Benin City.

(b) No. 58, Urubi Road, Benin City.

(c) No. 19, Omosede-Eweka Street, Benin City.

(d) No. 27, Awo Lane, off Omoruyi Street, Benin City.

(e) No. 24, Uwaifo Street, off Siluko Road, Benin City.

(f) N12, 361,112.47 as at 16/2/12 (plus interest of 6.5% per annum from 17/2/12 to the judgment date) in GT Bank Account, the proceeds in the fixed deposit of late Pa. Wilfred Aimiyekagbon Omonuwa in GT Bank, Benin in accordance with Bini Native Law and Custom.

(b) A declaration that the properties of late Pa. Wilfred Aimiyekagbon Omonuwa not captured in his last WILL and TESTAMENT dated 20th January, 2009 is subject to Benin Native Law and Custom.

(c) An order directing the 1st and 4th Defendants to account for the over N12,361,112.47 allegedly withdrawn by the 1st Defendant from the fixed Deposit Account in Guarantee Trust Bank (G.T.B.) (4th Defendant) belonging to late Pa. Wilfred Aimiyekagbon Omonuwa, the Claimant's late father, which said amount was withdrawn without the knowledge, authority or consent of the Claimant, the eldest son of late Pa. Wilfred Aimiyekagbon Omonuwa.

(d) An order setting aside the purported sale by the 1st Defendant to the 3rd Defendant of Claimant's late father's house situate at No. 173, Uselu Lagos Road, Benin City, housing Alpha Croup of Schools which is one of late Pa. Wilfred Aimiyekegbon Omonuwa's properties which was not captured in the last WILL and TESTAMENT of Pa. Wilfred Aimiyekegbon Omonuwa which sale was purportedly made by the 1st Defendant and other unauthorized people without recourse to, and or knowledge, authority and consent of the Claimant who is the eldest child and first son of late Pa. Wilfred Aimiyekagbon Omonuwa.

(e) Perpetual injunction restraining the 3rd Defendant, his privies and or agents and or anyone whosoever claiming through him or on his behalf from laying or staking any claim whatsoever to and on the property known and called No. 173, Uselu Lagos Road, Benin City, belonging to the Claimant by inheritance.

In proof of his claim, the Claimant testified and called two witnesses. The 1st, 2nd and 4th Defendants upon being served filed their Statement of Defence, whilst 3rd Defendant filed a Statement of Defence and set up a Counter-Claim against the Claimant. The 1st Defendant testified and called a witness. The 2nd Defendant testified in his defence. The 3rd Defendant also testified in his defence, while a witness testified on behalf of the 4th Defendant. The parties in the suit tendered eight (8) Exhibits; which were admitted as Exhibits "A – H2" respectively.

For sake of convenience and good order, I shall summarize the case put forward by the Claimant in a nutshell. The Claimant, Mr. Omobude Omonuwa adopted his sworn deposition on the 10/5/2016, wherein he stated that his late father, Pa. Wilfred Aimiyekagbon Omonuwa died on the 28/1/2012, and is survived by nineteen (19) children, amongst whom he is the eldest child and son. That the late father was a successful businessman who had various landed properties in Benin City and his village. He said that after the death of his father, he discovered to his greatest consternation that the bedroom had been ransacked and all the documents to the father's properties removed by unknown persons. He stated further that he performed the final burial rites of his late father in accordance with Benin Native Law and Custom with the siblings and relations in attendance. He said that he was aware that the father made a WILL which was read in the Probate Registry, Benin City on the 21/3/2012. That there were certain of the father's properties that were not captured in the WILL,

Exhibit "A" and such properties automatically fell into intestacy whose sharing is subject to Bini Native Law and Custom. That these properties and assets not included in the WILL amongst others is– No. 173, Uselu Lagos Road, Benin City, housing Alfa Group of School. He further said that instead of allowing Bini Tradition to take its course, with the 2nd Defendant convening a meeting for the sharing of the properties, the 1st Defendant held meetings with some persons excluding him, with the aim of sharing the said properties and purportedly selling others in defiance of Bini Native Law and Custom. That when he learnt of the development, he went to the property known as No. 173, Uselu Lagos Road, Benin City and put a caveat inscription "this house is not for sale", and also put up a publication in the Nigerian Observer of 22/2/2012, I.T.V. and E.B.S. advertisement respectively. He said that in spite of the caveat on the aforesaid property, the 1st Defendant and some others of his younger siblings unilaterally, without recourse to him and the Okaegbe of the Omonuwa's family and other principal members went ahead to purportedly sell the property to the 3rd Defendant. He said that according to Bini Native Law and Custom, he being the eldest son of the late father, is entitled to pick his choice of properties first among the properties listed in paragraph 16 of his sworn deposition, which properties were not captured in the WILL before any other person. That the properties were shared in his absence, and was never invited to any meeting to share the properties. He said it is the instruction of the late father in the WILL that none of his landed properties is sold by anyone. He further said that the 1st Defendant without recourse to him purportedly withdrew the sum of N12,361,112.47 from

the late father's fixed deposit Account with the Guarantee Trust Bank Plc. which was not captured in the father's WILL. That he later wrote a letter through his Solicitors to the Bank to ascertain the status of the money in the father's fixed deposit account with the Bank.

He finally urged the Court to grant all his reliefs in paragraph 23 of the Statement of Claim.

The next witness, CW 1 is Mr. Felix Ogbebor. He adopted his sworn deposition on the 9/5/2016, where he averred that he is a member of late Pa. Wilfred Omonuwa's family, and next to the Okaegbe of the entire Omonuwa's family. He said that late Pa. Omonuwa had various landed property, and the Claimant is the eldest surviving son. That the Claimant performed the final burial rites of his late father in accordance with the Bini Native Law and Custom with his siblings and relations. He said further that late Pa. Omonuwa made a WILL which was read in the Probate Registry, Benin City on the 21/3/2012, and certain properties were not captured therein which automatically fell into intestacy whose sharing is subject to Bini Native Law and Custom. He said that by Bini Tradition, in sharing an Estate of a deceased person, the family of the deceased headed by the Okaegbe will summon a meeting of all the children of the deceased where the properties will be shared among them. That in accordance with the Bini Native Law and Custom, it was expected that the Okaegbe and the Executors will summon a family meeting to be presided over by the Okaegbe where all the children and principal members of Omonuwa's family will be physically present

and the sharing of all those properties subject to intestacy will be shared among the children; and the children will be asked to choose their choice of properties in order of seniority. He said that the movable properties have been shared among the children presided over by the Okaegbe of the family (2nd Defendant) in the presence of the 1st Defendant, the children and himself. He said that to the best of his knowledge, the sharing of the immovable properties have not been done. That nobody has the power to sell late Pa. Omonuwa's properties which has not been shared without the consent of the Okaegbe, the Claimant and other principal members of the family.

The last witness is Mr. Airuoyuwa Osayemwenre, CW 2. He adopted his sworn witness statement on the 9/5/16, wherein he stated that he is the head and Chief Custodian of the Ancestral Stool (Ukhure) of the entire Omonuwa's family. That as the head and Chief Custodian of the Ancestral Stool, the family always have recourse to him before embarking on anything. I note that the evidence of this witness from paragraphs 4, 6 – 21 is substantially the same with the sworn deposition of CW 1 which I have earlier summarized. Therefore, I need not repeat same again.

At the close of the case for the Claimant, the 1st Defendant, Mr. Benson Edegbe, testified by adopting his sworn deposition on the 25/7/16. He stated that immediately after the death of the Testator, himself and Hon. Justice C. O. Idahosa jointly applied to the Probate Registrar for the proof of the WILL, Exhibit "D2" and the grant of letters of Administration of the Estate of the deceased by

reason of their appointment as the Executors and Trustees of the WILL by the Deceased/Testator. That the WILL was subsequently proved at the Probate Registry, Benin City and they were eventually granted letters of Administration, Exhibit "D1". He stated that the late Pa. Omonuwa in the WILL divided all his properties into two categories, i.e. those he gave out himself and those that they, the Executors were authorized and/or mandated to give out which properties were captured by paragraph 36 of the WILL. That armed with the letters of Administration, Exhibit "D1" and the WILL, Exhibit "D2", himself and Hon. Justice C. O. Idahosa in the capacity as Executors and Trustees promptly administered the Estate of the deceased which included the properties captured in paragraph 36 of the WILL which specifically directed them, as Executors/Trustees to share same among the children. That the Claimant not satisfied with the way they administered the Estate with regard to the sharing and apportioning of the residue of late Pa. Omonuwa, petitioned the Oba's Palace wherein they as Executors, the Claimant, and eminent members of the family of the deceased were all summoned to appear before His Royal Majesty, the Oba of Benin, at the instance of the Claimant. At the end of the deliberation at the palace, based on the investigation by the Panel of Chiefs led by Chief I. B. Obaseki, the Omo N'oba ratified their decisions as the Executors in the sharing and apportioning of the residue of the Testator, and particularly resolved that the property which is situate at No. 173, Uselu – Lagos Road, Benin City is not the traditional right of the Claimant to inherit and the Executors disposed of the properties properly and in

line with Bini Native Law and Custom on inheritance. The decision of the Oba was admitted as Exhibit "D4". He stated that the property situate at No. 173,Uselu – Lagos Road was sold and/or transferred to the 3rd Defendant by the Executors/Trustees in exercise of their rights of Administration of the Estate of the deceased, which proceeds were subsequently shared among all the children of the deceased including the Claimant. He stated that the sum of N12 Million Naira referred to by the Claimant in Guaranty Trust Bank at all times formed part of the Estate of the deceased from which the Probate Registrar assessed and deducted the appropriate death duty before the Probate granted letters of Administration of the Estate to the Executors. He stated that he acted purely in his capacity as an Executor and Trustee of the Estate. He further stated that at the end of the sharing of the properties of the deceased among the children including the Claimant, he wrote a Report, Exhibit "D3" in his capacity as an Executor which he presented to the Oba of Benin as a resume of the facts of the sharing of the properties of the deceased. He finally urged the Court to dismiss the Claimant's suit.

DW 1, Friday Omonuwa adopted his sworn Statement on the 25/7/16, wherein he averred that he is one of the sons of the late Pa. W. A. Omonuwa and the first male child of the mother who had five children for the late father. He stated that upon the death of their father, the Claimant did everything to see that the 1st Defendant did not preside over the burial as the Okaegbe by seriously objecting to it in one of the early meetings held by the family. That the Claimant put forward the 2nd Defendant who is not a member of the Omonuwa's family as

Okaegbe, and himself and others objected, but the 1st Defendant said he would concede the position of Okaegbe for the burial purpose so as to make peace even though it was his right to be Okaegbe. He stated that the only part of the WILL made known to all the children at a meeting by Mr. A. A. Omorodion, the father's solicitor was the request by the father as to the place he would be interred, but the Claimant openly told everyone that he would not bury him there but elsewhere, which is exactly what he did against their father's WILL. He stated that after the final burial of their father, the Probate Registrar granted letters of Administration to the Executors. That the properties not listed in the WILL were shared by the Executors to the children. That all the children were satisfied with the sharing done by the Executors and this was approved by them at the meeting held on the 24/6/2012, at Motel Benin Plaza. That the meeting was presided over by Hon. Justice C. O. Idahosa, the 1st Executor, which was called at the instance of the Claimant and Dr. Jude, but both of them failed to attend upon realization that they were on their own, and all the other children were in support of the Executors. He stated that the properties which the Claimant is asking for an order that the Okaegbe should share have been duly shared by the Executors who are authorized by the WILL to share them. That the Claimant has been collecting rents from the car Dealers he put on the property at No. 58, Urubi Street, Benin City, which was shared to him by the Executors. That the 2nd Defendant is not a member of the Omonuwa's family.

The 2nd Defendant adopted his sworn deposition on the 26/7/16, wherein he stated that he is the Okaegbe of the entire Omonuwa's family. He stated that

the Claimant as the eldest surviving son of late Pa. Wilfred Omonuwa performed the final burial rites in accordance with the Bini Native Law and Custom with his siblings and relations. That he is aware that the Testator made a WILL which was read on the 21/3/2012, as some of his movable and immovable properties including landed properties and money in his Bank Accounts were specifically excluded from the entire contents of the WILL with a residuary devise clause and a mandatory instruction that those properties be shared among his children. He said that the property situate at No. 173, Uselu-Lagos Road, Benin City (known as Alpha School Building) is one of the properties specifically excluded from the content of the last WILL. That by the Testator's residuary devise, he did not intend any of his properties to be sold, as his intention was for his properties not specifically mentioned in the last WILL to be shared among his children and not to be sold by the Executors of his last WILL. He said that those moveable and immoveable properties which were not specifically included in the WILL form part of his residuary Estate which sharing is governed by the Bini Native Law and Custom. He further said that at the residence of the Testator, in the presence of the 1st Defendant and his children, he as the Okaegbe of the Omonuwa's family presided over the sharing of some moveable properties (excluding the monies in the Testator's fixed Deposit in Guarantee Trust Bank) which form part of the residuary Estate. That to his knowledge as the Okaegbe, before any of the immoveable properties that form part of the residuary Estate can be shared among the children, it is expected of him as the Okaegbe and other interested parties to call for a meeting at the Testator's house where all the children,

principal members of the family will be physically present for the sharing. He said that to his knowledge some of the moveable and immovable properties which form part of the residuary Estate of the Testator have not been shared among the children (Beneficiaries). That all efforts to call for a meeting to preside over the sharing of the properties to them were delayed by the actions of the Executors who refused to release the immoveable properties' documents for proper sharing. He said that nobody has power to sell any of the properties that form part of the residuary estate of the Testator. That the "mandatory instruction clause" in the WILL did not empower anyone to sell nor the Bini Tradition empower anyone to sell without the consent of himself, the children (Beneficiaries), the principal member of the family and interested persons. That the palace resolution , Exhibit "D3" did not ratify the decision of the Executors to sell part of the properties that form the residuary Estate nor did the palace decision legalized the illegal sale of the property situate at No. 173, Uselu-Lagos Road, Benin City which form part of the residuary Estate. He said that the sum of N12, 361. 112. 47 that form part of the moveable properties of the late Pa. W. A. Omonuwa has not been shared by him.

The 3rd Defendant, Mr. Osamuyi S. Irenuma adopted his sworn deposition on 27/7/16, wherein he stated that he is the bona-fide owner by valid sale of the property known as No. 173, Uselu-Lagos Road, Benin City. He said further that the property originally belonged to the late Pa. W. A. Omonuwa who died testate on the 28/1/12, whose last WILL and Testament was proved in the Probate Division of the High Court, Benin City, while the Executors of the WILL were

granted letters of Administration to administer the real and personal property of the Testator. That the Executors were by the grant of Letters of Administration vested with the legal Estate in the real properties captured in the WILL and those not specifically mentioned in the WILL for the benefit of the beneficiaries. He said that the Executors in exercise of their power under the law shared the properties not captured by the WILL according to the recognized gates, and permitted the Claimant as the eldest son of the Testator representing his gate to take the property meant for his gate amongst the properties due for sharing by the personal representatives not captured by the WILL. He stated that he got to know that the property known as No. 173, Uselu-Lagos Road, Benin City had been put up for sale by the Executors with the consent of all the beneficiaries. He located the Executors and inquired from them and some of the beneficiaries and they confirmed that the property was for sale without any legal clog. He demanded for all the title documents to facilitate purchase and was shown all the relevant documents. He negotiated with the Executors/Administrators to the knowledge of the beneficiaries and acquired the legal Estate in the property on the 4/8/2012 upon payment of the agreed sum. He thereafter executed a Deed of Conveyance, Exhibit "E" with the Executors, and was given all the title documents including a photocopy of the last WILL of the Testator. That he took possession of the property from the Executors on the 4/8/2012, and took physical control of same on the 2/1/13 and started to operate his transport business and mechanic workshop for the repairs of his vehicles in the premises. He engaged his solicitors and caused a letter to be written to the Tenant intimating the school

authority that he was the owner, and was not desirous of renewing any new term in their favour. He stated that the Claimant took the matter before the palace of the Oba of Benin for resolution accusing the Executors of denying him his right under the WILL, and the Oba of Benin constituted a committee to look into the matter. That the Oba of Benin gave a verdict that the property he bought did not belong to the Claimant by any customary right and the Claimant should abide by the decision of the Executors. He finally urged the Court to dismiss the Claimant's claim and grant his Counter-Claim.

The 4th Defendant testified through his employee, Mr. Osakpamwan Oviawe, DW 2. He testified that Pa. Wilfred Omonuwa had a fixed Deposit Account with the 4th Defendant. That the fixed Deposit Account as at 16/2/2012 which has since been liquidated was to the tune of N1, 501, 346. 00 only and not N12, 361,112.47 as averred by the Claimant. He stated that the said sum of N12, 361, 112. 47 was not withdrawn from the fixed Deposit Account as the 4th Defendant, does not allow withdrawals on a deceased customer's account. He said that the Executors of the Testator applied for the opening of an Estate Account which was granted by the 4th Defendant, vide Exhibit "G". That upon the grant of the Application for the opening of an Estate Account by the 4th Defendant, the closing balance of the Fixed Deposit Account as at 16/5/2012 being N1, 530, 586. 39 were moved to the personal account of the Testator which was in credit to the tune of N3, 603, 357. 79. He stated that it was the Estate Account of the Testator that transactions were allowed by the lawful Executors

and not the Fixed Deposit Account as the Fixed Deposit no longer exist. The statements of Account were tendered and admitted as Exhibits "H1 and H2".

At the close of 4th Defendant's case, and in compliance with the Rules of Court, parties filed their written addresses. The 1st Defendant's written Address was filed on the 10/8/2016.

J. O. Aghimien (SAN), of learned Senior Counsel for the 1st Defendant, in his written Address gave an introduction, brief statement of the Claimant's case, summary of evidence led by the parties and formulated three issues for determination thus:

1. Having regard to the Writ and Statement of claim filed before this Honourable Court, whether the Claimant has the *locus standi* to institute this action?

2. Whether the Claimant's suit as constituted is competent?

3. From the totality of the evidence led, whether the Claimant is entitled to the Judgment of this Honourable Court as per his Reliefs?

Arguing issue 1, learned Senior Counsel submitted that the Claimant lacks the required *locus standi* to institute and prosecute this suit against the 1st Defendant who is sued in his personal capacity. He referred to paragraphs 4 (a), 15 and 16 of the 1st Defendant's written Statement on Oath.

He further submitted that at law, the legal title of a Testator's property, both real and personal devolves, notwithstanding his testamentary disposition on his personal representative for the purpose of administration of his estate. That the dispositions contained in the WILL take effect in equity only. That is to say, the devisee or legatees (i.e. the beneficiaries) only have rights enforceable in a

Court against the personal representative as the legal owner of the property upon his death. That the Executors/Administrators of the Estate, 1st Defendant and Hon. Justice C. O. Idahosa are personal representatives of the legal owner of the property, and only answerable to the Probate Registrar who granted them authority to administer the estate. That the devised properties in the WILL require the assent of the personal representative to vest it in the devisee or beneficiary, and cited JAMES CHIBUEZE UNOKA & 2 ORS. V. MRS. VICTORIA KANWAULIA AGILI & 3 ORS. (2007) 11 NWLR (PT. 1044) 122 AT 141 PARAS C – D, G – A.

He posited that the Claimant has failed to show the particular right or interest he has over the Executors and Trustees so appointed by the Testator to administer his estate as contained in his last WILL. That the law is settled that a beneficiary to a Will is not entitled to sue for any property devised to him when the said property is still vested in the Executors and/or Executrix of the WILL, and cited the cases of OJIKUTU V. FELLA 14 WACA 728; AND OGUNDIPE V. ODUWAIYE (2014) 6 NWLR (PT. 1404) 427 AT 429.

He argued that the list of the real properties of the Testator over which the Executors were granted letter to Administer are captured therein. That paragraph 36 of the WILL, the residuary clause gave the Executors the mandate to share the real properties not specifically mentioned in the WILL to the children of the Testator. That the mandate could not have been referring to or directed at any person or authority not provided for in the WILL such as the Okaegbe or Elders of the deceased, but to his Executors who in law are his recognized

personal representatives on earth at his death, and referred to Sections 3 (1 – 3) and 4 of the Administration of Estate Law Cap. 2 Laws of Bendel State as applicable in Edo State. That there is no known case of a Benin Custom where the Executors or Administrators of a Bini Estate jointly share the property of the deceased.

He further argued that it is very clear that no vesting of assent is made by the Executors of the WILL on the Claimant in respect of the property at No. 173, Uselu-Lagos Road, Benin City amongst other listed in paragraph 16 of his written deposition. That he cannot lay claim to the property as no interest whatsoever has been transferred to him. That it is clear that the Claimant is not challenging the WILL, but having taken possession of what was devised and bequeathed to him under the WILL, like Oliver Twist, wants to make his choice from the residue, being the eldest son of the Testator hence the Oba of Benin in his wisdom advised him to be content with what was given to him.

On the definition of *locus standi*, he cited the cases of EJIWUNMI V. COSTAIN (WA) PLC. (1998) 12 NWLR (PT. 576) 149 AT 152, AND EZECHOGBO V. GOVERNMENT OF ANAMBRA STATE (1990 9 NWLR (PT. 619) 386 AT 387. On the pre-conditions that determine whether a person has *locus standi*, he cited ATAHIRU V. BAGUDU (1998) 3 NWLR (PT. 543) 35; ELENDU V. EKWOABA (1995) 3 NWLR (PT. 386) 704 AT 740 PARAS. E –G. On when an action is said to be justiciable, he referred to the Black's Law Dictionary 6th Edition and OWODUNNI V. REGISTERED TRUSTEES OF CELESTIAL CHURCH OF CHRIST & ORS. (2000) 10 NWLR (PT. 674) 314 AT 366 PARAS. B – H.

He submitted that by Sections 3 and 40 of the Administration of Estate Law, the Claimant is not entitled to his claim. That the import of Section 3 (1 – 3) of the law is that the estate of a Testator devolves automatically on his personal representative who are deemed in law as his heirs and assigns and not on the Okaegbe, as the Claimant wants the Court to believe, and relied on OKONYIA V. IKENGAH (2001) 2 NWLR (PT. 697) 336 AT 361 – 362 PARAS. G – C. That the real estate of a Testator only vests in the beneficiary of the estate (such as the Claimant) when the personal representative/Executor of the estate assent in writing to the vesting of the estate in that beneficiary. That a beneficiary cannot claim a share in the estate of the deceased testator until the Executor(s') assent has been given to vest the property in him, and cited UNOKA V. AGILI (2007) 11 NWLR (PT. 1044) 122 AT 141 – 142 PARS. H – A, 142 PARAS. B – E; UDENSI V. MOGBO (1976) 7 SC 1 AND DUKE V. ADMIN. GEN. C.R.S. (2010) 15 NWLR (PT. 1217) 442 AT 454 PARAS. C – D.

He posited that it is trite law that the estate or property of a person who died testate is to be managed by the designated or appointed Executors/ Administrators of the WILL. That where a person not so appointed seeks or takes steps to sell, lease, acquire or otherwise deal with any part of the deceased estate, the basic effect is that the person will in the eyes of the law be regarded as an *Executor-de-son-tort*. That an *Executor-de-son tort* is a person who meddles with a deceased's estate without being appointed as an Executor in the deceased's WILL or without a grant of representation by the Court, and cited AUGUSTINE UDENSI V. ALICE OMOGBO (SUPRA) AT 20. That a beneficiary will

also be referred to as an *Executor-de-son-tort* who without legal authority take upon himself the responsibility to act as an Executor by attempting to administer the deceased's property to the detriment of the beneficiaries and creditors to the estate, and cite UNOKA V. AGILI (SUPRA).

He submitted that the Claimant herein constituted himself into an *Executor-de-son-tort*, having unlawfully intruded into the administration of the Testator's WILL by entering caveat inscription, "This House is not for sale" at No. 173, Uselu-Lagos Road, Benin City, publishing in the Nigeria Observer, Exhibit "B", by placing on ITV and EBS paid adverts and by his letter to the 3rd Defendant's Solicitor. He referred to paragraphs 18 and 19 of the Statement on Oath of 20/11/2012. He contended that the only portion in the WILL where the Claimant can be said to have an enforceable right is as stated in paragraph 39 of the WILL. He referred to the Claimant's evidence under cross-examination and cited ADMIN. EXEC. ESTATE, ABACHA V. EKE-SPIFF (2009) 7 NWLR (PT. 1139) 97 AT 133 PARA. D.

It was submitted that the action of the Claimant should be visited with sanction. That the effects and liabilities of an *Executor-de-son-tort* are grave and numerous for the wishes of a deceased must be respected, more so one who put the offers of his estate in order by making a WILL and appointing the attendant executors. That it is trite that these liabilities extend to named beneficiaries of the WILL, unauthorized persons and even the appointed executors. He referred to Order 53 Rules 3 of the Edo state High Court (Civil Procedure) Rules, 2012. He urged the Court to dismiss Claimant's suit with substantial costs as he is a

meddlesome interloper without the requisite *locus standi* to institute and prosecute this action.

On issue 2, learned Senior Counsel submitted that the Claimant has failed to demonstrate how the intention of the Testator in the validly made WILL was not carried out by the Defendants sued in this case who are not the appointed Executors, Administrators and Trustees of the estate.

He posited that a calm perusal of the Statement of Claim filed in this case will reveal that there can be no known Defendant in law in this case as none of the Defendants as presently constituted before this Honourable Court are in a position to provide answers to the issues raised in the Writ and Statement of Claim. That this is so because none of the Defendants herein, particularly the 1st Defendant owe(s) the Claimant any obligation under the WILL.

He argued that the 1st Defendant is sued in his personal capacity as a member of the family and not as an Executor, Administrator or Trustee of the Testator's estate, and referred to paragraph 2 of the Statement of Claim and written Statement on Oath.

He posited that the law is trite that the Administrators and/or Executors of an estate where they exist are beyond argument natural person who can sue and be sued in respect of the estate they administer. That such natural persons must sue or be sued in their respective names as representing the estate to sustain the action, and cited SHITTA & ORS. VS. LIGALI & ORS. (1941) 16 NLR 23; ADMINISTRATORS/EXECUTORS OF THE ESTATE OF ABACHA V. EKE-SPIFF (SUPRA) AT 125 PARAS. D – E.

He further posited that the Claimant failed woefully to meet this strict requirement of the law when he sued the 1st Defendant in his own name or in his personal capacity without indicating the legal capacity he is being sued. That this fundamental defect automatically deprives the 1st Defendant of the legal capacity to defend the action. That the sale sought to be set aside on its face was entered into by the Executors and Administrators in their official capacity in which they also applied to the 4th Defendant in respect of the Testator's Estate. That the legal effect of this is that the suit as constituted herein is incompetent as neither the Executors of the estate nor the Probate Registrar was sued, and cited ADMINISTRATRORS/EXECUTORS ESTATE, ABACHA V. EKE-SPIFF (SURPA) AT 126 PARA. E – G.

He submitted that where there are no proper parties before the Court, as in this case, the Court is bereft of the requisite jurisdiction to entertain the suit, and cited PLATEAU STATE V. A.G. FEDERATION (2006) 3 NWLR (PT. 967) 348 AT 423 PARAS. B – C; AND AMUDA V. OJOBO (1995) 7 NWLR (PT. 406) 170. That all the persons sued by the Claimant in this suit as presently constituted have no subsisting interest in the subject matter of the dispute. That the WILL having been executed according to the wishes of the Testator and the properties therein lawfully disposed off, the Claimant has no business suing the Defendants in this suit. That there are no proper parties before this Honourable Court and urged the Court to so hold, and relied on OLORIODE & ORS. V. OYEBI & ORS. (1984) 15 NSCC 286 AT 297.

He submitted that the action was wrongly constituted as the reliefs sought in the suit challenges the power of the 1st Defendant to deal with the properties as one of the Executors of the WILL of the Claimant's father, yet he was never sued as such. That "Exhibit "A" gave the 1st Defendant power to deal with the properties of the testator and nothing more. That having not been sued as Executor of the estate of late Pa. Wilfred Omonuwa, the suit is incompetent. He referred to 1st Defendant's evidence, and cited ADELAKUN V. ORUKU (2006) 11 NWLR (PT. 992) 625 AT 646.

He further submitted that there is no evidence on record that established any case against the 1st Defendant. That the law is settled that a Claimant can not sue a Defendant against whom he has no cause of action. That the Claimant can only sue a Defendant where there is a cause of action against the defendant, and cited MILITARY ADMINISTRATOR, AKWA IBOM STATE V. OBONG (2004) 1 NWLR (PT. 694) 214 AT 236 PARA. F – G. He urged the Court to strike out the suit for being improperly constituted or in the alternative, strike out the name of the 1st Defendant as the action is unsustainable against him.

On issue 3, learned Senior Counsel submitted that from the pleadings and evidence led, assuming without conceding that the Claimant has the requisite *locus standi* to bring this action and same is properly constituted, the Claimant is not entitled to the reliefs sought before this Honourable Court.

That the law is settled that he who asserts must prove. That the onus rests squarely on the Claimant to establish by way of cogent and credible

evidence that the properties which are purportedly not specifically captured in the WILL, Exhibits "A" or "D1" despite the residuary clause therein are liable to be shared amongst the children of the deceased Testator in accordance with the Benin Native Law and Custom and that he should preside over the sharing being the eldest son.

He argued that the Claimant who alleged that the non-inclusion of the properties in the WILL fail woefully to supply any evidence whatsoever that the said properties were not indeed contained in the WILL or that the Testator had any contrary intention. That the residuary clause aptly and conspicuously stated in paragraph 36 of the WILL, that the Executors and Trustees of the estate step into the shoes of the Testator to administer same in line with the powers vested in them in paragraphs 2, 3 and 5 of the WILL. He referred to the evidence of CW 1 and CW 2, and submitted that the Claimant's grouse that he was not allowed to make his choice first from the properties not captured in the WILL is not a justiciable wrong since there are no properties of the Testator that is not captured in the WILL. That it is well settled law that a person who has elected to make a WILL has removed the affairs of the administration of his Estate from the purview of Customary Law.

He submitted that the properties which the Claimant alleged in paragraph 16 of his written deposition as the properties not captured in the WILL are clearly listed as numbers 13, 20, 21, 22 and 23 in Exhibit "D1". That the Claimant's allegation of non inclusion of these properties in the WILL does not arise as the properties are actually captured in the WILL.

He further submitted that Section 14 of the Administration of Estate Law of Bendel State now applicable to Edo State mandatorily requires a personal representative to Exhibit inventory and accounts of the estate under oath wherever he is lawfully required to do so by the Court. That the Executors have the primary duties of locating and gathering all assets of the deceased before they set out to administer same.

He contended that the Executors are also empowered by law to pay death duties or levies which is normally 10% of the total property of the estate assessed. That the Claimant has not given any evidence of how much he contributed or paid to the Probate Registry (which was curiously not also joined in this suit) for the grant of the real properties. That on the schedule of fees attached to the letters of Administration, the Executors/Trustees of the estate paid the sum of

N9, 350, 205.00 as the legal fee for the grant of probate. That this was neither disproved not contradicted by pleadings or evidence led at the trial of this suit. He referred to paragraph 5 of the WILL and the Claimant's evidence under cross-examination.

It was submitted that the Claimant read into the WILL what is not there by stating that the Testator stated in the WILL that none of his properties should be sold. That there is nowhere in the WILL where the Testator so directed. It was further submitted that the Court cannot on the face of cogent/credible evidence, both documentary and otherwise of the Testator's testamentary intention as set

out in the Brief submitted at the Oba's Palace, the unchallenged evidence of Mr. Friday Omonuwa, (who is also a beneficiary of the Testator's estate) and even the evidence of the 3rd Defendant under cross-examination that the Testator before his death was desirous of selling the property at No. 173, Uselu-Lagos Road, shut its eyes and instead engage in speculation and conjecture. He referred to paragraph 39 of the said WILL.

On the allegation of forgery of Exhibit "D4" by the Claimant, he submitted that no issue of forgery was raise and/or particularized anywhere in the Claimant's Statement of Claim and issues were not joined thereupon. That parties are bound by their pleadings and the issue of forgery/fraud must be specifically pleaded and proved by the party alleging same, and cited FINNIH V. IMADE (1992) 1 NWLR (PT. 219) 511; AND ADENLE V. OLUDE (2002) 9 – 10 SC 124.

He posited that the evidence of the Claimant hinges on nothing in this regard, and therefore wholly irrelevant to substantiate this afterthought, and indeed, his case and urged the Court not to countenance same.

Learned Senior Counsel submitted that the Claimant's suit discloses no cause of action against the 1st Defendant. That in determining whether a cause of action has been disclosed against a defendant in any matter, the Court is only entitled to consider the contents of the Statement of Claim and no other document(s), and cited SEVEN-UP BOTTLING CO. V. AKINWARE (2011) 15 NWLR (PT. 1270) 302. On the definition of the cause of action, he cited EGBE V.

ADEFARASIN (1987) 1 NWLR (PT. 47) 1; AND RINCO CONSTRUCTION CO. LTD. V. VEEPEE INDUSTRY LTD. (2006) 17 WRN 119.

He submitted that the Claimant has not established any legally cognizable and enforceable grievance against the 1st Defendant worthy of this Court's adjudication, and urge the Court to so hold.

He contended that the Claimant's case is vague, generic and speculative in that apart from the fact that no reference is made to any area when and/or where the 1st Defendant acted in his personal capacity to purportedly deny him what was devised to him in the WILL, there is also no proof of same on the printed record. That apart from the ipse dixit evidence of the Claimant that he is entitled to the reliefs sought by him, there is no iota of proof that he is entitled thereto, particularly in the face of the existence of an unchallenged valid WILL and the grant of probate thereupon, and cited YOUNG V. CHEVRON (NG.) LTD. (2014) ALL FWLR (PT. 747) 620 AT 641 – 642.

He submitted that it is trite that to be entitled to the grant of the reliefs sought by him as per his claim before the Court, a Claimant must sink or swim on the strength of his own case. That the concomitant effect thereof is that in the instant case, the Claimant's claim must fail as there is nothing weighty about it to tilt the scale of justice in his favour as per his claim before the Court. That he also failed to establish the right of the purported Okaegbe whom he curiously and mischievously joined in the this suit as the 2nd Defendant over the testator estate of his late father including the account with the 4th Defendant and/or his distinct

legal rights to any of the properties listed in paragraph 16 of his claim as well as the money purportedly in the coffers of the 4th Defendant.

On the whole, he urged the Court to resolve this issue in favour of the 1st Defendant and dismiss all the reliefs sought by the Claimant.

The 2nd Defendant written address was filed on the 18/8/2016. C. N. Ezihe, Esq. of leaned Counsel for the 2nd Defendant in his written address gave an introduction, a brief statement of relevant facts, summary of evidence led by the parties and their witnesses and formulated two issues for determination thus:

1. Whether the Claimant's late father's properties not specifically captured in his last WILL and Testament are subject to Bini Native Law and Custom of inheritance? and

2. Whether the Claimant is entitled to the relief sought against the 2nd Defendant?

Arguing issue 1, leaned Counsel submitted that the historic Bini Native Law and Custom of inheritance of a late Bini man who domiciled in Benin and was buried according to Bini Native Law and Custom has been settled in plethora of authorities, and cited IDEHEN V. IDEHEN (1991) 6 NWLR (PT. 198) 382 AND LAWAL-OSULA V. LAWAL-OSULA (1995) 9 NWLR (PT. 419) 259.

He contended that certain properties of the testator not mentioned in the WILL were according to clause 36 of the last WILL and Testament of the late Pa. Wilfred Aimiyekagbon Omonuwa should be shared among his children is one of the fundamental issues before the Court to decide. That in the absence of any clause empowering the executors to share or to sell any of the properties,

whether it is the duty of the Okaegbe to share same in accordance with the Bini Native Law and Custom?

He posited that the standard of proof in this case is on the preponderance of evidence or on balance of probability. That it is trite law that he who alleges must prove, and referred to Sections 131 and 132 of the Evidence Act, 2011. It was submitted that Sections 16 and 17 of the Evidence Act, 2011 provides for the proof of customary law which the 2nd Defendant has complied with by his unchallenged and uncontradicted oral evidence that it is the Okaegbe who will call the Executors to a meeting for the sharing of those properties not captured in the WILL among the children. That it is on record that the 2nd Defendant did not participate in the sharing of the said properties and was not part of those who sold No. 173, Uselu-Lagos Road, Benin City to the 3rd Defendant.

He submitted that the principle of law is that unchallenged and uncontradicted evidence ought to be accepted by the Court as establishing the facts contained therein. That where evidence given by a party in a proceeding was not challenged by the opposite party who had the opportunity to do so, it is always open to the Court seized of the proceedings to act on the unchallenged evidence before it, and cited OGUNYADE V. OSHUNKEYE (2007) 15 NWLR (PT. 1057) 218 AT 227 RATIO 5; AND ODULAJA V. HADDAD (1973) 11 SC 357.

He argued that the 2nd Defendant in paragraphs 4 – 7 of his Statement of Defence and paragraphs 11 – 12 of his Statement on Oath complied with Section

16, 17, 131 and 133 of the Evidence Act, 2011 as well as discharging the burden placed upon him by law.

He urged the Court to find and hold that in the absence of any clause empowering the Executors to share or sell any of the properties not specifically mentioned in the WILL, the properties should be shared in accordance with the Bini native Law and Custom.

On issue 2, learned Counsel submitted that the burden of proof remains on the Claimant to prove his case and succeed only on the strength of his case. He referred to Claimant's evidence under cross-examination and 2nd Defendant's evidence. That the 2nd Defendant was not connected with the sharing of the said properties not captured in the WILL, and therefore ought not to have been sued by the Claimant. He urged this Honourable Court to make an order to convene a meeting of the elders of the family and the children of the late Pa. Wilfred Aimiyekagbon Omonuwa for the purpose of sharing the said properties. That the 2nd Defendant cannot on his own convene a family meeting. He finally urged the Court to dismiss relief (a) in paragraph 23 of Claimant's Statement of Claim as the 2nd Defendant cannot convene a meeting except it is ordered by the Court.

The 3rd Defendant's written address was filed on 16/8/2016. M. O. Iguodala, Esq. of learned Counsel for the 3rd Defendant gave an introductory facts, pleadings of the parties and distilled 4 issues for determination thus:

i. Whether in the entire circumstances of this case, the last WILL and Testament of the late Pa. Wilfred Aimiyekagbon Omonuwa made on the 20th day of

January, 2009 and duly probated did not vest the residuary estate in the Executors/Trustees?

ii. Whether the letters of Administration (Will annexed) granted by Court to the Executors/Trustees of the last WILL and Testament did not vest the legal interest in the estate of the deceased testator on the Executors/Trustees/Personal Representatives as administrators and empower them to administer the Estate of the Testator to the exclusion of the vestiges of Bini Native Law and Custom?

iii. Whether the 3rd Defendant acquired a valid title in the property at No. 173, Uselu-Lagos Road, Benin City sold to him by the Executors/Trustees under the authority of the enabling letters of administration (Will annexed) for the benefit of the beneficiaries, being one of the legacies captured by the Will though not specifically devised in the WILL? and

iv. Whether in the circumstances of this case the 3rd Defendant is not entitled to the benefit of his Counter-Claim?

Arguing issue 1, learned Counsel submitted that the Claimant admitted that he has no quarrel with the WILL made by his late father, but filed this suit because the property at No. 173, Uselu-Lagos Road, Benin City and some other properties constituting the residuary Estate not specifically devised by the WILL were not shared according to Bini Native Law and Custom. He contended that what has fallen for interpretation in this case is the construction of the last WILL and Testament made by the Testator and the effect to be accorded the instructions contained in the WILL, and cited IDEHEN V. IDEHEN (1991) 6 NWLR (PT. 198) 382 AT 421 PARA. F. On the definition of a WILL, he referred to the Back's Law Dictionary 8th Edition by Bryan A Garner at page 1628.

He further contended that the last WILL and Testament of late Pa. Wilfred Aimiyekagbon Omonuwa for all intents and purposes contained a residuary clause which captured the properties not specifically devised by the WILL but which the WILL actively directed to be shared amongst the same beneficiaries of the WILL in keeping with the expressed wish and intention of the testator. That it is the law that the residue is vested in the Executors/Trustees of a WILL for same to be applied as directed. That the provision of a WILL which is a legal document must be read as a whole and not in parts to discern the intention of the testator with a view to giving the WILL the necessary effect, and cited DANTATA JNR. V. MOHAMMED (2012) 14 NWLR (PT. 1319) 122 AT 160; AND MOHAMMED V. MOHAMMED (2012) 11 NWLR (PT. 1310) 1 AT 34 – 35 APRAS. G – A.

He finally submitted that the WILL by necessary implication vested the Executors/Trustees with the power to be applied as directed in clause 36 of the WILL.

On issue 2, learned Counsel submitted that the Executors/Trustees by the letters of Administration have been vested with an unlimited power of control and management of the estate of the deceased testator which includes real and personal properties. That the letters of Administration tendered in this case as Exhibit "D1" on the face of it clearly vested the Executors/Trustees power over real and personal properties of the deceased Testator including the devises not specifically given to beneficiaries in the WILL. He further submitted that the absolute power over the estate of Pa. Wilfred Aimiyekagbon Omonuwa is vested

in the Executors/Trustees as personal representative of the deceased testator, and cited ATUANYA V. ATUCHUKWU (2014) 16 WRN 91 AT 99. That for the purpose of this address, the property at No. 173, Uselu-Lagos Road, Benin City which forms part of the real property of the deceased testator captured in clause 36 of the WILL but not specifically devised to any beneficiary in the WILL is for all intents and purposes a property under the power and control of the Executors/

Trustees who as personal representatives of the deceased testator are his heir at law and seized of the legal interest in the property under the power of the devolution of real estate of a testator. He referred to Section 3 (1), (2) and (3) of the Administration of Estate Law of Bendel State, 1976. He contended that the law is a radical law which operates irrespective of whether or not there exist a WILL. That Section 2 defined personal representation to include executor of a WILL or Administrator to whom letters of Administration has been granted, and cited UNOKA V. AGILI (SUPRA), AND DUKE V. ADMIN-GEN; C.R.S. (2010) 15 NWLR (PT. 1217) 442 AT 454.

He submitted that the claim of the Claimant that the property at No. 173, Uselu-Lagos Road, Benin City is not captured by the WILL of his late father and ought to be shared under the Benin Native Law and Custom flies against the provision of the law and therefore unsustainable. That this is more so given that a letter of Administration exist to exclude the vestiges of Bini Native Law and Custom in the devolution of the property.

In relation to issue 3, learned Counsel submitted that the Administrators as personal representatives of the deceased testator had the power in the circumstance to sell for the benefit of the beneficiaries having duly obtained letters of Administration, and cited IBRAHIM V. OJOMO (2004) 4 NWLR (PT. 862) 89 AT 108 PARAS. E – G, 109 PARAS. D – F, ARIJE V. ARIJE (2013) 13 NWLR (PT. 1264) 265 AT 289 PARA. C; AND BAKARE V. BAKARE (2012) 16 NWLR (PT. 1325) 29 AT 45 PARAS. D – E.

He submitted that the 3rd Defendant bought without notice of any existing legal interest. That from the facts of the case and the evidence of the Claimant, he is not claiming any personal legal interest in the property at No. 173, Uselu-Lagos Road, Benin City nor can the said property be said to be family property. That the property having been acquired from those vested with the legal interest in the property, the sale cannot be impeached. He posited that the 3rd Defendant is a bona-fide purchaser for value without notice, and relied on BEST (NIG.) LTD. V. B. H. (NIG.) LTD. (2011) 5 NWLR (PT. 1239) 95 AT 120 PARAS. C – D. He referred to the evidence of the 1st Defendant, and submitted that the Executors/Trustees are the persons vested with the legal interest in the property at No. 173, Uselu-Lagos Road, Benin City, empowered to protect the said property and competent to file any suit to protect the property, and cited UNOKA V. AGILI (SUPRA) AT 141 PARAS. C – D, G – H, 143 PARAS. B – E.

He posited that the Claimant has no *locus standi* to file this suit having regard to the fact that he is not an Administrator of the estate of his late father. He referred to the Claimant's evidence, Exhibit "D4" and Exhibit "D3".

He submitted that there was a customary arbitration before the custodian of the Bini Native Law and Custom which is binding on the parties and operates as estoppel. That the Claimant claims that he was short changed and that Exhibit "D4" was altered but he did not plead forgery in anyway, and no step was taken to set aside Exhibit "D4", and cited ACHOR V. ADEJOH (2010) 6 NWLR (PT. 1191) 537 AT 569 PARAS. A – D; AND AGALA V. OKOSUN (2010) NWLR (PT. 1202) 412 AT 448 PARA. G.

That the existence of the letters of Administration having been pleaded by the defence, the legal issue that emanates from the totality of the case is the fact that the duty of the Claimant is to bring before the Court all the parties that are necessary for the effective determination of his case, and cited JIMOH V. OYINLOYE (2006) 15 NWLR (PT. 1002) 392 AT 401 – 402. He contended that in the instant case, the Claimant knew and admitted under cross-examination that the property at No. 173, Uselu-Lagos Road, Benin City was sold to the 3rd Defendant by the two named Executors of the WILL, and admitted also the fact that letters of Administration was granted to the Executors as pleaded in the Statement of Defence, yet he failed to join the Probate Registrar and the Administrators of the Testator's Estate; and cited AWONIYI V. REGISTERED TRUSTEE OF AMORC (2000) 10 NWLR (PT. 676) 522 AT 533.

He submitted that in civil claims, all parties necessary for the invocation of the judicial powers of the Court must come before it so as to give the Court the jurisdiction to grant the reliefs sought. That the absence of the Probate Registrar

and the two Administrators of the Testator's Estate from the suit goes to establish improper parties which affects the proper foundation of the entire suit, and cited SANTA F. E. DRILLING NIG. LTD. V. AWALA (1991) 6 NWLR (PT. 609) 623 AT 625 RATIO 5.

It was submitted that it is trite law, that where a party who is necessary for the invocation of judicial process is not before the Court, the Court has no jurisdiction to grant the relief claimed, and cited the cases of ALAMIEYESIGHA V. TEIINA (2002) ALL FWLR (PT. 96) 552 AT 577; AND DUWIN PARM CHEM V. BANEKS PHARM (2000) 11 NWLR (689) 66 AT 68 RATIO 2.

He argued that the evidence of CW 1 and CW 2 do not advance the case of the Claimant by any stretch of imagination. That a closer look at the reliefs of the Claimant, particularly reliefs (b), (d) and (e) when considered vis-à-vis the cold evidence of the Claimant on record show that the Claimant's evidence is at variance with his reliefs contained in his pleading. He highlighted the discrepancies in the Claimant's evidence and submitted that his evidence is at variance with his pleading on material issue and therefore goes to no issue, and cited AKUBUIRO V. MOBIL OIL (NIG.) PLC. (2012) 14 NWLR (PT. 1319) 42 AT 76 – 77 PARAS. G – C; AND AWARA V. ALALIBO (2002) 18 NWLR (PT. 799) 484 AT 503 PARAS. F – G.

On issue 4, learned Counsel referred to paragraphs 8 – 11 and 13 of the 3rd Defendant's Statement of Defence and paragraphs 9, 12 and 14 of his deposition on oath, and submitted that the Claimant in paragraphs 18 and 19 of his witness

deposition admitted interference with the 3rd Defendant's ownership and possession of the property at No. 173, Uselu-Lagos Road, Benin City and pleaded correspondence and letter from his Solicitor to the 3rd Defendant's Solicitor in respect of the challenge of his ownership and possession. That the documents were frontloaded as the 4th and 5th documents on the list of documents filed but were not tendered in evidence. He urged the Court to invoke Section 167 (d) of the Evidence Act, 2011. On facts admitted, he cited UNILORIN V. ADESINA (2010) 9 NWLR (PT. 1199) 331 AT 401 PARAS. A – C.

He contended that the 3rd Defendant is evidently in possession of the property at No. 173, Uselu-Lagos Road, Benin City whether from the facts or law and entitled to damages for trespass as claimed in his Counter-Claim against the Claimant, and cited AYANWALE V. ODUSAMI (2011) 18 NWLR (PT. 1278) 328 AT 344 PARAS. G – H; AND ANYAWU V. UZOWUAKA (2009) 13 NWLR (PT. 1159) 445 AT 474.

On the whole, he urged the Court to grant all the reliefs stated in the Counter-Claim and dismiss the Claimant's case.

The 4th Defendant's written address was filed on the 15/8/2016. C. Obaro-Umeh, Esq. of learned Counsel for the 4th Defendant gave summary of facts of the case and formulated two issues for determination thus:

1. Whether the Claimant has proved his case against the 4th Defendant?
2. Whether the 4th Defendant is obliged from the

evidence before this Court to give account to the Claimant of the N12,000,000.00 (Twelve million Naira) Fixed Deposit?

Arguing issue 1, learned Counsel submitted that in a civil matter, a Claimant is under an obligation placed on him by law to prove his case on the balance of probability or on the preponderance of evidence. That this obligation the Claimant has not been able to satisfy. That it is also on record that the Claimant's late father (late Pa. Wilfred Aimiyekagbon Omonuwa) made a WILL, Exhibit "D2" and appointed Mr. Benson Edegbe and Hon, Justice Cromwell Idahosa as Executors and Administrators of the said WILL. That the said Executors applied for Probate, Exhibit "D1" in respect of the deceased's Estate. He referred to the 4th Defendant's Statement of Defence and her evidence-in-chief, and submitted that these averments and evidence were never denied by the Claimant neither were they controverted during cross-examination.

He submitted that it is trite law that credible evidence given in examination-in-chief on a material fact if unchallenged or uncontroverted under cross-examination must be accepted, and cited ATUANYA V. ATUCHUKWU (2014) 16 W.R.N. 91 AT 99.

He further submitted that the Executors of a deceased Estate have absolute power over the property of the deceased, and cited ATUANYA V. ATUCHUKWU (SUPRA).

He argued that it is the evidence of the 4th Defendant that the monies in the various accounts of the deceased were paid into the Estate account opened by the Executors of the deceased Estate who were granted letters of

Administration by Probate, and that about N9, 300, 000 (Nine Million, Three Hundred Thousand Naira) was used to pay the death duties of the deceased's Estate. That this again was not contradicted or controverted by the Claimant, and that the Court must rely on the said evidence. That the Executors have the duty to pay the debts, funeral and Testamentary expenses of a WILL, and cited HON. JUSTICE ADENEKAN ADEMOLA V. CHIEF HAROLD SODIPO & ORS. (1992) 7 SCNJ (PT. 11) 417. He submitted that upon the death of the Testator and after the WILL has been read and the Executors identified, it is only the Executors of the WILL who have the authority to do anything on the Estate including its management and control, and cited MRS. SINMISOLA CAREW V. MRS. IYABO OMOLARA OGUNTOKUN & ORS. (2011) 1 – 2 SC (PT. 111) 1.

That the Claimant in this case tendered Exhibit "C", a photocopy of the Term Deposit Certificate of the 4th Defendant's deceased customer (Mr. Wilfred Aimiyekagbon Omonuwa). He submitted that this document is inadmissible as it is a public document and the Claimant did not fulfill the requirement of the law to make the document admissible.

He posited that the law is clear that any document which is inadmissible in law which was admitted can be expunged during judgment, and cited SHITTU V. FASHINE (2005) 14 NWLR (PT. 946) 671 AT 690. That assuming the Court thinks otherwise concerning the said Exhibit "C", he submitted further that the piece of evidence (document) is worthless and this Court cannot rely on it as the said document is not the Claimant's neither is he the maker, and relied on ALAO V. AKANO (2005) 11 NWLR (PT. 935) 160. He finally submitted that the 4th

Defendant acted (in good faith) based on the letters of Administration, (Exhibit "D1" which is not the subject of this suit), granted to the Executors of the Estate of late Pa. Aimiyekagbon Omonuwa (its deceased customer) who (Executors had powers to deal with the said deceased customer's Estate.

On the whole, he urged the Court to dismiss the Claim of the Claimant against the 4th Defendant with substantial costs.

The Claimant's written address was filed on the 26/8/2016. Chief Osaheni Uzamere of learned Counsel for the Claimant gave a brief introduction.

Replying to 1st the Defendant's written address, on the issue of *locus standi,* he submitted that the High Court of Edo State has already pronounced on it. That the same Court cannot be invited to sit on appeal over its own decision, final or interlocutory.

Responding to issue 2, he submitted the 1st Defendant says there are no proper parties in the case, but this Honourable Court has ruled on this issue and cannot now be invited to sit on appeal over its decision, and cited NGERE V. OKURUKET "XIV" (2015) 1 EJSC (Erudite Judgments of the Supreme Court) 185 AT 190; AND CHRISTOPHER OGIDI V. MUOBIKE OKOLI LNELR/2014/CA; LPELR 22925. That setting aside is different from sitting on appeal on a decision from itself. That a Court cannot sit as an appellate Court over the decision of a Court of co-ordinate jurisdiction, and referred to Section 241(1) (a) of the 1999 Constitution of the Federal Republic of Nigeria.

He submitted that an already concluded illegal act can indeed be set aside by the Court. He contended that any sale (No. 173, Uselu-Lagos Road, Benin

City) by anyone other than the family of Omonuwa according to Bini Customary Law is invalid, null and void and of no effect whatsoever. He highlighted the Ruling of Imadegbelo J., and submitted that non of the condition for customary arbitration were met.

Responding to the 3rd Defendant's final written address, on issue 3 of the said address, he submitted that the last WILL and Testament of Pa. Wilfred Aimiyekagbon Omonuwa did not contain clause which captured the properties not specifically devised by the WILL as contended by the 3rd Defendant's address written.

That nobody can import into a WILL what is not specifically there. That a WILL is a very sacred document which is ambulatory, i.e. speaks from the grave. That the cases cited in support of the 3rd Defendant in his written address are inapplicable to this case. That "necessary implication" does not apply to a Will whose only interpretation are the bare wordings of the WILL.

He argued that the 1st Defendant and his cohorts inserted into the inventory attached to the letters of Administration properties not captured in the WILL which was made well before the letters of Administration were issued, and the WILL did not contain key properties that later was smuggled into the inventory attached to the letters of Administration.

He contended that the 3rd Defendant's Address ignored the fact that Exhibit "E", the Deed of Conveyance was admitted subject to its being stamped and evidence of same submitted to Court. That there is nothing in the address to suggest that the order of Court has been complied with. That therefore, there is

no Exhibit "E" in these proceedings. That there is no nexus between the parties in that document. That no title is vested in the 3rd Defendant.

He further contended that it is not the law that the Executors/Trustees are the persons vested with the legal interest in the property at No. 173, Uselu-Lagos Road, Benin City empowered to protect the said property as contended by the 3rd Defendant in issue 3 of his address. That Executors of a WILL are not vested with authority over properties not captured in the WILL. That the Executors cannot shop for powers not in a WILL to enable them commit illegal acts.

He submitted that the issue of joinder of parties, *locus standi* and customary arbitration and necessary parties are issue that have been dealt with and disposed off by this Court, Coram Imadegbelo, J. Responding to 3rd Defendant's issue 4, he submitted that the issue of correspondence between the Claimant and the 3rd Defendant is not germane to the central issue, that is, No. 173, Uselu-Lagos Road, Benin City, which is not captured in the WILL and therefore should not be dealt with by the Executors. That the non tendering of those letters between Claimant and the 3rd Defendant is a subsidiary matter. That the letters if they were tendered would not contradict this central issue, so Section 167 (d) of the Evidence Act, 2011 does not apply. He urged the Court to dismiss the 3rd Defendant's Counter-Claim in it entirety.

Learned Counsel gave a synopsis of evidence led in the case and formulated two issues for determination thus:

1. Whether the Claimant's late father's properties not captured in his WILL do not revert to intestacy and therefore subject to Bini Native Law and Custom of inheritance?, and

2. Whether there can be a valid sale of family property without the consent of the 1st son of the patriarch in Benin Customary Law of intestacy and inheritance?

On issue 1, learned Counsel submitted that it is common ground in this case that certain properties belonging to late Pa. Wilfred Aimiyekagbon Omonuwa are not in his WILL. That the question the Court is called upon to decide is the status of these uncaptured properties. That being not in the WILL, they fall into intestacy and therefore subject to Bini Native Law and Customary Rules of distribution to his children.

That Exhibits "D2 and D1" are the WILL and the Letters of Administration granted the Executors of the WILL respectively. That the WILL was made before the letters were issued to the Executors. That attached to the letters of Administration is an inventory of the Testator's properties which can only be gleaned from the WILL. That the Testator did not author the inventory. That he could therefore not have envisaged that his properties not captured in the WILL would appear in the inventory attached to the letters of Administration granted the Executors. That a WILL is ambulatory. He argued that the WILL is not speaking from the grave in respect of those uncaptured properties. That it cannot be controverted that some under-hand business went under. That this is a factual situation and no amount of reliance on technicalities can cover it up. He submitted that Court are enjoined at all times to do substantial justice and shy away from mere technicalities, and cited HDP V. INEC & ORS. (2013) 217 LRCN 178, AT 185 RATIO 3, 188 RATIO 10.

He posited that strenuous effort was made in the 1st Defendant's address to extricate him from these proceedings. That Benson Edegbe is an Executor of the WILL and he belongs to the family of Pa. Wilfred Aimiyekagbon Omonuwa whose burial obsequies he presided over as the Okaegbe. That he cannot extricate himself from culpability. That Justice C. O. Idahosa is not a member of the Omonuwa's family. He further posited that Benson Edegbe was sued in his individual capacity as a member of the Omonuwa's family and not as an Executor. That any suggestion therefore that he should be sued as an executor is idle.

He contended that the Executors had no business intermeddling with properties not captured in the WILL. That such properties fall into intestacy which is subject to Bini Native Law and Custom. That the law governing the sharing of a departed Bini man's properties has been long recognized. That it is that, after the second burial, (Okaegbe) and the family will sit down with the children of the deceased (particularly the first son) and share the properties amongst the children. That instead in this case, the Administrators arrogated to themselves (in conjunction with some colluding children) to share properties the family ought to share and worse still, without the consent and knowledge of the 1st son whose position in a Benin Home is unexceptional and inalienable.

He further submitted that it is not the duty of a Defendant to change the case/claim of a Claimant before the Court. That the Oba's letter or decision does not estop the Claimant from instituting this action, and referred to his address. That the Oba's finding has no bearing on the Claimant's claim. That a careful

perusal of the Oba's letter dwells on the Igiogbe and the sharing which is not the case before the Court. That it suffice to say that Exhibit "A" (last WILL of late Pa. Wilfred Aimiyekagbon Omonuwa) did not empower anybody including the 1st Defendant to sell any of his properties under any guise, and reproduced paragraph 41 of Exhibit "A".

He contended that paragraph 36 of Exhibit "A" relied on by the 1st Defendant does not empower anybody including the 1st Defendant to sell any of the deceased's properties. He submitted that the properties not specifically mentioned in the WILL which by operation of law becomes family properties to be shared by the family of late Pa. Wilfred A. Omonuwa in accordance with the Benin Native Law and Custom. That the power to sell and to share are not one and the same. That they cannot be interpreted "*mutatis muntandis*". He further contended that the Executors acted *ultra vires* when they proceeded to sell any property captured or uncaptured in the WILL. He referred to the 1st Defendant's evidence under cross-examination, and submitted that those properties not captured in the WILL of Pa. Wilfred Aimiyekagbon Omonuwa reverted to intestacy and therefore subject to Bini Native Law and Custom. He urged the Court to resolve issue 1 in the Claimant's favour.

One issue 2, learned Counsel submitted that it is trite that no one can sell a family property without the consent and authority of the principal members of the family. That in the instant case, Claimant is a foremost member of his late father's family on the evidence of the 1st and 3rd Defendants corroborating the

evidence of the Claimant himself, and cited ODOUK V. EKONG (2012) ALL FWLR (PT. 652) 1809.

He further submitted that those uncaptured properties in the WILL formed the residual estate of late Pa. Wilfred Aimiyekagbon Omonuwa. That they fall into intestacy under Bini Native Law and Custom. That when a Bini man dies, even before the completion of the burial rites, all properties of the departed Bini man are held by the eldest son in trust for the other children, and cited the cases of EGHAREVBA V. OKUNOGHAE (2001) 1 NWLR (PT. 724) 318; OGBAKON V. REG. TRUSTEES C.C.C. (2002) 1 NWLR (PT. 749) 675; IBRAHIM V. OSUNDE (2003) 2 NWLR (PT. 84) 241 AT 266 PARAS. E – H AND ABUDU V. EGUAKUN (2003) 14 NWLR (PT. 840) 311 AT 319 PARAS. B – F. That in the instant case, the uncaptured properties fall under the purview of the trusteeship of the 1st son. That the Claimant as the 1st son of late Pa. Wilfred Aimiyekagbon Omonuwa performed all the burial rites of his late father under the Bini Native Law and Custom. Thus, he became the custodian of his father's properties uncaptured under the WILL. That the 1st Defendant and others proceeded to not only share those properties and even sold the choicest of the lot without the knowledge of the 1st son.

He argued that it is lame to suggest that these uncaptured properties in the WILL now suddenly captured in the inventory which the testator did not make was disposed of by the 1st Defendant out of the disdain he has for the Claimant as amply borne out by the brief he presented to the Oba of Benin, Exhibit "E".

He referred to Claimant's witness, Mr. Ogbebor's evidence, and submitted that the law is that documentary evidence is to be preferred to oral evidence. That there are exceptions such as in the present case where all other evidence point to support the oral evidence given.

He further argued that the evidence adduced by the Claimant and all his witnesses was to the effect that the Oba's decision was doctored by the Oba's secretary at the behest of the 1st Defendant and his cohorts. That this is the correct inference, given the fact that the same 1st Defendant caused those properties that were not captured in the WILL to be included in the inventory attached to the letter of Administration issued to him and another.

He posited the anything that was done illegally can be reversed. That the Court has the power to set aside an already completed act which is illegal, and cited JOHN HOLT V. HOLTS AFRICAN WORKERS UNION (1963) 2 SCNLR 383.

On the whole, he urged the Court to grant all the reliefs of the Claimant as adumbrated in paragraph 23 in his Statement of Claim.

On the 10/10/2016, the 1st Defendant filed a Reply on points of law. Learned Counsel responding to issue raised in paragraph (c) by the Claimant, submitted that the correct position of the law is that where a matter is transferred from one Judge to another Judge, (for whatever reason), the suit is heard *de novo* and all previous proceedings before the earlier Judge is swept clean by the new Judge, and the new Judge is not bound by the previous Ruling made by the earlier Judge, and cited UGOH V. B.S.L.G.S.C. (1995) 3 NWLR (PT.

383) 288 AT 323 – 324 PARAS. H – A; AND BAKULE TENEREWA (NIG.) LTD. (1995) 2 NWLR (PT. 380) 728 AT 738.

He further submitted that the authorities cited by the Claimant's Counsel on the issue of one Judge sitting on appeal on the previous ruling of another Judge are inapplicable and most irrelevant to this case and should be discountenanced. That it is an elementary law and practice procedure that the proceeding in this Court is not a continuation of the proceedings before Hon. Justice Imadegbelo. That the implication of placing reliance on the Ruling delivered by Imadegbelo J. without rebutting and/or reacting to the legal issues of *locus standi*, proper parties, competence of action and estoppel, is that the Claimant has conceded all the points raised and submission canvassed on those issues of law with the concomitant consequence thereto.

He urged the Court to dismiss the Claimant's case in its entirety.

The 3rd Defendant's Reply on points of law is substantially the same with the 1st Defendant's Reply on points of law as such, it requires no summary of same.

It is, the principle of law, that in every civil case, the onus of proof is always on the party who asserts, and he has to prove his case on credible and cogent evidence. Where a party fails to discharge the burden, he cannot therefore be entitled to judgment. See: ATAKPA V. EBETOR (2015) 3 NWLR (PT. 1447) 549, R.9. LONGE V. FBN PLC (2006) 3 NWLR (PT. 967) 355. UMEANIA V. EMORDI (1996) 2 NWLR (PT. 430) 384.

The standard of proof required is on the balance of probability and not beyond reasonable doubt as in criminal case. See: OBIAZIKWOR VS. OBIAZIKWOR (2008) 8 NWLR (PT. 1090) 551 AT 569.

It is important to state that from the pleadings and evidence adduced by the parties, the following facts which are admitted by the parties appear settled:

(i) That Pa. Wilfred A. Omonuwa who died on the 28/1/2012 was a successful business man who had various landed properties in Benin City and his village.

(ii) That Pa. Wilfred A. Omonuwa had (19) children and the Claimant is the eldest surviving son

(iii) That Pa. Wilfred A. Omonuwa made a WILL on the 20/1/2009.

(iv) That Pa. Wilfred A. Omonuwa in his aforesaid WILL appointed Hon. Justice C. O. Idahosa and Mr. Benson Edegbe (1st Defendant) as the Executors/Trustees of his WILL.

(v) That the aforesaid WILL of Pa. Wilfred A. Omonuwa was read in the Probate Registry, Benin City on the 21/3/2012, and

(vi) The Executors of the WILL of Pa. Wilfred A. Omonuwa were granted letters of Administration by the Probate Registry, Benin City on the 16/5/2012, vide Exhibits "D1" to administer the Estate of the deceased Testator.

Now, in the instant case, it is pertinent to note that Pa. Wilfred Aimiyekagbon Omonuwa (Testator) in his aforesaid WILL, Exhibit "A" devised and bequeathed various land properties to his children. However, certain real properties contained in the lists of real properties as numbers 13, 20, 21, 22 and 23 attached to the WILL, Exhibit "A" were not specifically devised by the Testator

in the WILL. These properties are the main issues in contention between the parties.

The Claimant in his Statement of Claim, particularly paragraphs 14, 15 and 16 pleaded thus:

> (14) The Claimant further averred that he is aware that his father made a WILL which was read in the Probate Registry, Benin City, on 21st March, 2012.
>
> (15) The Claimant states that there were certain of his father's properties that were not captured in the said WILL. Such properties automatically fell into intestacy whose sharing is subject to Bini Native Law and Custom; and
>
> (16) The Claimant avers that the residue properties not specifically mentioned in the last WILL and Testament of their late father is now liable to be shared among the children in accordance with Benin Native Law and Custom.

The Claimant gave evidence in line with his pleading wherein he maintained that the properties of the Testator which were not included or captured in the WILL automatically fell into intestacy and became subject to sharing in accordance with the Bini Native Law and Custom. That the Custom gave him the priority to make his choice from the properties, first as the eldest son before his younger siblings in a family meeting which ought to be convened by the Okaegbe (2nd Defendant), and other principal members of the family to share the properties. He further said that despite the caveat, Exhibit "B" and T.V. Advertisements, the 1st Defendant went ahead to share the properties and sold the property situate at No. 173, Uselu-Lagos Road, Benin City to the 3rd Defendant. The evidence of the Claimant was corroborated by that of CW 1, CW

2 and the 2nd Defendant with regard to Bini Native Law and Custom applicable to the residual Estate/Properties.

On his part, the 1st Defendant stated that as the Executor of the WILL with Hon. Justice C. O. Idahosa, they were duly granted letters of Administration to administer the Estate of the Testator. That armed with the letters of Administration, Exhibits "D1", they, the Administrators/Executors promptly administered the Estate of the deceased which included the properties captured in paragraph or clause 36 of the WILL that specifically directed them as Executors/Trustees to share same amongst the children.

The 3rd Defendant gave evidence of how he bought the building situate at No. 173, Uselu-Lagos Road, Benin City from the Administrators/Trustees of the Testator having been shown the letters of Administration grant by the Probate Registry, Benin City when they put up the property for sale with the consent of the Beneficiaries. Thereafter, he executed a Deed of Conveyance Exhibit "E", with the Executors/Administrators and was given all the title documents and a copy of the WILL.

The 4th Defendant through DW 2 gave evidence of how the Executors applied for the opening of an Estate Account after they were granted letters of Administration. That consequent upon the opening of the Estate Account all the monies in the Fixed Deposit Account of the Testator was transferred to the said Estate Account.

Suffice it to say that I have carefully and painstakingly considered the totality of both oral and documentary evidence adduced by the parties in line

with their pleadings and the written arguments of learned Counsel for the parties. It is, demonstrably clear, from the totality of the entire evidence that the issues for determination have been narrowed down considerably into a small compartment.

It is, my humble view, that the main issue for determination is: Whether the residual Estate of the Testator not devised by the Testator in the WILL ought to be shared among the children in accordance with Bini Native Law and Custom? Put differently: as between the Executors/Administrators and the Okaegbe and principal members of the Testator, who is/are entitled to share the residual Estate?

The point must first and foremost be made loud and clear, that the Claimant is not contesting the validity of the WILL of the Testator, Exhibit "A". Unarguably, there is no dispute by the Claimant as to whether the devise, bequest or disposition in the WILL is inconsistent with the established Bini Customary Law of inheritance.

Happily enough, in the instant case, the Testator categorically provided in the WILL, Exhibit "A" how these properties not devised in the WILL should be shared among his children. In other words, the WILL contain a residuary clause. In clause 36, it provides thus:

> "I hereby direct that my properties not specifically mentioned herein shall be shared amongst my children."

Therefore, what now calls for consideration is the interpretation of the WILL, Exhibit "A" made by the Testator and the meaning to be accorded the instructions contained in the aforesaid clause 36.

If one may ask, who did clause 36 refer to? Did the clause 36 refer to the Executors or the Okaegbe, Elders and principal members of the Omonuwa's family?"

The law is settled that in interpreting a document, where the words used are plain or clear, they must be given their ordinary meaning. The question of the interpretation of a document is a matter of law. The whole document must be considered in totality and not in isolation so as to ascertain the intention of the parties. See: AGBAREH V. MIMRA (2008) 2 NWLR (T. 1071) 378; AFROTECK SERVICES (NIG.) V. M.I.A. & SONS LTD. & ANOR. (2000) 15 NWLR (PT. 692) 730;

It is significant to note that in paragraph/clause 2 of the WILL, the Testator appointed Mr. Benson Edegbe (1st Defendant) and Hon. Justice C. O. Idahosa as Executors and Trustees of his WILL. And in paragraph/clause 4, the Testator exhort the Executors/Trustees to be honest and diligent in the discharge of their duties. And lastly, in paragraph/clause 5, he directed the Executors/Trustees to pay his just debts and Testamentary expenses.

It is worthy of note that in Black's Law Dictionary, 8th Edition at page 1628, a WILL is defined as "a document by which a person directs his or her Estate to be distributed upon his death." And at page 610 of the same Black's Law Dictionary, an Executor is defined thus:

> "A person named by a Testator to carry out the provisions in the Testator's WILL."

I have carefully and thoroughly perused the various clauses in the WILL, Exhibit "A". My own humble understanding upon a community reading or

proper construction of the WILL and the various clauses, is that it encapsulates two categories of distribution of the real properties to wit:

(i) Those the Testator devised to his children out rightly; and

(ii) Those properties directed by the Testator to be shared amongst the children not specifically mentioned in the WILL by the Executors/ Administrators who are mandated in the residuary clause to carry out the provisions in the testator's WILL.

It is, my view, that it is beyond any argument that the persons the Testator referred to in the residuary clause 36 of the WILL are the Executors/ Administrators of the WILL who are given the mandate to share the real properties. I cannot glean any intention in the aforesaid clause by the Testator for the residue to be shared by the Okaegbe, Elders and other principal members of Omonuwa's family under Bini Native Law and Custom.

In other words, the residuary clause could not have been referring to any person(s) not provided for in the WILL such as Okaegbe, elders or principal members of the Omonuwa's family, but the named Executors/Trustees. Afterall, the law is settled, that the residuary Estate in a WILL is vested on the Executors/ Administrators of the WILL, who are recognized as his personal representatives at his death to carry out the provisions in the Testator's WILL according to his wishes. This is clearly provided in Section 3(1)(2)(3) of the Administration of Estate Law, Bendel State (Cap 2) as applicable in Edo State which provides as follows:

3(1) Real Estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death and notwithstanding any testamentary disposition

thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this law chattels real devolved on the personal representatives from time to time of a deceased person.

(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

(3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate.

It must be noted that Section 2 of the law which is the interpretation Section defined personal representative to include Executor of a WILL or Administrator to whom letters of Administration has been granted.

It is, demonstrably clear, that the import of Section 3(1), (2), (3) of the aforesaid law is that the estate of the Testator as in this case, Pa. Wilfred A. Omonuwa devolves automatically on his personal representatives (Executors/ Administrators) who are deemed in law, as his heirs and assigns and not the Okaegbe, Elders and Principal members of the Omonuwa's family. In the result, the Executors having been granted the letters of Administration by the Probate Registry, Benin City, vide Exhibits "D1" are in law the only known personal representatives of the deceased Testator given the mandate by the residuary clause in the WILL to share the residue Estate amongst the children of Pa. Wilfred .A. Omonuwa, and not the Okaegbe as erroneously canvassed by the Claimant.

It is, my view, and I so hold that Pa. Wilfred .A. Omonuwa, having made a WILL, Exhibit "A", during his life time wherein he devised various real properties

to his children, and inserted a residuary clause therein, shows clearly his intention to exclude the applicability of Benin Customary Law of distribution of residue to his Testate Estate. On the whole, I hold that the properties not captured in the WILL can not be a subject of intestacy, and therefore be subject to Bini Native Law and Custom of inheritance in the face of the express residuary clause in the WILL, Exhibit "A".

Before I put a final dot on this judgment, let me deal with some issues raised by learned Counsel for the Claimant in his written submission that all properties not captured in the WILL of Pa. Wilfred A. Omonuwa fall into intestacy, therefore liable to be shared in accordance with Bini Native Law and Custom.

With the greatest respect, this is where learned Counsel missed the point. The parties in this case including the Claimant admitted that Pa. Wilfred A. Omonuwa made a WILL, Exhibit "A". That in the WILL, Exhibit "A", the Testator inserted a residuary clause in paragraph 36. It is, demonstrably clear, that Pa. Wilfred A. Omonuwa having made a WILL, Exhibit "A", died testate leaving one Estate which is governed by the Administration of Estate Law, of Bendel State as applicable in Edo State. The Executors by the grant of letters of Administration, were given power to administer all the real and personal Estate of the Testator captured by the WILL, and those not specifically mentioned in the WILL. Therefore, the issue of the property not captured in the WILL reverting to intestacy, and liable to be shared in accordance with the Bini Native Law and Custom will not arise at all once a Bini man makes a WILL which does not run

counter to the letter and spirit of Section 3(1) of the WILLS Law of Bendel State as applicable in Edo State.

Let me deal with issue two formulated by learned Counsel for the Claimant of the sale of the property situate at No. 173, Uselu-Lagos Road, Benin City. The issues formulated by learned Counsel for the Claimant is whether there can be a valid sale of the family property without the consent of the 1st son of the patriarch in Bini Customary Law of intestacy and in heritance.

With profound respect to the learned and respected Counsel for the Claimant, the residue not captured in the WILL, Exhibit "A" is not a family property which requires the consent of the first son, the Claimant for there to be a valid sale. I have earlier held that the residual properties did not revert or fall into intestacy which is subject to Bini Customary Law. I have stated severally in the judgment that Pa. Wilfred Aimiyekagbon Omonuwa made a WILL, Exhibit "A" wherein he appointed Executors/Trustees to administer the provisions of the WILL, and the Claimant is not one of the Executors. That the WILL also contains a residuary clause. And that the Executors/Trustees have been granted letters of Administration, Exhibit "D1". I have earlier held that by the residuary clause, the Executors/Administrators are the persons mandated to share the residual Estate not specifically mentioned in the WILL, Exhibit "A".

It is instructive to note that there are five properties involved that were not specifically captured or devised in the WILL as stated in paragraph 16 of the Statement of Claim and the Claimant's Statement on Oath. The main grouse of the Claimant as can be gleaned from both paragraph 20 of the Statement of Claim

and sworn deposition, is that being the eldest son of Pa. Wilfred Aimiyekagbon Omonuwa, he was not allowed to pick his choice of property first amongst the properties not captured in the WILL before his siblings or any other person. And his learned Counsel described the property situate at No. 173, Uselu-Lagos Road, Benin City as the "choicest of all" the properties.

Interestingly, the Claimant under cross-examination admitted that none of the properties involved is his right to inherit under the Bini Customary Law, the Igiogbe having been devised to him, in the WILL, Exhibit "A". No wonder, the Claimant stated emphatically that he is not challenging the validity of the WILL, nor the devise or bequest contained therein. Indisputably, the Executors/ Administrators armed with the letters of Administration shared the properties not captured in the WILL amongst the children of the Testator. The Executors/ Administrators in their wisdom and in compliance with the Testator's directive in clause 4 of the WILL which exhorted them to be honest and diligent in the discharge of their duties, gave the Claimant alone one of the properties out of the five properties in recognition of the fact of being the eldest son of the Testator, whilst the remaining properties were shared amongst the other children. It is apparent from the evidence of the Claimant that he wanted the "choicest property", that is, the property at No. 173, Uselu-Lagos Road, Benin City. It is my view, as I earlier held, that the Executors/Administrators have the authority and mandate to share the Residual Estate amongst the children of Pa. Wilfred A. Omonuwa.

The next issue is whether the Executors have the power to sell the property situate at No. 173, Uselu-Lagos Road, Benin City?

Let me quickly say that the Residual Estate not being a family property, and intestate Estate governed by Bini Customary Law, the Executors/Administrators do not need to obtain the consent of the first son, the Claimant before there can be a valid sale of the property in dispute. It is my humble view, that the Okaegbe and the Elders of the Omonuwa's family have no role whatsoever to play in this case, the properties not being intestate Estate governed by Bini Native Law and Custom. Learned Counsel for the Claimant submitted at page 12 of his written Address that Exhibit "A" did not empower anybody including the 1st Defendant to sell any of his properties under any guise. That the WILL placed a curse on anybody that will sell any part of the Estate of the deceased, and referred to clause 41.

With the greatest respect, the argument appears superficially attractive. A proper reading of the said clause 41 reveals that the Testator specifically referred to his children and not the Executors/Trustees. Therefore, no one can import into the clause what is not expressly mentioned therein. It is, therefore, safe to say that there is no where in the body of the WILL, Exhibit "A" where the Executors/Administrators are expressly prohibited from selling any of the properties not captured or devised in the WILL by the Testator. The 1st Defendant stated in his evidence that the property situate at No. 173, Uselu-Lagos Road, Benin City was sold and transferred to the 3rd Defendant by the Executors/Trustees in exercise of their rights of Administration of the Estate of

the Testator, which proceeds were shared amongst all the children/and beneficiaries. There is abundant evidence which was admitted that before the sale was done, a meeting was held by the Executors with the children of the Testator and other family members where the decision to sell same was reached. The Claimant admitted this fact under cross-examination, but stated that he was not present at the meeting. It is, my view, and I so hold that the mere fact that the Claimant was absent at the meeting where the Executors/Administrators of the Estate and the other children of the Testator reached a joint decision to sell the property situate at No. 173, Uselu-Lagos Road, Benin City does not render the aforesaid sale illegal and void. I, therefore, hold that the sale to the 3rd Defendant is legal having been carried out by the Executors/Administrators in the exercise of their rights of administration of the Estate in conjunction with the other children of the Testator and the proceeds shared amongst the children of the Testator, and not for the benefit of the Executors. In other words, there is no evidence from the Claimant that the Executors/Administrators benefitted personally from the sale or committed any act of illegality with regard to the sale of the property to the 3rd Defendant to vitiate the aforesaid sale or to warrant this Court setting aside the sale.

Lastly, on the issue of Pa. Wilfred Omonuwa's money (N12, 361, 112. 47) in the Fixed Deposit Account with the Guaranty Trust Bank, Plc., the 4th Defendant, through DW 2 gave evidence that the Executors/Administrators applied for the opening of an Estate Account which was granted vide Exhibit "G". That the money in the Fixed Deposit Account was transferred to the Estate Account where

transactions were allowed by the Executors. It is important to note, that the Testator in clause 5 of the WILL directed the Executors/Trustees to pay his just debts and testamentary expenses. The 1st Defendant gave evidence that the sum of N9, 346, 705. 00 was paid to the Probate Registry as death duty and estate fees/levies before the Probate granted letters of Administration of the Estate to the Executors. The payment is copiously endorsed on the schedule of fees attached to the letters of Administration as the legal fee for the grant of Probate. This evidence was not challenged or controverted by the Claimant. Learned Counsel for the Claimant acknowledged this much when he submitted that the balance of the N12 Million which is N3 Million should be returned to the family for sharing amongst the beneficiaries, first of whom is the claimant. With the greatest respect to the Claimant, he gave no evidence of where the Executors got funds to run the burial expense of his late father. It is, my view, that the Executors were legally directed in the WILL by the Testator to pay his just debts and testamentary expenses. It is trite law, that he who asserts must prove. In the instant case, the Claimant has failed to prove that the 1st Defendant withdrew the sum of N12, 361, 112. 47 from Pa. Wilfred Omonuwa's Fixed Deposit Account with Guaranty Trust Bank Plc. (4th Defendant) as pleaded in the Statement of Claim.

I wish to straight away deal with the Counter-Claim set up by the 3rd Defendant against the Claimant.

It is, settled law, that a Counter-Claim is a cross-action with the Claimant becoming the Defendant to the suit. Therefore, the onus of proof of the Counter-Claim rests upon the Counter-Claimant.

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

ANOZIA V. A.G., LAGOST STATE (2010) 15 NWLR (PT. 1261) 207 AT 217.

The 3rd Defendant gave evidence of how he purchased the property in dispute from the Executors/Administrators of the Estate of the Testator, and was given all the title documents and was in possession of the property. His evidence is corroborated by the testimony of the 1st Defendant, one of the Executors that the property was sold to the 3rd Defendant by the Executors/ Administrators in exercise of their right to administer the Estate of the Testator in conjunction with the decision reached with other children of the Testator. The Claimant admitted under cross-examination that a meeting was held by the Executors with his siblings for the sale of the property. The evidence of the 3rd Defendant not being challenged is accepted by me. I therefore, hold that the 3rd Defendant validly acquired title to the property having bought same from the rightful Executors/Administrators of the Testator based on the decision reached with the other children of the Testator.

On the whole, and in the final analysis, I hold that the Claimant has failed to establish his claim on the balance of probability as required by law. Accordingly, I hereby dismiss the Claimant's suit in its entirety as lacking in merit.

I further hold that the 3rd Defendant has successfully prove his Counter-Claim as required by law on the preponderance of evidence.

Consequently, I hereby enter judgment in favour of the 3rd Defendant/ Counter-Claimant against the Claimant/Defendant in the following terms:

(i) A declaration that the 3rd Defendant/Counter-Claimant is the legal owner and in possession of all that property known as No. 173, Uselu-Lagos Road, Benin City as shown in the property survey plan No. KS/ED/044/2008 dated the 8/6/2008 and therefore entitled to a statutory right of occupancy over same.

(ii) I hereby decree an order of perpetual injunction restraining the Claimant, his privies and or agents and any one whosoever claiming through him the property known as No. 173, Uselu-Lagos Road, Benin City.

(iii) The relief of N5 Million General Damages for trespass is hereby refused as same was not proved.

I award costs of N50, 000 in favour of the Defendants against the Claimant.

E. O AHAMIOJE,
JUDGE.
7/2/17

COUNSEL:

CHIEF OSAHENI UZAMERE …….. ……. FOR THE CLAIMANT
(with him – Mrs. G. I. Agbonlahor)

J. O. AGHIMIEN, (SAN) …….. FOR THE 1ST DEFENDANT
(with him – F. E. Aghimien, ESQ.,
O. Ohenhen, ESQ., and G. D. Aderemi, ESQ.)

C. N. EZIHE, ESQ. …… FOR THE 2ND DEFENDANT
M. O. IGUODALA, ESQ. …… FOR THE 3RD DEFENDANT
MRS. J. O. UKPEDOR …….. FOR THE 4TH DEFENDANT