

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA  
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY  
BEFORE HIS LORDSHIP, HON. JUSTICE N.A. IMOUKHUEDE  
JUDGE ON THURSDAY THE 4<sup>TH</sup> DAY OF MAY, 2017

B E T W E E N

SUIT NO:B/505/2012

DR. SOLOMON OLAYE

.....

CLAIMANT

A N D

1. MR. STEPHEN OLAYE

2. MR. CHARLES OLAYE

3. MRS. JOSEPHINE NKEKI

}  
.....

DEFENDANTS

BETWEEN

SUIT NO:B/528/2012

1. MR. JULIUS TAIYE OLAYE

2. MRS. JOSEPHINE NKEKI (nee Olaye)

3. MR. IYARE OLAYE

}  
.....

CLAIMANTS

A N D

1. DR. SOLOMON OLAIYE

2. PROPHETESS MRS. PATRICIA AIGUOBASIMWAN

}  
.....

DEFENDANTS

**J U D G M E N T (CONSOLIDATED)**

By an order of Court dated 12<sup>th</sup> of March 2013 Suits Nos:B/505/2012 and B/528/2012 were consolidated and this Court proceeded to hear the suits in a consolidated action. In the case of Kalu v. Chima (2007) 17 NWLR (Pt. 1062) 187 at 194, Rhodes-Vivour JCA (as he then was) held inter alia that:

"Consolidated suits are tried and resolved in the same proceedings. However it must be noted that each suit remains separate and distinct and its own judgment must be given separately at the end of the common trial. The reasoning being that the consolidation of suits does not render evidence accepted in one suit ipso facto evidence in the other. In the instant case, the

trial court erred when it fused the cases and delivered a single judgment in only one of the three cases leaving out the others.”

In the case of Ogidi & ors V Okoli & ors 2014 LPELR 22925AGIM,J.C.A. stated that:

It is trite law that the consolidation of two or more suits does not destroy the separate existence of the consolidated suits and fuse them into one suit. In spite of the consolidation, they remain distinct with separate existence and must be determined separately. The purpose of the consolidation is to avoid multiplication of trials on the same set of facts and issues and determine the suits in a single trial on the same facts and issues to save time and costs.

Finally in the case of **HON. ANTHONY OGUEJIOFOR & ORS V. HYACINTH EJIDIKE & ORS Suit No: CA/E/387/2008 (Consolidated)** OSEJI, J.C.A stated that:

Consequently, with consolidated suits remaining separate and retaining their separate identities, the burden of proof lies on the Plaintiff in each of the suits.

I now proceed first to deliver my judgment in suit no B/505/2012 which was filed first.

BETWEEN

SUIT NO:B/505/2012

DR. SOLOMON OLAYE

.....

CLAIMANT

A N D

1. MR. STEPHEN OLAYE

2. MR. CHARLES OLAYE

3. MRS. JOSEPHINE NKEKI

}  
}

.....

DEFENDANTS

**JUDGMENT**

The Claimant claims against the Defendants as follows:

- a. A declaration that the Claimant being the eldest son of Late Pa. Isreal Enadeghe Olaye, having performed the final burial obsequies of the said Pa. Isreal Enadeghe Olaye is deemed under Bini Customary Law to inherit his father's Igiogbe, the house where he lived with his family and died.
- b. As against the 1<sup>st</sup> Defendant, an order that as the Okaegbe of the family of Late Pa. Isreal Enadeghe Olaye, he should immediately fix a date for the distribution of the estate of Late Pa. Isreal Enadeghe Olaye.
- c. An order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants render account of all sum of money and/or properties comprised in the estate of Late Pa. Isreal Enadeghe Olaye which they authorized the 2<sup>nd</sup> Defendant to be collecting contrary to Benin Customary Law.
- d. An order for payment over of all sums of monies collected by the Defendants to the Claimant.
- e. Injunction restraining the Defendants their agents, and/or privies from in any way tampering with the trusteeship of the Claimant pending the distribution of the property of the Late Pa. Isreal Enadeghe Olaye contrary to Benin Customary Law.

On the 29<sup>th</sup> October 2013 the Claimant gave evidence in support of his case and called one witness. The Claimant testified that he belongs to the Omonosa family Benin City and that the 1<sup>st</sup> Defendant is the Okaegbe of the Omonosa family meeting, the 2<sup>nd</sup> Defendant is the Secretary of the Omonosa family meeting while the 3<sup>rd</sup> Defendant is his younger sister and resides in Benin City. The Claimant testified that his late father, Pa Israel Enadeghe Olaye who died on the 6<sup>th</sup> day of September, 2011 was a polygamist and had two wives, namely Mrs. Esther Olaye (Deceased) his mother and Mrs. Wura Olaye. The Claimant testified that his late father had eleven children, four by his

mother and seven by Mrs. Wura Olaye. The Claimant testified that the children by order of seniority are:-

- i. Dr. Solomon Olaye
- ii. Mrs. Patricia Aiguobasimwin
- iii. Professor Imafidon Olaye
- iv. Dr. (Mrs) Itohan Mercy Obanor
- v. Mrs. Josephine Nkeki
- vi. Mr. Julius Olaye
- vii. Mrs. Juliet Enaowho
- viii. Mrs. Rosemary Adams
- ix. Miss Edugie Olaye
- x. Miss Imade Olaye
- xi. Mr. Iyare John Olaye

The Claimant testified that the first four names above are by his mother, Mrs. Esther Olaye and the others from 7-11 are by Mrs. Wura Olaye.

The Claimant testified that his late father had his homestead at No. 89, Owina Street, Off Agbado Street, Benin City. The homestead is made up of a storey building and a bungalow where he lived with his wives and children. The Claimant testified that late Pa. Isaac Enadeghe Olaye lived in the 1<sup>st</sup> floor of the storey building, while his two wives lived in the bungalow, each wife occupying two rooms while the two other rooms comprised a room and a store. The Claimant testified that the ground floor of the storey building was given out as stores. The Claimant testified that after his late father died, the 3<sup>rd</sup> Defendant put tenants in the two other rooms occupied by her mother, the bungalow in addition to the two other rooms comprising a room and a store. The Claimant testified that his late father lived and died at No. 89, Owina Street, Off Agbado Street, Benin City and was buried there on the 12<sup>th</sup> day of

November, 2011. The Claimant testified that as the eldest son of late Pa. Olaye he performed his burial rites as prescribed by customary law and also buried him according to the Christian rites at the Benin United Baptist Church and he was interred at No. 89, Owina Street, off Agbado Street, Benin City. The Claimant testified that soon after his father's death, the 3<sup>rd</sup> Defendant took advantage of his absence from Benin City and locked up the house and got tenants occupying the shops to pay her six months rents in advance without his consent. The Claimant testified that the 3<sup>rd</sup> Defendant has failed or refused to pay the rents she collected from the property to him. The Claimant testified that his late father had other landed properties as follows:

- i. A parcel of land measuring 100ft by 100ft at Eyan village.
- ii. A parcel of land measuring 100ft by 300ft at Eyaen Village.
- iii. A parcel of land measuring 100ft by 100ft at Ewah Road, Benin City.
- iv. A bungalow at Ohovbe village, Agbor Road, Benin City and also
- v. Other personal effects as clothes and double barrel shot gun.

The Claimant testified that after the completion of his father's final burial rites, the 1<sup>st</sup> Defendant as Okaegbe of the family called him by telephone to say that there would be a family meeting and that he needed the original title documents of his late father's properties in order to take inventory of his properties. The Claimant testified that he sent the 1<sup>st</sup> Defendant photocopies of the documents that he had and told him to enlist the help of his sister, Mrs. Patricia Aiguobasimwin, who knew the location of his late father's properties.

The Claimant testified that the inventory of his late father's properties was taken. The Claimant testified that after the inventory was taken, he asked the 1<sup>st</sup> Defendant to fix a date for the distribution of his father's properties in accordance with Benin Customary Law but the 1<sup>st</sup> Defendant refused. The

Claimant testified that instead of fixing a date for the distribution of his father's properties, the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to be collecting rents from the properties which now amount to over N1,000,000.00 (One Million Naira) apart from the rents collected by the 3<sup>rd</sup> Defendant. The Claimant testified that according to Benin Customary law, his late father's properties should vest on him as eldest son pending distribution. The Claimant testified that later, the 2<sup>nd</sup> Defendant called him on phone and told him that his father wrote a Will and that he prepared the Will as his late father's lawyer and that he should surrender the death certificate and original title documents of his father's properties to him so that he could obtain the Will from the Probate Registry. The Claimant testified that he refused to surrender the original documents to 2<sup>nd</sup> Defendant and told him that the 1<sup>st</sup> Defendant had photocopies. The Claimant testified that he has known no peace since he refused to surrender the original title documents.

The Claimant testified that the Defendants and their hirelings have subjected him to threats and harassment and making his life unbearable. The Claimant testified that the Defendants and their supporters are plotting to scheme him out of his rights and interests as eldest son even after he had completed his father's funeral rites according to Benin customary law. Under cross examination the Claimant stated that the remains of his late father is interred in the storey building according to his instruction. The Claimant stated that the storey building is facing Owina Street while the bungalow is facing both Owina and Agbado streets. The Claimant stated that there are stores in the bungalow facing Agbado road and that the two buildings have different roofs. The Claimant stated that he is not aware that his father made a Will. The Claimant stated he was not invited on the 23<sup>rd</sup> of September 2012 to the Probate Registry and at that time he was burying his mother. The

Claimant stated that his mother showed him photocopies of the Will. The Claimant stated that when he was burying his father there was no talk of any Will and nine months after, when he was burying his mother, overnight the question of suing came about and he was taken aback. The Claimant stated that he does not know if the 1<sup>st</sup> Defendant, the Okaegbe, is senior to his late father. The Claimant stated that he was never asked by the 1<sup>st</sup> Defendant to bring his father's death certificate, it was 2<sup>nd</sup> Defendant that demanded for his death certificate. The Claimant stated that 2<sup>nd</sup> Defendant is a lawyer but he did not tell him why he wanted the death certificate. The Claimant stated that he does not know the lawyer who wrote the Will. The Claimant stated that to his knowledge only two women gave birth to children for his father, that his mother died in 2012 and he buried her in August 24<sup>th</sup> 2012. The Claimant stated that his father's second wife is staying with her children in Benin City. The Claimant stated that the 2<sup>nd</sup> wife was living with his father when he died because his mother was down with stroke, she was not with his father. The Claimant stated that he was not aware that the bungalow where he interred his mother was willed to Taiye. The Claimant stated that it is true that his lawyer represented him in Suit No. B/504/12. The Claimant stated that there was no order from any court disturbing him from burying his mother. The Claimant denied that he beat up Mrs. Josephine Nkeki when she allegedly came to tell him that the property was willed to Taiye. The Claimant stated that he is not aware that the burial of his mother was against the collective decision of his family.

CW1, Prophetess Mrs. Ehimwenma Aiguobasinmwin gave evidence and stated that she is the uterine sister to Dr. Solomon Olaye. The evidence of CW1 corroborates the evidence of the Claimant on all material facts. Under cross examination CW1 stated that she is not aware that her father wrote a Will.

CW1 stated that she is aware of suit no B/504/2012 in Court 4 that they should not bury their mother and that they won the case. CW1 stated that she does not know why they were asked not to bury their mother. CW1 stated that the title documents are no longer with her because her father asked her to give them to Claimant which she has done. CW1 stated that when they were in hospital, 3<sup>rd</sup> Defendant told her that she had put one tenant who wanted to off set the hospital bills and that previously Claimant and herself and were paying the bills. CW1 stated that the tenants in the house paid 6 months' rent when her father died. CW1 stated that there are a total of twelve tenants and five tenants in the bungalow. CW1 stated that that the bungalow was built in 1949 and the storey building in 1963. That was the Claimant's case.

On the 22<sup>nd</sup> of May 2014, the Defendants opened their case and DW1, Omoruyi Oviawe, testified and stated that he is a member of the Omonosa family of Benin City. DW1 testified that he knew Pa. Israel E. Olaye (deceased) who died testate and that was a member of Omonosa family. DW1 testified that the late Pa. Israel Olaye until his death lived in the storey building known as 89, Owina Street, Benin City. DW1 testified that on the 12<sup>th</sup> September 2008, he was called by Pa. Israel Olaye and in the presence of one Mr. Felix Osakue and himself, Pa. Israel Olaye signed his Last Will and Testament by thumb print. DW1 testified that before the thumb print, he tried to append his signature but as a result of the accident he had where he fractured his right hand, he was unable to append his signature hence right thumb impression in his presence and that of Mr. Felix Osakue. DW1 testified that before Pa. Israel Olaye signed his said Will, Mr. Felix Osakue and himself attempted to read and know the content of the will but they were prevented from doing so as they were informed by Barrister C. Olaye that as witnesses, they cannot know the content of the will. DW1 testified that he thereafter signed the will as a



witness after Mr. Felix Osakue had signed his column as witness. DW1 tendered a certified true copy of the Will and it was marked Exhibit A. DW1 testified that the Will was read at the Probate Registry Benin on 23<sup>rd</sup> August 2012. DW1 testified that in August 2012, the Claimant and his siblings were making preparation to bury the Claimant's mother who died in June 2012 on the parcel of land and bungalow known as No. 89, Owina Street, off Agbado Street, Benin City. DW1 testified that the Family confronted and warned the Claimant to desist from burying the remains of his mother on the property. DW1 testified that flowing from the report by the 3<sup>rd</sup> Defendant on the activities of the Claimant on the bungalow, the Okaegbe and other principal members of late Pa. Israel Olaye's family who in an attempt to avoid the action of the Claimant instituted Suit No. B/504/2012 seeking for among other reliefs an order restraining the Claimant from burying Mrs. Esther Olaye on the land and bungalow known as 89, Owina Street, off Agbado Street, Benin City. DW1 testified that the Claimant entered appearance and filed counter affidavit consequent upon which the Court ruled that the Plaintiffs in the said suit had no locus to institute the action. DW1 testified that after the Claimant's father's death, the Claimant was aware that his father made a will, and that the Claimant deliberately refused to provide the death certificate to enable the Probate Registrar read the will. DW1 testified that the Claimant thwarted the family's efforts to have the Will read. DW1 testified that late Pa. Israel Olaye lived and died and was buried in the storey building at No. 89, Owina Street, Benin City, the storey building is facing Owina Street, Benin City. DW1 testified that the bungalow situate at No. 89, Owina Street, Benin City facing Owina/Agbado Street was used for commercial purposes by late Pa. Israel Olaye, a retired Police Officer, while a room and parlour each was for the two wives; the remaining rooms and stores were let to tenants. Under cross

examination DW1 stated that Pa. Olaye did not divorce any of his wives in his lifetime. DW1 stated that he is a Benin man and that when a Bini man dies the property will be in the custody of the family before the properties are shared.

2<sup>nd</sup> Defendant, Charles Olaye testified that he is the secretary of Omonosa Family. The 2<sup>nd</sup> Defendant testified that he knew Pa. Israel E. Olaye (deceased) who died testate on 6<sup>th</sup> September 2011. The 2<sup>nd</sup> Defendant testified that the Claimant was not at home at the time and that he called him on phone saying he was ill and in London undergoing treatment. The 2<sup>nd</sup> Defendant testified that the Claimant came to Benin City sometime in October 2011 and met him in his office. The 2<sup>nd</sup> Defendant testified that after exchange of pleasantries and condolence, the Claimant was told that his late father made a Will. The 2<sup>nd</sup> Defendant testified that the Claimant responded to this information that he did not care if his father did not give him, the Claimant anything in the Will. The 2<sup>nd</sup> Defendant testified that the fact that the Claimant's late father made a Will was widely known after his death as he informed the family of the Will lodged at the Probate Registry. The 2<sup>nd</sup> Defendant testified that on 14<sup>th</sup> January 2012, as the secretary of Omonosa family, he was directed to contact the Claimant that there will be a family meeting in his father's house at No. 89, Owina Street, Benin City on 28<sup>th</sup> January 2012 to discuss steps to be taken to have his father's Will read. The 2<sup>nd</sup> Defendant testified that the Claimant said the meeting should hold on 12<sup>th</sup> February 2012 in Pa. Idehen Olaye's house. The 2<sup>nd</sup> Defendant testified that on the 12<sup>th</sup> of February 2012, the Claimant failed to attend giving excuse that he was ill and not in Benin City. The 2<sup>nd</sup> Defendant testified that the Claimant was told on phone to fix another date and this he failed to do. The 2<sup>nd</sup> Defendant testified that the family thereafter fixed 13<sup>th</sup> April 2012 to deliberate on the steps to take. The 2<sup>nd</sup> Defendant testified that the Claimant also failed to

attend on that date. The 2<sup>nd</sup> Defendant testified that the failure of the Claimant to attend the meeting prompted the 1<sup>st</sup> Defendant in the company of Pa. Idehen Olaye on 18<sup>th</sup> April 2012 to go to the residence of CW1, the Claimant's sister to enquire why the Claimant did not want the Will of his father to be read. The 2<sup>nd</sup> Defendant testified that a meeting was again fixed for 12<sup>th</sup> May 2012, but the Claimant and his siblings did not attend. The 2<sup>nd</sup> Defendant testified that Claimant's sister, CW1 called him on phone to know how her father shared his estate and he told her. The 2<sup>nd</sup> Defendant testified that on 19<sup>th</sup> May 2012, the Claimant was informed by the family that a meeting will be held in his father's house on 16<sup>th</sup> June 2012 but the Claimant shifted the date to 21<sup>st</sup> June 2012. The 2<sup>nd</sup> Defendant testified that on the 21<sup>st</sup> day of June 2012, the Claimant attended the meeting and he was told to give the documents relating to his father's property in his possession to him. The 2<sup>nd</sup> Defendant testified that the Claimant was also told to bring the death certificate of his late father so that the Will can be read. The 2<sup>nd</sup> Defendant testified that following the Family's directive, the Claimant brought and gave photocopies of his late father's landed property to him. The 2<sup>nd</sup> Defendant testified that at all material times after the Claimant's father's death, the Claimant was aware that his father made a Will. The 2<sup>nd</sup> Defendant testified that the Claimant deliberately refused to have same read by refusing to provide his father's death certificate to enable the Probate Registrar read the Will and he thwarted the family's efforts to have the Will read. The 2<sup>nd</sup> Defendant testified that since the Claimant was not willing to provide the death certificate of his late father, he told the 3<sup>rd</sup> Defendant to provide same. The 2<sup>nd</sup> Defendant testified that the 3<sup>rd</sup> Defendant provided the death certificate and the Will was read. The 2<sup>nd</sup> Defendant testified that the Claimant was informed on the 20<sup>th</sup> August 2012 of the reading of the Will on 23<sup>rd</sup>

August 2012 by letter from the Probate Registrar. The 2<sup>nd</sup> Defendant testified that to ensure that the Will of Pa. Israel Olaye was read before Claimant could bury his late mother, the 1<sup>st</sup> Defendant and two other members of the family went to Court to try and stop him from burying his mother on the property. The 2<sup>nd</sup> Defendant testified that the Will was read the same day the Court case came up for Ruling, a certified true copy of the ruling was admitted as Exhibit B. The 2<sup>nd</sup> Defendant testified that one of the tenants in late Pa. Olaye's property called him and informed him that the rent was due and there was nobody to pay to. The 2<sup>nd</sup> Defendant testified that he conveyed this information to other family members. The 2<sup>nd</sup> Defendant testified that the Claimant was contacted on phone and told the position of things as regard rent. The 2<sup>nd</sup> Defendant testified that the Claimant said that he was available to collect it. The 2<sup>nd</sup> Defendant testified that the family thereafter mandated Mr. Emmanuel Olaye and himself to collect the rent due and pay same into Omonosa Family Bank Account pending when all issues relating to the estate of late Pa. Israel Olaye are resolved. The 2<sup>nd</sup> Defendant testified that Pa. Olaye called him and told him he wanted to make his Will and thereafter instructed him on how he wanted his estate to be distributed among his children. The 2<sup>nd</sup> Defendant testified that he prepared the Will in accordance with the instructions given to him by Pa. Israel Olaye. The 2<sup>nd</sup> Defendant testified that the Will was duly executed by the Testator in the presence of two witnesses called by him. The 2<sup>nd</sup> Defendant testified that the witnesses were Mr. Felix Osakue and Mr. Omoruyi Oviawe who signed the Will as witnesses in late Pa. Israel Olaye's presence and in the presence of each other. The 2<sup>nd</sup> Defendant testified that as a result of an accident Pa. Israel Olaye had, where he fractured his right hand, he was unable to append his signature hence his right thumb impression in the presence of the witnesses. The 2<sup>nd</sup> Defendant testified that

the Will was duly lodged at the Probate Registry of the Edo State High Court, Benin City. The 2<sup>nd</sup> Defendant testified that consequent upon the death of Pa. Israel Olaye, his Will was read by the Probate Registrar on 23<sup>rd</sup> August 2012.

Under cross examination, 2<sup>nd</sup> Defendant stated that the Will was read on 23<sup>rd</sup> day of August 2012 and that he wrote the Will as a Counsel not as a family member. 2<sup>nd</sup> Defendant stated that he did not release the contents of the Will, he only informed the Family that late Pa Olaye made a Will. 2<sup>nd</sup> Defendant stated that he told CW1 how the property was distributed sometime in 2012, before the Will was read. 2<sup>nd</sup> Defendant stated that he and Emmanuel Olaye collected six months rent from the property. 2<sup>nd</sup> Defendant stated that he knows the role of the eldest son of a Bini man when he dies. 2<sup>nd</sup> Defendant stated that the eldest son ought to hold the property in trust but the Claimant as eldest son said he was not around. 2<sup>nd</sup> Defendant stated that when the tenants contacted him, he informed the family. 2<sup>nd</sup> Defendant stated that the Claimant was contacted on phone and he said that he should collect the rent. 2<sup>nd</sup> Defendant stated that he requested that someone else should accompany him in doing so. 2<sup>nd</sup> Defendant stated that Mr. Emmanuel Olaye was chosen who accompanied him to go and collect the rent from the tenants. 2<sup>nd</sup> Defendant stated that the family mandated him in 2012 before the Will was read.

3<sup>rd</sup> Defendant, Mrs Josephine Nkeki, gave evidence and testified that her father Pa. Israel E. Olaye (deceased) died testate and until his death lived at the storey building known as 89, Owina Street, Benin City. 3<sup>rd</sup> Defendant testified that her late father was survived by 11 children from two wives, Mrs. Esther Olaye and Mrs. Wura Olaye. 3<sup>rd</sup> Defendant then proceeded to name all the children of her deceased father and their respective mothers. 3<sup>rd</sup> Defendant testified that during the lifetime of her father, late Pa. Israel Olaye,

he had property both real and personal in Edo State and before his demise he made his last Will and Testament which was duly executed and lodged at the Probate Registry, High Court, Benin City. The 3<sup>rd</sup> Defendant then identified Exhibit A as her father's Will. 3<sup>rd</sup> Defendant testified that from the Will read, Mr. Julius Olaye became the owner of the bungalow known as 89, Owina Street, off Agbado Street, Benin City, Oredo Local Government Area of Edo State and the 3<sup>rd</sup> Defendant and Iyare Olaye are the owners of the parcel of land measuring 100ft by 100ft at Eyaen Quarters, Benin City pursuant to clause 6 & 9 of the last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September 2008 and read at the Probate Registry Benin on 23<sup>rd</sup> August 2012. 3<sup>rd</sup> Defendant testified that all the children of late Pa. Israel Olaye performed the burial rites of their late father in line with Bini Customary Law. 3<sup>rd</sup> Defendant testified that the sum of N200,000.00 (Two Hundred Thousand Naira) was given to the Claimant by the children of Mrs. Wura Olaye (the 2<sup>nd</sup> wife of Pa. Israel Olaye) for the general burial expenses. 3<sup>rd</sup> Defendant testified that this payment was acknowledged by the Claimant in the presence of the family members. 3<sup>rd</sup> Defendant testified that in August 2012, she was shocked that the Claimant and his siblings were making preparation to bury the Claimant's mother who died in June 2012 on Mr Julius Olaye's parcel of land and bungalow known as No. 89, Owina Street, off Agado Street, Benin City without Mr. Julius Olaye's consent and authority. 3<sup>rd</sup> Defendant testified that the Claimant was confronted and warned to desist from burying the remains of his mother on the property as same belongs to Mr. Julius Olaye. 3<sup>rd</sup> Defendant testified that she reported the activities of the Claimant to the Okaegbe, 1<sup>st</sup> Defendant and other principal members of late Pa. Israel Olaye's family who in an attempt to avoid the action of the Claimant, instituted suit No. B/504/2012 seeking for among other reliefs, an order restraining the Claimant from burying

Mrs. Esther Olaye on the land and bungalow known as 89, Owina Street, off Agbado Street, Benin City. 3<sup>rd</sup> Defendant testified that the Claimant entered appearance and filed a counter affidavit, consequent upon which the Court ruled that the Claimants in the said suit had no locus to institute the action. 3<sup>rd</sup> Defendant testified that after her father's death, the Claimant was aware that her father made a Will. 3<sup>rd</sup> Defendant testified that the Claimant deliberately refused to have same read by refusing to provide the death certificate to enable the Probate Registrar read the Will and he thwarted the family's efforts to have the will read. 3<sup>rd</sup> Defendant testified that her late father lived and died and was buried in the storey building at No. 89, Owina Street, Benin City; the storey building is facing Owina Street, Benin City. 3<sup>rd</sup> Defendant testified that the bungalow situate at No. 89, Owina Street, Benin City facing, Owina/Agbado Street was used for commercial purposes by her late father, a retired Police Officer while a room and parlour each was for the two wives; the remaining rooms and stores were let to tenants. 3<sup>rd</sup> Defendant testified that some of the tenants in the said commercial building are Mr. Udochukwu Ughalgba, Mr. Chukwuleku, Mr. James Obiamuwe and Mr. Ekene Ehirim. 3<sup>rd</sup> Defendant testified that the Claimant's mother left Pa. Israel Olaye's home about fourteen years before Pa. Israel Olaye died. 3<sup>rd</sup> Defendant testified that it was on the eve of the service of songs at Baptist Church Benin that the Claimant and his siblings brought their mother to the house and the next day took her away from the said house. 3<sup>rd</sup> Defendant testified that the Claimant's mother died about nine months after the death of Pa. Israel Olaye. 3<sup>rd</sup> Defendant testified that her father, Pa. Israel Olaye was knocked down by a vehicle when he left service at Baptist Church, Mission Road, Benin City in 2001 and in the process sustained injuries and fractured his right hand and left leg. 3<sup>rd</sup> Defendant testified that the Claimant was aware that the commercial house at No. 89,

Owina Street facing Agbado Street was devised to Mr. Julius Olaye; the Will having been read on 23<sup>rd</sup> August 2012 and a copy was attached to a further affidavit which was served on their counsel on 24<sup>th</sup> August, 2012 before the Ruling in Suit No. B/504/2012 was delivered. 3<sup>rd</sup> Defendant testified that the Claimant with the assistance of fierce looking thugs and men dressed in military apparel broke into one of the rooms in the commercial house devised to Mr Julius Olaye and forcefully interred Claimant's late mother therein, in spite of resistance from the 3<sup>rd</sup> Defendant and family members. 3<sup>rd</sup> Defendant testified that the Claimant and his sister are in possession of the plan and other title documents relating to the properties listed in the Will. 3<sup>rd</sup> Defendant testified that in spite of several warnings to the Claimant and his siblings, they forcefully and unlawfully buried late Mrs. Esther Olaye on Mr. Julius Olaye's property. Under cross examination, 3<sup>rd</sup> Defendant stated that the Claimant was served with the notice of the reading of her father's Will by 2<sup>nd</sup> Defendant. 3<sup>rd</sup> Defendant stated that she did not know the contents of the Will before it was read. 3<sup>rd</sup> Defendant stated that it is true that her mother Mrs. Wura Olaye and late Mrs. Esther Olaye both had one room each in the bungalow. 3<sup>rd</sup> Defendant stated that late Mrs. Esther Olaye was buried in her own room in the bungalow. 3<sup>rd</sup> Defendant stated that the tenants she earlier mentioned in her evidence were not put by her and that Mr. Mike Olaye collects rents from the tenants. 3<sup>rd</sup> Defendant stated that her brother, Julius Taiye Olaye is in London and that before he left Nigeria he was living in one of the rooms in the bungalow.

1<sup>st</sup> Defendant testified and stated that he is the Okaegbe of the Omonosa Family. 1<sup>st</sup> Defendant testified that he knew Pa. Israel E. Olaye and until his death lived at the storey building known as 89, Owina Street, Benin City. 1<sup>st</sup> Defendant testified that he was the Okaegbe at the burial of late Pa.



Israel Olaye. 1<sup>st</sup> Defendant testified that the children performed the burial rites of their late father in line with Bini Customary Law. 1<sup>st</sup> Defendant testified that all the children of late Pa. Israel Olaye fully performed the burial rites of their late father in accordance with Bini Customary Law. 1<sup>st</sup> Defendant testified that after the burial of late Pa. Israel Olaye, the Claimant was informed after several demands that his late father wrote a Will during his life time and that the Claimant should be prepared for the reading of the Will in Court; that since there is a Will, the Family cannot share the estate left behind by late Pa. Israel Olaye. 1<sup>st</sup> Defendant testified that the Claimant pleaded to be given 3 months as he said he was expecting an award from Abuja, and also to enable him recuperate as he was not in good health. 1<sup>st</sup> Defendant testified that from January 2012, the Claimant was always called upon by the family members to produce the death certificate so that necessary steps may be taken to have his late father's Will, read but he refused to comply. 1<sup>st</sup> Defendant testified that he also requested the Claimant to submit the original documents of his late father's property to the family. 1<sup>st</sup> Defendant testified that the Claimant failed to submit the documents by giving several excuses among which were that the documents were in Abuja and later with his sister CW1. 1<sup>st</sup> Defendant testified that at the family meeting held on 21<sup>st</sup> June 2012, the Claimant was informed that the 2<sup>nd</sup> Defendant and Mr. Emmanuel Olaye were mandated to collect the rent in the houses of late Pa. Israel Olaye and that the rent collected be paid into the Omonosa Family Bank Account pending when all issues relating to the estate of late Pa. Israel Olaye are resolved. 1<sup>st</sup> Defendant testified that the Claimant thanked the family for the action. 1<sup>st</sup> Defendant testified that after several demands, the Claimant reluctantly submitted photocopies to the family secretary who is the 2<sup>nd</sup> Defendant. 1<sup>st</sup> Defendant testified that himself and one Pa. Idehen Olaye went to see CW1 to inquire why the Claimant did not

want their late father's Will to be read. 1<sup>st</sup> Defendant testified that CW1 promised to see her brother, the Claimant about this issue but thereafter did nothing about the promise. 1<sup>st</sup> Defendant testified that the Claimant based his refusal to the reading of his late father's will on the ground that his father did not tell him that he made a Will. 1<sup>st</sup> Defendant testified that when the Claimant's mother died, the Claimant was told not to bury the remains of his mother in any of the property of late Pa. Israel Olaye, until the Will was read. 1<sup>st</sup> Defendant testified that in spite of the family's resolve that the Claimant's mother should not be buried on any of the property until the reading of the Will, the Claimant was adamant and was making preparation to bury his mother in the bungalow known as 89, Owina Street, Off Agbado Street, Benin City. 1<sup>st</sup> Defendant testified that to restrain the Claimant, the principal members of the family instituted suit No. B/504/2012 and same was struck out by the Court. 1<sup>st</sup> Defendant testified that the Will of late Pa. Israel Olaye was read on 23<sup>rd</sup> August 2012 at the Probate Registry, High Court, Benin City and the Claimant despite being aware of the date of reading of the Will, refused to attend. 1<sup>st</sup> Defendant testified that the Claimant went ahead to bury his late mother in the house given to Mr. Julius Taiye Olaye, vide the Last Will and Testament of late Pa. Israel Olaye. 1<sup>st</sup> Defendant testified that the Claimant ignored all entreaties from other family members and himself not to inter his late mother on the property. 1<sup>st</sup> Defendant testified that the Claimant armed himself with fierce looking thugs and men dressed in security apparels and forcefully interred his late mother on the property. 1<sup>st</sup> Defendant testified that the Claimant's mother was interred on 24<sup>th</sup> August 2012 and the security personnel threatened to shot anyone who dared to prevent the interment of Claimant's mother in the bungalow devised to Mr. Julius Olaye. 1<sup>st</sup> Defendant testified that since there is a Will, the family cannot share the estate left

behind by late Pa. Israel Olaye. Under cross examination 1<sup>st</sup> Defendant stated that the Claimant gave an instruction that since he is not around, the rent collected should be paid into Omonosa Family account.

DW2, Olaye Osamede Sunday testified and stated, that he is a member of Omonosa/Olaye family and that he knew Pa. Israel E. Olaye who was his uncle and until his death lived at the storey building known as 89, Owina Street, Benin City. The evidence of DW2 is substantially the same as the other defence witness but in addition DW2 testified that upon the death of Pa Isreal Olaye, the 1<sup>st</sup> Defendant as the Okaegbe of the Omonosa family called a general meeting of the family with a view of asking the children of late Pa.

Israe IOlaye the modalities and preparations for the burial of their Late father. DW2 testified that at the meeting, the 2<sup>nd</sup> Defendant informed the entire family members that late Pa. Olaye Israel wrote a Will and that the Will was lodged at the Probate Registry of the High Court, Benin City. DW2 testified that Pa. Israel Olaye was buried on the 11<sup>th</sup> November 2011 and that all the children of late Pa. Israel Olaye buried their late father in accordance with Bini Customary Law. DW2 testified that after the burial, several meetings were called by the 1<sup>st</sup> Defendant but the Claimant refused to attend these meetings. Under cross-examination, DW2 stated that he is familiar with Benin Customary Law and that the house where the Bini man lives and dies is called the Igiogbe, that he knows that the house where Pa. Olaye lived was his Igiogbe. DW2 stated that he knows that where he lived there was a storey building and a bungalow. DW2 stated that Pa. Olaye lived there with two wives at a time. DW2 stated that Pa Olaye lived in the storey building by himself while the two wives lived in the bungalow at a time.

DW3 Michael Nosakhare Olaye, testified and stated that Pa. Isreal E.

Olaye, was his uncle. DW3 testified that he received a letter from Probate Registry, High Court, Benin City, that he should appear in the probate section in respect of the last Will and Testament of late Pa. Israel Olaye. DW3 testified that the Will was read consequent upon which he found out that he was one of the Executors named in the said Will. DW3 testified that the fact that the Claimant's late father made a Will was widely known after his death as the 2<sup>nd</sup> Defendant informed the family of the Will lodged at the Probate Registry. DW3 testified that after the Claimant's father's death, the Claimant was aware that his father made a Will but the Claimant deliberately refused to have same read by refusing to provide the death certificate to enable the Probate Registrar read the Will. The evidence of DW4 Emmanuel Olaye, a member and Chairman of the youth of Omonosa Family corroborates the evidence of the other defence witnesses and he admitted that he was mandated by the family members to collect the rent in the houses of late Pa. Israel Olaye in company of 2<sup>nd</sup> Defendant. DW 4 testified that in line with the mandate, they collected six months rent from some of the tenants.

DW 4 testified that the rent collected was paid into the Omonosa Family Bank Account. Under cross examination DW4 stated that the eldest son does not hold the property in trust until it is shared, he stated that it is the family who has a right to set up a caretaker committee to manage the property of the deceased before sharing.

Counsel for the parties filed written addresses, Counsel to the Defendant Chief Dan Ose Okoh SAN formulated the following issues for determination:

Whether having regard to the Claimant's admission that the late father wrote a Will, the reliefs sought are grantable in Law.

Counsel to the Defendant submits that from a line of cases it is trite that a Bini man can make a Will and that the provisions of Will have to be construed strictly and in accordance with the intention of the Testator and refers to the case of IDEHEN v. IDEHEN (1991) 2. Counsel to the Defendant submits that the validity of the Last Will and Testament of late Pa. Israel Enadeghe Olaye is not in dispute and no evidence that it has not met the requirements of Law set down for admitting a Will to probate. Counsel to the Defendant submits that the Claimant's reliefs are rooted in customary sharing of the deceased father's estate knowing fully well that a written Will exists, is legally unjustifiable.

Counsel to the Claimant K.O.Longe Esq formulated the following issues for determination:

- i. Whether the Claimant is not entitled to inherit his late father's Igiogbe situate at No. 89, Owina Street, Benin City, having performed the final burial rites in accordance with Benin Customary Law?
- ii. Whether the bungalow situate at No. 89, Owina Street, Benin City does not form part of the principal house/Igiogbe of Late Pa. Israel Enadeghe Olaye?
- iii. Whether the Defendants should not render account to and pay all sums collected from the estate of late Pa. Olaye?
- iv. Whether the Claimant is not entitled to grant of injunction restraining the Defendants, their agents and/or privies from interfering with the trusteeship of the Claimant pending the distribution of late Pa. Israel Enadeghe Olaye's estate?

Counsel to the Claimant submitted that at his death, the Igiogbe of a Benin man passes to his eldest son and referred to the case of ARASE v ARASE

(1981) 5 SC at 63 where the Supreme Court defined Igiogbe as the principal house of a Benin man where he lived in his lifetime and died.

Counsel to the Claimant submitted that until distribution of the deceased's properties after final burial rites, all deceased properties are held in trust by his eldest son for himself and all the children of the deceased.

I have carefully read the Claimant's Claim and the reliefs sought which I will reproduce for ease of reference:

- a. A declaration that the Claimant being the eldest son of Late Pa. Isreal Enadeghe Olaye, having performed the final burial obsequies of the said Pa. Isreal Enadeghe Olaye is deemed under Bini Customary Law to inherit his father's Igiogbe, the house where he lived with his family and died.
- b. As against the 1<sup>st</sup> defendant, an order that as the Okaegbe of the family of Late Pa. Isreal Enadeghe Olaye, he should immediately fix a date for the distribution of the estate of Late Pa. Isreal Enadeghe Olaye.
- c. An order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants render account of all sum of money and/or properties comprised in the estate of Late Pa. Isreal Enadeghe Olaye which they authorized the 2<sup>nd</sup> Defendant to be collecting contrary to Benin Customary Law.
- d. An order for payment over of all sums of monies collected by the Defendants to the Claimant.
- e. Injunction restraining the Defendants their agents, and/or privies from in any way tempering with the trusteeship of the Claimant pending the distribution of the Late Pa. Isreal Enadeghe Olaye contrary to Benin Customary Law.

The Claimant's reliefs are rooted in Benin customary law.

Counsel to The Claimant referred to the case of *Arase V Arase* which is the locus classicus on Benin Customary law of inheritance, however in *Arase V Arase* there was no Will in question and the issues discussed were purely on Benin Customary Law of inheritance which is however not the case before this Court. In the other cases mentioned *Idehen V Idehen* and *Lawal-Osula V Lawal-Osula* (1995) 3 NWLR(Pt. 382) the Claimants challenged the distribution of the Estate in the Will.

One of the issues this court has to decide is what constituted The Igiogbe of the late Pa Isreal Enadeghe Olaye? Was it the storey building at no 86 Owina Street as alleged by the Defendants or the storey building and bungalow as alleged by the Claimant. There is unanimous evidence before this Court that No 89 Owina Street consists of two separate buildings. From the evidence led by all parties, No 89 Owina consists of two houses, a storey building and a bungalow. The bungalow was built in 1947 facing Owina/Agbado Street while the storey building was built in 1967 facing Owina Street. Evidence was led by all parties that Pa Olaye lived in the Storey building and was buried in the storey building. There is evidence that his wives, not him at some time lived in the bungalow and the rest were stores let out to tenants. From a preponderance of cases like *Arase V Arase*(supra), it is now established that the Igiogbe of a Benin man is the house where he lived and died and was buried. In the case of *Agidigbi V Agidigbi* (supra)it was held that even though there were three houses in the same compound the particular house in which the deceased lived and died was his Igiogbe, the other two in the compound were not regarded as his Igiogbe.

I have also carefully listened to the evidence led by the parties and I think the issue this Court has to resolve is what law governs the administration

of the Estate of late Pa Isreal Enadeghe Olaye. Is it the Benin Customary Law as stipulated by the Claimant or the Wills Law as stipulated by the Defendants.

There is evidence before this Court from the 2<sup>nd</sup> Defendant, who drafted the Will that at the earliest opportunity at a family meeting held soon after the death of Pa Isreal Olaye, the Claimant was informed that his father left a Will. This evidence was corroborated by the evidence of 1<sup>st</sup> Defendant and DW3. I find as a fact that the 2<sup>nd</sup> Defendant duly performed his duty as the lawyer who drafted the Will by informing all family members at the family meeting of the existence of the Will even before burial rites had commenced. The Claimant can therefore not claim ignorance of the existence of the Will on the ground that he was not informed by his father. In the case of *Osemwingie & ors V Osemwingie & ors* 2012 LPELR 19790 CA Yakubu, J.C.A. stated inter alia that:

A Will is ambulatory. It can be changed by the testator before his death. However, it is indeed a secret document, kept away from the knowledge of the beneficiaries thereof until the demise of the testator. And which is why, it is usually sealed and kept in the custody of the probate Registrar of the High Court of Justice. It is strictly a confidential document, known only by the testator and a witness with a Solicitor who prepared it for the testator. I think that is elementary enough which does not require any hair-splitting or hard thinking to be comprehended and understood."

There is copious evidence before this Court that the late Pa Olaye wrote a Will which was lodged in Probate and has been read in the Probate Registry. I have also carefully read the Claim before me and the Claimant has not challenged the validity of the Will which was tendered in evidence before this Court.

The next issue flowing from that is can this Court then wilfully ignore the Will and deny its existence? From the evidence led by the Defendants and their



witnesses, which I find to be consistent and cogent, this Court cannot deny the existence and validity of the Last Will and Testament of Pa Isreal Enadeghe Olaye and I so hold.

There is evidence before this Court that the Will was read in the Probate Registry.

Can the Claimant still refuse to acknowledge the existence of a Will and demand that the family distribute the property under Benin Customary law? I think the issue of distribution of the estate of Pa Olaye by the Family under Benin Customary law has been ousted by the existence of the Will of the deceased. It is noteworthy that the Claimant has not challenged the validity of the Will in this Court. The correct position of the law is that if the deceased died testate the Will must be read and the distribution of his estate is subject to the Wills Law and the Administration of Estate Law of Edo State and not Benin customary law. The Family therefore cannot distribute the deceased's estate because it is no longer governed by customary law.

I therefore hold that due to the existence of a last Will and Testament by Pa Isreal Olaye, the property of the deceased cannot be shared by the Family under Benin Customary law and I so hold. The Court is therefore unable to grant the orders a, b, c, d, e sought as it would amount to an illegality.

The Claimant's case therefore fails and is dismissed.

I now proceed to suit no B/528/2012

BETWEEN

SUIT NO:B/528/2012

|                                           |   |   |                  |
|-------------------------------------------|---|---|------------------|
| 1. MR. JULIUS TAIYE OLAYE                 | } | - | ..... CLAIMANTS  |
| 2. MRS. JODEPHINE NKEKI (nee Olaye)       |   |   |                  |
| 3. MR. IYARE OLAYE                        |   |   |                  |
| A N D                                     |   |   |                  |
| 1. DR. SOLOMON OLAIYE                     | } |   | ..... DEFENDANTS |
| 2. PROPHETESS MRS. PATRICIA AIGUOBASIMWAN |   |   |                  |

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

The Claimants seek the following reliefs:

The Claimants claim against the Defendants jointly and severally as follows:

- (a) A declaration that the 1<sup>st</sup> Claimant is the proper person entitled to apply and be granted a Statutory Right of Occupancy to all that parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City, Oredo Local Government Area of Edo State within Benin Judicial Division which 1<sup>st</sup> Claimant acquired by inheritance pursuant to clause 6 of the Last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.
- (b) An order of this Honourable Court directing the Defendants to release to the 1<sup>st</sup> Claimant the plan and title documents in respect of 1<sup>st</sup> Claimant's parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City, which 1<sup>st</sup> Claimant acquired vide inheritance pursuant to clause 6 of the last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.
- (c) An order of this Honourable Court directing the Defendants to release to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants their title documents in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants parcel of land measuring 100 feet by 100 feet lying, situate

at Eyaen Quarters, Benin City, which 2<sup>nd</sup> and 3<sup>rd</sup> Claimants acquired vide inheritance pursuant to clause 9 of the last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.

- (d) An order of this Honourable Court directing the Defendants to exhume forthwith the remains of Defendants' late mother Mrs. Esther Olaye which they forcefully and unlawfully interred in the bungalow, property of the 1<sup>st</sup> Claimant at 89, Owina Street, Off Agbado Street, Benin City on August, 2012.
- (e) N50,000,000.00 (Fifty Million Naira) being general damages for trespass in that on 24<sup>th</sup> August, 2012, the Defendants without the consent and/or authority of the 1<sup>st</sup> Claimant forcefully and unlawfully broke into 1<sup>st</sup> Claimant's bungalow known as 89, Owina Street, Off Agbado Street, Benin City, dug a grave in one of the stores and interred their late mother Mrs. Esther Olaye.
- (f) Perpetual Injunction restraining the Defendants by themselves, their servants, agents and/or privies from further committing acts of trespass and/or from interfering with the 1<sup>st</sup> Claimant's right of occupancy, possession and use of his parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City which 1<sup>st</sup> Claimant acquired by inheritance pursuant to Clause 6 of the Last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September 2008, for any purpose whatsoever or doing anything at all thereat inconsistent or competing with the 1<sup>st</sup> Claimant's rights and interest thereto.

On the 13<sup>th</sup> January 2016 the Claimants in this suit adopted all their evidence adduced in B/505/12 as their evidence in this suit. In suit no B/505/12 the following persons gave evidence for the Defence:

1. 2<sup>nd</sup> Defendant, Charles Olaye
2. 3<sup>rd</sup> Defendant Mrs Josephine Nkeki,
3. 1<sup>st</sup> Defendant Stephen Olaye
4. DW1 Omoruyi Oviawe
5. DW2 Olaye Osamede Sunday
6. DW3 Michael Nosakhare Olaye,
7. DW4 Emmanuel Olaye,

The 3<sup>rd</sup> Defendant in Suit no B/505/12 is the 2<sup>nd</sup> Claimant in this case, her evidence will be recorded in this judgment as evidence of 2<sup>nd</sup> Claimant. The other witnesses who are not Claimants in this case will be recorded as Claimants' witnesses, accordingly;

1. Charles Olaye Esq is CW1
2. 1<sup>st</sup> Defendant Stephen Olaye is CW2
3. DW1 Omoruyi Oviawe CW3
4. DW2 Olaye Osamede Sunday is CW4
5. DW3 Michael Nosakhare Olaye is CW5
6. DW4 Emmanuel Olaye is CW6

The evidence of the above witnesses have been earlier stated in the above consolidated judgment and it would be unnecessary to repeat their evidence again in this suit while giving judgment. Suffice it that I have had the opportunity to thoroughly assimilate and review the evidence of the Claimants and their witnesses since they form part of my records and I will only refer to salient portions of their evidence when the need arises.

The Defendants opened their case and DW1, Omoruyi Alfred Olaye gave evidence and testified that he is a member of Omonosa family of Benin City.

DW1 testified that the 1<sup>st</sup> Defendant is his uncle and the 2<sup>nd</sup> Defendant is his aunty. DW1 testified that Pa. Israel Enadeghe Olaye lived at No. 89, Owina Street, behind Agbado Street, Benin City with his family. DW1 testified that Pa. Olaye's two wives lived in the bungalow, occupying two rooms each; the fifth room was used as a store. DW1 testified that the 1<sup>st</sup> Defendant was living in one of the rooms in the bungalow and when he left the country for England, the 1<sup>st</sup> Claimant took over the use of the room. DW1 testified that Pa. Olaye lived upstairs while the 1<sup>st</sup> Defendant used the ground floor of the house to store his properties such as articles of furniture and books which he brought home on his return to Nigeria from the United Kingdom. DW1 testified that the house was built in such a way that one needs to go through the bungalow to access the storey building. DW1 testified that the occupants of the bungalow use the toilets in the main house/storey building. DW1 testified that the frontal part of the bungalow abutting Agbado Street was used as stores. DW1 testified that when Pa. Olaye died, he was buried in the main house and when the Defendant's mother died in June 2012, she was interred in her room.

Under cross examination, DW1 stated that he is not aware that late Pa Israel Olaye wrote a Will.

1<sup>st</sup> Defendant, Dr Solomon Olaye testified and stated that his late father had his homestead at No. 89, Owina Street, Off Agbado Street, Benin City, the homestead is made up of a storey building and a bungalow where he lived with his wives and children. 1<sup>st</sup> Defendant testified that his father lived in the 1<sup>st</sup> floor of the storey building, while his two wives lived in the bungalow, each wife occupying two rooms, while the two other rooms comprising a room and a store. 1<sup>st</sup> Defendant testified that the ground floor of the storey building was given out as stores. 1<sup>st</sup> Defendant testified that as a policeman his father was posted from place to place and he worked in places like Warri, Sapele Ile-Ife,

Ibadan, Oshogbo, Ijebu-Ode Owo and Epe before his final posting to Agbor from where he retired. 1<sup>st</sup> Defendant testified that Pa. Olaye moved from one station to the other with Mrs. Wura Olaye while he was in service and his late mother lived with the children including Mrs. Wura's children at No. 89, Owina Street, Off Agbado Street, Benin City. 1<sup>st</sup> Defendant testified that his late father and Mrs. Wura Olaye returned to settle in Benin in 1977 when his father retired from the Nigerian Police Force. 1<sup>st</sup> Defendant testified that he occupied one of the rooms in the bungalow during the time all the children lived with his mother in Benin and that when he left to Russia for further studies between 1969 to 1975 when he returned to Nigeria. 1<sup>st</sup> Defendant testified that the 1<sup>st</sup> Claimant thereafter took over the use of his room in the bungalow. 1<sup>st</sup> Defendant testified that the storey building was completed in the year 1963, while the bungalow was built in 1949. 1<sup>st</sup> Defendant testified that the house was built in such a way that one needs to go through the bungalow to access the storey building. 1<sup>st</sup> Defendant testified that the occupants of the bungalow use the toilets in the main house/storey building. 1<sup>st</sup> Defendant testified that when he returned from Russia in 1978 he secured a job in Lagos at the Bendel Government Liaison Office. 1<sup>st</sup> Defendant testified that his mother did not leave her matrimonial home 14 years before his father's death. 1<sup>st</sup> Defendant testified that in the year 1995, his father took ill and his younger sister Mrs. Itohan Obanor who resides in America came to pick his father for treatment. 1<sup>st</sup> Defendant testified that his mother also complained that her vision was deteriorating and his sister took both parents with her to America. 1<sup>st</sup> Defendant testified that her father returned alone from America around August 1997 but his mother stayed back with his sister who was expecting a baby. 1<sup>st</sup> Defendant testified that on the 7<sup>th</sup> of January, 2001 his father had an accident after Sunday service at the Benin United Baptist Church Mission Road,

Benin City and he was admitted at Ajayi Memorial Hospital. 1<sup>st</sup> Defendant testified that as a result of the accident his mother returned from America to attend to her husband. 1<sup>st</sup> Defendant testified that when his father was discharged the 2<sup>nd</sup> Defendant took both parents to live with her at her matrimonial home. 1<sup>st</sup> Defendant testified that his father later returned to live at No. 89, Owina Street, Off Agbado Street, Benin City but his mother remained with 2<sup>nd</sup> Defendant because she had a stroke. 1<sup>st</sup> Defendant testified that his mother left for America on the 28<sup>th</sup> of June, 2002 for medical treatment but she returned on the 25<sup>th</sup> of August, 2003 to 2<sup>nd</sup> Defendant's home because 2<sup>nd</sup> Defendant was her only child resident in Benin to care for her. 1<sup>st</sup> Defendant testified that his mother was always visiting America for medical check up and when she was in Nigeria, his father always visited her in 2<sup>nd</sup> Defendant's home. 1<sup>st</sup> Defendant testified that his father took ill on the 30<sup>th</sup> of August, 2008 and was admitted at Asuen Hospital and was again admitted at the same Hospital in April, 2011 but his mother could not take care of him because of her stroke. 1<sup>st</sup> Defendant testified that the 2<sup>nd</sup> Defendant took up the responsibility with the financial assistance from his siblings of same blood until his father died in September, 2011. 1<sup>st</sup> Defendant testified that his late father Pa. Israel Enadeghe Olaye lived and died at No. 89, Owina Street, Off Agbado Street, Benin City and was buried there on the 12<sup>th</sup> day of November, 2011. 1<sup>st</sup> Defendant testified that after his father died, the 2<sup>nd</sup> Claimant put tenants in the two other rooms occupied by her mother, the bungalow in addition to the two other rooms comprising a room and a store. 1<sup>st</sup> Defendant testified that as the eldest son of late Pa. Olaye, he performed his burial rites as prescribed by customary law and also buried him according to the Christian rites at the Benin United Baptist Church. 1<sup>st</sup> Defendant testified that soon after his father's death the 2<sup>nd</sup> Claimant took advantage of his absence from Benin and locked up the

house and got tenants occupying the shops to pay her 6 months rents in advance without his consent. 1<sup>st</sup> Defendant testified that the 2<sup>nd</sup> Claimant has failed or refused to pay the rents she collected from the property to him. 1<sup>st</sup> Defendant testified that his father had other landed properties as follows:

- i) A parcel of land measuring 100 feet by 100 feet at Eyan Village.
- ii) A parcel of land measuring 100 feet by 300 feet at Eyan Village,
- iii) A parcel of land measuring 100 feet by 100 feet at Ewah Road, Benin City.
- iv) A bungalow at Ohovbe village, Agbor Road, Benin City and also
- v) other personal effects as clothes and one double barrel shot gun.

1<sup>st</sup> Defendant testified that according to Benin customary law, his late father's properties should vest in him as eldest son pending distribution. 1<sup>st</sup> Defendant testified that the Claimants and their supporters are plotting to scheme him out of his rights and interests in his late father's property as eldest son even after he had completed his father's funeral rites according to Benin customary law.

Under cross examination 1<sup>st</sup> Defendant stated that he is not aware that his father wrote a Will and that he was not aware that on the 23<sup>rd</sup> of August 2012, the Will was read.

2<sup>nd</sup> Defendant, Mrs Patricia Aigubasinmwin gave evidence and her evidence corroborated the evidence of the 1<sup>st</sup> Defendant in all material facts. Under cross examination, 2<sup>nd</sup> Defendant stated that they did not bury their mother against the wish of the Olaye family. 2<sup>nd</sup> Defendant further stated that the documents of her father's property are in her custody and that she is not aware that her father wrote a Will. That was the case for the Defendants.

Counsel to the Parties both filed written addresses. Counsel to the Defendant formulated the following issues for determination:



1. Whether the bungalow attached to No. 89 Owina Street, Benin City is not part of the principal house of Late Pa. Israel Olaye?
2. Whether the 1<sup>st</sup> Defendant having performed the final burial rites of Pa. Israel Olaye is not the person entitled to inherit No. 89 Owina Street, Benin City as eldest son of Pa. Israel Olaye (Deceased) under Benin customary law?
3. Whether the purported Will of Pa. Israel Olaye has any probative value in the absence of Letters of Probate?

Counsel to the Defendant submitted that **Igoigbe**” is of utmost importance in Benin Customary law due to its fundamental incidence under Benin customary law of inheritance and referred to the case of **IDEHEN V IDEHEN (1991) 6 NWLR Pt. 198 @ 282** where the Supreme **Court** defined **“Igoigbe”** as the principal dwelling house where a Benin man lived and family seat. Counsel to the Defendants submitted that what constitutes Igiogbe will depend on the evidence before the court and relies on the cases of **AGIDIGBI v AGIDIGBI (1996) 6 KLR 1124 @ 1141; OKE v OKE (1974) 3 SC 1 @ 14** and **IDEHEN v IDEHEN**. Counsel to the Defendants submitted that the two houses comprising the bungalow and storey building at No 89 Owina Street comprise the Igiogbe of Pa Olaye.

On who should inherit the Igiogbe according to Benin Customary law, Counsel to the Defendant submitted that that by the provisions of Section 3 (1) of the Wills Law Cap 172 Laws of Bendel State applicable in Edo State testamentary dispositions are subject to customary law and relies on the case of **Oke v Oke supra**.

Counsel to the Defendants submitted that the Claimants found their case on the purported Will of Pa. Israel Olaye, and refers Court to the definition of a Will in the Osborne’s Concise Law Dictionary 3<sup>rd</sup> Edition thus:

*“a disposition or declaration by which the person making it (the testator) provides for distribution or administration of property after his death”.*

Counsel to the Defendants submitted that a Will takes effect on the death of the Testator but before it takes effect it must go through probate for the assets of an estate to be properly distributed and refers to Order 53 of the Edo State High Court (Civil Procedure) Rule 2012.

Counsel to the Defendants submits that until the named Executor/Executrix obtain letters of probate, the estate remains in the domain of customary law and the appropriate customary law is the Benin Customary Law and refers to the case of **ARASE v ARASE (1981) 5 SC 33**

Counsel to the Defendants submits that the 1<sup>st</sup> Defendant as eldest son, performed the final burial rites of his late father, letters of probate have neither been applied for nor granted and therefore the contents cannot be implemented. Counsel to the Defendants submits that until the Will is proved, there is no commercial bungalow bequeathed to the 1<sup>st</sup> claimant.

Counsel to the Defendants submits that under Benin Customary Law, the 1<sup>st</sup> Defendant retains the properties of his late father in trust for himself and the other children of the deceased and relies on the following cases;

**OKE v OKE (1974) 3 SC 1 @ 14.**

**IDEHEN v IDEHEN (1991) 6 NWLR Pt. 198 @ 382.**

**AGIDIGBI v AGIDIGBI (1996) 6 KLR 1124 @ 1141.**

Counsel to the Defendants submits that No 89 Owina Street, Benin City is the principal house of Late Pa. Israel Olaye, a Benin man, and that it devolves on his eldest son, Dr. Solomon Olaye, the 1<sup>st</sup> Defendant according to Benin customary law.

Counsel to the Defendants submits that the 2<sup>nd</sup> Defendant deposed in paragraph 9 of her evidence on oath that she has the authority of the 1<sup>st</sup> Claimant to institute this action. Counsel to the Defendants submits that there is no evidence before this Court that the 1<sup>st</sup> Claimant gave the 2<sup>nd</sup> Defendant a Power of Attorney to pursue this suit. Counsel to the Defendants submits that the 1<sup>st</sup> Claimant therefore is not a proper party to this suit.

Counsel to the Defendants refers to Section 3 (1) of the Administration of Estates Law Cap 21 Laws of Bendel State applicable to Edo State and submits that the real estate of a deceased person will devolve on his personal representatives, notwithstanding any testamentary disposition.

Counsel to the Defendants also refers to Section 3 (1) of the Wills Law Cap 172 Laws of Bendel State of Nigeria applicable to Edo State and submits that while it is lawful for anyone to make a Will, such Will must be subject to the Customary Law of the testator.

Counsel to the Defendants submits that in the present situation where there is neither an application by anyone for letters of probate or customary distribution of the deceased estate, the Claimants' claim are premature and not justiciable.

Counsel to the Claimants in their written address formulated the following issues for determination:

1. Whether the commercial bungalow bequeathed to Mr. Julius Taiye Olaye, the 1<sup>st</sup> Claimant is not distinct and separate from late Pa. Israel Olaye's "Igiogbe" a storey building where he lived and died.
2. Whether having regard to late Pa. Israel Olaye's Will, the 1<sup>st</sup> Claimant is not the person entitled to a grant of Statutory Right of Occupancy over the bungalow bequeathed to him.

3. Whether the Defendants' forcible entry into the 1<sup>st</sup> Claimant's bungalow to bury the 1<sup>st</sup> Defendant's mother on 24<sup>th</sup> August, 2012 after they became aware of their late father's Will amounted to trespass and thus liable in damages.
4. Whether all the houses in late Pa. Israel Olaye's compound built at different point in time constitute his Igiogbe, whereas he used some of the buildings for commercial purposes and never lived and died in the commercial houses.

I think that the issue for determination before this Court is

1. Whether the late Pa Olaye validly made the Will tendered as Exhibit 'A'.
2. Whether the Will of late Pa Olaye, Exhibit 'A' violates the Bini Native Law and Custom concerning inheritance of estates?

From the evidence led by all parties, No 89 Owina St consists of two houses, a storey building and a bungalow. The bungalow was built in 1947 facing Owina/Agbado Street while the storey building was built in 1967 facing Owina Street. Evidence was led by all parties that Pa Olaye lived in the storey building and was buried in the storey building. There is evidence that his wives not him at some time lived in the bungalow and the rest were stores let out to tenants. From a preponderance of cases like *Arase V Arase*(supra), it is now established that the Igiogbe of a Benin man is the house where he lived and died and was buried. In the case of *Agidigbi V Agidigbi* (supra)it was held that even though there were three houses in the same compound, the particular house in which the deceased lived and died was his Igiogbe, the other two in the compound were not regarded as his Igiogbe. I have read Exhibit A and it is clear that the Testator fully complied with section 3 of the Wills Law by not being in breach of the Benin Customary law when he devised his Igiogbe to the

1<sup>st</sup> Defendant. I find that Exhibit A fully complies with the Wills Law and I so hold.

In the case of **Egharevba Vs. Oruonghae (2001) 11 NWLR (Pt. 724) 319**

**Ibiyeye, J.C.A.** stated inter alia:

“It is also trite that section 3(1) of the wills Law of Bendel State does not state that the Bini man cannot make a Will but that in making such a Will, he should not bequeath the Igiogbe to any person other than the eldest surviving son. See Idehen V. Idehen (1991) 6 NWLR (Pt. 198) 382; Lawal-Osula Vs. Lawal-Osula (1995) 3 NWLR (Pt. 382) and Agidigbi Vs. Agidigbi (1992) 2 NWLR (Pt. 221) 98 IBIYEYE, J.C.A. (P. 34, paras. C-E) It is appropriate at this stage to examine the circumstances which make for a valid Will. Sections 6 and 7 (1) of the Wills Law Cap 172 of the Laws of Bendel State of Nigeria 1976 as applicable to Edo State are relevant. They read:

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

7(1) Notwithstanding the provisions of the foregoing section every Will shall, so far only as regards the position of the signature of the testator or of the person signing for him as herein provided be deemed to be valid if the signature be so placed at or after, or

following, or under, or beside or opposite to the end of the Will that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as Will”.

Attestation clause in a Will may be defined as that clause (e.g at the end of a Will) wherein the witnesses certify that the instrument has been executed before them and the manner of the execution of the same.

It is apparent from the wording of Exhibit A (the Will) and the unchallenged evidence of the Claimants, especially CW1 and CW6 that it was made in strict compliance with the provisions reproduced above. The evidence of the CW1 that the testator was hale and healthy when he instructed him on the contents of his Will (Exhibit A) remains unchallenged and it is accorded validity. It is settled that the burden of proof of the genuineness and authenticity of a Will lies on the party propounding it. Where there is a dispute as to a Will the person who propounds it must clearly show by evidence that prima facie everything is in order. Having done that, the burden is then cast upon the party who attacked the Will to substantiate by evidence the allegation he made. See Johnson Vs. Maja (1951) 13 WACA 290; Adebajo Vs. Adebajo (1973) 1 ALL NLR 361 and Okelola Vs. Boyle (supra) at page 557.

In the Estate of Randle (1962) 1 ALL NLR 130 where it was held that:

‘Where a testamentary instrument is ex facie perfectly regular as regards all the formalities of signature and attestation (as in this case), and no question of incapacity or fraud exists, a presumption of due execution arises which great weight must be given.”

In Idehen V. Idehen (1991) LPELR-1416 (SC) at pages the Court held inter alia that:

"The provisions of a WILL have to be construed strictly and in accordance with the intention of the Testator. It must be conceded that the chief if not the only aim of making WILLS is to allow owners of property or rights to indicate how their affairs on their death could be arranged. This involves the persons to whom their property could be given or those to succeed them otherwise. See Adebisi V. Sogbesan 16 NLR 26. For instance, the institution of family ownership which could be created on intestacy, the nature and quantum of the interest which could go to a beneficiary can be altered by testamentary disposition."

In the instant case, there is no doubt that from the preponderance of evidence, particularly that of CW1, that the Claimants discharged the burden of establishing the genuineness of Exhibit A. The burden thereby shifted to the Defendants who did not in anyway challenge the validity of Exhibit A. The validity of the Will (Exhibit A) is therefore not in doubt. It is no longer in doubt from the foregoing that the testator made a valid Will.

The existence of a will duly filed and read ousts the jurisdiction of customary law. I do not agree with the submission of Counsel to Defendant that until the named Executors are granted probate, the Estate remains in the domain of customary law. It is clear from the law that the Estate is still to be administered under the Wills Law, Administration of Estate Law and the High Court Law applicable in Edo State.

On Counsel to the Defendant 's submission that the 1<sup>st</sup> Claimant is not a proper party in this suit because the 2<sup>nd</sup> Claimant did not tender a power of attorney from the 1<sup>st</sup> Claimant, I do not think the absence of the 1<sup>st</sup> Claimant's evidence in this renders him an improper party. In the case of Iyimoga v. Gov. Plateau State

(1994) 8 NWLR (Pt.360) Orah, J.C.A. stated inter alia

Dealing with parties generally and specifically, it is my view, that a distinction must be drawn between "proper parties", "desirable parties" and "necessary parties". In legal proceedings, the parties generally speaking, are the persons whose names appear on the record as plaintiffs or defendants. The distinction between "proper", "desirable" and "necessary" parties are as follows:-

(i) 'Proper parties', are those who, though not interested in the plaintiffs' claim, are made parties for some good reasons e.g., where an action is brought to RESCIND a contract, any person is a party who was active or constructive.

(ii) 'Desirable parties', are those who have an interest or who may be affected by the result.

(iii) 'Necessary parties' are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceedings could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff: *Amon v. Raphael Tuck & Sons Limited* (1956) 1 Q.B.D. 357; *Settlement Corporation v. Hoshchild* (No.2) (1969) 1 WLR 1664.

I find that the 1<sup>st</sup> Claimant is a necessary party in this suit and I so hold.

I observed the witnesses as they testified and I believe the evidence of the 2<sup>nd</sup> Claimant when she testified that the 1<sup>st</sup> Defendant with the assistance of fierce looking thugs and men dressed in military apparel, broke into one of the rooms in the commercial house devised to Mr Julius Olaye and forcefully interred his late mother therein, in spite of resistance from the 2<sup>nd</sup> Claimant and family members.



I also believe the evidence of the Claimants and their witnesses when they testified that the 1<sup>st</sup> Defendant armed himself with fierce looking thugs and men dressed in security apparels and forcefully interred his late mother on the property. 2<sup>nd</sup> Claimant testified that the Defendant's mother was interred on 24<sup>th</sup> August 2012 and the security personnel threatened to shot anyone who dared to prevent the interment of Claimant's mother in the bungalow devised to 1<sup>st</sup> Claimant. Exhibits C3 C4 and C5 are photographs of the 2<sup>nd</sup> Claimant showing injuries which she sustained on the day in question.

From the evidence before me, I find that the 1<sup>st</sup> Defendant forcefully broke into a store in the bungalow devised to the 1<sup>st</sup> Claimant by Exhibit A, despite family opposition, with the aid of armed men interred his mother therein.

From the preponderance of evidence before me, the Claimants case succeeds and I grant the following orders:

1. A declaration that the 1<sup>st</sup> Claimant is the proper person entitled to apply and be granted a Statutory Right of Occupancy to all that parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City, Oredo Local Government Area of Edo State within Benin Judicial Division, which 1<sup>st</sup> Claimant acquired by inheritance pursuant to clause 6 of the Last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.
2. An order directing the Defendants to release to the 1<sup>st</sup> Claimant the plan and title documents in respect of 1<sup>st</sup> Claimant's parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City, which 1<sup>st</sup> Claimant acquired vide inheritance pursuant to clause 6 of the last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.

3. An order directing the Defendants to release to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants their title documents in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants parcel of land measuring 100 feet by 100 feet lying, situate at Eyaen Quarters, Benin City, which 2<sup>nd</sup> and 3<sup>rd</sup> Claimants acquired vide inheritance pursuant to clause 9 of the last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September, 2008.
4. An order directing the Defendants to exhume forthwith the remains of the Defendants' late mother ,Mrs. Esther Olaye which they forcefully and unlawfully interred in the bungalow, property of the 1<sup>st</sup> Claimant at 89, Owina Street, Off Agbado Street, Benin City on August, 2012.
5. N1, 000,000.00 (One Million Naira) general damages for trespass is awarded in favour of the 1<sup>st</sup> Claimant.
6. A Perpetual Injunction restraining the Defendants by themselves, their servants, agents and/or privies from further committing acts of trespass and/or from interfering with the 1<sup>st</sup> Claimant's right of occupancy, possession and use of his parcel of land and the bungalow thereon known as 89, Owina Street, Off Agbado Street, Benin City, which 1<sup>st</sup> Claimant acquired by inheritance pursuant to Clause 6 of the Last Will and Testament of Pa. Israel Olaye made on 12<sup>th</sup> September 2008, for any purpose whatsoever or doing anything at all thereat inconsistent or competing with the 1<sup>st</sup> Claimant's rights and interest thereto

.....  
**HON. JUSTICE N. A. IMOUKHUEDE,**  
**J U D G E**  
4/5/2017

SUIT NO:B/505/2012

K. O. LONGE ESQ  
WITH HIM J. E. EDOSA  
COUNSEL TO THE CLAIMANTS.

CHIEF DAN OSE OKOH, SAN WITH W. O. OVBIENO  
COUNSEL TO THE DEFENDANTS.

SUIT NO:B/528/2012

CHIEF DAN OSE OKOH, SAN WITH W. O. OVBIENO  
COUNSEL TO THE CLAIMANTS

K. O. LONGE ESQ  
WITH HIM J. E. EDOSA  
COUNSEL TO THE DEFENDANTS.