

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE AGENEBODE JUDICIAL DIVISION
HOLDEN AT AGENEBODE
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON MONDAY THE
30TH DAY OF OCTOBER, 2017.

BETWEEN:

SUIT NO HAG/04/2016

MR. TIMOTHY ETIUZALE
(Suing as an Executor/Trustee of the Estate
Of Late Chief Jacob Pius Okhure Etiuzale) }CLAIMANT

AND

1. MR. GODWIN ETIUZALE
2. HRM DR. GEORGE OSHAPI EGHABOR } DEFENDANTS
(The Okumagbe of Weppa Wanno Kingdom)

JUDGMENT

The Claimant claims *vide* a Writ of Summons and Statement of Claim dated 7th March, 2016 filed on the same day, against the Defendants jointly and severally as follows:

1. A declaration that the purported sharing of his fathers properties to the 1st Defendant by anybody is null and void and of no effect;
2. A declaration that the committee set up by the 2nd Defendant to share his father's properties is null, void and of no effect;
3. A declaration that the 2nd Defendant has no power under the law to constitute a committee to share his father's properties;

4. An order that the 1st Defendant should account for the rent he had collected from the properties without his consent since January, 2015 and handover same to him;
5. N10, 000,000.00 (ten million naira) general damages against the Defendants jointly and severally;
6. An order of perpetual injunction restraining the Defendants, their agents, proxies, servants or any person acting on their behalf from sharing his father's properties or collecting rent from same without his consent; and
7. An order restraining the 2nd Defendant from interfering with Claimant's fundamental human rights.

The 1st Defendant filed his Statement of Defence and Counter Claim, while the 2nd Defendant failed to file any defence despite the fact that he was served with the court processes.

The first Defendant Counter Claimed against the Claimant as follows:

- (i) A declaration that in accordance with the terms of the Will of 25th May 1991 of Chief Jacob Okhure Etiuzale the Claimant is not the sole beneficiary of the estate of late Chief Jacob Pius Etiuzale and that all the other children of late Chief Jacob Pius Okhure Etiuzale estate are entitled to benefit from the estate;
- (ii) And order directing the Claimant to account for the rent he has been collecting from tenants on the properties since 1991 and any other profit he has made as trustee from the administration of the estate of late Chief Jacob Pius Okhure Etiuzale's estate;
- (iii) The sum of N1,000,000 (one million naira) being cost of this action.

The Claimant thereafter filed his Reply and Defence to the 1st Defendant's Statement of Defence and Counter Claim respectively.

At the close of pleadings the Claimant formulated five issues for determination at the trial as follows:

- (i) *Whether the sharing of the property of late Chief Jacob Pius Okhure Etiuzale devised in a Will by Chief Okolo Alogaga on the 19th*

- December 2014 is legal and conveys or vests any title/ownership in the beneficiaries;*
- (ii) Whether the 2nd Defendant has any authority to share or constitute a committee to share the properties of late Chief Jacob Pius Okhure Etiuzale devised under a Will without the consent of the executors of the Will;*
- (iii) Whether the 1st Defendant should not account and refund the rent he had collected from the tenants in the properties arising from the sharing done on 19th December 2014 to the Claimant;*
- (iv) Whether the Claimants reliefs should not succeed;*
- (v) Whether the Defendant's Counter Claim should not fail.*

The 1st Defendant thereafter adopted the five issues formulated by the Claimant for trial.

The Court adopted the Issues as formulated above and commenced the hearing.

On the 3rd day of April, 2017, the Claimant opened his case. He testified on oath, adopted his Written Statement on Oath made on the 7th of March, 2016 as his testimony in this suit and tendered the following documents in evidence:

1. The will of Chief Jacob Pius Okhure Etiuzale-Exhibit 'A';
2. Letter dated 5/02/2015 from A. Innih Esq –Exhibit 'B';
3. Certified true copies of the motion for joinder-Exhibit 'C' 'C1' & 'C2';
4. Certified true copies of rent receipts issued by 1st defendant-Exhibit 'D' 'D1' 'D2' and 'D3';
5. Letter of invitation by the 2nd defendant –Exhibit 'E'; and
6. Letter dated 15/01/2016 from A.M. Aleogho & Co-Exhibit 'F'.

Under cross examination, the Claimant stated that since September, 1991, he has been the only person collecting the rents from his father's properties. That he did not render any account to any person ever since because the Will did not require him to render any account.

He stated that he did not use the proceeds from the properties for his personal benefit but to pay the school fees of his siblings, to maintain his father's surviving wives, to feed the 1st Defendant and to pay salaries to a jobless brother.

He said that he had the receipts for the school fees and that his jobless brother signed an exercise book for the salaries which he paid him.

He stated that the trustees of the will include: the 1st Defendant; one Agiegbewo Anerua; and Chief Okolo Alogaga. He said that he did not confer with the other trustees before paying the school fees of his siblings because he was not required to do so.

Under cross examination, the Claimant identified Exhibits C to C3 and Exhibit D1.

He said that sometime in December, 2014, he was invited by Chief Okolo Alogaga for the sharing of the properties under the will but he disagreed.

Upon the conclusion of the evidence of the Claimant, the Claimant closed his case.

On the 10th of April, 2017, the 1st Defendant opened his defence and counter claim and called one Mrs. Agiegbewo Anerua (D.W.1.) as his witness. She testified on oath and adopted her Written Statement on Oath made on the 30th of June, 2016 as her testimony in this suit.

Under cross examination, she stated that she was not present at the meeting held on 19/12/14 at the residence of Chief Okolo Alogaga but was informed of what transpired there. She said that they later showed her the document of sharing but she was not given a copy. She admitted being an executor under the will but denied neither signing the sharing document as an executor nor taking possession of any of the properties shared to her. She maintained that the properties devised to the Claimant under the will were meant to be held in trust for the children and that the Claimant is expected to give account of the properties to them.

Thereafter, the 1st Defendant testified on oath, adopted his Written Statement on Oath made on the 25th of April, 2016 as his testimony in this suit and tendered exhibit 'G' which is a letter dated 23/3/2016, titled "***Report on the sharing of late chief Jacob Pius Okure Etiuzale's Estate***" and urged the Court to grant his counter claim.

Under cross examination, he admitted that Exhibit G was not addressed to him and that neither the Claimant nor he signed Exhibit G. He said that the Claimant did not refuse the sharing under Exhibit G. He said that Exhibit E was an invitation from the palace after he reported the Claimant to the palace. He said that the 2nd Defendant set up a committee to share his father's property but the Claimant refused to appear before the committee. He identified Exhibit A as his father's will. He said that one Martins Etiuzale has built on his (Martin's) portion of the property shared to him. That he did not request for any parcel of land from the Claimant but he requested him to share the properties comprised in the will. He admitted that there is no duty on the Claimant to render account under the will. That the will did not specifically devise any property to any of his siblings. He said that the Claimant sued some of the tenants who are paying rents to him. He said that in Exhibits C to C3, he stated that his father died intestate.

The 1st Defendant maintained that Chief Okolo Alogaga shared some properties to him and he has been collecting rents from the tenants in seven stores since January, 2015.

The 1st Defendant closed his case and the suit was adjourned for adoption of Written Addresses.

The Defendant's Final Written Address was dated 5th June, 2017 and filed on the 11th of November, 2016. The Claimant's Final Address was dated 23rd of June, 2017 and filed on the 28th of June, 2017. The Defendant also filed a Reply to the Claimant's Address dated and filed on the 11th of September, 2017.

In his Written Address, the learned counsel for the 1st Defendant, S.K.Mokidi Esq. adopted the five Issues for Determination formulated by the Claimants as follows:

- 1. Whether the sharing of the property of late Chief Jacob Pius Okhure Etiuzale devised in a will by Chief Okolo Alogaga on the 19th December 2014 is legal and conveys any title/ownership on the beneficiaries;***
- 2. Whether the 2nd defendant has the authority to share or constitute a committee to share the property of late Chief Jacob Pius Okhure Etiuzale devised under a will without the consent of the executors;***

3. *Whether the 1st defendant should not account and refund the rent he had collected from the tenants in the property arising from the sharing done on 19th December 2014 to the claimant;*
4. *Whether the claimant's reliefs should not succeed; and*
5. *Whether the 1st defendant's counter claim should not fail.*

The learned Defendant's Counsel however led arguments on only Issues 4 and 5. He however argued Issue 5 before Issue 4.

ISSUE 5:

Arguing Issue 5, learned counsel submitted that the question to be determined is, whether by Exhibit A the claimant is the sole beneficiary of the estate of late Chief Jacob Pius Okhure Etiuzale. He submitted that in answering this question, the Court is enjoined to look at the entire document in order to discover the intention of the testator because a will is simply the intention and wishes of a person to be carried out after his death. See: *Asika V. Atuanya (2014) All FWLR (pt 710) pg 1251 @ p.1264.*

He referred to the opening sentence of paragraph 5 of Exhibit A which states thus:

“I DEVISE all my properties (personal and landed) to my son Timothy Egwemo Etiuzale for himself and to hold in trust for all my other children.”

He contended that in the light of the above sentence, it cannot be said that the properties thereafter bequeathed are for the sole benefit of claimant. He referred to the definition of a *trust* as defined in: *Keeton, Law of Trusts, 9th Ed. P.3* as:

“the relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some person (of whom he may be one and who are termed cestuis que trust) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.”

Learned counsel also referred to: *Black's law Dictionary 9th edition* where a *trustee* is defined as:

“ One who stands in a fiduciary or confidential relation to another, especially, one who is having a legal title to the property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.”

He argued that the trustee is not the beneficiary of the trust property; he holds the trust properties for the legal owner (beneficiary). Applying this rule, he submitted that the claimant who was appointed as both executor and trustee of the Will is not the owner of the property therein bequeathed and ought not to benefit from the trust properties because he is in a fiduciary position.

However, he maintained that from the wordings of paragraph 5 of exhibit A, there appears to be an intention of the testator that the claimant should be one of the beneficiaries of the Will. He drew this inference because of the use of the words: **“For himself and to hold in trust for all my other children.”** He therefore urged the court to hold that the 1st defendant is entitled to the declaration sought in relief (i) of his counter claim.

Furthermore, learned counsel submitted that the claimant is in breach of his fiduciary duties as a trustee. Again, he referred to: *Black's Law Dictionary* where a fiduciary is defined as:

“A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candor.”

He posited that in the discharge of his duties, the trustee must observe the utmost diligence and follow strictly, the express terms of the trust and if he deviates, he will be guilty of a breach of trust for which he will be personally liable. According to him, in the instant case, the claimant as a trustee owes other beneficiaries of the trust properties a duty to act in good faith, trust and confidence, which he admittedly failed to uphold. He said that a trustee must also keep proper accounts, allow the beneficiaries to inspect them and volunteer relevant information and explanation concerning any dealings with the trust property.

He pointed out that in paragraphs 8, 9, 10, 11 and 12 of the statement of defence, the 1st defendant's made specific allegations against the claimant and also led evidence accordingly. He maintained that these allegations were neither denied nor demolished under cross-examination and claimant. Furthermore, he submitted that the Claimant did not lead any cogent evidence of how he used the proceeds from the estate.

Counsel submitted that it is settled law that where a piece of evidence is credible and has not been discredited under cross examination the court is entitled to act on it. For this view, he relied on the following decisions:

Orient Bank (Nig) Plc v. Bilante International ltd [1996] 5NWLR (Pt. 441) 166 @ 173; Mudasiru v. Abdullahi [2012] All FWLR (Pt. 639) 1143 and BUA v Dauda [2013] All FWLR (Pt.838) 657.

He pointed out that under cross examination the claimant made some salient admissions: that since September 1991 he has been the only one collecting rent in respect of the trust properties; and that he did not account for the rent collected to the other trustees or beneficiaries because the Will did not mandate him to do so.

Counsel submitted that although the Claimant alleged that he paid school fees for his younger ones from the proceeds of the properties, he did not mention those he paid for or how much he spent on their school fees. Furthermore, he said that he did not produce any receipts of payment of school fees.

Again, he submitted that the Claimant failed to produce the exercise book where his siblings signed for the salaries which he paid them.

In the light of the foregoing, counsel urged the Court to hold that the Claimant used the proceeds of the estate for his sole benefit without reference to the other trustees and beneficiaries thereby breaching his fiduciary duties to other beneficiaries of the Will.

He submitted that a person in a fiduciary position will be a constructive trustee of any profits he makes out of the property entrusted to his care for the benefit of the persons entitled to the property. Counsel referred the Court to the dictum of Lord Herschel in the case of: ***Bray V. Ford (1896) A.C. 44*** as follows:

“It is an inflexible rule of a court of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.”

He said that this position was restated by Ademola J. (as he then was) in the case of: ***Marques V. Edematie (1950) 19 N.L.R. 75***

Learned counsel maintained that the claimant is both an executor and a trustee. That an executor must be a person of integrity without any proclivity to make unjust gains from the estate. Furthermore, he posited that a trustee is a person appointed to safeguard the trust property and apply it in the manner directed; he will be a constructive trustee of any profits he makes out of the trust property. He referred to the case of: ***Ibrahim V. Osunde (2009) All FWLR (Pt 465) P. 1651*** where Aderemi JSC observed as follows:

“It is wrong in law, for an administrator of an estate or anybody claiming through him, to assimilate that property to his own. Equity will not even permit that under any guise. To say the least, it is a gross abuse of office.”

From the evidence before the Court, learned counsel urged the Court to hold that the claimant is entitled to account for the rents he has been collecting from the tenants on all the properties since September 1991.

ISSUE 4:

On Issue 4, learned counsel submitted that the onus is on the Claimant to prove that the properties were shared for the 1st defendant. He referred to paragraph 9 of the statement on oath where he claimed that his father’s properties were not shared.

He contended that the properties allegedly shared to the 1st defendant were not identified and exhibits C- C2 did not identify the properties involved. He said that the main claim in suit No MAG/3/2016 was not tendered to enable the court identify the subject matter of the suit. According to him, Exhibit D and D1 have no nexus with the parties in Suit No MAG/3/2016.

He submitted that the evidence of the 1st defendant is that the trust properties were shared among all the children of the testator on the basis of the four wives of the testator. He maintained that the 1st defendant and his matrilineal siblings were given certain properties, just as claimant and his siblings. That there were no specific properties given to the 1st defendant in his personal capacity on the basis of which the claimant's Relief One can be granted because the 1st defendant was not sued in a representative capacity but in his personal capacity.

He contended that there is no evidence that the 1st defendant is representing his siblings in this action; yet their interest would be affected. He thus submitted that Relief 1 is therefore incompetent against the 1st defendant as all the necessary parties are not before the court.

Counsel observed that the Claimant seeks to set aside the properties shared to only the 1st defendant and is silent on what happens to the properties shared to other children of the testator, including him. He contended that it is incongruous for the Claimant to assert that no properties were shared and at the same time, urge the court to set aside the sharing of the testator's properties to 1st defendant.

Learned counsel referred to the evidence adduced by the 1st Defendant to convince the Court that the sharing was to enable all the children of the testator to benefit from the estate in line with the expressed intention of the testator as against the position of the claimant that he is the sole beneficiary.

He pointed out that apart from claimant, who believes he is the sole beneficiary of the estate; no other beneficiary is challenging the sharing of the trust properties. He maintained that it is the claimant who has acted contrary to the intention of the testator in his Will, which action paragraph 9 of the Will was intended to forestall.

He referred the Court to the case of: *Adeseye v. Williams [1964] All. N.L.R. 37 at 39* to buttress the point that the court can remove a trustee if satisfied that his continuance in office would be prejudicial to the due performance of the trust and to the interest of the beneficiaries or if the trustee has disregarded his duties as the claimant herein has done.

Submitting on the Claimant's claim for the 1st defendant to give an account of rents collected and hand over to him, he noted that the claimant, 1st defendant and 3 others are trustees and executors of the Will. That the other 3 executors and trustees are not parties to this suit. Furthermore, he observed that the 1st defendant is just one of the beneficiaries of the Will and not the sole beneficiary.

According to him, an order seeking that any rent collected should be handed over to the claimant, who is just one of the beneficiaries, will create the impression that the trust properties are for the benefit of only the claimant. He contended that if the court is of the opinion that the 1st defendant as an executor, trustee and beneficiary is not entitled to collect any rent, then any account ordered, must be to all beneficiaries of the estate and not claimant alone.

He submitted that he who comes to equity must come with clean hands. That the claimant has not dealt fairly in the administration of the estate of his late father prior to the sharing. That since 1991 when the Will was proved, he was solely in charge of the estate of the late Chief Jacob Pius Okure Etiuzale and never deemed it fit to distribute evenly the profits made from the estate or render any account. He submitted that equity cannot permit him now to ask for the 1st defendant to render accounts. See the case of: *N.L.C. V. Pacific Merchant Bank Ltd (2012) All FWLR (Pt. 640) P. 1211 t 1226 para. D*. He emphasised that he who comes to equity must do equity. See: *Robert V. Chinda (2010) All FWLR (pt 550) P. 1344 at 1363 para. C*.

He urged the Court to dismiss the case of the claimant in its entirety and grant the 1st defendant's counterclaim.

On the 25th of September, 2017, the learned Counsel for the Claimant, S.E.Isokpunwu Esq., adopted his Written Address dated 23/06/17, filed on 28/06/17. With the leave of the Court, he advanced some additional oral arguments. In his further submissions, Counsel maintained that the executors of a will must have the property placed in their care and cited the case of: *Ibrahim vs. Osunde (2009) 2 MJSC (Pt.2) 1 at 23*.

Again, the learned Claimant's counsel referred to page 10, paragraph 6.17 of his Written Address and submitted that documents are to be tested in open court before the Court can evaluate them. To buttress his point, he relied on the case of: *Omisore & Anor. Vs. Aregbesola (2015) 246 LRCN 44 at 84-85.*

He urged the Court to expunge the evidence of the 1st Defendant where he stated that the tenants stopped paying rents when the matter went to the Magistrate Court on the ground that such facts were not pleaded. For this view, he relied on the following decisions: *Okoko vs. Dakolo (2007) 1 FWLR (Pt.350) 499 at 525; and Okwejiminor vs. Gbakeji (2008) 2 FWLR (Pt.417) 213 at 216.*

In his Written Address, the learned Counsel formulated five Issues for Determination as follows:

- I. Whether the sharing of the property of late Chief Jacob Pius Okhure Etiuzale devised in a Will by Chief Okolo Alogaga on the 19th December 2014 is legal and convey or vest any title/ownership in the beneficiaries;
- II. Whether the 2nd Defendant has any authority to share or constitute a committee to share the properties of late Chief Jacob Pius Okhure Etiuzale devised under a Will without the consent of the executors of the Will;
- III. Whether the 1st Defendant should not account and refund the rent he had collected from the tenants in the properties arising from the sharing done on 19th December 2014 to the Claimant;
- IV. Whether the Claimants reliefs should not succeed; and
- V. Whether the Defendant's Counter Claim should not fail.

Learned counsel thereafter argued the five Issues seriatim.

ISSUE ONE:

Whether the sharing of the property of late Chief Jacob Pius Okhure Etiuzale devised in a Will by Chief Okolo Alogaga on the 19th December 2014 is legal and conveys or vests any title/ownership in the beneficiaries.

To resolve this Issue, learned counsel referred the Court to *Section 3(1), (2) and (3) of the Administration of Estate Law Cap 2 Laws of Edo State* which states as follows:

- (1) *Real estate to which a deceased person was entitled, for an interest not leasing on his death shall on his death notwithstanding any testamentary disposition thereof devolve from time on the personal Representative of the deceased.*
- (2) *The personal representatives for the time being of a deceased person are assigns within the measuring of all trusts and power*
- (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 leasing on his death as well as regards to his personal estate.*

Flowing from the above provisions, he submitted that the estate of late Chief Jacob Okhure Etiuzale devolved on the administrators/personal representatives.

He maintained that the Will clearly did not assign any duty to the Executors or place any of the properties in the care of the executors to manage. Furthermore, he insisted that the Will did not devise any of the deceased's properties to the other executors to hold on trust and apart from the Claimant.

Counsel observed that apart from Chief Okolo Alogaga, none of the executors signed the document of sharing, admitted as Exhibit "G" being relied upon by the 1st Defendant.

He submitted that the purported sharing by Chief Okolo Alogaga without the consent or concurrence of all the executors contravenes *Section 4(2) of the Administration of Estate Law of Edo State* which states as follows

"Where as respects real estate there are two or more personal representatives a conveyance of real estate devolving under this Part of this law shall not, save or otherwise provided as respect trust estate be made without the concurrence therein of all such representatives..."

He posited that the provision of that section, is *in pari materia* with **section 4(2) of the Administration of Estate Law Cap 3 Laws of Lagos State** which was given judicial interpretation in the case of: **DR BENJAMIN OHIAERI V ALHAJI B.I. YUSUF (2009) 175 LRCN 210 at 226 PAR A-U**, where the Supreme Court held:

“Thus a conveyance can under section 4(2) of the Administration of Estate Law Cap 3 Laws of Lagos State, be validly executed by one of two or more personal representatives provided it is so executed and signed with the concurrence or agreement of such other personal representatives”.

Counsel submitted that there was no other sharing done by anybody neither is there any other sharing document than Exhibit G which was tendered during the trial.

He pointed out that when the 1st Defendant was confronted with Exhibit E, a letter from the 2nd Defendant inviting the Claimant to the palace, the 1st Defendant admitted that the Claimant refused the sharing at the meeting held on 19th December 2014.

He submitted that at paragraph 6 of the 1st Defendant’s depositions in some of the suits filed by the Claimant against some of the tenants of his father’s properties at the Magistrates Court, Agenebode admitted as exhibits C,C1,C2,C3 he stated that his father died intestate, contrary to his Claim before this Court that his father died testate.

He submitted that where the evidence of a witness is filled with material contradictions the Court cannot pick and choose between them but must regard the entire testimony as unreliable. For this, he relied on the case of: **OWOR V CHRISTOPHER (2010) ALL FWLR (PT 511) 962 at 968 Ratios 13 & 14.**

Again, learned counsel pointed out that DW1 who also claimed that Chief Okolo Alogaga shared properties to her admitted under cross examination that she did not take possession of the properties allegedly shared to her by Chief Alogaga. He stated that there is no evidence on record that the other alleged beneficiaries of the sharing have challenged the Claimant except the 1st Defendant.

He submitted that the sharing of the deceased's properties by Chief Okolo Alogaga without the concurrence or agreement of all the executors of the Will is null and void and of no effect.

He urged the Court to resolve issue one in favour of the Claimant and hold that the purported sharing of the Claimant's father's properties by Chief Okolo Alogaga on the 19 December 2014 is illegal and does not convey or vest any title in the beneficiaries.

ISSUE TWO:

Whether the 2nd Defendant has any authority to share or constitute a committee to share the properties of late Chief Jacob Pius Okhure Etiuzale devised under a Will without the consent of the executors of the Will.

Counsel submitted that the 2nd Defendant did not defend the suit neither was he represented at the trial after he was served with the court processes. He submitted that facts not denied by a party who had the opportunity to so do are deemed to be admitted. He therefore urged the Court to resolve issue 2 in favour of the Claimant.

ISSUE THREE:

Whether the 1st Defendant should not Account for the rent he had collected from the tenants in the properties arising from the sharing done on 19th December, 2014 to the Claimant.

On this Issue, learned counsel adopted his arguments in respect of Issue 1 and submitted that since the 1st Defendant took possession of the properties on the strength of the purported illegal sharing, he lacks the right to collect rents from the tenants and he should give account to the Claimant.

He therefore urged the Court to resolve Issue three in favour of the Claimant.

In further response to some arguments raised by the 1st Defendant's counsel in his Final Address, counsel submitted that after producing copious evidence that their late father's properties had been shared to him, the 1st Defendant's counsel in his final address, turned round to argue that the properties or stores had not been

shared to him. He maintained that the address was inconsistent with the evidence and therefore unreliable.

Also on the submission that the shared properties were not identified, he submitted that they were identified in paragraph 5b of the Will and confirmed by the 1st Defendant through the address contained in the rent receipts which he issued to some of the Claimant's tenants admitted in evidence as Exhibits D,D1,D2 and D3 including the rent receipt he issued to one Mr. Ogar Bakery frontloaded with the originating process, showing that the stores are located on the Old Auchu Road, opposite Post Office, Agenebode.

He submitted that the address of Counsel cannot take the place of evidence and relied on the case of: *OLAGUNJU V ADESOYE (2009) 4 MJSC 76 at 78 Ratio 1*.

On the submission that any account ordered by the Court must be shared to all beneficiaries of the estate and not to the Claimant, he maintained that no evidence was adduced in support of the issue at the trial by the 1st Defendant. Furthermore, he submitted that the Court is not a Father Christmas and cannot grant to a party what such party has not claimed. He said that the relief of sharing to all the beneficiaries is not part of the counter claim of the 1st Defendant.

ISSUE FOUR:

Whether the claimant's reliefs should not succeed.

Arguing this Issue, learned counsel addressed on the reliefs seriatim.

RELIEF I

A declaration that the purported sharing of his father's properties to the 1st Defendant by anybody is null and void and of no effect.

Here, he adopted his arguments advanced under Issue 1 and submitted that the Claimant gave direct positive and cogent evidence in support of his Claim. He made further submissions which were mainly repetitive.

RELIEFS 2 & 3

Counsel addressed on Reliefs 2 and 3 together.

Relief 2:

A declaration that the Committee set up by the 2nd Defendant to share his father's property is null, void and of no effect.

Relief 3:

A declaration that the 2nd Defendant has no power under the law to share his father's properties.

He submitted that the Claimant's evidence was not denied or challenged by the 2nd Defendant as deposed to in paragraphs, 15, 16, 17, & 18 of the Claimant's statement on Oath.

He maintained that the 1st Defendant confirmed the evidence of the Claimant when he stated that the 2nd Defendant set up a Committee to go into their late father's properties and share same but the Claimant refused.

He reiterated that where a Claimant adduced oral evidence which established his Claim against the Defendant and that evidence is not rebutted by the defence, the Claimant is entitled to Judgment. For this, he relied on the case of: **Newbreed Organisation V Erhomosele (2006) 140 LRCN 2067 @ 2067 R. 10.**

He urged the Court to hold that the Claimant has proved reliefs 2&3 according to law and grant same.

RELIEF 4.

An order that the 1st Defendant should account for the rent he had collected from the properties without Claimants consent since January, 2015 and handover same to him

Learned counsel referred the Court to the rent receipts issued to some of the Claimant's tenants admitted in evidence as Exhibit D, D1, D2 and D3, all amounting to a total sum of N630,000.00 (six hundred and thirty thousand naira).

He also referred to another rent receipt issued to one Mr. Ogar Bakery amounting to N240,000.00 for 30 (thirty) months (i.e. Jan, 2014- June, 2017) pleaded in paragraph 16 of the statement of Claim deposed to in paragraph 12 of Claimant's Statement on Oath, frontloaded and forming part of the case file and

submitted that under pleadings, a reference to a document brings into the pleading the whole contents of the document as was held in the case of: ***NIMASA V ODEY (2014) 2 WRN83 at 94 RATIO 13***. He submitted that a judge can *suo motu* make reference to the case file before him and make use of any document he finds necessary and relied on the case of: ***FUMUDOH V. ABORO (1991) 9 NWLR (PT. 214) 210 AT 229E AND UMEZINNE V. FRN (2013) 42 WRN 91 AT 105 RATIO 11***

He submitted that since the rent receipt issued to Mr. Ogar Bakery is part of the record of the Court frontloaded, the court has jurisdiction to look at the document in its file in the determination of the relief under consideration.

He therefore urged the Court to hold that the Claimant has proved this relief and order the 1st Defendant to refund the sum of N630, 000.000 (six hundred and thirty thousand naira) to the Claimant.

RELIEF 5

N10, 000,000 (Ten Million Naira) general damages against the Defendants jointly and severally

Counsel submitted that the Claimant has placed credible material before the Court from which the Court can make assessment of general damages against the Defendants. He maintained that general damages are assessed not on any measurement but on the opinion and judgment of a reasonable man and relied on the case of: ***AG. OYO STATE V. FAIR LAKES HOTELS LTD. (1989) 5 NWLR (PT. 121) 255***.

He urged the Court to grant the relief for general damages.

On Claimant's **Reliefs (6) and (7)**, he submitted that once there is a finding by the Court that the Claimant's reliefs (1), (2), (3) and (4) succeed, the Claim for damages and injunction must be awarded by the Court. He urged the Court to grant the injunctions.

ISSUE FIVE:

Whether the 1st Defendant's counter claim should not fail.

Arguing this Issue, counsel submitted that the 1st Defendant has failed to provide any evidence to warrant this Court to award the reliefs sought in paragraph 22(i), (ii) and (iii) of his Counter Claim.

He thereafter made his submissions on each of the reliefs in the Counter Claim.

Relief 22(i) of the Counter Claim:

A declaration that in accordance with the terms of the Will of 25th May, 1991 of Chief Jacob Okhure Etiuzale the Claimant is not the sole beneficiary of the estate of late Chief Jacob Okhure Etiuzale and that all the other children of late Chief Jacob Pius Okure Etiuzale's Estate are entitled to benefit from his estate.

Counsel referred to paragraph 5 of the Will which stated thus: *“I devise all my properties (personal and landed) to my son Timothy Egwemo Etiuzale for himself and to hold in trust for all my other children. The properties are:”*

He submitted that the phrase: **“The properties are:”** goes to show the properties that the Claimant is to hold on trust for all the testator's children including himself (the Claimant).

He contended that paragraph 5(a) of Exhibit “A” expressly mentioned the property the Claimant is given to hold on trust for all the testator's children as follows:

“I give my son Timothy Egwemo Etiuzale to hold on Trust for all my children my residential premises which is situate, lying and being at the Market Square/Mission Road, Agenebode water-side and of one particularly contained in survey plan No OM 2489 of 4th day of August, 1976.”

He posited that paragraph 5b to 5d is without the opening phrase as contained in paragraph 5(a) to wit: *“I give my son, Timothy Egwemo Etiuzale to hold on trust for all my children”*.

He contended that by the maxim of statutory interpretation: *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) it is intended that by specifically including the phrase earlier stated in Paragraph 5(a) and excluding it from paragraphs 5(b), (c) and 5(d) the intention of the testator is that the Claimant is the sole beneficiary of the properties mentioned in

paragraphs 5(b), 5c and 5(d). For this view, he relied on the case of: ***CHIEF (MRS.) OLUFUNKE VICTORIA EHUWA V ONDO STATE IND. ELECTORAL COMM. (2007) 1FWLR (PT 351) 702 at 727 PARA C - D***

He submitted that when a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning and when the words of any instrument are free from ambiguity in themselves, such should be construed according to the strict, plain and common meaning of the words themselves. See the case of: ***KWARA STATE POLYTECHNIC ILORIN V SHITTU (2013) 17 WRN 78 AT 84 Ratio 4.***

Concerning the property contained in paragraph 5c of Exhibit “A”, learned counsel submitted that the Will gives the Claimant the power or discretion to give any of the vacant plots to any of the testator’s sons to build his personal house as declared by the testator in paragraph 7 of Exhibit “A”.

He submitted that the 1st Defendant misconceived the contents of the Will, Exhibit “A”, when he contended that the Claimant is not the sole beneficiary even after the clear and unambiguous statement of the testator in paragraphs 6 and 7 of the Will were admitted by the 1st Defendant and his witness (DW1) under cross examination.

He contended that under cross examination, the 1st Defendant and his witness (DW1) admitted that their late father did not specifically give any of his properties to any of his children apart from the Claimant. He said that they admitted that they were already adults when their father made Exhibit “A” to their knowledge which they never objected to or protested against when their father was alive.

Furthermore, he maintained that they are aware: that the Claimant assisted their father in building some of the houses; the education of some of the Claimant’s younger siblings including the 1st defendant and his witness (DW1); and that their late father made Exhibit “A” to compensate the Claimant and vest on the Claimant a wide discretion to administer the properties.

He argued that it is because the Claimant is the sole beneficiary of the properties; hence the DW1 admitted that she did not take over the properties that

were shared to her. He reiterated that besides the 1st Defendant, no other sibling of the Claimant has ever challenged the Claimant's right to the properties given to him under the Will.

Counsel submitted that the 1st Defendant in his address misconceived the word fiduciary in its application to this case. According to him, the term fiduciary is used when there is a duty given to a trustee. He posited that in this case, upon a careful construction of Exhibit A, no duty was imposed on the Claimant to do anything which he failed to do. Thus he concluded that the Claimant is not in a fiduciary position.

Furthermore he contended that there is no evidence that the Claimant acted in bad faith nor that any of his siblings asked him to account for the properties he is holding on trust for them and he failed to do so.

Again, he submitted that no notice was given to the Claimant to produce the rent receipts or to explain how the rents were spent. He maintained that the Claimant has given credible oral explanation under cross examination of how the rent was expended. He however contended that the evidence so elicited under cross examination was not pleaded by the 1st Defendant and is inadmissible in evidence. He urged the Court to discountenance the 1st defendant's evidence and his submission on this issue.

He submitted that it is only the items contained in paragraph 5a of the Will that the Claimant is not the sole beneficiary but a co-beneficiary with other children.

In further response to the 1st Defendant's address that the Claimant never deemed it fit to distribute evenly the profits made, counsel referred to the Claimant's evidence under cross examination that the rents he collected were used to maintain the younger children of the testator and the 1st Defendant when he returned from Lagos.

Relief in paragraph 22(ii)

“An order directing the Claimant to account for the rent he has been collecting from tenants on the properties since September, 1991 and any other

profit he has made as trustee from the administration of estate of late Chief Jacob Pius Okure Etiuzale's estate”,

Counsel submitted that there is no scintilla of evidence offered by the 1st Defendant in support of this Claim. He said that the 1st Defendant failed to give evidence of how many tenants are in the property and how much each tenant is paying as rent.

He maintained that there is no evidence to prove that the Claimant is making any profit as trustee. He said that the Will did not impose any duty on the Claimant to render account or do anything apart from holding the property in paragraph 5a on trust, thereby creating a ***dry trust***. He referred to BLACKS LAW DICTIONARY, 9th EDITION at page 1650 which defined a dry ***trust*** as *a trust that merely vests legal title in a trustee and does not require that trustee to do anything*.

He submitted that what the 1st Defendant is asking the Court to do with in the absence of evidence is to speculate and the Court cannot speculate.

According to him, the authority of: ***IBRAHIM V OSANDE (2009) All FNLR (Pt 465) 1651*** relied upon by the 1st Defendant does not apply to this instant case because unlike that case, in the instant case the testator's Will (Exhibit "A") gave legal title whereas in IBRAHIM'S case the deceased died intestate and the administrators appointed by the family were to administer the intestate estate on behalf his little children.

Relief in paragraph 22(iii)

N1, 000,000.00 being cost of this action.

Counsel maintained that the 1st Defendant never led any evidence in support of this claim for costs and he equally abandoned it in his final address.

He cited the cases of: ***GUINNESS V NWOKE (2000) 15 NWLR (Pt 689) 135 Ratio 8***; and ***NWANJI V COASTAL SERVICES NIG LTD (2004) 36 WRN I at 14-15 lines 25-5*** and submitted that it is unethical and an affront to public policy for a litigant to pass on the burden of his solicitors fees to his opponents in a suit.

In conclusion, he urged the Court to resolve Issue five against the 1st Defendant, dismiss his Counter Claim for lack of merit and grant the reliefs of the Claimant.

The learned counsel for the 1st Defendant also filed a Reply on Points of Law dated and filed on the 11th of September, 2017 which he adopted as part of his final address in this suit.

In the said Reply on Points of Law, the learned counsel referred to *section 3(1) (2) and (3) of the Administration of Estate Law of Edo State* which was relied upon by the learned counsel to the Claimant and submitted that the aforesaid section is not relevant to this case except to the extent that subsection 2 affirm that the estate of the Chief Jacob Okhure Etiuzale devolved on his heirs who by subsection 2 are deemed to be his personal representatives.

He submitted that the role of an executor in a testator's will is an issue of law because an executor is a person named by the testator to carry out the provisions in the testator's will and referred to Black's Law Dictionary 9th edition at page 651 on the meaning of an executor.

He submitted that it is the duty of the Executors to ensure that the terms of the Will are fully complied with.

Again, he referred to *section 4 (2) of the Administration of Estate law of Edo State and the case of Ohiaeri V. Yusuf (2009) 175 LRCN 210* cited by the Claimant's counsel and submitted that section 4(2) and Ohiaeri's case are not relevant because this case has nothing to do with a conveyance. He defined a conveyance as a voluntary transfer of a right or of property-See: *Black's Law Dictionary (supra) at page 383*. He maintained that Exhibit G is not a deed of conveyance that needed to be signed by other executors but a letter from Chief Okolo Alogaga to the committee of the Okumagbe in council stating what happened when the parties met in his house to discuss the request to share the properties. He said Exhibit G merely affirmed and corroborated the 1st defendant's evidence of how the properties were shared and further confirmed that no document of sharing was signed. He emphasised that the question of conveyance requiring concurrence does not therefore arise.

Furthermore, he submitted that the Claimant has no greater interest in the properties devised in Exhibit A than either the 1st defendant or any of the testator's children; that he is just one of the beneficiaries in Exhibit A and a trustee to other beneficiaries of the estate. He maintained that the Claimant is not the sole owner of the properties and has not shown in his pleadings or evidence that he commenced the action on behalf of the other beneficiaries.

He posited that as an Executor and Trustee the Claimant has a duty to account for how he managed the estate because a trustee stands in a fiduciary relation and holds the properties in trust for the benefit of others and therefore owes a fiduciary duty to the beneficiaries. He contended that the 1st defendant has no duty to account to the Claimant because the Claimant has not proved that he is the sole owner of the stores or to be acting on behalf of other beneficiaries.

On the objection that Exhibit G is inadmissible by virtue of section 83(3) of the Evidence Act 2011, counsel submitted that Exhibit G was tendered without objection therefore it is too late for the Claimant to raise this objection-See: *Oseni V. State (2012) All FWLR (pt 619) 1010 at 1033*.

Counsel referred to the cases of: *Ajanaku V. Osuma (2014) All FWLR (pt 727) 695 at 720 paragraph F-H; N.S.I.T.F.M.B v. Klifco (Nig) Ltd (2010) All FWLR (pt 534) 73; Holton V. Holton (1946) 2 ALER 534 at 535; and U.T.C (Nig) Plc V. Lawal (2014) All FWLR (pt 727) 656 at 719-712* and submitted that Chief Okolo Alogaga, is not an interested person as envisaged by section 83 (5) Evidence Act 2011.

He finally urged the Court to dismiss the Claimant's suit and grant the reliefs in the Counter Claim.

I have carefully considered all the processes filed in this Suit, together with the evidence led, the exhibits admitted in the course of the hearing and the addresses of the respective Counsel to the parties. Upon a careful examination of the 5 Issues formulated by learned counsel for the parties, I am of the view that two of the Issues are sufficient to determine the case.

Consequently, I adopt Issues 4 and 5 with slight modifications as follows:

- 1) Whether the claimant's reliefs should succeed; and
- 2) Whether the 1st defendant's counter claim should succeed.

ISSUE 1:

Whether the claimant's reliefs should succeed.

For the avoidance of doubt, the Claimant's claims against the Defendants are as follows:

1. A declaration that the purported sharing of his fathers properties to the 1st Defendant by anybody is null and void and of no effect;
2. A declaration that the committee set up by the 2nd Defendant to share his father's properties is null, void and of no effect;
3. A declaration that the 2nd Defendant has no power under the law to constitute a committee to share his father's properties;
4. An order that the 1st Defendant should account for the rent he had collected from the properties without his consent since January, 2015 and handover same to him;
5. N10, 000,000.00 (Ten Million Naira) general damages against the Defendants jointly and severally;
6. An order of perpetual injunction restraining the Defendants, their agents, proxies, servants or any person acting on their behalf from sharing his father's properties or collecting rent from same without his consent; and
7. An order restraining the 2nd Defendant from interfering with Claimant's fundamental human rights.

Essentially, the substratum of this suit is the interpretation of the Will of the Claimant's deceased father, Chief Jacob Okhure Etiuzale. All the parties are *ad idem* that the deceased died testate. The validity of the Will (Exhibit A) is not in issue in these proceedings. The bone of contention is on the interpretation of the contents of the Will, particularly as it relates to the distribution of the deceased's properties.

Thus, the resolution of the Claims must commence with the interpretation of Exhibit A. I must state from the onset that Exhibit A is one of the most inelegantly drafted Wills that I have ever come across. Most of the clauses appear quite ambiguous and ambivalent. It is a classical example

of how a Will should not be drafted. The ambiguities commenced from Clause 5 where the Testator stated thus:

“5. I DEVISE all my properties (personal and landed) to my son TIMOTHY EGWEMO ETIUZALE for himself and to hold in trust for all my other children. The properties are as follows:

- a) I give to my son, Timothy Egwemo Etiuzale to hold in trust for all my children, my residential premises which is situate, lying and being at the Market Square Mission road, Agenebode Water-Side and more particularly contained in a survey Plan No.OM 2489 of 4th day of August, 1976;***
- b) The building and premises opposite the Post Office.....;***
- c) An undeveloped plot measuring.....;***
- d) All my real estate.....”***

Now, the opening part of Clause 5 devised all the Testator’s properties to the Claimant ***for himself and to hold in trust*** for the other children. Clause 5(a) now devised the ***residential premises which is situate, lying and being at the Market Square Mission road, Agenebode Water-Side*** to the Claimant not for himself but to hold ***in trust for all*** the ***other children***.

Looking at the foregoing clauses, it is apparent that it is not clear whether the properties were devised to the Claimant as a ***sole beneficiary*** (as he is contending) or merely as a ***Trustee*** (as the 1st Defendant is contending). This is the bone of contention.

The general rule is that in construing a Will, the testator’s intentions as revealed by his words must be given their natural meaning. Once the intention of

the testator is clear, the Court will ensure its implementation, in spite of any inadequacies in expression. See: *Akinkunmi vs. Sadiq (1997) 8 NWLR (Pt.516) 277 at 286*; and *Idehen vs. Idehen (1991) 6 NWLR (Pt.198) 382 at 421*.

However, where the natural meaning of the words would lead to some absurdities or where the terms are ambiguous, evidence may be admitted to show the testator's intention. For this purpose, several rules of construction have been evolved to assist the court to correctly interpret the provisions of the Will.

On the interpretation of ambiguous provisions, the rule is that evidence of the testator's intention can be adduced to clarify the ambiguity. See the cases of: *Re Jackson, Beattie vs. Murphy (1993) Ch.237*; and *George vs. .Fajore (1939) 15 N.L.R 1*.

Coming to the instant case, the question therefore is what was the intention of the Testator as can be gleaned from the totality of evidence adduced in this trial?

The starting point must be the Will itself (Exhibit A).In Clause 2 of the Will, the Testator appointed five persons as *Executors* and *Trustees* of the Will. Incidentally, the Claimant was listed as the second Trustee/Executor .Thus; he evinced an intention to establish a Trust Scheme under the Will.

Again in Clause 5, which substantially devised all the Testator's properties, the phrase: "*hold in trust for all my children*" was used to qualify or delimit the

bequest. It is apparent that despite the ambiguities inherent in that clause, the discernible intention of the Testator was to make the Claimant a Trustee of all the properties devised. The unfortunate aspect was that the Will was not quite explicit on the terms of the Trust Scheme.

A critical omission was the failure to stipulate the modalities for the distribution of the properties under the Trust Scheme created under the Will. There are other gaping gaps. For example: what is to be given to each child; what is the sharing formula, equally or according to seniority; when will the beneficiaries become entitled to their legacies etc., etc. These lapses obviously set the stage for this suit.

Apart from Exhibit A, the pleadings and the evidence amply substantiate the fact that the Claimant was holding the properties in trust for the other children. In paragraph 9 of the Statement of Claim, the Claimant averred *inter alia* that:

*“...his father’s personal and landed properties were devised to him **to hold same in trust for all the other children**”* (emphasis, mine).

The Claimant repeated this fact in paragraph 5 of his Deposition and in his evidence under cross examination in Court; he admitted that he held the residential house in trust for his siblings. The D.W.1 also confirmed this fact in her evidence before the Court.

There is therefore a preponderance of evidence to establish the fact that the Claimant was not a sole beneficiary of the properties but a Trustee under the Will, holding the properties in trust for his siblings.

Having made the above preliminary finding which is quite germane to the resolution of Issue one, I will proceed to determine the said issue.

A careful examination of the Claimant's Reliefs Nos.1 to 3 will reveal that they are all challenging the alleged sharing of the Claimant's deceased father's properties. For this reason, I intend to consider the three reliefs together.

It is worthy of note that the purported sharing of the Testator's properties was done by one Chief Okolo Alogaga. The alleged document of sharing admitted as Exhibit G is actually a letter, signed by Chief Okolo Alogaga, addressed to: "The Committee, Okumagbe in Council, Okumagbe Palace, Agenebode".

Incidentally, the said Okumagbe who set up the Committee is the 2nd Defendant in this suit. There is no evidence to establish his authority to share the Testator's property. He was never appointed in the Will as an Executor and Trustee. Moreover, he never put up any appearance in this Court; neither did he defend the action. I agree with the learned counsel for the Claimant that since the 2nd Defendant did not defend the suit after he was served with the court processes, he is deemed to have admitted the claims against him.

Going through Exhibit G, it is evident that Chief Okolo Alogaga is just one among the five Executors and Trustees of the Will (for the avoidance of doubt, the Executors and Trustees are collectively referred to as the *personal representatives* of the deceased testator). There is nothing to show that the sharing was done with the concurrence of the other Executors and Trustees. This is contrary to *Section 4(2) of the Administration of Estate Law of Edo State* which states as follows

"Where as respects real estate there are two or more personal representatives a conveyance of real estate devolving under this Part of this law shall not, save or otherwise provided as respect trust

estate be made without the concurrence therein of all such representatives...”

The same provision was interpreted by the Supreme Court in the case of: ***DR BENJAMIN OHIAERI V ALHAJI B.I. YUSUF (2009) 175 LRCN 210 at 226 PAR A-U***, where the Supreme Court held thus:

“Thus a conveyance can under section 4(2) of the Administration of Estate Law Cap 3 Laws of Lagos State, be validly executed by one of two or more personal representatives provided it is so executed and signed with the concurrence or agreement of such other personal representatives”.

The purported sharing by Chief Okolo Alogaga appears to have been with the concurrence and agreement of the 2nd Defendant who is not one of the other personal representatives. This in my view, rendered the sharing invalid.

From the foregoing, I am of the view that Claimant’s Reliefs 1, 2 and 3 should succeed.

Coming to Relief 4 which is an order for the 1st Defendant to account for the rents he collected from the properties without the consent of the Claimant since January, 2015 and handover same to him.

The 1st Defendant has seriously opposed this relief on the grounds *inter alia* that the Claimant is just one of the beneficiaries of the Will and not the sole beneficiary and that the other 3 executors and trustees are not parties to this suit.

This raises some fundamental legal issues on the legal position of executors and trustees. A trust is defined as an equitable obligation binding a person (the trustee) to deal with property over which he has control (trust property) for the benefit of persons (the beneficiaries or *cestui que trust*) of whom the trustee may himself be one. See: ***Underhill’s Law of Trust and Trustees, 13th Edition, page 1.***

The above definition fits the Trust created under Exhibit A. In a unique arrangement some of the trustees like the Claimant and the 1st Defendant are occupying the dual positions of trustees and beneficiaries.

It is settled law that it is the duty of a trustee to keep a proper account of the trust property which he administers. Also, the beneficiaries have a right to call

upon a trustee to give account of the property in his care. See the following decisions on the point: *A.G Bendel State vs. A.G.of the Federation (1983) NSCC Vol.14, 181*; and *A.G. Cross Rivers State vs. A.G.of the Federation (2005) All FWLR (Pt.279) 1229*.

Now, the Claimant as a beneficiary, is asking the 1st Defendant to give account of the rents he collected from the properties since January, 2015 and *handover same to him*. The problem now is whether this will not affect the interest of the other beneficiaries. To grant such a relief, the other beneficiaries must be necessary parties to this suit. This is more so when the proceeds from the account are to be handed over to only one beneficiary, to wit: the Claimant. This type of order will adversely affect the interest of the other beneficiaries who are entitled to part of the proceeds from the rents.

Under this situation, can the Court order the 1st Defendant to render account and pay over all the rents collected to the Claimant who is suing as a single Executor/Trustee without joining the other Executors/Trustees/Beneficiaries?

Putting it in proper perspective, are all the proper parties in court? In the case of: *Iwuaba vs.Nwaosigwelem (1989) 5 NWLR (Pt.123) 623 at 632-633*, the Court held that it was not competent for a branch of a community to bring an action to recover money belonging to the entire community. In the said case, Kolawole JCA stated thus:

“It is erroneous to pass the funds and property of the community to another union who claim to be personally entitled”.

Applying the foregoing principle to the instant suit, I am of the view that the Claimant alone cannot receive the proceeds of the rents collected from the properties since January, 2015. The other Executors/Trustees or Beneficiaries ought to be proper parties. More so, since the Claimant is not suing for and on their behalf.

Consequently, Relief 4 is bound to fail.

Coming to Relief 5, which is for N10, 000,000.00 (ten million naira) general damages against the Defendants jointly and severally.

General Damages are presumed by law as the direct natural consequences of the acts complained of by the Claimant against the Defendant. The assessment of general damages is not predicated on any established legal principle.

Thus, it usually depends on the peculiar circumstances of the case. See: *Ukachukwu vs. Uzodinma (2007) 9 NWLR (Pt.1038) 167; and Inland Bank (Nig.) Plc vs. F & S Co. Ltd. (2010) 15 NWLR (Pt.1216) 395.*

The fundamental objective for the award of general damages is to compensate the Claimant for the harm and injury caused by the Defendant. See: *Chevron (Nig.) Ltd. vs. Omoregha (2015) 16 NWLR (Pt.1485) 336 at 340.*

Thus, it is the duty of the Court to assess General Damages; taking into consideration the surrounding circumstances and the conduct of the parties. See: *Olatunde Laja vs. Alhaji Isiba & Anor. (1979) 7 CA.*

The quantum of damages will depend on the evidence of what the Claimant has suffered from the acts of the Defendant. Going through the entire gamut of the Claimant's evidence, there is no evidence of anything he suffered from the action of the Defendants.

It is usual in cases such as this, where the Claimant has not shown that any particular loss was suffered for the Court to award nominal damages. See: *Artra Industries (Nig.) Ltd. vs. N.B.C.I (1998) 4 NWLR (Pt.546) 357; Ogbechie vs. Onochie (1988) 4 NWLR (Pt.70) 370.* In the event, I think the Claimant is not entitled to the sum of ten million. He is only entitled to nominal damages.

On Relief 6 which is for an order of perpetual injunction restraining the Defendants, their agents, proxies, servants or any person acting on their behalf from sharing his father's properties or collecting rent from same without his consent, I think he is entitled to this relief since the purported sharing has been faulted.

Relief 7 is for an order restraining the 2nd Defendant from interfering with Claimant's fundamental human rights. This relief was not contested by the 2nd Defendant. It will be granted.

Having granted most of the claims of the Claimant, Issue One is partially resolved in favour of the Claimant.

ISSUE TWO:

Whether the 1st defendant's counter claim should succeed?

The first Defendant Counter Claimed against the Claimant as follows:

- (i) A declaration that in accordance with the terms of the Will of 25th May 1991 of Chief Jacob Okhure Etiuzale the Claimant is not the sole beneficiary of the estate of late Chief Jacob Pius Etiuzale and that all the other children of late Chief Jacob Pius Okhure Etiuzale estate are entitled to benefit from the estate;
- (ii) An order directing the Claimant to account for the rent he has been collecting from tenants on the properties since 1991 and any other profit he has made as trustee from the administration of the estate of late Chief Jacob Pius Okhure Etiuzale estate;
- (iii) The sum of N1, 000,000 (one million naira) being cost of this action.

In the course of considering the Claimants case, I made some salient findings which invariably will affect the 1st Defendant's Counter Claim.

I will consider the reliefs in the Counter Claim in sequence.

Relief 1

A declaration that in accordance with the terms of the Will of 25th May 1991 of Chief Jacob Okhure Etiuzale the Claimant is not the sole beneficiary of the estate of late Chief Jacob Pius Etiuzale and that all the other children of late Chief Jacob Pius Okhure Etiuzale estate are entitled to benefit from the estate.

While considering the Claimant's claim, I held that the Claimant is not the sole beneficiary of the estate of the Testator but is merely a joint Executor/Trustee of the estate. He together with his siblings are entitled to benefit from the estate.

Consequently, this relief succeeds.

Relief 2

An order directing the Claimant to account for the rent he has been collecting from tenants on the properties since 1991 and any other profit he has made as trustee from the administration of the estate of late Chief Jacob Pius Okhure Etiuzale estate.

As I earlier observed, the beneficiaries of the estate have a right to call upon a trustee to give account of the property in his care. See again, the cases of: *A.G Bendel State vs. A.G.of the Federation (1983) NSCC Vol.14, 181*; and *A.G. Cross Rivers State vs. A.G.of the Federation (2005) All FWLR (Pt.279) 1229*.

Now, the 1st Defendant as a beneficiary is asking the Claimant to give account of the rents he collected from tenants on the properties since 1991 and any other profit he has made as trustee. It must be observed that unlike the Claimant's claim for account, he is not asking for the proceeds to be paid over to him.

Considering the nature of the 1st Defendant's Claim for account, I am of the view that the failure to join the other beneficiaries is not fatal because in this instance, an order for the Claimant to give account is not adverse to the interest of the other beneficiaries. They have nothing to lose if the relief is granted. Accordingly, this relief will be granted.

Relief 3

The sum of N1, 000,000 (one million naira) being cost of this action.

This relief for N1, 000,000 (one million naira) being cost of the action appears nebulous. It is not too clear whether the claim is for costs or damages. If it is damages, is it special or general damages?

In the case of: *GUINNESS V NWOKE (2000) 15 NWLR (Pt 689) 135 Ratio 8* cited by the learned counsel for the Claimant in opposition to this relief, the Benin Division of the Court of Appeal classified the claim for solicitor's costs as special damages which must be strictly proved. In that case, the claimant pleaded facts to support his claim, led oral evidence and tendered receipts to substantiate his claim but the Court still rejected the claim on the ground that it

was: ***“absolutely improper to allow the cross-appellant to pass his financial responsibility couched as ‘special damages’ to the cross-respondent”***.

Moreover, I agree with the learned Counsel for the Claimant that in the instant case, the 1st Defendant never led any evidence in support of this claim for costs and he equally abandoned it in his final address.

Consequently, this relief cannot succeed.

Having granted two of the reliefs, Issue Two is partially resolved in favour of the 1st Defendant.

On the whole both the Claim and the Counter Claim succeed in part.

I hereby enter judgment for the Claimant as follows:

- 1. A declaration that the purported sharing of his fathers properties to the 1st Defendant by anybody is null, void and of no effect;***
- 2. A declaration that the committee set up by the 2nd Defendant to share his father’s properties is null, void and of no effect;***
- 3. A declaration that the 2nd Defendant has no power under the law to constitute a committee to share his father’s properties;***
- 4. The sum of N100, 000.00 (one hundred thousand naira) as general damages against the Defendants jointly and severally;***
- 5. An order of perpetual injunction restraining the Defendants, their agents, proxies, servants or any person acting on their behalf from sharing his father’s properties or collecting rent from same without his consent; and***
- 6. An order restraining the 2nd Defendant from interfering with Claimant’s fundamental human rights.***

I also enter judgment for the 1st Defendant as follows:

- (i) A declaration that in accordance with the terms of the Will of 25th May 1991 of Chief Jacob Okhure Etiuzale the Claimant is not the sole beneficiary of the estate of late Chief Jacob Pius Etiuzale and that all the other children of late Chief Jacob Pius Okhure Etiuzale are entitled to benefit from the estate; and***

(ii)An order directing the Claimant to account for the rent he has been collecting from tenants on the properties since 1991 and any other profit he has made as trustee from the administration of the estate of late Chief Jacob Pius Okhure Etiuzale estate;

I make no order as to costs.

P.A.AKHIHIERO
JUDGE
30/10/17

COUNSEL:

S.E.ISOKPUNWU ESQ.....CLAIMANT.

S.K.MOKIDI ESQ.....1ST DEFENDANT.

UNREPRESENTED.....2ND DEFENDANT.