


**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA  
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY  
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE E. F. IKPONMWEN –  
CHIEF JUDGE**


**FRIDAY, 3<sup>RD</sup> NOVEMBER, 2017**

**SUIT NO. B/141/11**

**BETWEEN:**

<ul style="list-style-type: none"><li>1. MR. GODFREY ALILE</li><li>2. APOSTLE HAYFORD I. ALILE, F.R.</li><li>3. MR. FRIDAY ALILE</li><li>4. MR. EWU ERONMWON ALILE (Suing for and on behalf of the Alile Family members excluding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants)</li></ul>		í í í	CLAIMANTS
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**AND**

<ul style="list-style-type: none"><li>1. CHIEF OSAMEDE ADUN</li><li>2. MR. FAGBIYE ALILE</li><li>3. MR. SAMSON IGBINOBA ALILE</li></ul>		í í . í	DEFENDANTS
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**J U D G M E N T**

The claimants instituted this action vide a writ of summons filed on 28<sup>th</sup> of February 2011. By paragraph 33 of the extant statement of claim filed on 16/5/2016 the claimants claim against the Defendants jointly and severally as follows:

- (a) An order that the purported sale, transfer or alienation of any title or interest in the property situate, lying and being at 25 Abehe Street, Off Ekpenede Street, Ogbe Quarters, Benin City measuring approximately 3487 metres by 38.79 metres and 31.79 metres by

43.10 metres by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant is null and void and of no effect.

- (b) A declaration that the claimants family is the one entitled to the grant of Statutory Right of Occupancy.
- (c) The sum of ~~N~~500,000,000.00 ( five hundred million naira) as damages for trespass and destruction of the claimants ancestral shrines and other valuable properties of the family.
- (d) An Order of perpetual injunction restraining the 1<sup>st</sup> defendant either by himself or his agents, privies and/or servants from trespassing on the property or howsoever doing anything inconsistent with the rights or interests of the claimants on the said property.

Pleadings were duly exchanged between the parties. This case has a rich history, judgment was originally scheduled to be delivered in May, 2016 however before the date of judgment, the claimants filed a motion to amend their statement of claim and reply on 16/5/2016 which was granted on 15/6/2016. The defendants being dissatisfied with the ruling appealed against same. The Court of Appeal upheld the ruling of this court in its ruling/judgment delivered on 8/6/2017. The case was therefore adjourned to 3/10/2017 for judgment, however the case file could not be found until 28/9/2017. Without the case file, judgment could not then be delivered on

3/10/2017 and the court invited the learned counsel to address court afresh.

The case was thereafter adjourned to 3/11/2017 for judgment.

The issues formulated as arising for determination by both parties in this case are as follows:

1. Whether the sale of the property in dispute by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 1<sup>st</sup> defendant is valid.
2. Whether the claimants are entitled to damages arising from the destruction of their family properties.

The claimants opened their case on 23/4/2013 with 1<sup>st</sup> claimant Godfrey Alile adopting his witness statement on oath filed on 22/1/2013. He states that he is the son of late Osayiuwu Alile and his brother Godwin Alile is the head of the Osayiuwu branch of the Pa Alile Eguavoen Ogbedoyo family. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are also members of the Alile family who purportedly sold the Alile family house to the 1<sup>st</sup> defendant. The land in dispute has from time immemorial been the property of the late Pa Alile Eguavoen Ogbedoyo who was the first settler on the land. The deceased lived and died in the land in dispute and thus the land is a family property. The claimants engaged a surveyor to carry out a litigation survey in respect of the land in dispute Survey Plan No. UPS/ED/2011/2012/010. The 1<sup>st</sup> claimant gave the gyneology of Pa Alile Eguavoen Ogbedoyo's male children and grandchildren. The Alile family did not sell or partition the

family ancestral home and properties under the several past heads of the family. At all times material to the purported sale by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant was not the family Okaigbe because he had not been so installed traditionally and was therefore not recognized as one by the family. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not have the power or the right nor consent of the family members to sell the land in dispute to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant demolished the family house, a bungalow building belonging to late Omoruyi Alile, the ancestral shrines and other family properties on the land. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are only an integral part of the part of the Alile family and do not encompass the other and several lineages in the Alile family.

Under cross examination by Afolabi Esq. the 1<sup>st</sup> claimant testified **that the 2<sup>nd</sup> defendant is the eldest surviving son of late Pa Alile Eguavoen.** 2<sup>nd</sup> defendant sold the land in dispute to the 1<sup>st</sup> defendant. His father Pa Osayiuwu Alile was not the 1<sup>st</sup> son of late Pa Alile Eguavoen. He is not aware that the 2<sup>nd</sup> defendant gave 3<sup>rd</sup> claimant ₦5 million after the sale. He does not know Pa Omogiade.

CW1 Tina Osagie (Mrs.) Nee Alile testified on 23/4/2013 by adopting her statement on oath filed on 18/3/2013. She states that she is a daughter of late Omoruyi Alile and a younger sister to the 3<sup>rd</sup> claimant, she used to live in the property in dispute along with her brother and her mother. On the 4<sup>th</sup>

of January, 2011 while they were at home the 1<sup>st</sup> defendant sent some boys to inform them that their compound including the houses therein had been sold to him. They were advised to pack out their belongs as the house was about to be demolished. Shortly after the 1<sup>st</sup> defendant began to demolish the property in dispute and other properties including her father's properties. She stated that upon the destruction of her father's house her brother called the 3<sup>rd</sup> claimant to inform him of the development. The 3<sup>rd</sup> claimant confronted the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and demanded for compensation for the destruction. It was on this premise that the defendants paid the sum of ₦5,000,000.00 (five million naira) to the Omoruyi Alile family through the 3<sup>rd</sup> claimant for their father's house that was destroyed by the 1<sup>st</sup> defendant. The money given to the 3<sup>rd</sup> claimant was not given to him as his share of the proceeds of sale but for the Omoruyi Alile family house that was destroyed by the 1<sup>st</sup> defendant.

Under cross examination by Afolabi Esq. CW1 testified that 2<sup>nd</sup> defendant is the eldest surviving son of late Pa Alile Eguavoen. 3<sup>rd</sup> claimant collected ₦5million when the house was sold. She was not given from the money. Under re-examination CW1 re-affirmed that the ₦5million 3<sup>rd</sup> claimant collected was payment for her father's house i.e. Omoruyi Alile.

2<sup>nd</sup> claimant Apostle Hayford Ikponmwosa Alile testified on 11/6/2013 by adopting his witness statement on oath filed on 22/1/2013. He testified along the same lines as the 1<sup>st</sup> claimant.

Under cross examination by Afolabi Esq. the 2<sup>nd</sup> claimant said he is a grandson of the late Pa Alile Ogbedoyo. The 2<sup>nd</sup> defendant is the eldest surviving son of late Pa Alile Ogbedoyo. The 3<sup>rd</sup> claimant is his relation. He heard that 2<sup>nd</sup> defendant paid N5million to 3<sup>rd</sup> claimant but he was not a witness to it and he did not state so in his deposition on oath because he was not in a position to say whether it was true or not. He was not aware that Friday Alile was the person who initiated the sale of the property to the 1<sup>st</sup> defendant.

3<sup>rd</sup> claimant Friday Alile testified on 5/3/2014 by adopting his statement on oath filed on 18/11/2013. He states that he is a principal member of the Alile family. He is the 1<sup>st</sup> son and head of Omoruyi Alile brand of Pa Alile Eguavoen Ogbedoyo family. Before and even now the family did not sell nor partition this family ancestral land in dispute under the several past heads of the family as to entitle his late father to a share of the property as the portion his (late father) built on was never shared to him. The Alile family only permitted his father to build on the land when the Okaegbe of the family fell on him since he had no house in Benin at that time and so that he would not be too far from the family as Okaegbe.

Although his father was permitted to build on the land in dispute, the land nevertheless belonged to the Alile family while only the house belonged to Omoruyi Alile family. The land in dispute was not bushy neither was it used as a dumping ground, it was occupied by his mother, brother, Amos Alile and his sister Mrs. Tina Osagie. Following the destruction of his late father's property on the land, he and his father's children demanded that the defendants must pay for their house that was destroyed. It was on account of this that the sum of ₦5,000,000.00 (five million naira) was paid to his family which sum he collected on behalf of his family. He did not at any time beat the 2<sup>nd</sup> defendant either by himself or with thugs and he does not know of any such incident reported at the Evbotubu Police Station. The sale of the land in dispute was not initiated by him. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not consult him neither did they get his consent to sell the property in dispute including the destruction of his father's house that was on the land in dispute.

Under cross examination by Afolabi Esq. 3<sup>rd</sup> claimant testified that the 2<sup>nd</sup> defendant is the eldest surviving son of the Alile family. He is a grandson of Alile family. There are about eight rooms in his grandfather's house and his father's house built on the land has six rooms. The land on which the two buildings are is about 100ft by 100ft in dimension. The 2<sup>nd</sup> defendant gave him ₦5,000,000.00 (five million naira) as (compensation)

payment for his father's building on the land that was destroyed. The money was for himself and his siblings.

CW4, Victor Akhimien a registered surveyor testified on 5/3/2014 by adopting his statement on oath filed on 22/1/2013. He states that in February, 2012, the claimants represented by the 1<sup>st</sup> and 4<sup>th</sup> claimant instructed their firm Victor ó Pak Surveys & Co. to survey the land in dispute with a view to preparing a litigation survey. He undertook the survey and pursuant to the above instruction that 1<sup>st</sup> and 4<sup>th</sup> claimants took him to the land in dispute where he carried out the survey and exhibit A was produced. The land in dispute is located at No. 25, Abehe Street, Off Ekpenede Street, Ogbe Quarters and covers a total area of 1357.400sq metres.

Under cross examination by Afolabi Esq. CW4 testified that when he surveyed the land there was no gate. The land was not fenced round. There was no building on the land. The dimension of the land is 100ft by 150ft.

CW5 Clement Imuetinyan Alile testified on 5/3/2014 by adopting his witness statement on oath filed on 18/11/2013. He testified along the same lines as the 3<sup>rd</sup> claimant.

Under cross examination by Afolabi Esq. CW5 testified that the eldest surviving of Alile is the 2<sup>nd</sup> defendant. He is a grandson of Alile. The land in question is slightly more than 100ft by 100ft, it is about 30 ó 40 metres on



each side of the rectangle. He was not happy when he learnt that 3<sup>rd</sup> claimant collected N5million from 2<sup>nd</sup> defendant. 3<sup>rd</sup> claimant is still part of the family.

At the close of the claimants' case, the defendants opened their case on 20/11/2015 with 2<sup>nd</sup> defendant Mr. Fagbiye Alile testifying. He adopted his statement on oath filed on 14/3/2013 wherein he states that he is the eldest surviving male child of Pa Alile Eguavoen Ogbedoyo. The property in dispute belonged to his late father and his late father lived, conducted his affairs at the property in dispute but never died there. The claimants are members of Alile family but are grandchildren of the deceased. He gave additional list of children of the deceased apart from that given by the claimant. The family meetings of Alile family were held at the disputed property before it was shifted to Ogbe, opposite Obaseki house because Obaseki was older than his late father. The father of one late Titi Alile (late Mr. Edeaye Alile) was given a plot at Siluko to build on by his late father. Himself, the claimant, Friday Alile and Pa Omogiade who are principal members of the family agreed to sell the land to the 1<sup>st</sup> defendant and exhibit B was issued to acknowledge the sale. The 3<sup>rd</sup> claimant was the one that initiated the sale and was offered the sum of ₦3,000,000.00 (three million naira) as his share from the proceed of the sale by him which he refused and brought thugs to beat him up. The incident was reported at Evbotubu Police

Station. The 3<sup>rd</sup> claimant later collected the sum of ₦5,000,000.00 (five million naira) from the proceeds of the sale while ₦1,500,000.00 (one million five hundred thousand naira) was given to Pa Omogiade and the sum of ₦3,500,000.00 (three million five hundred thousand naira) was given to him. That all the claimants have their own land where their fathers were buried after their death. 1<sup>st</sup> defendant never demolished any ancestral shrine on the land.

Under cross examination by Idaiye Esq. the 2<sup>nd</sup> defendant testified that the claimants are the grandchildren of the deceased. Samson Alile is also one of the grandchildren of Ogbedoyo Alile. When he sold the house in dispute to the 1<sup>st</sup> defendant he was not living in the house. His late brother was brought to the village and built two rooms in the land in dispute. He shared part of the money to the 3<sup>rd</sup> claimant for his father's building on the land. It was his son who is now deceased that got 3<sup>rd</sup> claimant arrested by Police when he brought thugs to him. There were no shrines in the house, there was a tenant (female) who had olokun juju in the house but when she left, she left with it. All the rooms of the house were all broken when he sold the land in dispute. The wife and children of Omoruyi were living in the house before he sold it. 3<sup>rd</sup> claimant was paid for the house and the 1<sup>st</sup> defendant after the purchase, destroyed the Omoruyi house.

1<sup>st</sup> defendant, Chief Osamede Adun testified on 25/1/2016 by adopting his statement on oath filed on 14/3/2013. He states that he is the rightful owner of the land in dispute. The property was sold to him by the 2<sup>nd</sup> defendant in January, 2011 with the consent of the 3<sup>rd</sup> claimant who is the eldest son of Omoruyi Alile and Pa Omogiade who are equally principal members of the Alile family. The house was destroyed before it was sold to him as it was a vacant land and no ancestral shrine of any sort was on the land as at the time he took possession of the property. He interviewed the vendors including the 3<sup>rd</sup> claimant and they claimed to be principal members of the family. After he had bought the land, he told the 3<sup>rd</sup> claimant and the 2<sup>nd</sup> defendant to ensure that they distribute the proceeds from the sale among their family members and they assured him of same. After purchasing the land he took immediate possession and erected a mechanic workshop which is still operational. 2<sup>nd</sup> defendant is the eldest surviving son of Pa Alile Eguavoen Ogbedoyo and the rest of the claimant are grandchildren. These facts came to his knowledge when the claimant sued him and the 2<sup>nd</sup> defendant called him to intimate him about these facts.

Under cross examination by Idiayi Esq. the 1<sup>st</sup> defendant testified that at the time he bought the land he knew that the property belonged to the Alile family. When he bought the property it was a vacant land. There was no building on the land. There was no building on the land. It is not true

that 2<sup>nd</sup> defendant was living on the land when he purchased it. He tendered exhibit C.

At the close of evidence both learned counsel adopted their written addresses on 3/10/2017. Learned counsel for the defendants Olayiwola Afolabi Esq. submitted that from the evidence of the claimants and from the pleadings it is settled that the persons that sold the land to the 1<sup>st</sup> defendant are principal members of the Alile family. Having admitted through their pleadings and under cross examination that the persons that sold the land in dispute are integral part of the family and the said Friday Alile a co-claimant having collected money from the 2<sup>nd</sup> defendant after the sale, the case of the claimant, can no longer stand as it is an admission against interest See **I.N.E.C. v Oshimole** (2009) 4 NWLR (pt. 1132) page 607 at 623. A party cannot approbate and reprobate on the same issue. See **Fortune Int'l Bank Plc v City Exp. Bank Ltd** (2012) 14 NWLR (pt. 1319) pg. 86 at 97. Learned counsel submitted that the sale of family land by the members of the family without the family head is void abinitio. The sale of family land by the head of the family without the consent of the principal members of the family is voidable at the suit of the non-consenting members. See **Ekpendu v Erika** (1959) 4 F.S.C. 70; **Solomon v Mogaji** (1982) 11 S.C. 30. It is not the requirement of the law that for a valid sale of family property, there has to be unanimity of concurrence of all the members of the

family and to insist on that is to set up a dictatorship of the minority. See **Mogaji v Nugh** (1960) 1 NSCC 73. He submitted that the sale by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be declared void due to the following reasons:

- (a) The 2<sup>nd</sup> defendant is the overall head of the family being the only surviving son of the original owner of the land.
- (b) The 3<sup>rd</sup> defendant got ten million naira only from the sale and out of it he gave half of the entire money to one of the co-claimant after the sale.
- (c) The claimants are aware of the money collected by one of them before they filed this suit in a representative capacity and the person that collected the money is one of the named claimants.
- (d) The 3<sup>rd</sup> defendant is also a grandchild of Alile like the claimants.
- (e) The 2<sup>nd</sup> defendant pleaded that the co-claimant Friday Alile agreed to the sale and this was reaffirmed by him under cross examination.
- (f) The claimants agreed that the people that sold the land are integral part of the Alile family.
- (g) The 2<sup>nd</sup> defendant is not a grandchild and his position is stronger than any of the co-claimants.
- (h) The 2<sup>nd</sup> defendant never sold the land as his own personal property but as head of the family in conjunction with the principal

members of the family. See **Teniola v Oluhunkunmkun** (1999) 5 NWLR (pt. 602) page 294.

Learned counsel further submitted that the Alile family is not a **juristic person** in law because it is neither a natural person that can sue and/or be sued and not being a natural person, it cannot be represented in an action. See **Nduka v Ezonwaku** (2001) 6 NWLR (pt. 709) 494 at 512. He submitted that the principle of estoppel by conduct/equitable estoppels will rise against the claimants as the object of the estoppel is to prevent an unjust departure of the person from an assumption adopted by another as the base of some act or omission which unless the assumption is adhered to could operate at the other's detriment. See **Ude v Nwara & Anor.** (1993) 2 NWLR (pt. 278) 638; **A.G. Nassarawa State v A.G. Plateau State** (2012) 3 S.C. (pt. 11), Section 169 of the Evidence Act Cap E14 2011. He submitted that from the conduct of the claimants the fair inference that can be drawn is that they sanctioned the sale. See **Sosanya v Onadeko** (2000) 11 NWLR (pt. 677) 34 at 61 ó 62. The law is settled that in a representative action, the representatives who are named parties are not the only parties to the action and all other members of the family being represented are also parties. See **Reugadu v Reugadu** (1988) 5 NWLR (pt. 93) 189. Mr. Afolabi submitted that the claimants and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are of the same family, the claimants never excluded the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as not being part of the

family represented in the suit filed by them. The law is settled that a person can not be a claimant and a defendant at the same time as being currently done by the claimants. See **Elis v Keir** (1910) 1 CH 529 at 537.

Afolabi Esq. submitted that the claimants' case as to the identity of the land is full of contradictions and the court cannot pick and choose which piece of evidence or witness to believe. See **Ajudu v Nwogu** (No. 2) (2004) 16 NWLR (pt. 898) 79 at 88 ó 89, See **Unilorin v Adesina** (2010) 9 NWLR (pt. 1199) 331 at 401. According to him, the claimants are not entitled to any damages flowing from the arguments canvassed above and that the 1<sup>st</sup> defendant bought as a purchaser without notice of any encumbrance having been assured by the head of the family together with a principal member of the family of the legality of the sale.

In conclusion, Afolabi Esq. submitted that the claimants have not proved their case and the capacity in which the suit was instituted by the claimants have successfully destroyed their case.

In his written address filed on 16/3/2016 learned counsel for the claimants M. A. Idaiye Esq. submitted that the age long principle of law regarding sale of family property is that a family property can only be transferred or sold by the head of the family with the consent or concurrence of the principal members of the family. In the same vein members of the family cannot sell without the consent of the head of the family. See

**Ejilemele v Opara** (2003) 9 NWLR (pt. 826) page 536 at page 559. According to the learned counsel, the claimants and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are principal members of the family but the 2<sup>nd</sup> defendant is not the Okaegbe of the family as he has not been installed as such. See **Ejilemele v Opara** (supra) at page 559. The onus is however on the 2<sup>nd</sup> defendant claiming headship of the family to establish same but he failed to do so. See **Orakwute v Umolu** (1998) 7 NWLR (pt. 557) page 266 at 280. He submitted that from the above the 2<sup>nd</sup> defendant did not sell the property to the 1<sup>st</sup> defendant as the head of the family. See **Odekilekun v Hassan** (1997) 12 NWLR (pt. 531) page 56 at 70. He submitted that assuming but not conceding that the 2<sup>nd</sup> defendant is the head of the Alile family he cannot still sell family property in his personal capacity. See **Achilihu v Anyatonwu** (2013) 12 NWLR (pt. 1368) page 256. He submitted that the 2<sup>nd</sup> defendant neither consulted the principal members neither did he obtain their consent, thus the effect of the sale of the family property is void abinitio. See **Achilihu v Anyatonwu** (supra) page 279; **Odekilekun v Hassan** (supra) 70.

Idaiye Esq. submitted that the claimants have been able to establish both in their pleadings and evidence that the land in dispute was in their possession and the 1<sup>st</sup> defendant trespassed upon same. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not witnesses of truth as their testimonies are



full of contradictions. Learned counsel submitted that every act of unlawful and unauthorized entry into land in possession of another is an actionable trespass for which damages would be awarded as monetary compensation for the legal injury which a defendant has committed on the property of the claimants. He urged the court to grant their claim for damages for the building, shrine and other properties damaged by the defendants as they have established trespass against the defendants. He submitted that exhibit A speaks for itself and cannot be altered or contradicted either by oral or extrinsic evidence. See Section 128 of the Evidence Act 2011 and the case of **Basil v Fajebe** (2001) 11 NWLR (pt. 725) page 592 at 622. Learned counsel submitted that the argument of the defendants' counsel as regarding the capacity in which the claimants are suing the defendants is misconceived relying on **Jinadu v Esurombi-Aro** (2005) 14 NWLR (pt. 944) page 142 at 204; **Amadike v Gov. of Imo State** (1993) 2 NWLR (pt. 275) page 302 at 316. He submitted that the **objection taken as to the capacity of the claimants to institute** this action was done through a wrong procedure i.e. in defendants' counsel written address instead by way of motion on notice or preliminary objection and objection must be raised timeously. According to him the objection is coming rather too late. See **Wali v Amaefule** (2014) 12 NWLR (pt. 1421) page 299 at 325; **Eboade v Atomesin** (1997) 5 NWLR (pt. 506) page 490 at 508. He submitted that assuming but not conceding

that this action is not properly constituted, this action will not be vitiated or be incompetent but will only have the effect of changing same from a representative action to a personal action. See **Ifekwe v Madu** (2000) 14 NWLR (pt. 688) page 459 at 475.

In conclusion, learned counsel urged the court to find in favour of the claimants and declare the sale null and void and award damages in trespass.

On 30<sup>th</sup> of March, 2016 the defendants' counsel filed a reply on point of law in reaction to the claimants' counsel written address and urged the court to dismiss the claimants' case.

I have very carefully and thoroughly read the evidence adduced by both parties and all the processes filed in this suit. I have also read the addresses of both learned counsel.

A look at the originating processes will show that this suit was not instituted by the head of the family and principal members but by only the principal members. This in effect shows that the capacity in which the claimants instituted this action is defective and incompetent as the head of the family is not one of the claimants. On this score alone this case can be struck out. Also the claimants state that this action is a representative one however the proper claimants are not before the court as the originating processes are not properly headed. Instead of the named claimants suing for and on behalf of themselves and the Alile family excluding the 2<sup>nd</sup> and 3<sup>rd</sup>

defendants, the originating processes states suing for and on behalf of the Alile family members excluding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which is a wrong heading. See **Alafia & Ors v Gbode Ven. Nig. Ltd & Ors** (2016) vol. 253 LRCN 75. The issue of proper party before court goes to the root of a case and raises the issue of jurisdiction which can be brought at any time and any of the parties even the court can suo motu raise it. See **Yakubu v Yola Electric Distribution Co. Ltd** (2014) 33 WRN 97. The claimants apparently are not suing for themselves rather for Alile family which is a non-juristic person as argued by Mr. Afolabi. This is strange when it is trite that in a representative action, persons who are to be represented and the person/persons representing them should have the same interest in the cause or matter. See **Oregbade v S.J.M. Onitiju** (1962) WRN 21; **Ejezie v Anuwu** (2008) 47 WRN 1.

In sum, it is my respectful view that it is the legal personality of the persons suing that gives legal personality to the persons being represented who otherwise would not have the legal capacity to sue. In this case, the claimants who are natural persons with legal capacity did not state they were suing for themselves but rather that they sue on behalf of Alile family excluding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Meanwhile as stated earlier I agree that Alile family is not a juristic person. This lapse is fundamental as it is jurisdictional and capable of rendering the case a nullity.

At this point this case is liable to be struck out. However, since both parties did not address on this issue though the court can suo moto decide on a jurisdictional issue. I proceed to examine the questions raised in the addresses especially as regards sale of family land. The concept of family property/land on which both parties dealt extensively is hardly a feature in Benin land tenure system rather what is notorious legally is the concept of òIgiogbeö. In the book cases and Materials on Nigeria Land Law 1<sup>st</sup> ed 1992 by Niki Tobi JCA as he then was in chapter 4 page 75 ó 87 at page 82 he dealt with the Benin custom. It can be seen that it is different from that practiced elsewhere citing **Ogiamien v Ogiamien** (1967) NMLR 243. See also the book òNigeria land Lawö by Prof. B. O. Nwabueze page 392 ó 394 as to the eldest surviving son's right to sell property without consent of the other children. This is Benin custom different from Yoruba custom both learned counsel concentrated on which is alien to Benin custom.

In the case of **Uwaifo v Uwaifo** (2013) 10 NWLR (pt. 1361) page 189 the Supreme Court held that Igiogbe is a principal house where a deceased Bini man lived and died. This is an ancestral home. It is not a vacant land. Under Bini Native Law and Custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as òIgiogbeö in which the deceased/testator lived and died. See **Igbinoba v Igbinoba** (1995) 1 NWLR (pt. 371) page 375. From paragraph 5 of the

extent statement of claim filed on 16/5/2016 and paragraph 4 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants statement of defence filed on 20/7/2012 the property/land in dispute fits the description of an Igiogbe and not a family property/land. As an Igiogbe it is the eldest surviving son of Pa Alile that is entitled to inherit same and deal with it as he pleases. From paragraph 12 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants statement of defence and the evidence of the claimants and their witnesses under cross examination it is clear that the 2<sup>nd</sup> defendant (Mr. Fagbiye Alile) is the eldest surviving son. The 2<sup>nd</sup> defendant reaffirmed the above fact in paragraph 2 of his statement on oath filed on 14/3/2012. The 2<sup>nd</sup> defendant is the rightful person to deal with the property/land in dispute and sell it to the 1<sup>st</sup> defendant even without the consent of the other members of the family as the property/land in dispute is adjudged an Igiogbe. It is my respectful view that the claimants have not proved that the sale of the property/land in dispute by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 1<sup>st</sup> defendant is invalid, null and void especially as the 3<sup>rd</sup> claimant benefited from the sale.

In the circumstance of this case, it is my finding that the claimants' case is lacking in merit and is hereby dismissed. The claims in paragraph 33 (a-d) are hereby dismissed.

Hon. Justice E. F. Ikponmwen  
Chief Judge.  
3/11/2017.

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