

**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, 31ST MARCH, 2017

SUIT NO. B/108/2013

BETWEEN:

MR. OMORUYI NIYI ALONGE í í í í í í í í í CLAIMANT

AND

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| <p>1. MISS UYIGUOSA ABISOYE ALONGE
 (AS BENEFICIARY OF LAST WILL AND
 TESTAMENT OF MRS. FELICIA AINA
 ALONGE) (DECEASED)</p> <p>2. MR. EBOIGBE LAWANI</p> <p>3. MR. SONNIE AMEN ERHUNMWUNSE (JP)
 (AS EXECUTORS OF THE LAST WILL AND
 TESTAMENT OF MRS. FELICIA AINA
 AGHAHOWA ALONGE) (DECEASED)</p> <p>4. THE PROBATE REGISTRAR.</p> | <p style="font-size: 4em;">{</p> | <p>í í DEFENDANTS</p> |
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J U D G M E N T

The Claimant instituted this action vide a Writ of Summons filed on 8/3/2013. By paragraph 20 of the statement of claim filed on 8/3/2013, the claimant claims against the defendants jointly and severally as follows:

- (a) A declaration that the Last Will and Testament of Mrs. Felicia Aina Aghahowa Alonge (Nee Olugosi ó Erhunmwunse) (deceased) dated 31st day of May, 2010 is invalid and of no effect whatsoever in that it is tainted with fraud for not being the act of the deceased as well as for non-compliance with the relevant statutory requirements relating to WILLS.
- (b) An Order to set aside the Letters of Administration with the WILL annexed dated the 25th day of October, 2011, issued to the 1st

defendant by the 4th defendant having being obtained by fraud and misrepresentation by the 1st defendant.

After exchange of pleadings, the claimant opened his case on 2/6/2014 with CW1 Jimoh Osaro Agbonifo adopting his statement on oath filed on 8/3/2013. According to him, the deceased was his aunt who died on the 12th of January, 2011 and was given both Christian and Benin Native Law and Custom burial on 25/2/2011 financed fully by the claimant. That on 31st day of May, 2010, the 1st defendant came to inform him that his aunt wanted to see him. On getting to the house of his aunt, 1st defendant told him that his aunt wanted him to be a witness to her Will, which he did. When he signed as witness to the Will, his aunt was not present, neither were the other witnesses namely Engr. Sunny Oriakhi and Mrs. Uwa Uwumarogie. The only persons present when he signed as a witness to the Will was the 1st defendant and his aunt's lawyer. He did not see his aunt and upon inquiring, he was told that she was sleeping. The deceased never lived at No. 31A, Emovon Street, Upper Ewaka Road, New Benin, Benin City even though the property belonged to her, which property ought to be exclusively inherited by the claimant. Sometime in late April, 2013, the 3rd defendant informed him that on the 6th of April, 2011, the deceased's Will was read and he gave him Exhibit A.

Under cross examination by Mr. Okhifoh, CW1 stated that it was a male lawyer that he met at the deceased's residence not a female lawyer. When he was signing the document, he knew it was a Will from what his sister told him. He did not read the document he only appended his signature on 31/5/2010.

Under cross examination by Mr. Ezomo, CW1 stated that the 2nd and 3rd Defendants are his uncles and he sees them nearly every week. They have never travelled out of the country since the time he signed the Will.

Claimant Mr. Omoruyi Niyi Alonge on 2/6/2014 adopted his statement on oath filed on 8/3/2013 stating that he is the eldest surviving son of his mother, who died on the 12th of January, 2011. His late mother was given a Christian burial at St. Peter's Anglican Church, No. 115, Lagos Street, Benin City and also buried in accordance with Benin Native Law and Custom which burials were wholly financed by him and presided over by the 3rd defendant who is the Okaegbe of his mother's family. Later the 3rd defendant informed him that his late mother made a WILL which was going to be read on the 6th of April, 2011 at the Probate Registry, High Court of Justice, Benin City and that the 3rd defendant was made an executor to the Will. On the 6th of April, 2011, the 3rd defendant went to the office of the 4th defendant, where the purported WILL of his late mother was read by the 4th defendant. The 3rd defendant after the reading of the WILL applied for and obtained the certified true copy of the purported WILL. On the 4th of March, 2013, the 2nd and 3rd defendants and himself briefed the Chambers of Eghobamien & Eghobamien, SAN, to apply for letters of administration with the WILL annexed on behalf of the 2nd and 3rd defendants. The 4th defendant informed them that the Letters of Administration with the WILL annexed has been issued to the 1st defendant and Omolara A. Alonge (deceased) since 25th October, 2011. 1st defendant had sworn to an affidavit that the 2nd and 3rd defendants had traveled out of the country and thus were unavailable to prove the WILL, which was denied by both the 2nd and 3rd defendants. His late mother had only one real property, No. 31A, Emovon

Street, Off Upper-Eweka Road, New Benin, Benin City which under Benin Native Law and Custom is to be inherited exclusively by him. His late mother never lived at No. 31A, Emovon Street, Off Upper-Eweka Road, New Benin, Benin City. Claimant tendered exhibits B and C.

Under cross examination by Okhifoh Esq., the claimant stated that while his late father was alive he had properties in Lagos, Benin, Akure etc, but was not the owner of Mandilas Estate along Sapele Road, Benin City. The estate belongs to him (claimant). He bought it after his father's death and named the estate after his late father. By his late father's Will, he inherited all his properties, apart from house No. 31, Emovon Street, Benin City given to 1st defendant by his mother. 1st Defendant has no property anywhere else. Presently, 1st defendant is not in any dispute with him over the properties he inherited from his father but she was the Plaintiff in all the previous litigations over their father's WILL. In exhibit A, their late mother did not make him a beneficiary.

At the close of the claimant's case, 1st defendant on 22/10/2014 opened her case with DW1, Olayiwola Afolabi Esq. adopting his statement on oath filed on 29/4/2013. He stated that he knew the late Mrs. Felicia Aina Alonge as far back as year 2000 when she called him to help her manage her properties at No. 31A, Emovon Street, Benin City, Off Upper Eweka Street, New Benin, Benin City. The properties are two storey buildings of four flats each and one boy's quarters, (Bungalow). In the month of March, 2010, the said Mrs. Felicia Aina Alonge sent for him and he went in company of Barrister Uwa Uwumarogie to her house at No. 8, Lawani Street, Benin City, and told him that she wanted to write her WILL. When he inquired about her reason for writing her Will, she said that if she

did not write her Will, the claimant would use force to take the properties from his younger ones as he did in respect of his late father's estate. She mentioned the names of her children as follows:

- (i) Mr. Omoruyi Niyi Alonge
- (ii) Ms. Omolara Amenaghawon Alonge
- (iii) Ms. Uyiguosa Abisoye Alonge.

The deceased requested that the properties should be bequeathed solely to the women and she also made mention of a First Bank of Nigeria Plc Account No.1113010018199 of Mission Road Branch. She gave the names of the executors as:

- (1) Eboigbe Lawani of 25, Owoseni Street, Benin City and
- (2) Mr. Sunny Amen Erhunse of No. 46, Efehi Street, Benin City.

DW1 stated that he later went to the houses of the executors to inform them that the deceased wanted them to be the executors of her Will which they accepted. After he prepared the Will, he asked Mrs. Uwa Uwumarogie to interpret the Will to the testatrix in Bini Language. After the Will had been interpreted to the deceased and she understood it, she put her right thumb impression on it. The two witnesses, the deceased, himself and Mrs. Uwa Uwumarogie were present and the two witnesses signed in the presence of the deceased on the same day. After they have all signed, the WILL was lodged with the Probate Registrar. On the death of the testatrix, he wrote a letter to the Probate Registrar about the death of late Mrs. Felicia Aina Alonge and the need to read the Will. Although he was not present when the Will was read, he contacted the executors of the Will about the date the Will would be read. Later the 1st defendant brought him a letter written by the claimant to the tenants at No. 31A, Emovon Street, Benin City to the effect

that the properties therein are his own properties to which he replied. The 1st defendant brought another letter to him written by the claimant directing one Mr. Nosa Ojo to be collecting the rents and he also replied the said letter. The 1st defendant later came to him that the present counsel acting for the 2nd and 3rd defendants wrote a petition against her over the affidavit she deposed to and he advised her to report herself to the Police which she did. The property in issue is not an Igiogbe. The 1st defendant was not present when the Will was being executed. The testatrix was given a modest Christian burial which he attended where he was introduced to the claimant. DW1 tendered exhibits D, E, E1 and E2.

Under cross examination by Eghobamien (SAN), DW1 he identified his signature in exhibits A, E and D. He has different signatures. He wrote his name on his witness statement on oath. On the day the WILL was executed, he was present with Mrs. Uwa Uwumarogie, Engineer Oriakhi and Jimoh Agbonifoh and the deceased.

Dw2, Sunny Oriakhi testified on 22/10/2014 by adopting his witness statement on oath filed on 29/4/2013. According to him, he knew the deceased. He knows the children of the deceased. The deceased had already informed him that she wanted to write her WILL and that he would be one of her witnesses. On 31st day of March, 2010, the deceased sent for him and when he got to her house at No. 8, Lawani Street, Benin City he met one Barrister Olayiwola Afolabi and a woman who sat close to him. He waited till one Jimoh Agbonifo came to join them and after the deceased had signed in their presence, himself and the other witnesses signed and Barrister Olayiwola Afolabi informed them that they should put the date that they signed which they did. The house at No. 8, Lawani Street, Benin City is the

Igiogbe of the claimant which under Bini Native Law and Custom he is entitled to inherit. The deceased had a right to make her WILL which she told them was her desire before she signed in their presence. The deceased was the owner of the house at No. 31A, Emovon Street, Upper Eweka Road, Benin City.

The 1st defendant, Abisoye Uyiguosa Ruth Alonge on 19/11/2014 adopted her statement on oath filed on 29/4/2013. Her parents had three children namely the claimant, late Ms. Omolara Amenaghawon Alonge and herself. The said Omolara Amenaghawon Alonge was alive when their mother died, She is survived by a daughter. Their father had several houses when he was alive and their elder brother the claimant took them. The property at No. 31A, Emovon Street, New Benin, Benin City is not an Igiogbe and claimant has already inherited the Igiogbe of their late father at No. 8, Lawani Street, Benin City. After the death of their father, the claimant drove herself and her elder sister from the house claiming that the house is an Igiogbe. Olayiwola Afolabi Esq. was assisting her mother to collect her rents in respect of the property before he stopped. She had no knowledge of the content of the WILL until they were summoned to appear at the High Court where the Will was read. She never challenged her brother when he claimed that all the properties of their late father are his, but she was surprised when the tenants in the houses given to them by their late mother showed her a letter written by the claimant to the effect that the properties are his. She later showed a copy of the letter to her counsel who replied the said letter. She equally asked her counsel to write to the tenants which he did. She was surprised when the claimant hired a gateman to keep watch at the property in question and directed one Nosa Ojo to be collecting

rent from the property on his behalf and she asked her lawyer to write to the said Nosa Ojo which he did.

On 3rd of October, 2011, her elder sister called her and informed her that she needed money to take care of her health and she would want to make use of the money given to her in the WILL and she agreed. She told her that she had enquired from the òhousesö of the executors and was told that they have traveled abroad. She was asked to write the affidavit of facts to that effect which she did the following day being the 4th of October, 2011. Her sister has since died. The letter of administration was later obtained in respect of their money and property. They both collected the money. To her amazement, the present counsel wrote a petition against her on behalf of the 2nd and 3rd defendants and she made her statement at the Police Station giving the details and circumstances of how the affidavit of fact was written. The 3rd defendant later called her that if she agreed to give her inheritance to the claimant, the claimant will leave her alone and she answered him in the negative. The Probate Registry did the publication in the Observer Newspaper in the year 2011. The 2nd and 3rd defendants are very aware of this fact before the letters of administration were issued to them after they have paid the necessary fees. Olayiwola Afolabi Esq. informed her that her mother placed a curse on whosoever that will alter the WILL, and that her mother freely gave her wishes to him and she perfectly understand the Will which was read to her in Bini language by Mrs. Uwa Uwumarogie. She was the one that called CW1 when her mother sent for him.

Under cross examination by Ezomo Esq., 1st defendant stated that she knows Eboigbe Lawani and Mr. Sunny Amen Erhunmwunse. She also knows where they live as they are relations of her late mother. They are the

executors of her late mother's Will. She does not have any contact with the two defendants. The Nigeria Observer is a national newspaper.

DW3, Mrs. Uwa Uwumarogie on 20/11/2015 adopted her witness statement on oath filed on 29/4/2013. She is a legal practitioner was practicing in the Law firm of Olayiwola Afolabi & Co. Sometime in the month of March, 2010, she went with her principal, Olayiwola Afolabi Esq. to see Mrs. Felicia Aina Alonge at Lawani Street, Benin City. Mrs. Felicia Aina Alonge expressed her desire for her principal to prepare a Will for her and she named her children, the properties she had (including account with First Bank Plc) the beneficiaries of the properties and also the executors to the Will and stated the reason she wanted to write her Will. Olayiwola Afolabi Esq. after preparing the Will in May, 2010 went with her to the said Mrs. Felicia Aina Alonge's house in order to read and interpret the contents of the Will to her as she understood Bini and Yoruba Languages. She being a Benin woman read and interpreted the Will in Bini language to the said Mrs. Aina Alonge who understood same before affixing her right thumb impression on the Will in the presence of her witnesses to the Will. She then signed the Will as the interpreter in the presence of two witnesses who equally signed but theirs was after she had signed her column.

Under cross examination by Mr. Okhigbochie, she stated that when exhibit A was signed five persons were present i.e. herself, Mr. Afolabi, the two witnesses and the testatrix.

2nd and 3rd defendants' case opened on 14/1/2016. 2nd defendant, Eboigbe Lawani on 14/1/2016 adopted his witness statement on oath filed on 29/4/2013. He is one of the executors of the last Will and Testament of Mrs. Felicia Aina Aghahowa Alonge (Nee Olugosi-Erhunmwunse) (deceased) of

No. 8, Lawani Street, Benin City. On the 4th of March, 2013 himself, 3rd defendant and the claimant briefed the Chambers of Eghobamien & Eghobamien (SAN) to apply for letters of administration with the Will annexed on their behalf as executors of the Will of the deceased but found that it had been issued to the 1st defendant and one Omolara A. Alonge (deceased) since 25th October, 2011. The 4th defendant informed them that the 1st defendant had sworn to an affidavit stating that the 3rd defendant and himself travelled out of the country and thus were unavailable to prove the Will. He has never travelled out of the country. He is the proper person as one of the executors of the deceased to apply, pay for and obtain the letter of administration with the Will annexed.

Under cross examination by Okhifoh Esq., 2nd defendant stated that he knew the late Mrs. Felicia Aina Alonge very well as she was his relation. The deceased wrote a Will. He also knew late Omolara Alonge, she was sick before she died. Based on his complaint and that of the 3rd defendant the 1st defendant was charged to the Magistrate Court.

3rd defendant Sonnie Amen Erhunmwunse on 14/1/2016 adopted his witness statement on oath filed on 29/4/2013. He testified along the same lines as the 2nd defendant and stated further that he is the Okaegbe of the deceased's family. He presided over the burial of the deceased in accordance with the Benin Native Law and Custom. He is also an executor of the Will of the deceased. Sometime before the 6th of April, 2011 after the death and burial of the deceased, he informed the claimant that Barrister Olayiwola Afolabi wrote a letter informing him that the claimant's late mother made a Will which was going to be read on the 6th of April, 2011 at the Probate Registry, High Court of Justice, Benin City. On that day he went

to the office of 4th defendant where the purported Will of the claimant's late mother was read by the 4th defendant. After the reading of the Will, he applied, paid for and obtained the Certified True Copy of the Will. He did not apply for letters of administration because he was waiting for the surviving children of the deceased to approach him as to the sharing of her property.

Under cross examination by Okhifoh Esq., 3rd defendant stated that for the lie 1st defendant told she was charged to the Magistrate Court. He testified in the case. It is true that the case has been withdrawn by him as the head of the family. He became aware that the deceased wrote a Will when Afolabi Esq. came to his house with a letter after her burial from the Probate Registry for the reading of the Will. On 6/10/2011, he never saw the publication in the Nigeria Observer.

4th defendant's case opened on 11/3/2016 with DW4, Uyioghosa Mary Emuobome adopted her statement on oath filed on 25/11/2014. She stated that sometime on the 8th of March, 2011, the 4th defendant received a letter from E. O. Afolabi Esq. informing him that Mrs. Felicia Aina Alonge died on the 12th of January, 2011 and suggested a date for the reading of the Will. On 27th day of September, 2011, E. O. Afolabi Esq. applied to the Probate Registrar for letter of administration and for issuance of Probate Forms and collected same. On 4th of October, 2011, Miss Uyiguosa A. Alonge in her affidavit stated that the two executors in her mother's Will were abroad hence they were not available to prove the Will and that the beneficiaries were applying for letter of administration. On the 6th of October, 2011, the 4th defendant made a publication in respect of the issuance of letter of administration to the applicants namely: Miss Uyiguosa A. Alonge and Miss

Omolar A. Alonge in the Nigeria Observer. On the 25th of October, 2011 letter of administration with Will annexed were granted to the applicants. She tendered exhibits F, G and H.

At the close of evidence, all learned counsel adopted their written addresses on 17/2/2017. In his written address filed on 29/6/2016, Oluwale O. Iyamu Esq. of counsel to the 4th defendant submitted that as a statutory body the 4th defendant is empowered to keep testamentary documents and to issue letter of administration or probate as in this case which it did. In this case, the 4th defendant accepted and kept the Will of the deceased and when application was made for the Will to be read by counsel of the beneficiaries the Will was read and letters of administration with Will annexed was issued. He submitted that the 4th defendant discharged its statutory duty imposed on it by the enabling law. As to whether the Will was validly made or otherwise is not for the 4th defendant to enquire into before she accepts the Will.

In conclusion, Iyamu Esq. submitted that whether the Will is valid or not is the issue before the court whichever way the matter is decided, parties will be bound by it including the 4th defendant.

In his written address filed on 28/7/2016, O. Okhigbochie Esq. of counsel to the 2nd and 3rd defendants raised two issues for determination viz:

- (1) Whether or not the 2nd and 3rd defendants are the right and proper persons to be issued with the Letter of Administration with the Will annexed dated the 25th day of October, 2011 in respect of the estate of late Mrs. Felicia Aina Aghahowa Alonge (deceased) as her lawful executors.

- (2) If the answer to issue 1 is in the affirmative, whether the Letter of Administration with the Will annexed dated 25th day of October, 2011 issued to the 1st defendant by the 4th defendant is invalid and ought to be set aside by this Honourable Court.

Learned counsel submitted on both issues that an executor must prove the Will of his testator, otherwise, the court may of its own volition or on the application of any person claiming an interest under a Will give notice to the executors therein named to come in and prove the Will or renounce probate and in making a grant, the court must comply with the order of priority as laid down by the rules of this Honourable Court. See Order 54 Rule 21 of the Edo State High Court (Civil Procedure) Rules 2012. According to him, the evidence of both CW1 and the 1st defendant established the fact that the letters of administration dated 25/10/2011 was fraudulently obtained by the 1st defendant. It is trite that where the grant is made mistakenly or on fraudulent representation or where there is a false and fraudulent representation or claim that the person entitled to the grant is dead, the original grant can be revoked. Citing **Kakih v P.D.P.** (2014) 15 NWLR (pt. 1430) 374 S.C. and **Otun v Otun** (2004) 14 NWLR (pt. 893) 381. The 2nd and 3rd defendants have established a case of dishonesty against the 1st defendant in obtaining the said letters of administration issued to her by the 4th defendant relying on Sections 6 and 23 of the Administration of Estate Law of Bendel State as applicable to Edo State, Order 53 Rule 12 (1) & (2) of the Edo State High Court (Civil Procedure) Rules 2012 and the case of **Re: Odutola** (2006) 16 NWLR (pt. 794) 470 at 474.

In conclusion, Mr. Okhigbochie urged the court to revoke and or set aside the said letter of administration issued to the 1st defendant by the 4th defendant in respect of the estate of Mrs. Felicia Aina Aghahowa Alonge (deceased).

In his written address filed on 20/7/2016, Ebosele Okhifoh Esq. of counsel to the 1st defendant raised two issues for determination viz:

- (1) Whether there was any element of fraud in the making of exhibit A to render it invalid.
- (2) Whether the late Mrs. Felicia Aina Aghahowa Alonge had testamentary capacity to make exhibit A the Will or whether the Will complied with the Benin Native Law and Custom.

Learned counsel submitted on issue 1 that when the deceased made exhibit A there was no element of fraud and subsequently thereafter. A Will can only be set aside on any of the following grounds:

- (a) Fraud
- (b) Mental incapacity of the testator or
- (c) Under influence.

See **Odifola v Mabogunje** (2013) NWLR (pt. 1354) 522 at 561. According to Mr. Okhifoh DW1, DW2 and DW3 gave unchallenged evidence before the court of the making of exhibit A and the signing of same and urged the court to give probative value to these unchallenged evidence relying on the case of **Mairasara v Iman** (2012) ALL FWLR (pt. 618) 854 at 860 and paragraphs 5 and 6 of DW3's statement on oath. He submitted that the claimant has failed to prove any fraudulent conduct on the part of the 1st defendant and that exhibit A was not duly executed. The 1st defendant by her evidence and that of DW1, DW2 and DW3 showed that there was no

fraud during and after the making of exhibit A, the burden has shifted to the claimant to show that there was fraud. See **Mudasiru v Abdullahi** (2012) ALL FWLR (pt. 639) 1141. The claimant was not able to impeach any of the signatures of the testatrix nor her witnesses or show undue influence in any way. In the circumstance he urged the court to resolve issue 1 in favour of the 1st defendant.

Okhifoh Esq. submitted on issue 2 that the claimant only claimed that there was fraud in the making of exhibit A because CW1 stated that he signed the Will alone and that he did not see the testatrix. According to him CW1 was on a mission to lie and same was exposed when you compare his testimony with that of DW2 his co-witness in exhibit A who debunked his evidence and stated otherwise. The evidence of DW2 was not challenged hence reliance should be placed on it. He maintained that there is no Bini Native Law and Custom that was breached by the testatrix. The testatrix is not a man hence the house cannot be regarded as an Igiogbe subject to be inherited by the claimant. There is no law which states that a female (Bini) testatrix must of necessity devise her house to her first son. Though the testatrix was a Bini woman she was never a traditionist as attested to by the evidence of the 1st defendant. The evidence was also supported by the testatrix in her exhibit A where she directed that she should be given a Christian burial. Assuming without conceding that the testatrix was subject to Bini Customary Law, it still does not exclude or prevent her from making a Will once she has testamentary capacity to do so. See Section 3(1) of the Wills Law of Defunct Bendel State 1976 as applicable to Edo State. He submitted that exhibit A met the formalities and formal requirements for

making a Will as provided by Sections 6 and 7 of the Wills Law (supra) and same should be regarded as valid by the court.

In conclusion, learned counsel urged the court to uphold the validity of exhibit A and dismiss the claims of the claimant as he has failed to prove his case on the preponderance of evidence.

In his written address filed on 12/10/2016, B. O. Ojumah Esq. of counsel to the claimant raised one issue for determination namely:

Whether the purported Will was properly executed having regard to the provisions of the Wills Law of Edo State.

He submitted that Section 6 of the Wills Law Cap 172 Laws of the defunct Bendel State 1976 as applicable to Edo State provides for how a valid Will should be executed. According to him, the said Will (exhibit A) is tainted with fraud and was not properly executed in that CW1 did not sign exhibit A in the presence of the testatrix and the other witnesses. See Paragraph 16 of the Statement of claim and paragraphs 5 ó 9 of CW1's witness statement on oath. The 1st defendant could not effectively debunk the evidence of the claimant in her defence. The 1st defendant's defence actually supports the case of the claimant.

Mr. Ojumah submitted that CW1 and DW2 the two witnesses to the Will are in agreement that DW3 did not interpret the Will to the testator in their presence. Since the testator only signed the Will at the time DW3 interpreted it and the interpretation was not done before the witnesses signed, it means the evidence of CW1 is more credible and ought to be believed and therefore affirms the claimant's case that the Will was not properly executed in line with section 6 of the Wills Law.

In conclusion, learned counsel urged the court to set aside the Will and grant the claim.

I have soberly considered the evidence in this case as well as the legal submissions of counsel. I have also examined the exhibits tendered. In the case of **Ize-Iyamu v Alonge** (2007) ALL FWLR (pt. 371) page 1570, the Court of Appeal stated that for a Will to be valid, it must comply with the following factors: It must be in writing, signed by the testator, attested and subscribed by witnesses. See also Section 6 of the Wills Law Cap. 172 Laws of Bendel State 1976 applicable to Edo State. Attesting the Will, the signature of the testator must be made or acknowledge by him in the presence of at least two witnesses who must be present at the same time. The minimum number of witnesses is two and there is no limit on the maximum. Where for instance four persons attest the Will, the attestation is valid. In **Ize-Iyamu v Alonge** (supra) the court held that the attestation clause in a Will is the clause where the witnesses to the Will certify that the Will has been executed before them and state the manner of the execution of same. Where the testator does not make his signature in the presence of witnesses, he could acknowledge in their joint presence. Where he makes his signature in the presence of witnesses, the witnesses must be present at the same time, though they may not be present when each of them is attesting. It is important to strictly comply with the formalities for executing a Will. The requirement for execution is that the Will must be signed by the testator in the presence of witnesses. Where a Will appears *ex facie* regular, the courts will presume that it is duly executed. The burden of proving due execution whether by presumption or by positive evidence rests on the propounder of the Will. The testator must have testamentary capacity, sound

disposing mind and must not be under any undue influence. The persons who are entitled to probate on testate succession are:

- (i) The executor to the Will.
- (ii) A residuary beneficiary holding in trust for other persons.
- (iii) A residuary beneficiary for life.
- (iv) A beneficiary whose legacy is vested in interest.
- (v) The ultimate residuary beneficiary including one entitled on the happening of any contingency. In the alternative, where the residue is not wholly disposed of by the Will, then any person entitled to share in the residue not so disposed of or the personal representative of any such person.
- (vi) Any beneficiary of a specific legacy or devise or any creditor or the personal representative of any such specific beneficiary or any creditor.
- (vii) Any beneficiary of specific legacy or devise entitled on the happening of any contingency, or any person having no interest under the Will who would have been entitled to a grant if the deceased had died wholly intestate.

Grounds that may lead to the revocation of a grant include the following:

- (1) Where it was made to a person in whom it ought not to have been made.
- (2) Where a subsequent Will or Codicil is discovered which supersedes the Will upon which the first grant was made.
- (3) Where it was discovered later that the Will upon which a grant was made had been revoked or was invalid before the grant.

- (4) Where the deceased is not in fact dead.
- (5) Where the person to whom the grant was made consents to its revocation.

See property Law Practice in Nigeria by Y.Y.D. Dadem at page 281 and 304.

In the case of **Otun v Otun** (2004) 14 NWLR (pt. 893) 381 at 398 ó 399 the court held that òwhere it is sought to revoke grant of letters of administration made to a party, it is only relevant to consider evidence of the acts of the grantee of the said letters of administration sought to be revoked done after the letters of administration was issued and not before. Upon notice that letters of administration will be issued to a person, a party is free to raise an objection thereto by way of a caveat. Although failure to enter a caveat cannot be justification for obtaining letters of administration by fraudö. See Order 53 Rule 12 of the Edo State High Court (Civil Procedure) Rules 2012.

I have looked at exhibit A the Will prepared by the deceased. I find it complies with the provision of Section 6 of the Wills Law (supra) as there is a presumption of regularity. CW1 was the only one who testified that the Will was not signed in the presence of the testatrix by himself and DW2. The evidence of the claimant does not hold water as it is hearsay which is not admissible in law. I believe the evidence of DW2 as his evidence was corroborated by DW1 and DW3 who were present when the deceased signed exhibit A and CW1 as well as DW2 jointly signed as her witnesses. I do not believe the testimony of CW1 as he appears to be a bought witness to fulfill the commands of the claimant. In the circumstance, I hold that the Will (exhibit A) is valid and proper as the claimant has failed to prove otherwise.

The testator as at the time of making the Will had testamentary powers to do so in line with Section 3(i) of the Wills Law. She was also of a sound disposing mind and was not under any undue influence. The Will was validly executed as it was in writing, signed by the testator (although it was a thumb print) and it was properly attested to by CW1 and DW2. The claims of the claimant cannot be sustained as they have no legs to stand on. The claimant failed to discharge the burden of proving the Bini custom that was breached by the testator. The said house does not fit the description of an Igiogbe to be inherited exclusively by the claimant. See **Uwaifo v Uwaifo** (2013) 10 NWLR (pt. 1361) 185. Neither did he inherit same from his mother as she did not bequeath anything to him in exhibit A or in any other way. The claimant's claim to declaratory relief is not sustained as no fraud is established in that the 1st defendant in her statement on oath paragraphs 15 and 16 and statement of defence paragraph 20 clearly explained the circumstance that led to her deposing to the affidavit.

The next pertinent question to be asked is who is entitled to apply to for grant of probate or letters of administration, the 1st defendant or the 2nd and 3rd defendants. From the list given above, the executors are the ones entitled to apply for grant of probate or letters of administration. However, their conduct has been reprehensible to say the least as they were present when the Will was read on the 5th of April, 2011. See Exhibit F. The 3rd defendant also paid for and obtained a certified true copy of exhibit A. The question that arises, is what stopped the 3rd defendant there and then or soon after to set the machinery in place to prove the Will. Why wait for almost two years (i.e. from 5/4/2011 to 4/3/2013) to prove the Will and obtain the grant or letters of administration and in the company of the claimant and his

counsel. See paragraphs 7 ó 10 of the claimant's statement on oath and paragraphs 9 ó 11 of the 3rd defendant's statement on oath. This act of the executors (2nd and 3rd defendants) smacks betrayal of trust as it shows that they are colluding with the claimant to deprive the 1st defendant and her sister (of blessed memory) of their inheritance. By their action, the 2nd and 3rd defendants failed to accept or renounce executorship of the Will, thereby leaving the 1st defendant to do what she thought was best. I fail to see the fraud on the part of the 1st defendant, rather what I see is an error of judgment in that she did not bother to verify the fact that her late sister gave her before applying for letters of administration. What she should have done was to apply to court to issue what is referred to as "citation" calling on the executors to formally accept or renounce probate. The court may also act suo motu or may be moved to do so by the 1st defendant. The 1st defendant may request that another person should be appointed by the court to act as executor. See Property Law Practice in Nigeria by Y.Y.D. Dadem at page 327. From the foregoing, it is evident that the 1st defendant was not the proper person to be granted the letters of administration with Will annexed and it is a ground to revoke probate or set aside the said letters of administration. The letters of administration with Will annexed is (exhibit B) and the affidavit of fact (exhibit C) are hereby ordered set aside.

I hereby invoke my powers in Order 53 Rules 7 and 8 of the Edo State High Court (Civil Procedure) Rules 2012 to Order the 2nd and 3rd defendants to formally accept or renounce probate within twenty one days of the delivery of this judgment.

I further order the executors (2nd and 3rd defendants) to carry out the express wishes of the deceased. The beneficiaries to the Will are Ms.

Uyiguosa A. Alonge and her late sister Ms. Omolara A. Alonge. The deceased's properties should devolve to them and no other person. Where the 2nd and 3rd defendants fail to carry out the wishes of the deceased they will in addition be liable for contempt of court and be stripped of their powers as executors as the court will suo motu appoint another person to act in their stead to carry out the wishes of the testator.

Hon. Justice E. F. Ikponmwen
Chief Judge
31/3/17

Counsel:

N. Omeje (Mrs.) with P.W. Akuen Esq. for the Claimant.

Ebosele Okhifoh Esq. for the 1st Defendant.

A. R. Hameed Esq. for the 2nd and 3rd Defendants.