IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON FRIDAY THE
13TH DAY OF DECEMBER, 2019.

APPEAL NO: CCA/5A/2015

BETWEEN:

1. AGHAFEDO OKUNROBO
2. ESELEGBE IDUOZE ----------APPELLANTS

AND

MODAY IMAYUSE ----------RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Area Customary Court sitting at Ehor, Uhunmwode Local Government Area of Edo State wherein the court decided in favour of the Respondent on the 9th day of December, 2013.

The facts giving rise to this Appeal is that the Respondent sued the Appellants in the lower court claiming *inter alia,* the custody of one Queen Obeh (f) who has been with the 2nd Appellant since 1997; the sum of N600, 000.00 (six hundred thousand naira) damages, and he urged the court to hold that his deceased brother is the biological father of the said Queen Obeh (f).

At the trial, the Respondent testified and called some witnesses and the 2nd Appellant testified and called two witnesses in defence of the suit.

At the conclusion of the trial the court gave judgment in favour of the Respondent and awarded him N500, 000.00 (five hundred thousand naira) as damages.

Dissatisfied with the judgment, the Appellants filed their Notice and Grounds of Appeal as follows:

i. The learned trial President erred in law when he did not consider all the issues raised in the defendants' address.

PARTICULARS OF ERROR

- ***a. Issue two in the defendants' address was never decided by the Court below.***
- ***b. The Plaintiff previously sued in a representative capacity.***
- ***c. This action is presently in a personal capacity.***
- ***d. In the judgment being appealed, the learned trial President only held that issue No.2 in the defendants' written address was previously decided without more i.e. stating how and when such issue No.2 in the defendants' written address was previously decided.***
- ***e. The defence raised the issue that the plaintiff, including his witnesses came to lie to court.***
- ***f. All the lies in the plaintiff's evidence were pointed out to the trial court.***
- ***g. It is the law that when an issue is raised for determination, the court must consider same one way or the other.***
- ***h. The trial court did not also consider the issue of whether the plaintiff and his witnesses actually lied to court.***

ii. The learned trial President erred in law in premising his decision on the evidence of the Plaintiff by holding thus: "That the plaintiff has proved his case as required by law…".

PARTICULARS OF ERROR

- ***a. Pw1 did not physically testify before the learned trial President who gave the judgment being appealed against.***
- ***b. In law, Pw1's evidence as per the exhibit in the court below is unreliable.***
- ***c. Inadmissible documents (exhibits) were admitted and relied upon by the lower court to reach its decision.***
- ***d. All plaintiff's witnesses were in agreement that pw1 did not become pregnant in the harem of late Pullen Obe until after three years.***
- ***e. It is in the evidence of Pw1 that the plaintiff taught her what she testified to in Court and that she i.e. Pw1 was also induced by the plaintiff.***
- ***f. Exhibit "C" is unknown to customary law.***

g. Assuming without conceding that Exhibit "C" is known to customary law, same Exhibit "C" is patently defective.
h. Plaintiff's evidence is inconsistent with his claim.
i. The learned trial President did not consider the legal implications of Exhibit "C" in spite of the legal authorities commended to him.
j. Plaintiff witnesses were tutored.
k. Court, in law, cannot rely on the evidence that is induced.

iii. The learned trial President erred in law when he held that the 1st Defendant did not defend his case.

PARTICULARS OF ERROR

a. It is on record that the defence called 3 witnesses to defend the case.
b. 1st Defendant is deaf and the trial Court was told of this position but surprisingly it was never reflected in his judgment.
c. The defence tendered exhibits and same were admitted in evidence.
d. The learned trial President was biased in his judgment.
e. The authorities (Alhasan v. Abu (2010) All FWLR pt.538p.962 @ 977 r. 16) cited and relied on by the learned trial President while holding that the 1st defendant did not defend his case is inapplicable in this case.
f. It is allowed in law for a defendant and/or a plaintiff to rely on the evidence of his witness (es) and/or his adversary to sustain his case even without personally testifying.

iv. The learned trial President erred in law when he held that Queen being the subject matter of the action is the daughter of Pw1 born to Late Pullen Obe.

PARTICULARS OF ERROR

a. Late Pullen Obe is not a party in this action neither is Queen.
b. All Courts are enjoined in law to decide only as to the interest and/or rights of parties in an action.
c. In law, the court below was wrong when it held that Queen is the daughter of Pw1, born to late Pullen Obe.
d. The Statutory authority of s. 233 (b) Evidence Act 2011 as well as case law authorities were not considered despite being brought to the notice of the court below.
e. The Plaintiff in this case is a meddlesome intermeddler.
f. The learned trial President premised his decision on the plaintiff's evidence while relying heavily on Exhibits "C", "D" and "F".
g. Exhibit "D" i.e. the purported birth record of Queen is worthless as it is a mere paper.

h. There is the uncontroverted evidence of defence (especially Exhibits "N & O") that while Pullen Obe was alive, Queen maintained her paternity of the 1st defendant and the said Pullen Obe never at all contested it.

v. The learned trial President erred in law when he also premised his judgment on his perceived weakness in the defence case.

<u>PARTICULARS OF ERROR</u>

a. The defence was not weak as the Defendants called witnesses who were credible and were never impugned and/or impeached by the Plaintiff.
b. It is the plaintiff's evidence that is weak because of its manifest contradictions and falsehood.
c. The learned trial President, through the length and breadth of his judgment only considered his perceived weakness in the defence case without considering in the least the obvious incurable defects in the evidence of the plaintiff even when they were pointed out to him.
d. It is the learned trial President who did his research to bring out what he perceived to be the defects in the defence to make submission for the plaintiff.
e. Courts are enjoined in law not to rely on the weakness of the defence case to arrive at a decision in favour of the Plaintiff. Plaintiff must, in law, sustain his case with credible evidence.
f. The learned trial President did not consider the defective evidence of the Plaintiff despite the fact that the defence counsel x-rayed and pointed them to him in his written address.
g. It is the law that a plaintiff must sustain his case on the strength of his evidence

vi. The learned trial President erred in law when he awarded N500, 000.00 as damages against the Defendants.

<u>PARTICULARS OF ERRORS</u>

a. The Plaintiff did not show to Court wherein he deserves the award of N500, 000.00 damages.
b. The award of N500, 000.00 is gold digging.
c. Evidence abounds on record that Queen being the subject matter of this action was trained through primary school to the university by the Defendants who are being asked by the Court below to pay N500, 000.00 to the plaintiff.

vii. The learned trial President erred in law when he held that there was marriage between pw1 and late Pullen Obe.

<u>PARTICULARS OF ERROR</u>

a. ***Both Pw1 and late Pullen Obe are not parties to this action.***
b. ***The evidence of the Pw1 on this issue was induced.***
c. ***The Exhibit "C" relied on by the trial court is unknown to customary law and assuming without conceding that it is known to customary law, the said Exhibit is patently defective.***
d. ***Dw2 and Dw3 who are principal members of pw1's family testified in this case and denied that any such marriage between pw1 and late Pullen Obe ever existed as they claim:***
   i. Pw1 married only two husbands (Late Egbon Osazemwinde and the 1st Defendant).
   ii. Late Pullen Obe never married or came to marry from the Pw1's family i.e. Aghariaha family any person, moreso the pw1.
e. ***The Plaintiff who doubles as pw3 and who alleged such marriage could not point out to Court any member of pw1's family to give credence to his alleged marriage between pw1 and late Pullen Obe or that is known to him or to the said Pullen Obe.***
f. ***The legal authorities commended to the trial court were never considered.***
g. ***The entire evidence of Plaintiff on the alleged marriage between Pw1 and Pullen Obe is contradictory.***
h. ***Customary marriage is a union of both families.***
i. ***Plaintiff and his witnesses' evidence on the purported return of Pw1's bride price to the 1st Defendant is contradictory.***
j. ***The learned trial President was economical in his finding of facts particularly in the Plaintiff and his witnesses accounts of the purported returned bride price of Pw1 to the 1st Defendant.***
k. ***The learned trial President wrongly appraised the evidence of the plaintiff.***
l. ***Pw1 never testified before the learned trial President of the court below.***
m. ***The learned trial President found as of fact that under the Benin Customary law of marriage, twelve pounds is the bride price.***
n. ***It is not correct that Plaintiff evidence on this issue was not controverted***

viii. The learned trial President erred in law when he went on his own voyage and frolic by conducting his address before holding on same.

<u>PARTICULARS OF ERROR</u>

a. ***Courts are enjoined in law not to be sentimental but to consider dispassionately only the evidence of the parties before it.***
b. ***The Judgment of the Court below was highly sentimental.***
c. ***The learned trial Court gave his own evidence in the case before delivering his judgment.***

d. The learned counsel to the plaintiff did not respond to any of the issues raised by the Defendant's counsel in his address.

Thereafter, Counsel for the parties filed and exchanged their respective briefs of arguments in consonance with the rules of this Court.

In her Brief of Argument, the learned Counsel for the Appellants, **Miss Osama Idehen** identified four issues for Determination as follows:

1) ***Whether, having regards to the evidence before the court below (both Plaintiff and Defendants' evidence), the holding of the trial court that "…the plaintiff has proved his case as required by law…" is right in law?***
2) ***Whether having regards to the non-consideration by the trial court of some issues raised for determination, the principle of fair hearing was not breached in the judgment of the lower court. And if it is that fair hearing was breached, whether such breach does not render the judgment a nullity or inappropriate?***
3) ***Whether, considering the fact that Pullen Obe including Queen and pw1 are not parties to this action, the holding of the lower Court that: "Queen is the child of pw1 bore (sic) for late Pullen Obe," is right in law? And***
4) ***Whether the award of ₦500, 000.00 (five hundred thousand naira) damages against the defendants is not inappropriate? And in the alternative whether it is not the Defendants now Applicable (sic) that deserve the award of damages in their favour?***

In her Appellant Brief, the learned counsel for the Appellants marshalled her arguments in respect of the four issues for determination.

ISSUE ONE:
Whether, having regards to the evidence before the court below (both Plaintiff and Defendants' evidence), the holding of the trial court that "…the plaintiff has proved his case as required by law…" is right in law?

Before opening argument on this issue, learned counsel posited that it is necessary to outline some very fundamental facts from proper evaluation and

appraisal of evidence adduced at the trial particularly the bundles of contradictions, evidence of incredibility and inducement, conflicting evidence of the relationship between the plaintiff, Pullen Obeh, pw3 and pw4, alleged marriage between pw1 and Pullen Obeh, the incredibility of the conception birth of Queen and the absurdities in plaintiff's documentary evidence contained in the evidence of the plaintiff and his witnesses.

Counsel submitted that the evidence of the incredibility and inducement of pw1 are as follows: In Exhibit "A" at page 529 lines 12-16 the pw1 stated that the plaintiff taught her the evidence she gave in court. She reproduced the evidence as follows:

> **"I used to live at Evboesi. It is about some days when the plaintiff came to pick me up and brought me to Evbueghae since I came back to Evbureghae I have been living in the plaintiff's house. It is true that it is while I stayed with the plaintiff that he taught me all I have said in court today."**

She said that the Pw1 further stated at p.529 supra particularly lines 23-25 that the plaintiff made promises to give her things when she returns from court.
That at lines 37-38 the PW1 emphatically stated thus:

> **"If he did not give me all that he promised me I will not be happy."**

On the conflicting evidence of the relationship between the plaintiff, Pullen Obe, pw3 and pw4 counsel enumerated as follows:

i. Plaintiff gave evidence that he and Pullen Obe are brothers born of/by the same mother – p. 291 line 15 of the records;
ii. Pw3 pointedly said at p. 304 lines 4 – 6 of the record that his own father (Ogunrobo) and Pullen Obe are full blooded brothers (meaning pw3's father & Pullen Obe are born by the same father & mother) when he said:
    "My father Ogunrobo and Pullen Obe were born by the same father and the same mother" page 304 lines 4-6 of the record.
    Whereas, at page 316 lines 5-6 of the record, the pw3 unequivocally stated:
    "The plaintiff and my father are not the same mother and the plaintiff and Pullen Obe are of the same mother".
iii. Pw4 (Sunday Ehrumwunse) said at page 325 lines 1-5 of the record that the father of Pullen Obe and his father are born of the same father.
iv. Whereas the same pw4 equally said at page 1 of Exhibit "L" particularly line 5 therein that it is himself and Pullen Obe that are born of the same father.

On the purported marriage between the PW1 and Pullen Obe, the incredibility of the conception and birth of Queen, counsel pointed out as follows:

i. PW1 said Pullen Obe paid dowry to 1st defendant (see Exhibit "A") particularly at page 528 of the records of appeal. In the Further and Further Amended Claim, the same is stated therein.

ii. On the face of Exhibit "C" the PW1 personally refunded part of her bride price to the 1st defendant (see Exhibit "C").

iii. Whereas evidence of the plaintiff equally abound that Exhibit "C" was issued by the 1st defendant and same issued to the plaintiff (see Exhibit "J" at page 554 of the record of appeal).

iv. But by a careful perusal of Exhibit "C", it will be found that 1st defendant is not the one who issued same.

v. Plaintiff oral evidence is to the effect that pw1's bride price was returned to the 1st defendant whereas "Exhibit "C" shows that part of pw1's bride price was returned.

vi. There is *consensus ad idem* in the plaintiff's evidence (assuming without conceding that PW1 was in the harem of Pullen Obe) that PW1 never conceived at the harem of Pullen Obe until after 3 years of the alleged return of bride price on 2/9/1992 (see page 290 lines 10-11; page 302 lines 25-26; page 321 line 7 and page 528 of the record of appeal). The trial court found at page 502 lines 5-7 that the PW1 stayed 3 years at the harem of Pullen Obe before she became pregnant. The trial court equally found that it was after the issuance of Exhibit "C" that PW1 started to live in the harem of Pullen Obe. Counsel submitted that assuming without conceding to these findings of facts of the court below, if we calculate three years from the day Exhibit "C" was issued which was 2/9/1982, it would be found that the earliest three years could come will be 1/9/1985. So if the facts as found by the court below is that PW1 stayed three years in the harem of Pullen Obe after the issuance of Exhibit "C" on 2/9/1982 before she became pregnant, it simply means that PW1 couldn't have become pregnant for the first time in the harem of Pullen Obe until 1/9/1985 which is after three years from 2/9/1982. Yet the court below relied and believed very strongly on Exhibit "D" which same exhibit is to the effect that the child Queen was born on the 13/6/1985 when the pw1 was not even have conceived in the first place.

Next, learned counsel addressed on some alleged absurdities in documentary evidence. She identified them thus:

i. Exhibit "C" shows only the signature of a receiver but oral evidence at p 290 lines 6-7 of the record was led to the effect that the maker of same Exhibit "C" signed same but that the receiver thumb printed;

ii. One hundred naira is contained on the face of Exhibit "C" as being "part of the bride price" returned to and received by the 1st defendant whereas the court found that twelve pounds is the bride price under the Benin Customary Law of Marriage (see page 498 paragraph 3 of the record of appeal);

iii. Pw2 (Aigbedion Uwadiae) at page 532 of the record said:
"Sometime in 1982 one Helen married Aghafedo"

iv. Exhibit "C" was issued on 2/9/1982 and it has the caption, **"… for the marriage contracted since nine months ago".**
She posited that considering the above caption, it shows that the marriage between PW1 and the 1st defendant was only nine months yet evidence was led by the plaintiff that two children were born in that marriage.

v. In Exhibit "D" the name that appears on its face is Queen Pullen. The name of the father and/or the mother of Queen Pullen is not on the same Exhibit "D".

vi. Exhibit "F" relates to Queen Pullen.

Learned counsel identified further contradictions in the plaintiff's evidence as follows:

i. At p. 322 of record, there is evidence that plaintiff and Pullen Obe lived at different houses.

ii. Whereas evidence abounds at page 290 lines 25-26 of the record that plaintiff and Pullen Obe lived together in the same house.

iii. At p. 322 of the record, pw4 (Sunday Ehrumwunse) pointedly stated in evidence that they mandated the plaintiff to write to the 1st defendant to release Queen to them. She submitted that this is a manifestation of the obvious truth that Queen lived with the 1st defendant who gave her custody to the 2nd defendant.

iv. At p. 320 (lines 25 – 27) – p. 321 (lines 1 – 3), of the record, pw4 pointedly stated that it was pw3, plaintiff and pw1 that went to the Enogie of Evboesi's palace where pw1's dowry (bride prize) was returned and the trio later came to report the outcome to them (family).

v. The same pw4 who at page 320 lines 25 – 27 of the record did not mention Pullen Obe as one of those who went to the Enogie of Evboesi's palace to return pw1's dowry now said at p. 322 lines 24-26:
"Pullen Obe knows Aghafedo because he was the person Pullen Obe paid the bride price to at the palace of the Enogie of Evboesi."
She said that the **"Aghafedo"** referred therein is the 1st defendant.

vi. Pw3 also contradicted himself on who went to the Enogie's palace for the purported return of pw1's dowry. First in page 304 line 22 – 23 he said it was himself and plaintiff that were sent but at line 29 – 30 of the same page, he then said Pullen Obe was equally there.

On whether the defendants did in fact, defend their case counsel submitted thus:

i. Three witnesses testified for the Defendants;

ii. Dw2 and Dw3 are members of pw1's family;

iii. The defence proved that Queen being the subject in issue lived with the 1st Defendant and same was admitted by pw1;

iv. It is the evidence of the defendants that Queen lived with the 1st defendant from birth hence she bears the names Queen Okunrobo (Exhibits "N" and "O");

v. Defendants tendered Exhibits "N" and "O" (pages 564 and 565 of the record) respectively which were never impugned. As par the exhibits, it will be found that Queen bears the name "Queen Okunrobo."

vi. At p. 529 lines 41 – 42 of record, pw1 admitted that the 1st defendant put Queen in school.

Counsel submitted that on the basis of the above concrete pieces of evidence of contradictions, incredibility and inducement, absurdities etc. in the record which were pointed to the trial court, the only question that ought to have agitated the mind of the learned trial President was: "whether in law the court can rely on such evidence of the plaintiff and more so the point blank evidence of pw1 who admitted that she was tutored by the plaintiff to give the evidence she gave in court?" She posited that the answer should be in the negative.

Counsel submitted that from the totality of the plaintiff's evidence as graphically itemized above, the evidence was induced, doctored (particularly pw1) full of flaws, inconsistencies, absurdities and/or contradictions. She submitted that the evidence of pw1 is totally unreliable. That on existing legal authority, the evidence of a witness commissioned and/or tutored like that of pw1 is liable to be discountenanced by the court. That such tutored or induced evidence is not to be relied upon as it does not fall within the realm of acceptable evidence. That it is equally the law that a court does not rely on contradictory evidence as it has been shown above that plaintiff's evidence on some fundamental issues like the purported return of dowry (bride prize) to the 1st defendant and other related issues such as the alleged relationship between plaintiff, Pullen Obe, pw3 and pw4, plaintiff's evidence on Exhibit "C" and the evidence of conception and birth of Queen etc. are full of inconsistencies, contradictions and absurdities.

Counsel submitted that from the above facts, the plaintiff and his witnesses were never reliable witnesses of truth. That these facts having regards to the incredibility of the plaintiff & his witnesses which are in evidence and the authority of **s.233 (b) Evidence Act 1990** as amended were pointed out and commended respectively to the learned trial President at p.412 line 15 – 32 of the record of appeal but the learned trial President, for no apparent reason, failed and/or refused to consider them. That he did not even comment on them which he was obliged to do to arrive at a just determination of the case.

Counsel submitted that an action is governed by the applicable law at the time of its commencement. See the authority of **Adesanoye v. Adewole (2000) 9 NWLR pt. 671 @ 127; (2000) 11 WRN @ 138; (2000) 5 SCNJ 47.** That in the

instant case, the **Evidence Act 1990** as amended was the law in force as at when this action commenced and it is therefore applicable to this case.

That the finding of the trial court that the 1st Defendant did not defend his case even where three witnesses testified for the defence and exhibits tendered was wrong. That assuming without conceding that the appellants did not call any witness to defend their case, no law requires a Plaintiff or a Defendant to be present to testify if he can otherwise prove or defend his case. See the case of: **Cross River State N/Papers v. Oni (1995) 26 LRCN 51.** She submitted that the onus is on the Plaintiff to prove his case and it is not the duty of a defendant to disproof the Plaintiff's case. See: **Agbama v. Owa (2004) 119 LRCN 4298.**

Counsel further submitted that the PW1 is a witness of doubtful veracity having admitted that she was tutored by the plaintiff to give the evidence she gave in court. She equally admitted to have been induced by the plaintiff.

While she conceded that the realm of believing any witness is the prerogative of the trial court but that in the instant case, the PW1 did not testify before the learned trial President of the court below. That the learned trial President simply relied on Exhibits "A" and "K" at pages 528-531, pages 556-558 respectively of the record to decipher the evidence of pw1. That he undermined the damning evidence of pw1 in Exhibits "A" and "K" aforesaid even when they were pointed out to him.

Counsel referred to p. 529 Lines 7 – 8, where the pw1 said she does not know whether Pullen Obe, the man according to her she was married to, and whom the plaintiff alleged that the three of them (pw1, Pullen Obe and the plaintiff lived together in the same house) has/had other children. This line of evidence by the pw1 ought to further convince the mind of the court below and indeed this court that pw1 is not a witness of truth. Again, she pointed out that the pw1 who also claimed to know that the plaintiff is the brother of Pullen Obe, does not know who is senior between the two (the above evidence can be found at the 1st paragraph of p. 528 of the record of appeal). She said that this further give credence to the fact that pw1 is not a credible witness.

On Exhibit "C" she submitted that it is unknown to customary law and therefore ought to be expunged from the evidence. That assuming without conceding that Exhibit "C" is known to Customary law, the absurdities and inconsistencies are such that by critical appraisal of same it will be found that it is not headed to indicate the issuing authority, no serial number show that it is the usual practice of the issuing authority, oral evidence at page 590 lines 6-7 of the record of appeal says the maker of the document signed and that the receiver of the sum on the face value of the aforesaid exhibit thumb printed but the only visible signature on the exhibit is that of the receiver.

Counsel submitted that the names of the parents of the Queen Pullen are not captured in Exhibit D. She questioned how the court will know the actual parents of Queen Pullen since the names of the Queen's parents are not captured in Exhibit "D". That the court is not a magician and cannot imagine a fact. That facts in evidence must be clear and unambiguous. That Exhibit "F" is equally carrying "Queen Pullen" whereas the names on the extant claim reads "Queen Obe" or "Queen Pullen Obe".

She maintained that Exhibits "C", "D" & "F" are fraught with discrepancies, inconsistencies, contradictions and absurdities. That Exhibit "C" which is unknown to Customary law ought to be expunged and referred to the under listed authorities: **Olabodun v. Lawal (2008) 51 WRN 1 @ 20 r. 6; Egwu v. Egwu (1995) 5 NWLR Pt. 396 @ 351; Abubakar v. Joseph (2008) 50 WRN 1 @ 8 r. 2.** That the plaintiff who tendered same is not the maker, the maker being the proper person in law to tender it – **Olatunji v. Waheed (2010) 21 WRN 144 @ 153 r. 8.**

On Exhibits "D" & "F", counsel submitted that the discrepancies in the names are such that they are inconsistent with the names in the plaintiff's extant claim and such discrepancies are caught with the principle enunciated in **Esenowo v. Ukpong (1999) 6 NWLR pt. 608 p. 617 paragraphs E-F and p. 621 paragraphs C-E.**

She submitted that the evidence of pw2 is equally tainted with lies and falsehoods as in the following:

a. Pw2 gave evidence that pw1 after leaving/parting with one Aibangbe, to whom she was married, pw1 then left for Evbueghae to settle down. See Exhibit "B" (evidence of pw2) at page 532 of the record. Whereas pw1's evidence was that when she left the said Aibangbe, she was in her father's house at Evboesi and that it was while she was there the late Pullen Obe came to solicit her hand in marriage.
b. Pw2 equally testified that it was sometimes in 1982 that pw1 married the 1st defendant.
c. Pw2 testified too that there existed a marriage union between pw1 and the late Pullen Obe before the issuance of Exhibit "C" in 1982 whereas other plaintiff's witnesses evidence, though assuming without conceding, points that the Exhibit "C" was already issued before pw1 got married to the late Pullen Obe.

She maintained that the entire evidence of the plaintiff and his retinue of witnesses are not only conflicting and/or contradictory, they are tissues of lies. That the Respondent has sinister motives for instituting this action. That if the Court critically peruses the judgment of the court below it would discover that the

learned trial President was highly sentimental. That all the plaintiff's evidence which were inimical to him and his case were never reflected in the judgment.

That in some instances the court below recorded evidence which never flowed from the mouth of the plaintiff's witnesses. For instance at p. 502 lines 15-18 of the record, the lower court while appraising the evidence of witnesses recorded pw1 thus:

> **"Pw1 stated that when Pullen Obe died, his family asked her to go and bring Queen who she told them was with the 2nd defendant's wife her daughter and 2nd defendant refused to release Queen to her hence she went to the Enogie's palace to report the matter."**

She contended that the above piece of evidence did not flow from the pw1 but from the mouth of the court below. She urged the Court to critically examine Exhibits "A" & "K" at pages 528-531, 556-558 of the record which are the recorded evidence of pw1,and it will be clearly found that such evidence did not come from pw1.

Counsel submitted that long before the court below heard the evidence, it had already made up its mind against the defendants/appellants. That in the interlocutory application of 9/8/2011 the court below in its ruling of 19/9/2011 delved into fundamental issues that bothered on the substantive action when it held:

> **"From the forgoing, it is certain that there was a customary marriage between the plaintiff's brother and the mother of the child. Whereof the plaintiff in this case as a representative of his deceased brother who on the basis of the said customary marriage now seeks to enforce his brother's right/benefits accruing from the said marriage."** Page 244 lines 6-10 of the record refers.

That when the above ruling was delivered, the appellant herein have not given evidence. She submitted that by the aforesaid ruling, the substantive action, for the biases and sentiments of the court below, was decided on the 19/9/2011 even before the appellants herein led evidence at the court below.

In conclusion, she urged the Court to reject/discountenance the evidence of the plaintiff.

ISSUE TWO:

"Whether having regards to the non-consideration by the trial court of some issues raised for determination, the principle of fair hearing was not breached in

the judgment of the trial court. And if it is that fair hearing was breached, whether such breach does not render the judgment a nullity".

Arguing this Issue, learned counsel submitted that the following issues 2, 3, 4, 5 and 6 at page 409 of the record were raised and arguments canvassed. She referred to pages 409, 421 – 432 of the record of appeal where arguments were indeed canvassed on the said issues. She maintained that the above issues which were raised by the defence and which same issues were not responded to by the plaintiff's counsel and were never decided by the court below were quite fundamental in ascertaining the veracity of the evidence of the plaintiff adduced during the trial. That some of the issues bother on jurisdiction and the learned trial President deliberately avoided commenting on and/or determining them one way or the other. She submitted that in law, such attitude of the court below is abhorred/forbidden and referred to the case of: **Olabode v. Kila (2010) 13 WRN 73 @ 77 r. 1.**

Counsel submitted that the law is settled that a trial court must consider all issues formally raised before it and make findings of facts therein. See the case of: **Onyenweuzor v. Osunjor (2001) FWLR (pt.38) 1292 @ 1298.** That failure to pronounce on all issues raised may lead to miscarriage of justice even if the issues are irrelevant or unimportant and it is better to dispose of it by saying so and with convincing reasons. See: **Chevron Ltd v. Warri L.G.A. (2002) FWLR (pt.132) 177 @ 186.**

She submitted that in the instant case, fundamental issues were raised and arguments canvassed at the trial court. That the learned trial President for no apparent reason refused to make any pronouncement on them and all the learned trial President could say is that issue No.2 i.e. locus standi was previously decided without stating when, how, where and the decision reached. She maintained that the aforesaid issue No 2 was never decided by the court below and for the lower court to have refused to consider all the issues raised by the defence counsel was incurably bad in law and same amounts to a violation of the principle of fair hearing which is capable of rendering the entire judgment a nullity in reliance on the authorities of **Onyenweuzor v. Osunjor and Cheron Ltd v. Warri L.G.A. supra.**

On the basis of the above violation of the principles of fair hearing by the court below, assuming without more, she urged the Court to nullify the lower court's judgment dated 9/12/2013.

Finally, counsel pointed out that it would be found from the record of appeal (see pages 436-443) where the plaintiff counsel made his submission that he did not respond to all the above issues 2-6. That the attitude of the Plaintiff's counsel is

tantamount to conceding to all the arguments having regards to all the aforesaid issues.

ISSUE THREE

"Whether, considering the fact that Pullen Obe including Queen and pw1 are not parties to this action, the holding of the lower Court that: 'The child Queen is the child of pw1 bore (sic) for late Pullen Obe,' is right in law."

Here, learned counsel submitted that for a court to reach a decision in a case that could affect the right of a person, such person must be a party in the action and this brings us to the question of, "Who is a party in an action?" To answer the above question, she referred the court to the following authorities: **Bello v. INEC (2010) 19 WRN 1 @ 7 r. 2; Abia v. CRSPI Ltd (2006) All FWLR (pt.339)955@960-961 r. 10; Ajibola v. P. S. T. S. C Ekiti State (2007) All FWLR (pt.350) 1341 @ 1347 r. 11.**

In **Bello v. INEC** supra, a party to an action is defined as***:*** **"Persons whose names appear on the record as plaintiff or defendant."**

In the case of: **Abia v. CRSPI Ltd** supra **@ 960-961 r. 10,** the court held thus:

> ***"A necessary party is a party who will be affected by the decision of a court. His right will be affected either positively or negatively by the outcome of the case. A court or tribunal will not make an order or give a judgment that will affect the interest or right of a person or body that is not a party to the suit and who was never heard in the matter. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the reason of the action and the question to be settled unless he is a party… when, however, a party claims a relief which when made, will be binding on a person not a party to the action, the action becomes incompetent as the necessary party has not been joined."***

Again, counsel referred to the case of: **Ajibola v. P. S. T. S. C Ekiti State** *supra* **at page 1347 r. 11** where the Court opined thus:

> ***"What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of some relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled…"***
>
> On the strength of the above authorities, we venture to further ask the following question:

On the authorities of **Abia v. CRSPI Ltd and Ajibola v. P. S. T. S. C Ekiti State supra**, counsel submitted that the decision of the trial court was wrong since neither Pullen Obe nor Queen is a party to this action. That the Pw1 is equally not a party to this action. She contended that it is an undisputable fact that the right of the trio was decided in the judgment being appealed whereas the decision of the court below did not at all relate to the right of the plaintiff in this action. She submitted that in law such a decision is misplaced, bad and/or flawed because a court cannot be seen to pronounce on the right of a person who is not a party in an action, more particularly since the plaintiff sued in personal capacity, it is the right of the plaintiff that ought to have been decided and not otherwise. See the case of: **Oladele v. Akintaro (2010) 24 WRN 167 @ 173 r. 3.**

On this Issue, counsel finally submitted that this action is incompetent and urged this Court to nullify the judgment of the court below.

ISSUE FOUR:

"Whether the award of N500, 000 (five hundred thousand naira) damages against the defendant is not inappropriate? And in the alternative, whether it is not the defendants now Appellants that deserve the award of damages in their favour?'

Learned counsel submitted that the award of N500, 000 to the plaintiff is gold digging and therefore misplaced. That the plaintiff does not in any way deserve or merit the award of any damages because he did not lead any credible evidence to entitle him to damages. On the position of the law having regards to the award of damages, she referred to the following decisions: **Akinfosile v. Ijose (1960) SCNLR 447; Akanmu v. Adigun (1993) 7 NWLR pt. 304 p. 218; Ajawon v. Akanni (1993) 9 NWLR pt. 316 p. 182 @ 200.**

In the alternative counsel submitted that the appellants deserve the award of damages having proved that Queen has lived her life with the duo of the 1st and 2nd defendants who trained her up to the university level.

She maintained that the intent behind this action is mischievous considering the incoherence of the plaintiff's case. That he deliberately and mischievously brought the defendants to court for no reasonable cause. That in law, he is a meddlesome interloper.

On the basis of the above submission, she urged this Court to discountenance award of damages in favour of the plaintiff and award damages in favour of the defendant.

On her part the learned counsel for the Respondent, **Princess Mrs. P.I.Iyomon** Esq., formulated two Issues for Determination as follows:

1. ***Whether having regards to the claim canvassed at the lower court (paternity) as contained in paragraph 1.01 of the Appellants' Brief, the 2nd Appellant can maintain this appeal jointly through the 2nd Appellant having not personally testified at the lower court? Distilled from Ground 3 of the Appellants' brief.***

2. ***Whether the lower court was right to have pronounced in its judgment that the Respondent has proved his case as required by law and entitled to his claim. Also distilled from Ground 3***.

In her Respondents' Brief of Argument, the learned counsel articulated her arguments on the two Issues for Determination.

ISSUE ONE

Whether having regards to the claim canvassed at the lower court (paternity) as contained in paragraph 1.01 of the Appellants' Brief, the 2nd Appellant can maintain this appeal jointly through the 2nd Appellant having not personally testified at the lower court?

Arguing this first Issue, learned counsel submitted that the 1st Appellant cannot maintain this Appeal jointly or severally as he did not testify throughout the case and despite being aware of the matter chose to stay away. That the 2nd Appellant, his son-in-law who clearly does not have the capacity to defend such a sensitive issue as PATERNITY opted to defend same.

She submitted that a man who claimed the subject matter Queen Obeh is his daughter ought to be diligent in defending his right to paternity and custody of the subject matter but surprisingly this was not the case as he stayed away and allowed the 2nd defendant his son in law, to defend the action.

Learned counsel referred to the records at the lower court to show that most of the court attendance was by the 2nd Appellant. She posited that having not shown enough diligence in the prosecution of this case, the 1st Appellant cannot at this stage maintain this Appeal either by himself, through the 2nd Appellant, jointly or severally.

Counsel referred to page 1 paragraph 1.03 of the Appellants' brief where the 2nd Appellant furnished reasons or excuses for the 1st Appellant's inability to testify when he stated thus:

'The 1st defendant could not testify personally because of his hearing impediments as he is partially deaf' This fact was brought to the attention of the court below.'

Counsel posited that the questions that arises at this stage are:

a. Whether the 2nd Appellant has the capacity to say that the 1st Appellant is partially impaired without proof?
b. Whether there is anything to show that it was brought to the court's attention.

She submitted that as the 2nd Appellant admitted that the 1st Appellant did not testify, he cannot at this stage canvass reasons which obviously are afterthought as there is no proof whatsoever, that the issue of impairment was ever raised at the lower court. She therefore submitted that what has been admitted need no further proof and referred to page 498 lines 15 to 23 of the Record of Appeal; to the effect that it is evidently clear that the 1st Appellant did not testify.

She submitted that it is only the 1st Appellant who can answer questions on issues bothering on consummation after the refund of dowry Exhibit C and no other not even the 2nd Appellant who only came to know the subject matter in 1997 by virtue of his marriage to his wife who is the daughter of the Pw1 and 1st Appellant.

She submitted that the 1st Appellant cannot cure his lack of diligent defence of his case at the lower court with this frivolous and vexatious Appeal. That there is no cogent and strong reason proffered by the Appellants capable of swaying the mind of this Court on the 1st Appellant's refusal to defend the action.

She further submitted that it does not lie in the mouth of the 2nd Appellant to raise the issue of partial ear impairment at this stage on Appeal when the 1st Appellant had the opportunity of doing so himself which he failed to do. She further submitted that there is nothing to show that the court's attention was drawn to the health status of the 1st Appellant. On the attitude of Appeal Court to belated objection, counsel relied on the case of: ***BURAIMOH VS COP 1968 1 NMLR PAGE 272 @275 RATIO 4.***

She further submitted that even if it was raised without conceding, there is no proof that the Appellants applied to the court to have an interpreter in that field to come and interpret. Furthermore, that there was no medical certificate in respect thereof. That in the absence of this, the Appellants cannot be heard to complain on Appeal. She relied on section 135 and 137 of the Evidence Act to the effect that he

who asserts must prove. See also the case of: ***ORJI V DORJITEXTILE MILLS(NIG). LTD.2010 AFWLR PART519, PAGE 999 @ 1002 RATIO 2and I***

She further submitted that the 2nd Appellant does not have the legal right or interest equivalent to the two disputants on paternity issues. That if so, it becomes repugnant to natural justice and a taboo.

Counsel maintained that it is in evidence that the subject matter was under the custody of the 2nd Appellant and that he knew the subject matter Queen in 1995 and that he took her into his custody in 1997 on the appeal from the 1st Appellant by virtue of the fact the 1st Appellant is the Father- in-Law. See: page 389 lines 15 to 30 and page 419 lines 3 to 31 of the Record of Appeal which is the judgment.

She submitted that the fact that the subject matter was in the custody of the 2nd Appellant cannot elevate his status as a guardian to be equivalent to the status of the disputing parties. That the only interest he has stopped at being a guardian which can never metamorphose into being at par with both the 1st Appellant and the Respondent.

Furthermore counsel submitted that it can never be within the knowledge of the 2nd Appellant to know how his mother in law (Pw1) conceived and gave birth to the subject matter Queen. Therefore she submitted that the 2nd Appellant lacks the legal right and capacity to talk about the paternity of the subject matter and or defend same on behalf of the 1st Appellant. That the 2nd Appellant admitted under cross examination that he is not in a position ***"to determine the father of Queen"*** at page 398 line 14**.** That what is admitted needs no further proof. See: the case of ***IBRAHIM IDRIS VS ALL NIGERIA PEOPLES PARTY(ANPP) 2008, 8 NWLR PT 1088,PAGE 1 @ PAGE 39 RATIO 3.***

Finally, she urged this court to resolve this issue in favour of the Respondent and hold that the 2nd Appellant's status as a guardian cannot metamorphose into a right to enter into the arena of paternity dispute with the disputants (Respondent & 2nd Appellant) and that since the 1st Appellant did not testify to contradict the evidence of the Respondent and his witnesses, they stand uncontradicted. On the treatment of unchallenged and uncontradicted evidence, counsel relied on the case of: ***N. S. I. T. M. B. VS KLIFCO NIG. LTD. 2010 13 NWLR PT 1211 PAGE 307 @315 RATIO2.***

ISSUE TWO

Whether the lower court was right to have pronounced in its judgment that the Respondent has proved his case as required by law and entitled to his claim.

On this Issue, learned counsel submitted that the Respondent and his witnesses proved their case to secure this judgment now being appealed against.
She submitted that the evidence of the Respondents and his witnesses all pointed irresistibly to the fact that Queen Obeh is the daughter of late Pullen Obeh who was the elder brother of the Respondent.

She said that the most important of all the witnesses who testified at the lower court was the Pw1; the mother of the subject matter Queen. Therefore she submitted that the said Pw1 was a ***vital witness*** who testified and gave a vivid account of how she married the 1st Appellant as contained in Exhibit A and K.
Counsel referred to the case of: ***Smart v state (2016) EJSC (vol.36)145 at page 152 Ratio 6*** where the Supreme Court defined a vital witness thus:

> ***"A vital witness is a witness whose evidence is very important, since his testimony decides the case either way"***

She submitted that the evidence of the Pw1 as contained in Exhibits A and page 528 of the Record of Appeal were not contradicted by the Appellants particularly the 1st Appellant who is in a proper position to do so. She relied on the case of: ***OKOROCHA V PDP 2015 EJSC PAGE 1 @ page 8 ratio 9.***
She posited that her evidence to the effect that dowry was refunded to the 1st Appellant at the palace of the Enogie of Evboesi and receipt issued to that effect was corroborated by the evidence of the Respondent who tendered Exhibit C as contained in paragraph 294 lines 28-30 to show that there was a refund of dowry by his brother to the 1st Appellant. That the evidence of PW2 Aigbedion Uwadiae as contained in Exhibit B at paragraph 532 and 534 of the Record of Appeal; Pw4 one Sunday Erhuomuosee (see page 318 line 4) (and page 320-321 lines 22-28 of page 35 and lines 1-4 of page 321 and that of Pw3 Mr. Felix Ogunrobo also confirmed the fact that dowry was refunded at the palace of the Enogie.

Counsel submitted that since the 1st Defendant felt comfortable staying away from defending the issue of paternity in which he had so much at stake and was aware that Queen was the subject matter at the lower court, he cannot be heard to complain on Appeal. See: the case of: ***OKOROCHA V PDP SUPRA @ PAGE 9 RATIO 10.B***
Learned counsel pointed out that all the witnesses alluded to the fact that the 1st Appellant was present at the palace where Exhibit 'C' was issued and that he calculated the money that he expended which amounted to N100 before Exhibit C was issued to him which he thumb-printed. She therefore submitted that failure to adduce evidence to contradict all the evidence of the Respondents and his witnesses as stated in the lower court amount to admission and thus fatal to the Appellants.

She submitted that the Appellants could not prove at the lower court at what point the 1st Appellant and the Pw1 consummated after the refund of the dowry to have extra-marital affair. That in the absence of this evidence, the Appellants cannot short circuit the evidence on appeal.

Finally Counsel submitted that contents of any document are appraised by the court. See the case of: ***Dr.Charles Ezenwa vs. Katsina State Health Service Management Board (2011) 9 NWLR (Pt.1251) 89***.

That the Appellants could not contradict Exhibits C which is the receipt of the refund of Dowry which clearly points to the signature of the Enogie of Evboesi (the father of the 2nd Appellant); Exhibit D which is the birth record and contains the name Queen which she bears and called even by the Appellants; and Exhibit F- which is the certified copies of the Primary School she attended from primary one to four. Counsel relied on the case of: *N.S.I.T.M.B V KLIFCO NIG. LTD SUPRA*.

She submitted that since the Appellants could not controvert the said exhibits and more importantly allowed the exhibits to sail through without objection, the Appellants cannot raise any objection at this stage. She relied on the case of ***SHORUMU V THE STATE 2012 LRCNCC PAGE 14 A RATIO K-EE PARTICULARLY AT RATIO 1*** where the Supreme Court stated that:

> ***"When a counsel stands by and allows exhibits to sail smoothly through to become evidence without batting an eyelid, then it becomes obvious that the counsel is comfortable with the evidence and sees no reason why he should challenge its admission"***

Counsel submitted that it is the duty of the trial court to properly evaluate documentary evidence/exhibits. See: the case of ***EZENWA VS K. S. H. S. M. B. 2011 9NWLR PART 1251 PAGE 89 @ 99 RATIO 9.*** That in the instant case, the trial court properly evaluated the evidence of parties, their witnesses as well as all the exhibits tendered to arrive at the decision reached. That in the absence of any contrary evidence to exhibits C, D, and F in particular, the Appellant cannot employ their Appellants' Brief to vary the said exhibits.

That the courts have held in a number of cases that written address no matter how well penned cannot take the place of evidence.

Counsel therefore urged this Court to hold that the judgment of the Lower court is unassailable and should be affirmed as being right in Law while the appeal put forth by the Appellant is vexation, time wasting and thus should be dismissed.

On the issue of damages, learned counsel submitted that since it did not exceed the jurisdiction of the Lower Court, it should be allowed on the ground that the Respondent and his witnesses were able to lead cogent and uncontroverted evidence to the prove that the subject matter Queen, the daughter of Pullen Obeh

was deprived of her biological root and connection by the 2nd Appellant claiming that she is the daughter of the father in law, the 1stAppellant.Also that were there is a breach of contract the Plaintiff is entitled to the full amount claimed.
That in this case, it was found that the 1st Appellant neglected to heed the decision of the Enogie of Evboesi to return the subject matter Queen to the Respondent family to enable her bury her father which (till date) has not been adhered to. That if the decision was complied with, there would have been no need to come to court.

She urged this Court to uphold the decision of the lower court.

Upon a careful examination of the Issues formulated by the learned counsel for the parties I am of the view that the Issues formulated by the Appellants' counsel are more germane to the determination of this appeal and I accordingly adopt them with some modifications as follows:

1. ***Whether, having regards to the evidence before the court below, the holding of the trial court that "…the plaintiff has proved his case as required by law…" is right in law?***
2. ***Whether the non-consideration by the trial court of some issues raised for determination did not amount to a breach of the principle of fair hearing to render the judgment a nullity?***
3. ***Whether the fact that Pullen Obeh and Queen Obeh were not parties to this action is sufficient to vitiate the finding of the lower Court that Queen is the child that the pw1 bore for late Pullen Obeh? And***
4. ***Whether the award of ₦500, 000.00 (five hundred thousand naira) damages against the defendants is proper in the circumstances?***

I will now proceed to resolve the Issues seriatim.

ISSUE 1

Whether, having regards to the evidence before the court below, the holding of the trial court that "…the plaintiff has proved his case as required by law…" is right in law?

It is settled law that in a civil case, the burden is on the Plaintiff to prove his case by preponderance of evidence. Failure of the defendant to disprove the plaintiff's case or his refusal to testify cannot alleviate the primary burden on the plaintiff. See the following cases: ***Urneojiako Vs Ezenamuo (1990) 1 NWLR (Pt 126) 253, Ogunyade Vs Osunkeye (2007) 15 NWLR (Pt 1057) 218, Oyeneyin vs Akinkugbe (2010) 4 NWLR (Pt 1184) 265***. In other words, in a civil suit, the person who asserts has the primary burden of proving the assertion. The maxim is:***"ei quii affirmat non ei qui megat incumbit probation"*** which means the burden of proof lies on he who alleges and not on he who denies. See also: ***Arum***

Vs Nwobodo (2004) 9 (Pt. 878) 411, Olaleye Vs Trustees of ECWA (2011) 2 NWLR (Pt. 1230) 1.

Thus in the instant case, the burden of proof of the Claims before the trial court rested squarely on the Respondent. The issue to be determined now is whether the Respondent discharged that burden.

Essentially the cause of action is to establish the paternity of one Queen. In proof of his case, the plaintiff testified, called four witnesses and tendered exhibits. In their judgment, the trial court held that the Plaintiff led sufficient evidence to prove that Queen is the daughter of one Pullen Obeh (deceased) who was the elder brother of the plaintiff.

In this appeal, the Appellants have seriously challenged the finding of the trial court that the plaintiff proved his case to be entitled to judgment. The Appellants raised some points to try to vitiate the judgment. Some of their salient objections to the court's finding are as follows:

(i) The alleged evidence of incredibility and inducement of the P.W 1 by the Plaintiff:

(ii) Conflicting evidence of the Respondent on the relationship between the Respondent, late Pullen Obe, P.W 3 and the P.W 4;

(iii) The uncertainty of the purported marriage between the P.W 1 and Pullen Obe;

(iv) The incredibility of the conception and birth of Queen;

(v) The alleged absurdities in the documentary exhibits tendered by the Respondent.

I have carefully examined the evidence adduced by the Respondent at the trial in relation to the above salient objections and I will make my findings seriatim hereafter.

On the issue of the alleged evidence of incredibility and inducement of the P.W 1 by the Plaintiff, going through the records, I observed that under cross examination the Appellants elicited some evidence from the P.W.1 to show some form of inducement to testify in favour of the Respondent. At page 529 lines 12-16 of the records, the P.W.1 stated thus:

> ***"I used to live at Evboesi. It is about some days when the plaintiff came to pick me up and brought me to Evbueghae since I came back to Evbureghae I have been living in the plaintiff's house. <u>It is true that it is while I stayed with the plaintiff that he taught me all I have said in court today." (underlining, mine)</u>***

Again, at p.529 particularly lines 37-38 the P.W. 1 stated thus:
"If he did not give me all that he promised me I will not be happy."

The impression created by the evidence elicited from the P.W.1 under cross examination highlighted above is that the P.W.1 appears to have been tutored and induced by the Respondent to give evidence favourable to him.

On the alleged conflicting evidence of the Respondent on the relationship between the Respondent, late Pullen Obe, P.W 3 and the P.W 4, I have carefully gone through the records and am of the view that there are no material contradictions in the evidence of the said witnesses on the relationship between the Respondent, late Pullen Obe, P.W 3 and the P.W 4. The thrust of their evidence was to establish that the Respondent and the late Pullen Obe were maternal brothers.

On the alleged uncertainty of the purported marriage between the P.W 1 and Pullen Obe, the preponderance of evidence showed clearly that the P.W. 1 was married to the late Pullen Obe before his demise. The Respondent led evidence to establish that while the P.W.1 was in her father's house, the late Pullen Obeh came to ask for her hand in marriage. That she gave him a condition that he must fulfill before she will marry him which was to refund her dowry to the 1st Appellant at the palace of the Enogie of Evboesi. That a day was fixed for the refund of the dowry at the Palace of the Enogie of Evboesi and on that day, the Respondent, the P.W 1, P.W 2 and P.W 3 were present. See page 289 lines 20 to 29 of the record of appeal.

On the alleged incredibility of the conception and birth of Queen, I am of the view that the issues involved are quite intricate. They are not issues to be resolved by mere calculation of dates and natural presumption of events. Upon the evidence adduced at the trial it would be improper to hold that the evidence of conception and birth of Queen was incredible.

On the alleged absurdities in the documentary exhibits tendered by the Respondent, the point must be made that this was a trial by a customary court and the marriage in question was allegedly conducted under customary law. I agree wholeheartedly with the finding of the trial court that the tendering of documentary evidence was merely superfluous. It is settled law that documentary evidence is unknown to native law and custom. See the cases of: ***OLUBODUN vs. LAWAL (2008) LPELR-2609 SC; and SURU v. GOMA (2018) LPELR-44650(CA)***

Thus on this Issue of whether the Respondent established his case, the only viable challenge to the evidence adduced by the Respondent is the apparent

deficiency in the evidence of the P.W.1 who appears to have been induced and tutored by the Respondent to testify in his favour.

Incidentally, the P.W.1 appears to be the star witness of the Respondent. The point was orchestrated all through the trial that it is a woman who can say who is the father of her child. The woman in this case happens to be the P.W. 1 whose evidence now appears quite frail, fragile and imminently frangible. Can the evidence of the P.W 1 sustain the Respondent's case?

It is pertinent to observe at this stage that the P.W 1 did not testify in person before the trial court that eventually concluded the case. She testified before another panel before this matter was head *de novo* before the last panel. It is settled law it is the prerogative of the trial court to determine the credibility of witnesses since they have the benefit of studying their demeanour while testifying. However, where as in the instant case, the P.W.1 did not testify before the trial court it is difficult to ascertain the credibility of such a witness.

It is pertinent at this stage to shed some light on the consequences of a trial *de novo* in relation to the previous evidence of a witness. The consequence of a retrial order or a *de novo* (a *VENIRE DE NOVO*), is an order that the whole case should be retried or tried anew as if no trial whatsoever has been had in the first instance. In the case of: ***Fadiora vs. Gbadebo (1978) NSCL (Vol.1) 121*** Idigbe JSC made the following salient observation on such trials:

> ***"We think that in trials de novo the case must be proved anew or rather re-proved de novo and therefore, the evidence and verdict given are completely inadmissible on the basis that prima facie they have been discarded or got rid of."***

With this in mind, it is evident that the proceedings and evidence taken before the aborted trial were got rid of and of no legal consequence in the new trial. See the case of: ***GOVERNOR OF BORNO STATE & ANOR v. ALI (MNI) & ORS (2014) LPELR-23544 (CA).***

Again it has been held in a plethora of cases that a record of previous proceeding can only be used for the purposes of cross - examination to contradict the oral evidence of a witness who testified in the said previous proceeding in a subsequent proceeding. See: ***Salisu & Ors Vs Abubakar & Ors (2014) LPELR 23075 (CA).*** In the instant case, the record of the previous proceedings was not used to contradict any witness but to simply reproduce the evidence of a witness in a previous proceeding. The approach adopted by the trial Court to determine the

dispute by adopting the evidence of the P.W 1 wholesale was clearly wrong. All put together, the evidence of the P.W.1 cannot be relied upon.

In her Written Address, the learned counsel for the Respondent orchestrated the point that the 1st Appellant did not put up any defence to the action and cannot prosecute this Appeal. She tried to highlight the weakness of the Defendant's caseIt is settled law that in civil matters, the onus is on the Plaintiff to proof his case. In the case of: ***Ibrahim vs. Ibrahim (2006) LPELR 7670 (CA),*** the Court of Appeal exposited thus: ***"It is true that the burden of proof in a civil case is on the plaintiff; in this case on the appellant who was the plaintiff at the trial Court and where the plaintiff fails to discharge the burden, he cannot rely on the weakness of the defendant's case. In that sense the defendant bears no burden to adduce any evidence or satisfactory evidence. See KODILINYE VS MBANEFO ODU (1935) 2 WACA 336."Per BA'ABA ,J.C.A (P. 26, paras. D-F)"***

Thus, notwithstanding any perceived weakness in the Defendants' defence, the burdens still rests on the Plaintiff to prove his case by leading credible and reliable evidence. Unfortunately, the evidence adduced by the Plaintiff did not appear quite reliable enough.

In view of the fact that that the evidence of the P.W.1 was quite pivotal to the Respondent's case, I am of the firm view that the trial court erred when they held that ***"…the plaintiff has proved his case as required by law…"***

I therefore resolve Issue 1 in favour of the Appellants.

ISSUE 2

Whether the non-consideration by the trial court of some issues raised for determination did not amount to a breach of the principle of fair hearing to render the judgment a nullity.

Under this Issue, the Appellants seriously contended that the trial court failed to consider some issues raised at the trial and that the failure amounted to a breach of the principle of fair hearing to render the judgment a nullity.

One of the fundamental issues which they alleged was not considered by the trial court was the issue of the ***locus standi*** of the Respondent.

It is settled law that the court generally, has the duty to consider and make pronouncement on all material issues raised and canvassed before it. This position of the law has been stated and re-stated in several decisions of the superior Courts.

Re-stating this position, ***Ogbuaju JSC*** in the case of: ***AGBE v. THE STATE (2006) NWLR (Pt. 977) 545*** stated thus:-

> *"I have conceded that it is firmly settled by this Court in a number of decided authorities, see THE STATE v. AJIE (2000) 11 NWLR (PT. 675) 434, and BAMAIYI V. STATE (2001) 8 NWLR (Pt 715) 285 (SIC) it is p. 270 at 285.. .... It is that it is the duty of the Court to deal, consider and pronounce on all material issues properly before it. See also recent case of CHIEF OKOTIE-EBOH V. MANAGER & 2 ORS (2004) 18 NWLR (PT. 905) 242.. ."*

See also the following decisions: ***OJOH V. KAMALU (2006) ALL FWLR (Pt. 297) 978, WILSON V. OSHIN (2000) 9 NWLR (Pt. 1145) 193, 221***.

However, the consequence of failure to consider and pronounce on all material issues placed before the court depends on the facts and circumstances of each case and the effect of the non-consideration or pronouncement of the issue on the party affected. Where such failure deprives the party the right to fair hearing and occasions a miscarriage of justice, and is of the nature that the Appeal Court cannot properly look into, the proper order to make is that of remitting the case back for proper consideration of the issue. See: ***OKWARA v. OKWARA (1997) 11 NWLR (Pt. 527) EZEOKE v. NWAGBA (1998) 1 NWLR (Pt. 72) 616.***

However, where it relates to an issue of evidence which the Appeal court will not be prejudiced to look into, the Appellate Court can step into the shoes of the trial Court and may as well determine the issue where it does not involve the question of credibility of witnesses. See: ***EBBA v. OGODO (1984) 1 SCNLR 372, OKWEIJIMINOR v. GBEKEJI (2008) 5 NWLR (Pt. 1079) 172 SC, AKINKOYE v. EYILOLA (1968) NWLR 92 at 95.***

In the instant case, the main issue which they alleged was not considered by the trial court is the issue of *locus standi.*

Locus standi is a crucial and fundamental jurisdictional question that can be raised at any time during the trial either as a preliminary issue or even for the first time on appeal. It is therefore the duty of the court to look into it and resolve it before proceeding to hear the substantive matter as the case may be. See: ***ISHAQ v. BELLO & ORS (2008) LPELR-4337(CA)***.From the authorities, it is well settled that locus standi is an issue of jurisdiction and it is a threshold issue.

A threshold issue is an issue that should be looked at, at inception. Jurisdiction is a threshold issue in that a Court must have jurisdiction before it can

enter into the cause or matter at all or before it can make a binding order in it. See the cases of: ***Odofin v. Agu (1992) NWLR (pt.229) 350; Nalsa in Team Associates v. N.N.P.C , NWUKE V. ONYIKE 29 (1991) 8 NWLR (pt.212) 652; Adefulu v. Oyesile (1989) 5 NWLR (pt.122) 277; Elebanjo v. Dawodu (2006) 15 NWLR (pt.1001) 76; Owodunni v Registered Trustee of C.C.C. (2000) 6 SC (Pt.111) 60.***

Locus standi to institute proceedings in a Court is not dependent on the success or merits of a case but it is a condition precedent to the determination of a case on the merits. See: ***Owodunni v. Registered Trustees of C.C.C. (2000) 6 SC (Pt.111) page 60; (2000) 10 NWLR (Pt.675) 315; Madukolu v. Nkemdilim (1962) 2 SCNLR page 341; Klifco Ltd. v. Philips Holzmann Attorney General (1996) 3 NWLR (Pt.435) page 276.***

Incidentally, during their final address, the learned counsel for the Appellants raised the issue of *locus standi* but rather that resolve it in its judgment, the court posited that the issue of locus standi was previously decided by the court. Unfortunately, the court did not give sufficient details of its previous ruling on the said issue of *locus standi*. I have frantically searched the records to find the aforesaid ruling on *locus standi* but I could not find it. All I saw was the motion raising the preliminary objection on the issue of *locus standi*. There is nothing to show that the motion was argued and a ruling delivered by the court.

It is settled law is that, a Court has a duty to hear and determine all applications or issues raised before it. In other words, a Court of law which has the established constitutional duty to adjudicate on disputes between competing interests has the legal duty to hear and determine all applications brought before it. Though the Court may have an unfavorable view of the application, in the sense that it considers it to be unmeritorious or bogus or inelegantly couched, but once such application has been properly filed, the Court has a legal duty to hear and determine same. In the same vein, once a Notice of Preliminary Objection has been appropriately and properly filed, the Court must consider and make findings thereon, no matter how frivolous. In the case of: ***Eke v. Ogbonda (2006) 18 NWLR (pt.1012) p.506 at p.529 Paragraphs A - D,*** Mohammed, J.S.C, held that:

> ***"It is the law that where an appellate Court like the Court below refused to hear and determine all interlocutory applications pending in the Court before the hearing and determination of an appeal, may indeed result in a denial of fair hearing as enshrined under the Constitution as complained by the Appellant in the present"***

Sequel to the foregoing, I am of the view that the failure of the trial court to consider some issues raised for determination amounted to a breach of the principle of fair hearing to render the judgment a nullity.

Issue 2 is therefore resolved in favour of the Appellants.

ISSUE 3

Whether the fact that Pullen Obeh and Queen Obeh were not parties to this action is sufficient to vitiate the finding of the lower Court that Queen is the child that the pw1 bore for late Pullen Obeh?

It is settled law that a court cannot give judgment in favour or against a person who is not a party to the proceedings. The court has no jurisdiction to decide the fate of a person when such a person is not made a party to the action.

In the case of: ***Ramada International and Pharmaceutical Limited v. Felix Ezeonu & 2 Ors. (2016) 14 NWLR (Pt.1533) 339 at 356 per Bolaji-Yusuf, JCA***, the Court of Appeal held that a Court cannot give judgment against a person who is not a party to a case. Therefore, there is need for a Court not to make any Order which binds non-parties to the case before it. See: Charles ***Chinwendu Odedo v. Independent National Electoral Commission & Anor. (2008) 17 NWLR (Pt. 117) 554***

Again, in the case of: ***DANIEL v. KADIRI & ANOR (2010) LPELR-4017(CA)***, the Court of Appeal stated the position thus:

> ***"The position of the law is very clear on the fact that a person who is not a party to a suit is not bound by the result of the action. Thus, no person is to be adversely affected by a judgment, order or decree of a Court in an action to which he is not a party. This is partly because of the injustice in deciding an issue against him in his absence."***

In the instant case, the Plaintiff is the maternal brother of the late Pullen Obe, the alleged putative father of Queen. The 1st Defendant is also claiming the paternity of Queen and the 2nd Defendant is the son-in-law of the 1st Defendant.

It is to be observed that a paternity suit is a personal action. The right of paternity is a personal right which can be enforced by a father to establish his paternity or by the child to establish the identity of her father or by a mother to establish the identity of the father of her child.

In the case of: ***AHMAN & ANOR v. AYUBA & ORS (2008) LPELR-3659(CA)*** the court exposited thus: ***"It is apparent that the claim in Suit No. FHC/KD/CS/36/07 is personal and peculiar to the sole beneficiary of Exhibit P6***

- that is Late Maj.-Gen. Musa Bamaiyi (Retd.) The applicable maxim is rendered thus: actio personalis moritur cum persona , death terminates the cause of action or the interests of the party in a personal action. Hence, an action in personam engenders a decision in personam which determines the jurat relation of persons to one another. See Idris V. A.N.P.P. (2008) 8 N.W.L.R. (Pt. 1088) 1/120 para. H .With the subsequent development in the instant case, enforcement of the orders of the Federal High Court, Kaduna has become impossible, in the sense that there has been an intervening event of death of the sole beneficiary of Exhibits P5 and P6."

In the instant case, the alleged putative father of Queen (Pullen Obe) is now deceased and by a curious twist of fate, his half-brother filed this action in a personal capacity to try to establish the paternity of his deceased brother. This was clearly erroneous. The maxim is: ***actio personalis moritur cum persona*** (a personal action dies with the deceased). This being an *action in personam*, the viable plaintiff would have been the late Pullen Obe himself. Upon his demise it is evident that his right of paternity which was personal to him became extinguished.

The only persons with viable personal rights to determine the paternity of the late Pullen Obe over Queen are the P.W 1 who is the mother of Queen and of course Queen herself. For very curious reasons they were not made parties to the suit. Yet the trial court went ahead to give a judgment which fundamentally affected their interests. I agree entirely with the learned counsel for the Appellants when he submitted that: ***"that all the three persons: P.W 1, Pullen Obe and Queen ought to be parties in order that their rights could be pronounced upon but were not made parties to this action. The failure to make them parties to this action is fatal and therefore renders the action incompetent and the entire judgment of 9/12/2013 a nullity."***

Sequel to the foregoing, I hold that the fact that Pullen Obeh and Queen Obeh were not parties to this action is sufficient to vitiate the finding of the lower Court that Queen is the child that the P.W 1 bore for the late Pullen Obeh.

Issue Three is therefore resolved in favour of the Appellants.

ISSUE 4

Whether the award of ₦500, 000.00 (five hundred thousand naira) damages against the defendants is proper in the circumstances?

In view of my findings in respect of Issues 1, 2 and 3, it is evident that there was no basis whatsoever for awarding the sum of ₦500, 000.00 (five hundred thousand naira) damages against the defendants. This Issue is therefore resolved in favour of the Appellants. Having resolved all the Issues in favour of the Appellants, this Appeal succeeds and I hereby set aside the judgment and the orders made by the trial court on the 9th of December, 2013. I award the sum of N50, 000.00 (fifty thousand naira) as costs in favour of the Appellants.

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P.A.AKHIHIERO
JUDGE
13/12/19

COUNSEL:

Mrs.Osama Idehen…..……..……..Counsel for the Appellants

Princess (Mrs.) P.I.Iyomon……Counsel for the Respondent.