

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON WEDNESDAY THE
29TH DAY OF JULY, 2020

BETWEEN:

SUIT NO: HCU/16/2017

MR. HENRY OGUN.....CLAIMANT

AND

MR. BENITO OGUN.....DEFENDANT

JUDGMENT

The Claimant instituted this suit *vide* a Writ of Summons and Statement of Claim dated the 6th of May, 2017 seeking the following reliefs:

- (i) A declaration that the claimant is the eldest surviving male child of late Hon. Vincent Ebosele Ebhodaghe Ogun of Idumughulu Village, Amedokhian-Uromi;
- (ii) A declaration that the claimant is the proper person to perform the final funeral rites (Itolimi) of his deceased father entitling him to inherit the entire estate of his deceased father late Hon. Vincent Ebosele Ebhodaghe Ogun in accordance with Esan Native Law and Custom of Amedokhian-Uromi;
- (iii) A declaration of this Honourable Court that the purported final funeral rites performed by the defendant for late Hon. Vincent Ebosele Ebhodaghe Ogun between the 26th and 30th of April 2017, is null and void; and
- (iv) An order of perpetual injunction restraining the defendant, his agents, servants and privies from interfering in any manner whatsoever with the claimant's position as the eldest male child of late Hon. Vincent Ebosele Ebhodaghe Ogun.

The Defendant on the other hand counterclaimed against the Claimant as follows:

- (i) A DECLARATION that the Claimant is not one of the children of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that the rejection of the paternity of the Claimant by Late. Hon. Vincent Ebosele Ebhodaghe Ogun during his lifetime is lawful and proper;
- (ii) A DECLARATION that the defendant is the eldest male surviving child of Late. Hon. Vincent Ebosele Ebhodaghe Ogun of Amendokhian-Uromi in Esan North East Local Government Area of Edo state;
- (iii) A DECLARATION that the defendant is the proper person to perform the burial rites/ceremony of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that having performed the burial ceremony is entitled to inherit the 'Igiogbe' in accordance with the Esan Native Law and Custom of Amedokhian-Uromi;

- (iv) A DECLARATION that the final Burial rites/ceremony performed by the defendant for late Hon. Vincent Ebosele Ebhodaghe Ogun between the 26th and 30th of April, 2017 is proper and lawful;
- (v) A DECLARATION that late Hon. Vincent Ebosele Ebhodaghe Ogun having being married to Mrs. Rosaline Ogun under the Marriage Act and died intestate his property is to be shared in accordance with the Administration of the Estate Law of Bendel State as applicable in Edo State; and
- (vi) AN ORDER of perpetual injunction restraining the claimant, his agents, servants and privies from interfering in any manner whatsoever with the defendant's position as the eldest male surviving child of late Hon. Vincent Ebosele Ebhodaghe Ogun.

At the hearing the claimant testified and called three witnesses, to wit: CW1 Andrew Edo, CW2 Maria Oza and CW3 Victoria Aghegbese.

The defendant did not testify in person but he called four witnesses, to wit: DW1 Roseline Ogun, DW2 Madam Esther Okoduwa, DW3 Rasaki Akin Adesina and DW4 Smart Ebhojeaye Aitiegbemine.

The claimant's case as can be gleaned from his evidence and that of his witnesses is that he is the eldest surviving son of Hon. Vincent Ebosele Ebhodaghe Ogun, a native of Idumu-Ughulu, Amedokhian-Uromi and the defendant is the second surviving son of his father.

Furthermore, that the defendant and he have the same father but different mothers and that he is senior to the defendant in age.

That sometime in 1958 when his father was a student at the defunct Provincial Teachers Training College, Igueben, he had an affair with one Maria Ebhotemhen Imadojemu, a Princess from the Royal Palace, Igueben, now deceased and the affair resulted in the birth of the claimant on the 26th day of June 1959 at Igueben.

That when his mother's pregnancy was made known to his mother's family, they insisted on terminating the pregnancy but the claimant's father's family persuaded her not to abort the unborn child.

That during his mother's pregnancy, the late Onojie of Igueben, His Royal Highness David Eluojerior, sent the claimant's mother to the mother of the claimant's father, Madam Ekeijele Ogun to take proper care of her. That the claimant's mother, relocated to Uromi to live with the said Madam Ekeijele Ogun for some time.

That arising from the incident of his mother being impregnated by his father, his father was expelled from the Teachers' Training College, Igueben and he relocated to St. Thomas' College, Ibuzor where he eventually completed his education.

The claimant maintained that while his mother was pregnant, Madam Ekeijele Ogun was always visiting his mother at the Royal Palace Igueben until she eventually gave birth to the claimant on the 26th of June 1959 whereupon, his father, Vincent Ebosele Ebhodaghe Ogun paid the maternity bills. That after he was born, his father's mother and grandmother were always visiting him in Igueben and bringing various items and clothing for his upkeep. That whenever he fell sick, his mother would take him to his father's mother at Uromi who would in turn take him to St. Camillus Hospital, Uromi for treatment.

According to the claimant, when he attended his primary and secondary schools at Igueben, his father always kept his school fees and other cash with his mother, Madam Ekeijele Ogun which he usually collected from her.

That four years after the claimant's birth, his father married the defendant's mother and this prevented the claimant from having direct dealings with his father hence he was accessing his father through his father's mother, Madam Ekeijele Ogun.

According to the claimant, while his father was a member of the then Bendel State House of Assembly between 1979 and 1983, he was always with him at the House of Assembly complex, Benin City to seek for his assistance in respect of his education and welfare.

That when he paid dowry on his wife on the 7th day of July 2012, his father was attending a convention organized by the People's Democratic Party in Abuja and he sent his kinsmen to represent him in the said ceremony.

According to the claimant, the defendant's mother, Mrs. Roseline Ogun has not been comfortable with him since she discovered that he is the eldest son of Hon. Vincent Ebosele Ebhodaghe Ogun and she did everything to cause disaffection between the claimant and his father before his demise.

After the death of his father in March 2017, he said that he informed his father's kinsmen that he wanted to perform the final funeral rites but the defendant and his mother objected on the ground that the claimant is not the son of Hon. Vincent Ebosele Ebhodaghe Ogun. That he was prevented from performing the funeral rites of his deceased father by the defendant and his mother.

That consequent upon the said development, the claimant reported the matter to the elders of his community for resolution but when the elders were not forthcoming owing to division amongst them, he summoned the defendant and his mother to the Palace of the Onojie of Uromi for the resolution of the matter.

That at the Palace of the Onojie of Uromi, it was resolved that although it was within the right of the claimant to perform the final burial rites of his deceased father in his capacity as the eldest surviving male child, a DNA test should be conducted to determine the paternity of the claimant while the burial activities should be put on hold pending the outcome of the said test to avert unnecessary hostilities between the parties.

However, before the implementation of the decision of the Onojie of Uromi, the defendant and his mother started to make arrangements for the final burial rites of Hon. Vincent Ebosele Ebhodaghe Ogun.

That when he saw the desperation of the defendant to commence the burial, the claimant quickly instituted a suit against the defendant and his mother at the Area Customary Court, Uromi in Suit No: ENEACC/50/2017. But in spite of the said suit and the motion for interlocutory injunction duly served on the defendant and his mother, the defendant still went ahead to perform the burial rites of his father between the 26th and 30th of April, 2017.

That before the said burial, the elders of Idumu-Ughulu summoned both parties to a meeting for a resolution of the matter and at that meeting, the elders resolved that the claimant being the eldest surviving male child of Honourable Vincent Ogun was the rightful person to perform the final burial rites of his deceased father, Hon. Vincent Ogun

notwithstanding the purported denial by Hon. Vincent Ogun as recorded in the DVD that was played in the court.

That when Suit No: ENEACC/50/2017 was pending at the Area Customary Court, Uromi, the defendant wrote a petition against him to the Edo State Police Commissioner over the same subject matter and he was arrested on the 21st of April 2017 and detained till the 23rd of April 2017 when he was eventually released on bail.

That notwithstanding the pendency of Suit No: ENEACC/50/2017, the defendant has been harassing the claimant with Policemen over this issue of paternity and as a result of the defendant's acts in undermining judicial process by intimidating him with the Police and conducting the burial rites of his deceased father, he decided to discontinue the said suit vide a notice of discontinuance before instituting this suit.

According to the claimant, the purported burial rites performed by the defendant for Hon. Vincent Ebosele Ebhodaghe Ogun from the 26th to the 30th of April 2017, is invalid because under Esan Native Law and Custom of Amedokhian- Uromi, it is only the eldest surviving male child of a deceased person that can perform the burial rites of his deceased father to enable him inherit the property of his deceased father. He maintained that at the time the defendant performed the final funeral rites of Hon. Vincent Ebosele Ebhodaghe Ogun, the defendant was the second male child of their deceased father.

He stated that under Esan Native Law and Custom of Amedokhian- Uromi, a child born outside wedlock, has the same status with other children of the family including those whose parents are legally married.

He stated that the meeting which was recorded in a video DVD was made in anticipation of proceedings. He said that the said meeting was pre-arranged by defendant's mother and some of his father's kinsmen who prevailed on him to deny the claimant and pave way for the defendant to emerge as the eldest male child of Hon. Vincent Ogun. He said that he and members of the Idumughulu Community who knew about his paternity and members of his mother's family were not invited to state their own side of the matter. That what transpired at the said meeting did not border on determination of the claimant's paternity but a mere denial of claimant's paternity by Honourable Vincent Ogun. That under Esan Native Law and custom of Amedokhian Uromi, no verdict is obtained without hearing from both parties to a dispute as in the instant case.

He said that when his mother was alive, his father did not deny his paternity until when the defendant's mother mounted pressure on him to deny his paternity.

He said that before the burial, he was arrested by the Police and made to sign an undertaking not to participate or disrupt the said burial.

That owing to the fact that the Idumughulu Community acknowledged him as the eldest surviving male child of Hon. Vincent Ogun, the defendant caused the police to arrest him together with some elders of the community and they were arraigned before the Magistrate Court Uromi Court in charge No: MCU/130C/2019 for conduct likely to cause the breach of peace. That they were eventually discharged by the Court on a no case submission.

He stated that contrary to Esan native Law and Custom of Amedokhian Uromi, the meeting where his father denied paternity was held at Emaudo Quarters, Amedokhian Uromi

as against Idumughulu Quarters, Amedokhian-Uromi, the ancestral home of his father. That for any denial of paternity to be valid under Esan Native Law and Custom of Idumughulu, Amedokhian Uromi, the person denying such paternity must swear with a she-goat which shall be slaughtered by his kindred and Elders of his Quarters, and sacrificed to the gods of the land as proof of the truth of his assertion and seriousness. That his father did not comply with the said requirement of Esan Native Law and Custom while denying the paternity of the claimant owing to the dire consequences associated with such custom.

As earlier stated, the Defendant did not testify in person but he called four witnesses who testified on his behalf. The defendant's case as can be gleaned from the evidence of his witnesses is that the defendant is the eldest surviving son of Hon. Vincent Ebosele Ebhodaghe Ogun, a native of Idumu-Ughulu, Amedokhian-Uromi.

The evidence led was that the late Hon. Vincent Ebosele Ebhodaghe Ogun during his lifetime had only one wife to wit: Mrs Roseline Ogun who testified as the D.W.1.

According to the D.W.1, during his lifetime, her husband never mentioned that he had the claimant outside wedlock. She said that immediately after they got married they lived together with her husband's mother, Mrs. Ekeleijele Ogun for eight years and her mother in law never mentioned the existence of the claimant or his alleged mother.

She said that their marriage was blessed with the following children:

- i. Mrs. Adesuwa Esivue
- ii. Mr. Benni Ebosele Vincent Ogun (the defendant)
- iii. Mr. Afe Ogun
- iv. Mrs. Omozusi Onyeama
- v. Miss Obehioye Ogun
- vi. Miss Onomen Ogun
- vii. Mrs. Izehinosen Olufawo
- viii. Mrs. Isedua Agbonkhese.

Furthermore, the D.W.1 stated that during his lifetime, her husband had a son outside wedlock named Oseyili Ogun. That the said Oseyili Ogun lived and grew up in the same home with the defendant and his siblings and she took care of him as her own son.

She maintained that the claimant would have lived under the same roof with the defendant and his siblings and would have had unfettered access to her husband if he acknowledged him as his own son or even knew of his existence.

She stated that sometime in the year 2011, her husband was informed that the claimant and two other persons went to meet one Mr. Edo to inform him that the claimant is the son of her husband. That thereafter, the said Mr. Edo sent for her husband to come and verify the claimant's allegation.

She said that her husband was shocked to hear of such an allegation and promptly went to Mr. Edo to vehemently deny the allegation.

She said that again sometime in the year 2012, someone came to their house to inform them that the claimant got married in Uromi and made people to believe that he was her husband's son. She said that this prompted her husband to go to Amedokhian-Uromi to

report to the elders of his family about the conduct of the claimant. That at the meeting, her husband informed the elders that the claimant whom he rejected as his son was now conducting his wedding in his own name and that he was disappointed that Andrew Edo (C.W.1) who was aware of his rejection still accompanied the claimant to his wedding ceremony.

She said in a bid to lay the matter of the paternity of the claimant to rest, her husband invited members of his family for a meeting at Amedokhian-Uromi. That those who were present included Madam Esther Okoduwa (D.W.2), Mrs. Christy Ebosele, Mrs. Maria Oza (C.W.2), Mr. Patrick Iga, Chief Oza and some elders, women and youths of Amedokhian-Uromi. She said that the late Odionwere of Amedokhian-Uromi presided over the meeting.

That at the meeting, her husband informed everyone unequivocally that the claimant is not his son and that he knows nothing about the birth of the claimant or the claimant's mother. The D.W 1 informed the court that the meeting was recorded by video recording and photographs.

The witness stated that they never heard about the claimant after the said meeting until in 2017 immediately after the demise of her husband when he rose up again and started to assert furiously that her husband is his father and that he is entitled to conduct the burial ceremony as the first son in accordance with the Esan traditional law and custom.

The witness narrated how the claimant went to meet the elders of Amedokhian-Uromi and the Onojie of Uromi in a bid to assert his right to bury his alleged father and the Onojie tried to settle the matter but he did not succeed. Subsequently it was alleged that the claimant and some people were threatening the defendant so the matter was reported to the police for investigation and the claimant and some other suspects were later charged to court.

Eventually, the defendant performed the final burial ceremony of his father.

Upon the conclusion of the evidence, learned counsels for the parties filed their Written Addresses and adopted same on the date fixed for final addresses.

In his Written Address, the learned counsel for the Defendant, *Anthony Osula Esq.* formulated two issues for determination as follows:

1. ***Whether the claimant has been able to prove his case on the balance of probability; and***
2. ***Whether based on the video recording of Late Vincent Ogun's denial of Claimant's Paternity, the defendant should be entitled to his counter-claim.***

ISSUE 1:

Arguing Issue 1, the learned defence counsel submitted that is trite law that civil suits are decided on the balance of probabilities; put differently on the preponderance of evidence. He said that the principle requires that the totality of the evidence are placed on both sides of an imaginary scale to determine on which side the evidence preponderates. He said that the party on whose side the scale tilts succeeds in the case. For this view, he relied on the decision of the Supreme Court in the case of *OLONADE & ANOR v. SOWEMIMO (2014) LPELR-22914(SC)*.

He submitted that in order to determine which evidence is weightier, the court will naturally have regard to the following: (a) whether the evidence is admissible (b) whether it

is relevant; (c) whether it is credible; (d) whether it is conclusive; and (e) whether it is more probable than that given by the other party.

He submitted that the issues before this court is one of paternity and it is trite law that the three ways to prove paternity are as follows:

- I. Paternity by existing marriage;
- II. Paternity by subsequent marriage to the mother; and
- III. Paternity by acknowledgment of the father.

Learned counsel referred to the decision in the case of *OKOLONWAMU & ANOR V. OKOLONWAMU & ORS (2014) LPELR-22631(CA) Pp. 43, para. C-F* where the Court stated as follows:

"How can paternity be proved? Paternity of a child can be determined by three major ways which are akin to the ways of proving legitimacy of a child. They are: (1) Paternity by existing Marriage: A child born during the pendency of a valid marriage between a couple is automatically presumed to be legitimate. (2) Paternity by Subsequent Marriage to the mother: This occurs when a child is born at a time when the mother was not married to the father and after whose birth the mother and father entered into a valid marriage. (3) Paternity by acknowledgement by the father accepting paternity of the child: This includes paying for the hospital bills and upkeep of the child, introducing the child to his family as his child etc."

Thereafter, learned counsel applied each of the three methods of proof of paternity to the instant case.

On proof of paternity by existing marriage, counsel submitted that the parties are in agreement in this suit that late Hon. Vincent Ogun never married the claimant's mother. He referred to paragraphs 1-18 of the claimant's amended statement of claim where the claimant admitted that late Vincent Ogun never married his mother.

He said that at paragraph 19 of the statement of claim, the claimant admitted that late Vincent Ogun got married to the Defendant's mother four years after he was born.

On proof of paternity by subsequent marriage to the mother, counsel submitted that there is no evidence from both claimant and Defendant that the Claimant's mother was subsequently married to late Vincent Ogun after the Claimant was born. He said that the Claimant admitted that four years after he was born, late Vincent Ogun got married to the Defendant's mother.

On proof of paternity by acknowledgement by the father accepting paternity of the child, he submitted that acknowledgement includes paying for the hospital bills and upkeep of the child or introducing the child to his family as his child.

Counsel submitted that the Claimant's case is anchored on this third method of proving paternity wherein the Claimant alleged that late Vincent Ogun paid his hospital bills and was responsible for his upkeep.

He posited that the Defendant in debunking this claim called DW1, Dw2, and Dw3 and tendered a video recording where the deceased denied paternity of the claimant. He said that the Dw4 interpreted the contents of the video recording from Esan language to English language.

Learned Counsel reproduced some parts of the English interpretation of the video clip which he alleged contained a record of the denial of the paternity. He said that these unequivocal rejection and denial of claimant's paternity was supported by the evidence of CW1 and 2. He referred the Court to some relevant paragraphs of the defendant's amended statement of defence.

Counsel submitted that the evidence given by Claimant's witnesses particularly CW1 and CW 2 are in material contradictions and cannot stand. Counsel referred to some alleged inconsistencies between the evidence of the CW1 and CW2 under cross examination and their statements during the meeting.

He pointed out that the CW2 under cross examination on the 12/03/2018 stated that late Vincent Ogun invited her for the meeting but that she did not attend the meeting and that she did not hear that late Vincent Ogun said that the claimant is not his son. However, he pointed out that in the transcript, the C.W.2 made some statements in the said meeting.

Similarly, he posited that the CW1 under cross examination on the 12/03/2018 testified that he was present at the meeting conveyed by Hon. Vincent Ogun and that at the meeting, the late Vincent Ogun did not deny claimant's paternity. That under the same cross examination, the same witness denied being in the said meeting. Counsel further reproduced the transcript of the meeting where the C.W.1 allegedly stated that the late Ogun told them that the child in question is not his own.

Learned counsel referred to the case of **EZEMBA V. IBENEME & ANOR. (2004) LPELR-1205(SC) P. 22, para.G- A where the court stated thus:**

"No witness who has given on oath to material or inconsistent evidence is entitled to the honour of credibility. Such a witness does not deserve to be treated as a truthful witness."

He also referred to the decision in the case of **OFFONRY V. EMEZI & ANOR (2012) LPELR-15356(CA) P. 27, paras A-C** where the Court stated as follows:

"A material contradiction is one which goes to the root of the evidence of a witness and is therefore fatal to the case of the party who calls him, as it destroys the credibility of the witness."

Again he relied on the following decisions on the same point: **NLNG CO LTD V. HART (2013) LPELR-21176(CA) Pp. 14-15; and CIVIL DESIGN CONST. (NIG.) Ltd. V. SCOA NIGERIA LTD. (2007) 6 NWLR (Pt. 1030) 300**

Counsel submitted that throughout the length and breadth of the Claimant's case, he did not tender any documentary evidence to substantiate his oral testimony in court. That the Claimant's case is based on informal acknowledgment of his birth by Late Vincent Ogun, yet the Claimant could not provide any certificate of birth, academic certificate, pictures or any other documentary evidence that suggest that Late Vincent Ogun had dealings with him during his lifetime. That there is no documentary evidence before the Court to show that the Claimant bears the surname of late Vincent Ogun. That the Claimant admitted under cross examination that he never lived with late Vincent Ogun and his family.

He submitted that it is trite law that documentary evidence is the hanger to test the veracity and truthfulness of oral testimony in court and relied on the case **AHMED V. MOHAMMED (2009) LPELR-8739(CA) Pp. 34-35, paras. F-A.**

Counsel submitted that the defendant in controverting the evidence of the Claimant tendered a legion of documents to support his case. He referred to Exhibit B, D, E, G, H and particularly Exhibit J. That in Exhibit G, the names and pictures of all Late Vincent Ogun's children were listed at page 4 and 31-32. He said that Exhibit J debunks the evidence of the claimant and his witness that he is the son of late Vincent Ogun. He said that the Claimant did not tender any documentary evidence to contradict Exhibit J, particularly as the CW1 and CW 2 attended the meeting and witnessed when late Vincent Ogun denied Claimant's paternity.

Counsel submitted that the law is settled that where there is conflicting piece of evidence on a material issue, the party that has documentary evidence is accorded more credibility than the other party without any document. He referred to the case of: **UZOKWE V. UZOKWE (2016) LPELR-40945(CA) P. 28, paras. B-C** where the Court stated thus: **"...it is the law, that where there are conflicting pieces of evidence on a matter, the party whose evidence is supported by documentary evidence, would be accorded more credibility. Eya v. Olopade (2011) 11 NWLR (Pt.1259) 505; (2011) 5 SCNJ 98."**

He submitted that after the Claimant adopted his deposition dated 21st February, 2019 on the 16th of March, 2020, under cross examination, he admitted that one of his witnesses, the CW 2 stated that he (Claimant) is not the son of Late Vincent Ogun. That nevertheless, the CW 1 never challenged Late Vincent Ogun in the meeting as evidenced by Exhibit J and it was seen that he begged for forgiveness for acknowledging the claimant as Late Vincent Ogun's son.

He said that this admission made by the Claimant and his witnesses (Cw2 and Cw1) is the best evidence in favour of the defendant. He referred to the decision in the case of **ALI V. UBA PLC (2014) LPELR-22635(CA) at P. 33, paras. D-F** where the Court stated as follows:

"It is trite law that an admission by a party against his interest is best evidence in favour of his adversary in the suit. See ONYENGE VS. EBERE (2004) 13 NWLR (PT. 899) 20; KAMALU VS. UMUNNA (1997) 5 NWLR (PT. 505) and AJIDE VS. KELANI (1985) 3 NWLR (PT 12) 248. However, for an admission against interest to be valid in favour of the adverse party, it must not only vindicate or reflect the material evidence before the court, but also vindicate and reflect the legal position. See ODUTOLA VS. PAPERSACK (NIG) LTD. (2006) 11-12 SC 60."

He also relied on the case of **ADEBOYE V. BAJE (2016) LPELR-40578(CA) P. 44, paras. B-E.**

He urged the Court to dismiss the claim of the claimant as lacking in merit.

ISSUE TWO:

On Issue two, learned counsel posited that the Defendant counter claimed against the Claimant. That it is trite law that a counter-claim is a separate, independent and distinct action which must be proved to obtain judgment. See **KWAJAJFA & ORS v. BANK OF THE NORTH LTD (1998) LPELR-6371(CA) at P.13, Paras. F-G.**

He submitted that the proof of the counter claim is on the preponderance of evidence, and balance of probability. See **HUSSAINI, J.C.A. in ARANDA v. KELGUM (2016) LPELR-40324(CA) at P. 16, Paras. C-D.**

Counsel submitted that the Defendant is seeking six reliefs which were never controverted or challenged. He submitted that there is no defence to the defendant's counter-claim because the claimant merely filed a defence to the counter claim dated 12th of December, 2017 without attaching any witness deposition or evidence to substantiate his defence. He said that the implication is that he has abandoned his defence to the counter-claim.

He submitted that where a claimant fails to adduce evidence in support of his pleadings (defence to counter-claim), it will be deemed that he has accepted the facts as stated in the statement of defence notwithstanding his general traverse as stated in paragraph 1 of the defence to the counter-claim.

He referred to the decision of the Supreme Court in the case of **IDESOH & ANOR V. ORDIA & ORS (1997) LPELR-1421(SC) Pp. 13-14, paras. F-B** where they stated as follows:

"It is not enough for a party to make averments in pleadings. Averments which on the face of them appear impressive are useless if no evidence is led to prove them. Mere averment in pleadings without proof of the fact pleaded is no proof if the averment is not admitted. See Adegbite v. Ogunfaolu (1990) 4 NWLR (Pt.146) 578. Also, failure to give evidence in support of an averment means that the averment in question has been abandoned. See: Omoboriowo & Ors v. Ajasin (1984) 1 SCNLR 108; (1984) 1 S.C 206 at p.202, and Balogun v. Amubikanhun (1985) 3 NWLR (Pt.11) 27 at pp. 36 & 37."

See also: **IFETA V. S.P.D.C. NIG. LTD (2006) LPELR-1436(SC) P. 10, paras. C-G.**

Learned counsel submitted that the Defendant in reliefs I, II, III and VI of his counter claim is asking for a declaration that he is the eldest male surviving child of late Vincent Ogun, that the burial of Late Vincent Ogun on the 26th and 30th day of April 2017 is lawful and proper and an order restraining the claimant and his agent from interfering with the defendant's position as the eldest male child of Late Vincent Ogun. He submitted that this Court has the jurisdiction to grant the above reliefs.

On relief I, he said that the Defendant called four witnesses and tendered several documents. That the most crucial of them is Exhibit J and the Esan interpretation evidence of DW4, the Esan interpreter. He referred to paragraphs 1 Z (i-xxxxi) of the Defendant's Amended Statement of defence and paragraph 1-8 of the witness deposition of Dw4 dated 29th of January, 2019. He also referred to the Pictures of the meeting tendered by Dw3 and posited that there is no evidence from the claimant to contradict this vital piece of evidence from the Defendant.

On reliefs II, III, IV and VI, he submitted that sufficient evidence has been led in proof of same both oral and documentary and referred to paragraphs 4-12 of the Amended Statement of defence and counter-claim. He also referred to Exhibit G - Copy of the Order of Funeral Mass.

On relief V, he said that the Defendant is seeking for a declaration that Mrs. Rosaline Ogun (DW1) having been married under the Marriage Act, the property of Late Vincent Ogun who died intestate should be shared in accordance with the Administration of Estate Law of Bendel State as applicable in Edo State. He submitted that this relief is in tandem with the facts and documents before the court. That it is the case of the defendant at Paragraph 1(1) that the Dw1 got married to Late Vincent Ogun in the Catholic Church and they were issued a marriage certificate which was tendered and marked as Exhibit B. That it also not in dispute that Vincent Ogun is late and he made no will before his demise. He referred to Exhibit A which is the death certificate.

He submitted that the law is clear in respect of the above facts that the Defendant's father who died intestate and having contracted a marriage in accordance with the marriage Ordinance, his property which might have distributed by a will shall be distributed in accordance with the Administration of Estate Law of Bendel State. He referred to the decision of the Supreme Court in the case of *SALUBI V NWARIAKU (2003) 7 NWLR, pt.819 at pages 451-452, Para E-E; and OBUSEZ & ANOR V. OBUSEZ & ANOR (2007) LPELR-2197(SC) at Page 24-25, Para A-C.*

He said that the claimant in his consequential amended statement of claim alleged that under native law and custom, a person denying such paternity must swear with a she-goat which shall be slaughtered by his kindred and Elders of his Quarters and sacrificed to the gods of the land as proof of the truth of his assertions and seriousness and that Late Vincent Ogun never complied with the customs of Esan land.

On this issue, he submitted that the Claimant admitted under cross examination that Late Vincent Ogun was a Christian. That it goes without saying that late Vincent Ogun was therefore not subject to the above practice and custom stated in the aforesaid paragraph by the claimant. That having embraced Christianity he could not be associated with such practice. He submitted that the Christian burial given to Late Vincent Ogun as shown in Exhibit G and the Christian marriage (Exhibit B) he conducted in the Roman Catholic Church are all overwhelming evidence of the Christian virtues and lifestyle adorned by the Late Vincent Ogun. He submitted that the formal denial of Claimant by Late Vincent Ogun before his kinsmen was proper and valid.

He urged the Court to dismiss the claim of the Claimant and grant the counter-claim of the Defendant.

In his written address, the learned counsel for the Claimant, *Dr. P.E.Ayewoh Odiase* formulated three issues for determination as follows:

(i) Whether from the totality of evidence before Court, the claimant has discharged his evidential burden of proof entitling him to the judgment of this Honourable Court?

(ii) Whether the defendant's counter-claim is not torpid or stale; and if the answer is in the negative; and

(iii) Whether evidence led in support of the counter-claim is sufficient to sustain the reliefs contained therein?

The learned counsel argued the issues seriatim.

ISSUE ONE:

Whether from the totality of evidence before Court, the claimant has discharged his evidential burden of proof entitling him to the judgment of this Honourable Court?

On Issue one, learned counsel submitted that the claimant has led credible, reliable and cogent evidence in proof of his claim before this Honourable Court.

That in proof of his claim, the claimant told the Court that his mother was impregnated by his father, Hon. Vincent Ogun when he was a student at Igueben Teacher's Training College sometime in 1958. That the claimant further told the Court that he is the product of the aforesaid pregnancy as his mother and father, were not formally married.

He submitted that the fundamental fact that Hon. Vincent Ogun actually schooled in Igueben at the material time, was admitted by the defendant's witnesses. That by the nature of the admission of the said fact, facts connected to the fact in issue which revolves around the love relationship between the claimant's mother and Hon. Vincent Ogun who was a student at Igueben at the material time, have been brought to the fore.

On the purport of admission of related facts, learned counsel cited the case of ***Asaba Textile Mill PLC V Bona V. Textile Ltd (2007) 15 WRN, page 31 at P. 59 lines. 15 – 35.***

He further submitted that there is evidence before this Court that Hon. Vincent Ogun's two surviving sisters as well as his nephew, Andrew Edo were aware of his birth. He referred to paragraphs 15 and 3 of the claimant's statement on oath of 16th May 2014. Furthermore, he said that the claimant maintained that his mother, now deceased was impregnated by Hon. Vincent Ogun which resulted in his birth on the 26th day of June 1959 as contained in paragraphs 5, 6, 8, 10, 11 and 12 of the Claimant's Statement on Oath of 16th of May, 2017. He submitted that the said facts were not challenged by the defendant or his witnesses even when they had opportunity to so do or to lead contrary evidence. On the duty of the Court to act on unchallenged evidence, he cited the case of ***Kayode Ventures Ltd V Minister of Federal Capital Territory (2010) Vol. 181 LRCN page 69 at pages IIOJJ & IIIAF.***

He submitted that the defendant's witness, the DW4 also corroborated the fact that many persons shown in the video clip stated that the mother of a child is in the best position to say who the father of the child is. That the act of sexual intercourse between a man and a woman is not carried out in public but secretly by both parties. That the claimant maintained very strongly in his evidence before this Court that it was the impregnation of his mother, a Princess of Igueben royal Palace by Hon. Vincent Ogun that led to the expulsion of his father from the Teachers Training College Igueben whereupon, he, Vincent Ogun relocated to St. Thomas College Ibuzor to complete his education.

He submitted that as weighty and material as this piece of evidence was, it was neither challenged nor controverted by the defendant and referred to paragraph 11 of the claimant's Statement on Oath of 16th of May 2017. He therefore submitted that evidence not challenged during cross-examination as in the instant case, is deemed admitted and can be acted upon by the Court and cited the case of ***Universal Trust Bank Nigeria Ltd V. Ajagbule (2006) 2 NWLR part 965, page 447 at P. 491, Paras. B – C.***

Furthermore learned counsel submitted that there is evidence that the issue of the claimant's paternity, has been in dispute even while the claimant's mother was alive as contained in paragraph 11 of the DW1's evidence. That the CW2 who is a younger sister to late Hon. Vincent Ogun told the Court that her brother impregnated the claimant's mother while he was a student in Igueben and Hon. Vincent Ogun's mother took care of the claimant at the instance of Hon. Vincent Ogun. He said that this fact was also corroborated by the CW1, Andrew Edo, Hon. Vincent Ogun's Kinsmen, now deceased, who told the Court about the love affair between the claimant's mother and Hon. Vincent Ogun which resulted in the birth of the claimant.

He therefore submitted that since there is no evidence before this Honourable Court suggesting that the claimant's mother had mental or psychological infirmities which precluded her from knowing who impregnated her, the Court should invoke the provisions of Section 167(a) of the Evidence Act to presume that the birth of the claimant flowed naturally from the consummation of the love relationship between the claimant's mother and Hon. Vincent Ogun.

He submitted that the claimant also led unchallenged evidence that his father, Hon. Vincent Ogun was taking care of his education as he always visited him while he was a member of the House of Assembly in Benin City. He posited that this evidence of acknowledgement of claimant's paternity by Hon. Vincent Ogun, was not also challenged or denied by the defendant and what is admitted, needs no further proof. See the case of *Okosun V. Ayanrinola (2009) 16 WRN 113*.

He submitted that the principle of law in *Okolonwamu & anor. V. Okolonwamu & Ors. (2014) LPELR – 22631 (CA) Pp.43, Para. C – F*. which dwells on acknowledgement of paternity as one of the ways of proving paternity has been satisfied by the claimant in this suit because the claimant led unchallenged evidence that his father, Hon. Vincent Ogun cared for him and sponsored his education. See paragraphs 13, 14, 16 and 19 of the claimant's statement on oath of 16th of May 2017. He said that the above pieces of evidence were corroborated by the CW2 who also told the Court that the claimant constantly visited his paternal grandmother, Hon. Vincent Ogun's mother through whom, Hon. Vincent sent money for the upkeep of the claimant.

He submitted that there can be no better acknowledgement of paternity than the love and affection Hon. Vincent Ogun exhibited towards the claimant during his upbringing. He submitted that the claimant having discharged his burden of proving acknowledgement of paternity by his father, Hon. Vincent Ogun, the onus of leading rebuttal evidence in disproving that piece of evidence, shifted to the defendant who he said could not as the onus of proof in civil cases is not static. See the case of *Ogbu V. Wokoma (2005) 4 F.W.L.R., part 292, page 2123 at P. 2145, paras. C – D*.

Counsel submitted that the defendant's refusal to lead any evidence in rebuttal of the claimant's case that the claimant is the eldest male child of Hon. Vincent Ogun, amounts to an admission of all the averments in the claimant's pleadings as well as his evidence on oath. On when evidence is deemed to be admitted, he cited the case of *Ikare Community Bank (Nig.) Ltd. V. Ademuwagun (2005) 7 NWLR part 924, page 275 at P. 294, paras. G.H.*

Furthermore, he submitted that the defendant merely filed a statement on oath which he never activated by way of adoption. That a Statement on Oath not activated, remains moribund and impotent. See the case of *Ibrahim V Okutepe (2015) All FWLR part 785, page 331 at 336.*

He therefore submitted that the claimant having led credible evidence by calling two witnesses from Hon. Vincent Ogun's family i.e. CW1 Hon. Vincent Ogun's younger sister and CW2, Hon. Vincent Ogun's Kinsman who knew about the fact in issue and one witness from his maternal lineage, the CW3, the cousin of the claimant's mother who also knew about his birth, issue one should be resolved in the affirmative.

ISSUE TWO:

Whether the defendant's counter-claim is not torpid or stale?

On Issue two, learned counsel submitted that the counter-claim of the defendant is not legally maintainable as same has been abandoned by the defendant. He further submitted that in as much as the defendant is at liberty to call witnesses to testify in relation to the fact in issue, his refusal to testify in proof of his counter-claim, defeats all the reliefs contained therein.

He submitted that the Court not being a Father Christmas, cannot grant a relief devoid of any evidence, particularly that of a party who has an interest in the subject matter of litigation. He referred to the case of *Obaseki V Orukwo (2007) 17 NWLR part 1062, page 138 at P. 160, paras. D – E.*

On when a counter-claim is deemed abandoned, he referred to the case of *Olonade Sowemimo (2006) 2 NWLR part 963, page 30 at P.40 paragraph G.* He further submitted that failure of a party to ask for the reliefs contained in his claim or counter-claim as in the instant case, renders the counter-claim moribund and deemed abandoned. See the case of *Apatira V. Lagos Island Local Government Council (2007) 39 WRN, page 144 at Pp 170 – 171 lines. 45 – 10.*

ISSUE THREE:

On issue three learned counsel submitted that the evidence led by the defendant's witnesses in proof of his counter-claim lacks sufficient force, substance and credibility. That the defendant tendered several documents including photographs and video clips to show that his father, Hon. Vincent Ogun denied the paternity of the claimant. He submitted that there is evidence before the Court that at the said meeting where the alleged denial was made, the claimant was not invited.

He submitted that under Esan Native Law and Custom and the Nigerian Legal system, the central place of fair hearing cannot be negotiated, displaced and jettisoned if there is no ulterior motive behind such meeting. He therefore submit that the purported meeting where Hon. Vincent Ogun purportedly denied the paternity of the claimant, to say the least, is antithetical to human conduct, reasoning and conscience. On the meaning and

essence of fair hearing he cited the case of *Okike V Legal Practitioners Disciplinary Committee (2006) 1 NWLR part 960, page 67 at P. 12, paras F – G.*

On the issue of the electronically generated evidence, learned counsel submitted that the video clip relied upon by the defendant lacks probative value and substance. That in the first instance, the video clip which was played in the open Court, merely displayed the faces and voices of individuals without identifying them and juxtaposing their alleged roles with the evidence before the Court.

He further submitted that home videos meant for entertainment all over the world, captures names roles and identities of actors for easy comprehension unlike the video clip in this suit which was played by the defendants without pin pointing who the speakers were in relation to the evidence before the Court. That it is not sufficient to assume that it is the business of the Court to identify Hon. Vincent Ogun in the said clip or to merely capture in the statement on oath thus:- “Ogun – English translation”, -----; when nobody, including the videographer could identify Hon. Vincent Ogun and other characters in the said video.

Secondly, he submitted that when the CW1, Andrew Edo and CW2, Maria testified, nobody confronted them with the said video clip to show that they were present at the said meeting or uttered certain words as contained in the evidence on oath of the defendant’s witnesses.

Thirdly, that the DW 2 who was alleged to have been present at the said meeting, was not shown the video clip to identify those who were present and confirm what was said. That she was not also recalled to authenticate her claim that such a meeting was held even when the claimant specifically stated that the said video clip, was a product of concoction and manipulation.

He submitted that the video clip was contrived for the purpose of this suit in anticipation of proceedings. That the sole object of the recording was not for the kinsmen of Hon. Vincent Ogun to decide whether or not, the claimant is his biological child but evidence of a mere denial of paternity without more. He therefore urged the Court to expunge the video clip from its records as it is inadmissible or in the alternative detach any probative value from it. On the status of documents made in anticipation of proceedings, he cited the case of *Owie V Ighiwi (2005) 5 NWLR part 917 page 184 at P. 22 paras A – B.*

He submitted that there is a clear distinction between admissibility of a document and the weight to be attached to the document as in the instant case and referred to the cases of *Wike Nyesom V. Dakuku Peterside & ors (2016) Vol. 255 LRCN page 102; Lambert V Nigerian Navy (2007) 14 WRN page 156 at P. 193 lines. 15 – 25*

Counsel submitted that the video clip and evidence led on it are tainted with bad motive, suspicion, malice and concealment of the truth relating to the claimant’s paternity. That the question that arises at this juncture is why did the defendant not call a single elder or Hon. Vincent Ogun’s kinsmen from the Amedokhian Community who attended and participated in the said meeting to give evidence of what actually transpired at that meeting or any elder of the Amedokhian Community to counter the claimant’s allegation that Vincent

Ogun is his biological father? He said that it is imperative to state that even Hon. Friday Itulah who was alleged to have accompanied Hon. Vincent Ogun to the said meeting as contained in paragraph 1(q) of the amended Statement of defence, was not called by the defendant. On the effect of failure to call evidence, he cited the case of *Alechenu V Oshoke (2002) FWLR, part 85, page 281 at 284.*

He said that rather than call credible witnesses, the defendant called the DW1, his mother whose evidence he said is predicated on hearsay as contained in her statement on oath. Furthermore, that the DW2, a cousin of late Hon Vincent Ogun is not as credible as that of the CW2, late Hon. Vincent Ogun's younger sister who has direct blood relationship with Hon. Vincent Ogun. He further submitted that the evidence of the DW3, the photographer/videographer as well as that of the DW4, the Esan interpreter, is that of expert witnesses which is largely based on hearsay and has no probative value in enhancing proof of the facts in issue.

On the effect of failure to lead evidence for Court's evaluation, he cited the case of *Cappa & D'Alberto Ltd. V Akintilo (2003) 9 NWLR part 824, page 49 at 58.* On the nature of hearsay evidence, he cited the case of *Olojede V Ige (2015) 31 WRN, page 160 at P. 170 lines 30 – 45.*

He submitted that there is evidence before this Honourable Court by the DWI that two meetings were held over the claimant's paternity. That the defendant failed to lead any evidence why the video clip or documentary evidence of the other meeting was concealed and not presented to the Court the same way the video clip, Exhibit "J" was tendered. He submitted that the other meeting or meetings held in respect of the same issue will not be favourable to the defendant as stated in paragraph 11 of the claimant's further statement on oath of 21st February 2019 hence it was withheld. He referred the Court to Section 167(d) of the Evidence Act. See also the case of *Musa V Yerima (1997) 7 NWLR part 511, page 27.*

Counsel submitted that since the counter-claim of the defendant is anchored on nothing and his evidence bogus, issue three should be resolved in the negative as one cannot put something on nothing and expect it to stand. See the case of *Adewunmi V Oketade (2010) 23 WRN page 25 at P. 38 line 40.*

RESPONSE TO THE ARGUMENT OF DEFENDANT'S COUNSEL

On the issue of material contradiction in the evidence of the claimant and his witnesses, counsel submitted that since the claimant was not present at the purported meeting where his paternity was denied and having stated categorically in his further statement on oath that the video clip was doctored, whatever was said at the said meeting which the claimant saw, for the first time in Court through Exhibit "G" cannot form the basis of any contradiction. On the meaning of material contradiction, he cited the case of *Bodi V Agyo (2003) 16 NWLR, part 846, page 305 at Pp. 325 – 326, Paras. F – B.*

He further submitted that the evidence of the claimant on the 16th of March 2020 wherein he purportedly admitted that one of his witnesses, the CW2 said that from the video clip, he is not the son of late Hon. Vincent Ogun, is of no moment as the authenticity of the video clip, has been called to question. He referred to paragraphs 8 and 16 of the claimant's further statement on Oath of 21st of February 2019 which were not challenged by the defendant.

Furthermore, he posited that the CW2 who testified was not confronted with the video clip to either affirm or deny what is contained in the clip. He submitted that the essence of cross-examination for the purpose of contradicting a witness, is not for a party who was not present in a meeting, to be confronted by what a third party said in the said meeting as in the instant case. On the role of cross-examination, he cited the case of *Buhari V Independent National Electoral Commission (2009) 7 WRN page 1 at Pp. 176 – 179 lines 45 – 5*.

In response to the defendant's counsel's submission that Hon. Vincent Ogun did not comply with the rule of custom of Amedokhian Uromi for not taking oath before denying claimant's paternity on grounds of being a Christian, he submitted that religious belief does not dispense with the necessity of observing the applicable rule of custom relating to the issue at stake. That there is no evidence from the defendant that the said meeting where Hon. Vincent Ogun denied the paternity of the claimant was a Christian gathering to preclude his observance of the said rule of custom. Furthermore, that the defendant did not join issues with the claimant in his pleadings on that particular rule of custom to highlight any exception to the said rule of custom. That a perusal of paragraphs 4, 5 and 7 of the defendant's amended statement of defence reveal that all activities relating to Hon. Vincent Ogun's earthly sojourn, burial rites and succession to his estate where predicated on applicable rules of custom of Amedokhian-Uromi. On the meaning and bindingness of custom, he cited the following cases: *Aiibi V Olaewe (2003) 8 NWLR part 822, page 237 at P. 227 paras F – H*; and *Odutola VSanya (2008) 47 WRN, page 170 at P. 190 lines. 30 – 35*.

He therefore submitted that while all the authorities relied upon by the defendant's counsel, represent the correct principles of law enunciated therein, that they are however misplaced and inapplicable to the facts and circumstances of this case.

Upon receipt of the Written Address of the Claimant's counsel, the learned counsel for the Defendant filed a marathon Written Address of Reply on Points of Law. Going through the said document, I observed that the learned counsel went beyond points of law and delved into some arguments which bordered on the evaluation of the evidence adduced at the trial. I will try to confine myself to the aspects of the said Reply which I think are on points of law.

In his Reply to the issue of the consequences of the failure of the Defendant to testify in person, learned counsel submitted that it is settled law that a defendant need not testify as a witness in his own case so long as the evidence elicited from his witnesses is sufficient to support and sustain his case. For this view, he relied on the following authorities: *IGYUSE V OCHOLI (1997) 2 NWLR (PT.487) 364*; *EZEOKAFOR V AHNNONU*

EZENAMUO & ORS (1990) 1 NWLR (PT.126) 253; and OKOYE V DUMEBI (2014) LPELR-24155 (CA).

Furthermore, on the alleged failure of the Defendant to adopt his alleged deposition, learned counsel submitted that the submission was quite misleading as the Defendant never filed any deposition in this suit.

On the submission that the failure of the Defendant to testify in proof of his counter-claim has vitiated all his reliefs under the counter-claim, learned counsel submitted that a counter-claim must be supported by a separate witness deposition. He posited that since the counter-claim was filed along with the statement of defence, the evidence in support of the statement of defence can be used to prove the counter-claim. For this view, he relied on the case of ***OROJO V L.R. AVIONICS TECHNOLOGIES LTD (2018) LPELR-43797 (CA).***

Responding to the submission that the Claimant was not given any fair hearing before his alleged father denied his paternity, learned counsel submitted that the late Vincent Ogun could not have invited the claimant before he denied paternity because he never knew the Claimant personally. Furthermore, he contended that both C.WI and C.W.2 who were present at the meeting were presumed agents of the Claimant so he was afforded the opportunity of a fair hearing. Again, counsel contended that the right to fair hearing contemplated by section 36(1) of the 1999 Nigerian Constitution is limited to a hearing on the determination of the rights and obligations of a person before a competent court of law or tribunal. He said that it did not include the incident of denial of paternity.

During the final address, the learned counsel for the Claimant made some oral submissions in adumbration. He submitted that the Defendant never testified although he has a counter claim. That the Defendant's failure to testify implies that he has abandoned his defence and counter-claim. On the implication of filing pleadings by parties to a suit and effect of failure of the defendant to present his case, he relied on the case of ***SONA BREWERIES PLC V OGUNNUBI (2015) 27 WRN 105 at 130 lines 40 – 45.***

Again, he submitted that in this suit the Defendant relied heavily on documentary evidence in proof of the facts in issue. On whether it is the volume of documentary evidence tendered and the number of witnesses that determines the truth, behind a case, he referred the Court to the case of ***KOLAWOLE V OLORI (2009) 11 WRN 27 at 97 line 5.***

Finally, he pointed out that in his Reply on point of law the Defendant's Counsel reopened his arguments by submitting a 15 paged document as against the Claimant's 11 paged final written address and the Defendant's original final address of just 13 pages. He urged the Court to discountenance the said Reply on Points of Law.

He urged the Court to grant the Claimant's Reliefs and dismiss the Counter-claim with substantial costs.

I have carefully considered all the processes filed in this suit, together with the evidence led, the exhibits admitted in the course of the hearing and the addresses of the respective Counsels to the parties.

Upon a careful examination of the Issues formulated by learned counsel for the parties, I observed that the Defendant filed a Counter-Claim in this suit. So in essence, there are two Claims before the Court. In the event I am of the view that the issues to be resolved in this suit are as follows:

1. ***Whether the Claimant has established his claims in this suit?; and***
2. ***Whether the Defendant/Counter-Claimant has established his claims in this suit?***

I will now proceed to resolve the two issues seriatim.

ISSUE 1:

Whether the Claimant has established his claims in this suit?

It is settled law that in civil suits the legal burden of proof is on the claimant to prove to the satisfaction of the Court the assertions made in the pleadings. He has the onus of proving his case by the preponderance of evidence and failure of the defendant to prove or his refusal to testify cannot alleviate the primary burden on the claimant. See the following decisions on the point: *Urneojiako Vs Ezenamuo (1990) 1 NWLR (Pt 126) 253*, *Ogunyade Vs Osunkeye (2007) 15 NWLR (Pt 1057) 218*, *Oyenyin 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. See- *Arum Vs Nwobodo (2004) 9 (Pt. 878) 411*, *Olaleye Vs Trustees of ECWA (2011) 2 NWLR (Pt. 1230) 1*.

Thus in the instant suit the burden is on the Claimant to proof his case. Essentially, this suit is a paternity suit. The Claimant asserts that he is the eldest surviving male child of late Hon. Vincent Ebosele Ebhodaghe Ogun of Idumughulu Village, Amedokhian-Uromi (hereinafter referred to as “the deceased”). That he is the proper person to perform the final funeral rites of the deceased and that the purported final funeral rites performed by the defendant for the deceased is null and void. The question of whether the Claimant is senior in age to the Defendant is not in dispute. The dispute is whether on the preponderance of evidence, the Claimant has proved that the deceased was his biological father.

Generally, there are three major ways of proving the paternity of a child under Nigerian law. They are: (1) Paternity by existing marriage: A child born during the pendency of a valid marriage between a couple is automatically presumed to be legitimate; (2) Paternity by subsequent marriage to the mother: This occurs when a child is born at a time when the mother was not married to the father and after whose birth the mother and father entered into a valid marriage; and (3) Paternity by acknowledgement by the father accepting paternity of the child: This includes paying for the hospital bills and upkeep of the child, introducing the child to his family as his child etc.

Apart from the three ways enumerated above, there is also the scientific or forensic means of proving paternity. This is through a DNA examination. The DNA test has to do with the use of genetic analysis, scientifically, to determine the paternity of a child, i.e., whose male spermatozoa fertilized the egg of a female. This is usually applicable and

relevant where there is dispute as to the paternity of a child, or where there are disputing claims or uncertainty as to the paternity of an individual. See the case of *Olayinka Vs Adeparusi & Anor (2011) LPELR 8691 CA*, where the Court of Appeal, per *Denton West JCA* stated thus:

"... If a party is claiming paternity, it is trite that a Court of law should be allowed to determine same on proof of evidence relating to paternity, which could only be done by referral for a DNA test of the parties involved. After such test the Court has a duty to declare, the actual father of the child in dispute in consonance with the evidence at its disposal. DNA, that is, "Deoxyribonucleic acid" is a molecule that contains the genetic code of any organism. It is hereditary and has become a euphemism for scientific analysis of genetic constitution, to determine one's roots."

In the instant suit, on proof of paternity by existing marriage, it is common ground that the deceased never married the Claimant's mother. The Claimant himself admitted that the deceased never married his mother but got married to the Defendant's mother four years after he was born. On paternity by subsequent marriage to the mother, there is no evidence from either the Claimant or the Defendant that the Claimant's mother got married to late the deceased after the Claimant was born. So we are left with proof of paternity by the acknowledgement by the father or through the forensic approach of a DNA test.

From the evidence adduced in this suit, the Claimant is relying on paternity by the acknowledgement of the father through the payment of the hospital bills and upkeep of the child, introducing the child to his family as his child etc. This was the thrust of the evidence adduced by the Claimant at the trial. However, the Defendant led evidence in a spirited attempt to refute the claims of the Claimant.

The issue to be resolved at this stage is whether the evidence adduced by the Claimant is credible and cogent enough to establish the fact that he is the son of the deceased.

In proof of his case, the Claimant told the Court that his mother was impregnated by the deceased when the deceased was a student at Igueben Teacher's Training College as far back as sometime in 1958 and that he is the product of the aforesaid pregnancy. The CW2 who is a younger sister to late Hon. Vincent Ogun told Court that her brother, Hon. Vincent Ogun impregnated the claimant's mother while he, Hon. Vincent Ogun was a student in Igueben. The CW 1 and C.W 2 also testified that they were aware of the claimant's paternity by the deceased and that the deceased's mother took care of the claimant at the instance of the deceased.

However, the Defendant vehemently challenged the assertion of the Claimant that he is the son of the deceased. In her evidence in support of the Defendant, the wife of the deceased who testified as the D.W.1 stated that during his lifetime, her husband never mentioned that he had the Claimant out of wedlock. That immediately after they got married they lived together with her husband's mother for eight years and her mother in law never mentioned the existence of the Claimant or his alleged mother.

She said that the deceased had nine children and she gave the names of all the children including a son who was born outside wedlock named Oseyili Ogun. She informed the Court that the said Oseyili Ogun lived and grew up in the same home with the defendant and his siblings and she took care of him as her own son. She maintained that if the claimant was her husband's son, he would have had unfettered access to her husband just like the other children.

The D.W.1 narrated how in a bid to lay the matter of the paternity of the Claimant to rest, the deceased invited members of his family for a meeting at Amedokhian-Uromi where he informed everyone unequivocally that the Claimant is not his son. The meeting was recorded by video and photographs. The video recorded compact disc was admitted in evidence through the videographer (D.W.2) as Exhibit J. The said video recording was played in the open Court.

Clearly the issue to be resolved at this stage borders on the credibility of the witnesses. The Claimant gave very lucid evidence of some vital facts to support his proof by acknowledgment of paternity by the deceased. They include: how the Claimant's mother, allegedly relocated to Uromi to live with the deceased's mother for some time; that the deceased allegedly paid the maternity bills; that the said deceased's mother took care of him after he was born; that his father provided his school; that he sometimes visited his father while he was a member of the then Bendel State House of Assembly; and that his father allegedly sent his kinsmen to represent him in his marriage ceremony.

Incidentally, most of these allegations made by the Claimant were not backed up with sufficient evidence. Unfortunately for him, his mother who would have been the best person to say the person who impregnated her is not alive to testify. Furthermore, the deceased's mother who allegedly took care of him is also late. The Claimant's allegations that the deceased was responsible for his mother's maternity bills and his school fees were not substantiated with any documentary proof. It is settled law that documentary evidence is a hanger upon which to base other pieces of evidence. See the case of *Olowu v Building Stock Ltd (2018)1 NWLR Part 1601 Page 343 at 398 Para E-H*.

In the case of *EBEM & ANOR v. NSEYEN (2016) LPELR-40122(CA)*, the Court stated *inter alia* thus: ***“Documentary evidence is the best form of evidence because they are not only unassailable but are more authentic than oral evidence, In Aiki vs. Idowu, (supra) the Court held: “Documents when tendered and admitted in evidence are like words uttered and do speak for themselves, they are more reliable and authentic as they are neither transient or subject to distortion and misinterpretation but remains permanent and indelible through the ages.”***

In the instant case, the Claimant's allegations appear to be hanging in the air without any documentary support. He did not tender any documentary evidence to substantiate his oral testimony in court. He could not provide any certificate of birth, academic certificate, pictures or any other documentary evidence to establish his relationship

with the deceased. As the learned counsel rightly pointed out, there is no documentary evidence before the court to show that the Claimant bears the surname of the deceased.

On the part of the Defendant, he tendered a plethora of salient documents to support his defence such as the Order of Funeral Requiem Mass which was admitted as Exhibit G. In Exhibit G, the names and pictures of all the deceased's children were listed therein. The Defendant also tendered the Video CD admitted as Exhibit J in which the deceased allegedly denied the paternity of the Claimant.

Furthermore, there are some apparent contradictions in the Claimant's case. For example, the CW1 under cross examination testified that he was present at the meeting conveyed by the deceased and that at the meeting, the deceased did not deny claimant's paternity. But under the same cross examination, the same witness denied being in the said meeting. Furthermore, in her testimony in Court, the C.W.2 stated that she did not inform those present at the meeting that the Claimant is not the son of the deceased.

However, after the video clip was tendered and played in Court, the Claimant was recalled to give further evidence. Under cross examination upon his recall, the Claimant admitted that he saw the C.W.1 and the C.W.2 in the meeting when the video clip Exhibit J was played in this Court. He said that in the video clip, he saw when the C.W. 1 and 2 stood up to address people in the meeting. Moreover, the Claimant admitted that in the video clip, he saw when the C.W.2 denied that the deceased is the Claimant's father, thus contradicting the story of the C.W 2 that she did not inform the meeting that the Claimant is not the deceased's son.

Curiously, no reason was given for the apparent prevarication of these witness on these salient points of what transpired at the meeting where the paternity was allegedly denied. I agree wholeheartedly with the learned counsel for the Defendant that in the circumstances, the evidence of these witnesses are incapable of belief.

As explicated by the Supreme Court in the case of **EZEMBA V. IBENEME & ANOR. (2004) LPELR-1205(SC) P. 22, para.G- A:**

“No witness who has given on oath to material or inconsistent evidence is entitled to the honour of credibility. Such a witness does not deserve to be treated as a truthful witness.”

A more fundamental aspect of the Claimant's case is that from the totality of the evidence before the Court, the Claimant is actually not denying the fact that the deceased denied his paternity in the said meeting. In paragraphs 49, 50, 51 and 52 of the Claimants ***Consequentially Amended Statement of Claim*** the Claimant averred as follows:

“ 49 The claimant further states that the said meeting was pre-arranged by defendant's mother and some of Honourable Ogun's kinsmen who prevailed on him to deny the claimant's paternity and pave way for the defendant to emerge as the eldest male child of Hon. Vincent Ogun.

50. The claimant states that himself, members of the Idumughulu Community who knew about his paternity and members of his mother's family were not invited to the said meeting to hear their own side of the matter.

51. The claimant states that what transpired at the said meeting did not border on determination of the claimant's paternity but a mere denial of claimant's paternity by Honourable Vincent Ogun.

52. The claimant avers that under Esan Native Law and custom of Amedokhian Uromi, no verdict is obtained without hearing from both parties to a dispute as in the instant case."

Furthermore, in *paragraph 5 of his Further Statement on Oath* which he adopted after the video was played in Court, he categorically stated thus:

"5. That what transpired at the said meeting did not border on determination of the claimant's paternity but a mere denial of my paternity by my father, Honourable Vincent Ogun." (Underlining, mine)

In effect, what the Claimant is saying is that rather than acknowledging his paternity, what the deceased did was to deny his paternity before his kinsmen. The explanation proffered by the Claimant that the deceased denied his paternity because the Defendant's mother and some of the deceased's kinsmen prevailed on him in order to pave way for the Defendant to emerge as his eldest son appears rather fickle and feeble. Such speculations cannot sustain the burden on the Claimant to prove paternity by the father acknowledging paternity of the child.

Furthermore, on the allegation of the Claimant that under native law and custom, before a person can deny paternity, he must swear with a she-goat which shall be slaughtered by his kindred and Elders of his Quarters and sacrificed to the gods of the land, I am of the view that the Claimant did not adduce convincing evidence to prove such a custom. It is settled law that except where a custom is so notorious that the Court can take judicial notice of it, the burden of proving a particular custom lies upon the person alleging its existence. See *Section 16 (1) & (2) of the Evidence Act, 2011* and the following cases: *OKPOWAGHA & ANOR VS. EWHEDOMA (1970) All NLR 208, AGBAI & ORS VS OKOGBUE (1991) 9-10 SCNJ 49 or (1991) 9-10 SC 57 and KARREEN & ORS VS. OGUNDE & ANOR (1972) All NLR 75.*

Still on the issue of the failure of the deceased to swear, I agree with the submission of learned counsel for the Defendant that during cross examination, the Claimant admitted that the deceased was a Christian. Evidence was adduced to show that he was married in the church and his funeral service was conducted in a Church. I think it would be unexpected for someone who has embraced Christianity to engage in swearing with a she-goat which shall be sacrificed to the gods of the land.

On the complaint of the Claimant that he was denied fair hearing when the deceased denied his paternity, I agree entirely with the learned counsel for the Defendant that the right to fair hearing contemplated by section 36(1) of the 1999 Nigerian Constitution is limited to

a hearing on the determination of the rights and obligations of a person before a competent court of law or tribunal. It does not include the incident of denial of paternity.

For the avoidance of doubt *section 36(1) of the 1999 Nigerian Constitution* provides as follows:

“36. (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”(Underlining, mine)

It is evident that a meeting convened to deny paternity is clearly not *a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality* as envisaged under section 36(1) of the 1999 Constitution.

In the face of the palpable weakness of the evidence adduced by the Claimant to establish paternity through the acknowledgment of the deceased, the viable option which the Claimant may have explored is the forensic means of proof through a DNA test. Incidentally in his evidence at the trial, the Claimant himself testified that at the palace of the Onojie of Uromi, it was resolved that although it was within his right to perform the final burial rites of his deceased father in his capacity as the eldest surviving male child, a DNA test should be conducted to determine the paternity of the claimant while the burial activities should be put on hold pending the outcome of the said test to avert unnecessary hostilities between the parties.

One would have expected the Claimant at that stage to invoke the powers of the courts to secure a court order for a DNA test to be performed to determine the salient issue of paternity. In the case of *ANOZIA v. NNANI & ANOR (2015) LPELR-24277(CA), ITA GEORGE MBABA, J.C.A* expounded thus:

“DNA test has to do with the use of genetic analysis, scientifically, to determine the paternity of a child, i.e, whose male spermatozoa fertilized the egg of a female, and, I think, this is usually applicable and relevant where there is dispute as to the paternity of a child, or where there is disputing claims or uncertainty as to the paternity of an individual”

Even when the body is already buried, in an appropriate case such as this, upon the application of a party, the court can make an order for the body to be exhumed to enable the forensic pathologist to conduct a DNA test to determine paternity. Sadly, instead of exploring this salient option, the Claimant relied on the rather contradictory proof of alleged acknowledgment of paternity.

On the whole, I am of the view that the Claimant has failed to establish his claims. Issue 1 is therefore resolved against the Claimant.

ISSUE 2:

Whether the Defendant/Counter-Claimant has established his claims in this suit?

I will commence by pointing out that a counter claim is a separate action, independent of the Claimant's claim. Therefore the burden and standard of proof on the Defendant is the same with that required of the Claimant. In the case of *Onazi & Anor V C.G.C (Nig) Ltd & Anor (2015) LPELR-40583 (CA)*, a counter claim was defined thus: *"It is elementary law that a counter claim is an independent action which is usually appended to the main or principal claim for convenience of determination. See Ogbonna V A-G Imo State (1992)1 NWLR (Pt.220) 647; Usman V Garke (2013) 14 NWLR (Pt.840) 261.*

It has been described as *'a weapon of defence'* which enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. It must however, be directly related to the principal claim but not outside and independent of the subject matter of the claim. See *Nsefik V Muna (2014) 2 NWLR (Pt.1390) 151 at 184, Per Ariwoola, JSC. Per Ogbuinya, JCA pp. 37-38, Paras E-B.*

In the instant case, the Defendant is claiming as follows:

(i)A DECLARATION that the Claimant is not one of the children of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that the rejection of the paternity of the claimant by Late. Hon. Vincent Ebosele Ebhodaghe Ogun during his lifetime is lawful and proper;

(ii)A DECLARATION that the defendant is the eldest male surviving child of Late. Hon. Vincent Ebosele Ebhodaghe Ogun of Amendokhian-Uromi in Esan North East Local Government Area of Edo state;

(iii)A DECLARATION that the defendant is the proper person to perform the burial rites/ceremony of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that having performed the burial ceremony is entitled to inherit the 'Igiogbe' in accordance with the Esan Native Law and Custom of Amedokhian-Uromi;

(iv)A DECLARATION that the final Burial rites/ceremony performed by the defendant for late Hon. Vincent Ebosele Ebhodaghe Ogun between the 26th and 30th of April, 2017 is proper and lawful;

(v)A DECLARATION that late Hon. Vincent Ebosele Ebhodaghe Ogun having being married to Mrs. Rosaline Ogun under the Marriage Act and died intestate his property is to be shared in accordance with the Administration of the Estate Law of Bendel State as applicable in Edo State; and

(vi)AN ORDER of perpetual injunction restraining the claimant, his agents, servants and privies from interfering in any manner whatsoever with the defendant's position as the eldest male surviving child of late Hon. Vincent Ebosele Ebhodaghe Ogun.

In proof of his counter-claim, the Defendant did not testify in person but he called four witnesses, to wit: DW1 Roseline Ogun, DW2 Madam Esther Okoduwa, DW3 Rasaki Akin Adesina and DW4 Smart Ebhojeaye Aitiegbemine.

The Claimant has raised some salient issues on the failure of the Defendant to testify in proof of his counter-claim. According to the learned counsel for the claimant, the failure of the Defendant to testify in support of his case implies that he has abandoned his defence

and counter-claim. The Claimant also queried the failure of the Defendant to file separate depositions in support of the counter-claim.

It is trite law that parties may prove their case without physically appearing to testify in the Court. In the case of *ERINFOLAMI v. SOCIETE GENERAL BANK NIG. LTD. [2007] LPELR-8763 (CA)*, p. 52, paras B-E, the Court of Appeal, per *Agube JCA* expounded thus:

“The fact is that there is no rule of practice that requires a plaintiff in a civil suit to appear in person to prove his case if he can otherwise do so and there is no rule which compels a defendant to appear personally in Court and testify before it. He may successfully defend an action against him and Plaintiff or defendant may prove his case without physically appearing to testify in Court. See also NEWSPAPER CORPORATION v. ONI [1995] 1 SCNJ 218 at 239-234; ABIDOGUN v. AROWOMOKUN [1990] 6 NWLR 619.”

Furthermore, on whether a counter claimant must file a witness statement on oath in support of his counter claim I must point out that there is no law requiring that where there is a Statement of Defence and Counterclaim, a separate witness statement on oath has to be filed for the defence and another one for the counter-claim. While it is conceded that a counterclaim is a separate and independent action which the counter-claimant must lead evidence to prove, the practice is that the counter-claimant normally presents his evidence in defence and in support of the counter-claim at the same time. He does not defend the claim and prove the counterclaim at different times. See *OROJO v. L.R. AVIONICS TECHNOLOGIES LTD (2018) LPELR-43797(CA)* aptly cited by learned counsel for the Defendant.

Thus, the objections raised by the learned counsel for the Claimant on the above points are clearly misconceived and consequently overruled.

Having disposed of the preliminary issues, I will now resolve Issue 2 on its merits. As earlier stated in this judgment, a counter-claim is a separate, independent and distinct action and the the Counter-Claimant must prove his claim against the Claimant before obtaining judgment on the counter-claim.

In Relief 1 the Counter-Claimant is seeking a declaration that the Claimant is not one of the children of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that the rejection of the paternity of the claimant by Late. Hon. Vincent Ebosele Ebhodaghe Ogun during his lifetime is lawful and proper. Having resolved Issue 1 against the Claimant, it is evident that Relief 1 automatically succeeds.

In Relief 2, the Counter-Claimant is seeking a declaration that he is the eldest male surviving child of the deceased. At the trial, the D.W.I gave very comprehensive evidence of the hierarchy of the children of the deceased. According to her evidence which I find quite credible, the Counter-Claimant is the eldest male child of the deceased. Since the Claimant has failed to establish the fact that the deceased was his father, upon the evidence adduced

on behalf of the Counter-Claimant, I hold that the Counter-Claimant is unquestionably the eldest male surviving child of the deceased.

In Reliefs 3 and 4 the Counter-Claimant is seeking declarations that he is the proper person to perform the burial rites, to inherit the 'Igiogbe' of the deceased in accordance with the Esan Native Law and Custom of Amedokhian-Uromi and that the final Burial rites/ceremony performed by him between the 26th and 30th of April, 2017 is proper and lawful.

The said Reliefs 3 and 4 will flow naturally from Reliefs 1 and 2. At the trial it was common ground that the eldest male surviving child of the deceased is the proper person to perform the burial rites and to inherit the 'Igiogbe' of the deceased in accordance with the Esan Native Law and Custom of Amedokhian-Uromi. Upon the evidence adduced by the Counter-Claimant which I find very credible, I hold that Reliefs 3 and 4 should be granted.

In Relief 5, the Counter-Claimant is seeking a declaration that the deceased having being married to Mrs. Rosaline Ogun (D.W.1) under the Marriage Act and died intestate his property is to be shared in accordance with the Administration of Estate Law of Bendel State as applicable in Edo State. At the trial, the Counter-Claimant led credible evidence which was uncontroverted that the D.W.1 got married to the deceased in the Catholic Church and they were issued a marriage certificate which was tendered and admitted as Exhibit B. Furthermore, there is evidence that the deceased died intestate.

I agree entirely with the learned counsel for the Counter-Claimant that in a case such as this where the deceased who died intestate contracted a marriage in accordance with the Marriage Act, his properties would be distributed in accordance with the provisions of the Administration of Estate Law of Bendel State, now applicable to Edo State. See the decision of the Supreme Court in the cases of *SALUBI V NWARIAKU (2003) 7 NWLR, pt.819 at pages 451-452, Para E-E*; and *OBUSEZ & ANOR V. OBUSEZ & ANOR (2007) LPELR-2197(SC) at Page 24-25, Para A-C* rightly relied upon by learned counsel for the Counter-Claimant.

In Relief 6, the Counter-Claimant is seeking an order of perpetual injunction restraining the Claimant, his agents, servants and privies from interfering in any manner whatsoever with the Counter-Claimant's position as the eldest male surviving child of the deceased.

It is settled law that an order of perpetual injunction is usually given as a necessary consequential relief to safeguard the rights of a claimant where a declaratory order has been made in favour of the claimant. It is a consequential relief which naturally flows from the declaratory order sought and granted. The Supreme Court has held severally that the grant of an order of perpetual injunction to a successful claimant consequent upon the final determination of the rights of the parties to the dispute, is meant to prevent permanently, the infringement by the losing party of the rights of the successful party, and to obviate the necessity of bringing multiplicity of actions in respect of the subject matter of the dispute. See *Goldmark (Nig.) Ltd & Ors v. Ibafor Co. Ltd (2012) 10 NWLR (pt.1308) 29; Anyawu*

& Ors v. Uzowuaka & Ors (2009) 13 NWLR (pt.1159) 445 and F.C.D.A & Ors v. Unique Future Leaders International Ltd (2014) LPELR - 23170 (CA).

On that note, I hold, that the Counter-Claimant is entitled to an order of perpetual injunction restraining the Claimant, his agents, servants and privies from interfering in any manner whatsoever with the Counter-Claimant's position as the eldest male surviving child of the deceased.

Having held that the Counter-Claimant is entitled to all the Reliefs which he seeks in the Counter-Claim, I resolve Issue 2 in favour of the Counter-Claimant.

In the event, I hereby dismiss the Claimant's Claim and grant the Counter-Claim of the Defendant/Counter-Claimant as follows:

(i)A DECLARATION that the Claimant is not one of the children of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that the rejection of the paternity of the claimant by Late. Hon. Vincent Ebosele Ebhodaghe Ogun during his lifetime is lawful and proper;

(ii)A DECLARATION that the Defendant is the eldest male surviving child of Late. Hon. Vincent Ebosele Ebhodaghe Ogun of Amendokhian-Uromi in Esan North East Local Government Area of Edo state;

(iii)A DECLARATION that the Defendant is the proper person to perform the burial rites/ceremony of Late. Hon. Vincent Ebosele Ebhodaghe Ogun and that having performed the burial ceremony is entitled to inherit the 'Igiogbe' in accordance with the Esan Native Law and Custom of Amedokhian-Uromi;

(iv)A DECLARATION that the final Burial rites/ceremony performed by the defendant for late Hon. Vincent Ebosele Ebhodaghe Ogun between the 26th and 30th of April, 2017 is proper and lawful;

(v)A DECLARATION that late Hon. Vincent Ebosele Ebhodaghe Ogun having being married to Mrs. Rosaline Ogun under the Marriage Act and died intestate his property is to be shared in accordance with the Administration of the Estate Law of Bendel State as applicable in Edo State; and

(vi)AN ORDER of perpetual injunction restraining the claimant, his agents, servants and privies from interfering in any manner whatsoever with the defendant's position as the eldest male surviving child of late Hon. Vincent Ebosele Ebhodaghe Ogun.

The sum of ₦50, 000.00 (fifty thousand naira) costs is awarded in favour of the Defendant/Counter-Claimant.

Hon. Justice P.A.Akhihero

29/07/2020

COUNSELS:

DR. P.E.AYEWOH-ODIASE-----CLAIMANT

ANTHONY OSULA ESQ.-----DEFENDANT/COUNTER-CLAIMANT