

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

THURSDAY, 15TH MARCH, 2018

SUIT NO. B/169/2014

BETWEEN:

MRS. DORA IMARIAGBE í í í í í í í í CLAIMANT

AND

1. VICTOR OSUNDE
2. BENSON IMARIAGBE } í í í í í í DEFENDANTS

J U D G M E N T

The claimant, Dora Imariagbe by paragraph 14 of the amended Statement of Claim filed on 20/5/2014 claims as follows:

1. A Declaration that the building and premises known as No. 1 Imariagbe Street, Evbuotubu Quarters, Benin City is jointly owned by the Claimant and her late husband.
2. A Declaration that the successor to the real and personal estate of Imariagbe is governed by Section 49 (5) of the Administration of Estate Law 1976 (as applicable to Edo State) to the exclusion of Bini Customary Law.

3. An Order that the grant of letters of Administration in Solemn form for the administration of the said Estate be issued to Mrs. Dora Imariagbe.
4. Perpetual Injunction restraining the defendants from ejecting the Claimant from No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City or assaulting, molesting, embarrassing, interfering with the deceased husband's estate and/or committing any act therein competing with and/or inconsistent with the Claimant's legal right to the said property/properties.

The Defendants filed their joint Statement of Defence and the 2nd Defendant's Counter Claim on 29/2/2016 and by paragraph 43 thereof Counter claims against the Claimant as follows:

- (a) A declaration that the property of No. 1, Imariagbe Street, Evbuotubu Quarters, Benin is the Igiogbe of late Mr. Peter Imariagbe and the 2nd Defendant/Counter Claimant is entitled to inherit same under Bini native law and custom being the biological first son of the deceased who died intestate.
- (b) An Order directing the Claimant herein to hand over to the 2nd Defendant/Counter Claimant all the title

documents in respect of late Mr. Peter Imariagbe's property at No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City, being his Igiogbe.

- (c) A declaration that the houses and premises known as Nos. 205A, 205B and 205C Evbuotubu Road, Evbuotubu Quarters, Benin City are the estate of late Mr. Peter Imariagbe and the 2nd defendant is therefore entitled to the management of same as an administrator under the Bini native law and customs as the first son for himself and on behalf of other children of late Mr. Peter Imariagbe who died intestate.
- (d) An Order directing the Claimant therein to hand over the title documents to the said Nos. 205A, 205B and 205C, Evbuotubu Road, Evbuotubu Quarters, Benin City to the 2nd Defendant/Counter Claimant.
- (e) An Order of perpetual Injunction restraining the Claimant from further harassing, intimidating and embarrassing either by herself and/or agents or hired thugs, servants and any other person acting through or under her the 2nd Defendant/Counter Claimant and other children of late

Mr. Peter Imariagbe from entering their late father's houses at No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City and Nos. 205A, 205B and 205C Evbuotubu Road, Evbuotubu Quarters, Benin City.

The Claimant on 28/4/17 failed to appear in court and her case was struck out for want of diligent prosecution. On 24/5/17, 2nd Defendant/Counter Claimant gave evidence in proof of his Counter claim. The case of the 2nd Defendant/Counter Claimant is as follows:

Claimant cohabited with his now deceased father Mr. Peter Imariagbe as one of his concubines while his mother Madam Grace Imariagbe Nee Asemota was the first wife of his father married under Bini Native Law and Custom. His mother had two sons for their late father, he being the first son. His father married another wife who had Osaro Imariagbe. Victoria Ogbe and late Kate Oviasogie had a son, Gregory and daughter Rita respectively for his father. Later their father sent his two wives packing out from his house in 1979 and 1980 because of incessant trouble with Claimant. That his father lived, died on 27/12/2007 and was buried on 28/2/2008 in accordance with Bini Native Law and Custom at No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City. This is his Igiogbe on a land measuring 100 feet by 100 feet and comprising of a two storey building. His father had two other

storey buildings. In order to compensate the Claimant for cohabiting with him, his father built a house along Owegie Street, Off Ekenwan Road, Benin City for her since she had no child for him. The claimant has been in-charge of all his father's estate collecting the rents even from the Igiogbe. She has all the title documents to the properties. He gave evidence of threats from the Claimant and hired thugs.

The Claimant/Respondent to the counter claim, failed to defend the counter claim. The 2nd Defendant/Counter Claimant's counsel raised two issues for determination in his final written address viz:

1. Having regard to the circumstances of this case, whether the 2nd Defendant/Counter Claimant is entitled to the reliefs sought by him in his counter claim.
2. Having regard to the circumstances whether this Honourable Court can proceed on a trial of the 2nd Defendant/Counter Claimant's counter claim in the absence of the claimant.

On issue (i), the learned counsel, G.A. Asemota Esq. submitted that it is settled law that where evidence given by a party in any proceedings is not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the facts of the case as presented by the 2nd Defendant/Counter Claimant to act on the evidence before it. He relied

on **Asafa Foods Ltd v Alraihe Nig Ltd** (2002) 22 WRN 1, Ratio 1. He urged the court to resolve the issue in favour of the 2nd Defendant/Counter Claimant.

Secondly, learned counsel submitted that where evidence is unchallenged or uncontroverted by the adverse party, the evidence should be taken as admitted by the other party and judgment should be entered on it, citing **Health Care Products (Nig) Ltd v Bazza** (2003) FWLR (part 162), 1937 at 1945, ratio 10.

Thirdly, counsel submitted that the counter claim is an independent action which is distinct and separate from that of the Claimant and same is entitled to survive upon the failure or striking out of the claimant's claim relying on **Anambra State Government v Gemex Inter. Ltd** (2011) 15 WRN 77 at 83, Ratio 7.

Furthermore, the learned counsel submitted that in Nigeria, children not born in wedlock (marriage) Ordinance or who are not issues of a marriage under native law and custom, but born without marriage can also be regarded as legitimate children if paternity has been acknowledged by the putative father relying on **Motoh v Motoh** (2011) 42 WRN 138 at Ratio 16.

On issue (ii), counsel submitted that the court can determine the 2nd Defendant/Counter Claimant's Counter claim in the absence of the claimant

who has not filed any defence to same. He urged the court to consider the 2nd Defendant/Counter claimant's case as presented by him and grant all the reliefs sought by him relying on **Olatunyi v Adedapo** (2014) 5 WRN 149 at 156, Ratio 7.

He further submitted that when a party is put on notice of a pending process or suit against him but elects to stall the progress of the proceedings by an epileptic participation, a court is at liberty to proceed without such a party. He relied on **Olatunji v Adedapo** supra at 156, Ratio 7.

He urged this Honourable Court to enter judgment for the 2nd Defendant/Counter Claimant as per his Counter claim.

I have carefully and thoroughly read the evidence adduced by the 2nd Defendant/Counter Claimant and all the processes filed in this suit. I have also read the address of learned counsel.

As regards the first issue raised by the 2nd Defendant/Counter Claimant and from the evidence before me, the 2nd Defendant/Counter Claimant is the first son of the deceased (born in 1966) whose mother is Madam Grace Imariagbe and was married to the deceased under Bini Native Law and Customs. The claimant, Mrs. Dora Imariagbe's bride price was never paid. She was only a concubine who cohabited with the late father of the 2nd defendant/counter claimant. The evidence also revealed that the 2nd

Defendant/Counter Claimant and the other children of the deceased participated in the full burial rites of their late father which automatically entitles the 2nd Defendant/Counter Claimant to the Igiogbe of his late father (Mr. Peter Imariagbe).

The Supreme Court in **Idehen v Idehen** (1991) 6 NWLR, (pt. 198) page 387 at 409, paragraph G defined Igiogbe as the house where the deceased lived in his life time. See òA hand book on some Bini Customs and Usages issued on the authority of the Omo Nø Oba Erediauwa, Oba of Beninö.

In **Lawal Osula v Lawal Osula** (1995) 9 NWLR (pt. 419) SC 259, the court held that the òIgiogbeö cannot be taken from the eldest son who succeeds to the title or office.

The Benin Traditional Council in its hand book on some Benin Customs and Usages supra at page 14, paragraph H states that by Bini custom, it is the eldest son that automatically inherits the Igiogbe of his deceased father while the remaining properties, if any are shared among the remaining children.

Also see **Mark Ugbo & Anor v Sunday Asemota** suit No. B/491/79 of 30/3/74 where the court held that Bini custom is that when a man dies, the

eldest surviving son of the deceased inherits the house but if the deceased leaves many houses, the other houses go to his brothers and sisters.

In **Addah & Ors v Ubandawaki** (2015) Vol. 241 LRCN 1 at page 35, per Ogunbiyi, JSC, stated thus: "A Claimant who asserts to be entitled to a relief has the onus of establishing its case without regard to the defendant's case." In this instant case, the 2nd Defendant/Counter claimant has established his case by his evidence which is unchallenged and so he is entitled to the reliefs as claimed on minimal proof.

I therefore find that the 2nd Defendant/Counter Claimant is entitled to the reliefs sought by him in his Counter claim in the absence of any defence put forward by the claimant/Respondent.

On issue (ii) raised by the 2nd Defendant/Counter Claimant, the law is trite and enjoins a court to act on an unchallenged evidence. See **Kayili v Yilbuk & Ors** (2015) Vol. 244 LRCN, page 142 JJ.

In the circumstance, I hold that this Honourable court can proceed to judgment on the 2nd Defendant/Counter Claimant's counter claim in the absence of the Claimant/Respondent.

Consequently, I enter judgment in favour of the 2nd Defendant/Counter Claimant as he has proved on minimal proof that he is the one entitled to the building and premises known as No. 1, Imariagbe

Street, Evbuotubu Quarters, Benin City being the first son of the late Mr. Peter Imariagbe entitled to the Igiogbe.

- (ii) I therefore order the Claimant/Respondent to hand over to the 2nd Defendant/Counter Claimant all the title documents in respect of late Mr. Peter Imariagbe's property at No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City being his Igiogbe.
- (iii) I declare that the houses and premises known as Nos. 205A, 205B and 205C Evbuotubu Road, Evbuotubu Quarters, Benin City are the estate of late Mr. Peter Imariagbe and the 2nd Defendant/Counter claimant is therefore entitled to the management of same as an administrator under the Bini native law and customs as the first son for himself and on behalf of other children of late Mr. Peter Imariagbe who died intestate pending the sharing.
- (iv) I therefore order the Claimant/Respondent to hand over the title documents to the said Nos. 205A, 205B and 205C Evbuotubu Road, Evbuotubu Quarters, Benin City to the 2nd defendant.

- (v) I further grant perpetual injunction restraining the claimant from further trespassing, harassing, intimidating and embarrassing either by herself and/or agents or hired thugs, servants and any other person acting through or under her the 2nd Defendant/Counter Claimant and other children of late Mr. Peter Imariagbe from taking possession of their late father's houses at No. 1, Imariagbe Street, Evbuotubu Quarters, Benin City and No. 205A, 205B and 205C Evbuotubu Road, Evbuotubu Quarters, Benin City.

Hon. Justice E. F. Ikponmwen,
Chief Judge.
15/03/2018

Counsel:

Chief Dan Ose Okoh (SAN) with W. O. Ovbiebo Esq. í for the Claimant.

G. A. Asemota, Esq. with T.J. Peretei Esq. í for the Defendants/Counter Claimants.