

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIRO,
ON WEDNESDAY THE 24TH
DAY OF MARCH, 2021

BETWEEN:

SUIT NO. HCU/32/2014

1. MR. EDONMHEN MONDAY -----CLAIMANT

AND

1. MR. THOMAS UKONI EIGBIBHALU

2. CHIEF PATRICK IMOISILI

3. MR. AUGUSTINE IYERE

} -----DEFENDANTS

JUDGMENT

By a further amended Statement of Claim attached to a motion dated the 18th day of February 2020, the Claimant is seeking the following reliefs:

- (i) A declaration that the installation of the Claimant as the substantive Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni – Uromi in September 1990 is valid, subsisting and in tandem with the Esan native law and custom of Idumu-Odion, Ukoni-Uromi;
- (ii) A declaration that the Claimant is the rightful Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi having been properly installed in accordance with Esan native law and custom of Ukoni-Uromi;
- (iii) A declaration that the Chief Priest of Egbaken Shrine is the traditional head of Idumu-Odion and the owner of all the landed property attached to the stool of Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi;
- (iv) A perpetual injunction restraining the 1st Defendant from presenting and/or parading himself as the Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi; and

- (v) An order of perpetual injunction restraining the Defendants, their agents, servants and privies from further interfering with the Claimant's position as the substantive Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi.

By the Defendants' Amended Joint Statement of Defence and Counter-Claim filed on the 13th day of March, 2020, the 1st Defendant *inter alia* counter-claimed against the Claimant as follows:-

- (a) A DELARATION that the 1st Defendant/Counter-Claimant is the rightful person entitled to occupy the position and perform the duties and functions of Chief Priest, a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi, a place within the jurisdiction of this Honourable Court;
- (b) AN ORDER of perpetual injunction restraining the Claimant/Defendant to counter-claim from parading himself as Chief Priest and performing the duties and functions of Chief Priest a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;
- (c) AN ORDER of perpetual injunction restraining the Claimant/Defendant to counter-claim from interfering with the 1st Defendant's rights and position and performing the duties and functions of Chief Priest a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;
- (d) A Declaration that the 1st Defendant in his capacity as the Chief Priest a.k.a Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi is the rightful person entitled to apply for and be granted Statutory Right of Occupancy over the parcels of land/properties forming parts of the land/estate of the rightful Chief Priest a.k.a Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;
- (e) An Order directing the Claimant/Defendant to counter-claim to render account and hand over to the 1st Defendant/Counter-Claimant the proceeds from the counter-claimant's illegal and unauthorized sale of portion of land and/or property forming part of the estate of the 1st Defendant including the sum of N1,000,000.00 (One Million Naira) unlawfully received by the Claimant/Defendant to counter claim from one Mr. Raymond Ebhodaghe in respect of 1st Defendant's land measuring 100ft by 150ft lying, situate and being at Idumu-Odion, Ukoni-Uromi sold by the Claimant/Defendant to counter – claim to the said Mr. Raymond Ebhodaghe on the 12th day of March, 2011;
- (f) The sum of N1, 000,000.00 (One Million Naira) being general damages suffered by the 1st Defendant/Counter Claimant as a result of the Claimant/Defendant to Counter-Claim's usurpation of the 1st Defendant's position as Chief Priest of Egbaken juju shrine since year 2014 and for the illegal and unauthorized sale of the 1st Defendant's land and property, and unlawful appropriation of the 1st defendant's entitlement as Chief Priest of Egbaken juju shrine.

At the hearing, the Claimant testified and called one Monday Iboi who testified as the CW I. The sum total of the Claimant's case as can be deduced from his evidence is that the Claimant and the Defendants are natives of Idumu-Odion, Ukoni-Uromi. The Claimant and the

1st Defendant are cousins from the same grandfather, Pa. Oyemiror and great-grand father, Pa. Egbikor.

The Claimant testified that he was installed as the Chief Priest of Egbaken shrine, Idumu-Odion, Ukoni-Uromi by the Ikegbele (Elders' Chief Messenger) at the instance of the elders and the then Odionwele of Idumu-odion, Ukoni-Uromi, Pa. Iyere Ogbagba on the 30th of September 1990 in accordance with Esan Native Law and Custom of Ukoni-Uromi.

According to the Claimant, the position of the Chief Priest of Idumu-Odion is by inheritance and as the Chief Priest of Egbaken Shrine, he settles disputes presented to him by the people of Idumu-Odion, Ukoni-Uromi and supervises worship activities in the Shrine.

The claimant stated that the Defendants were present in September 1990 when he was installed as the Chief Priest of the shrine and that from that time until the 11th of January, 2014, nobody has challenged his position.

According to him, on the 11th of January 2014, the Defendants and some other persons including Christopher Okokhere, Edward Okodolor and Jacob Isabu, stormed his official residence at Idumu-Odion, Ukoni-Uromi and instructed him to vacate the said building to enable the 1st Defendant take over as the Chief Priest of Idumu-Odion, Ukoni-Uromi.

He said that when he queried the rationale behind the Defendants' action, they stormed out of his building only to resurface on the 19th of January 2014 with a summons from the Palace of the Onojie of Uromi requesting him to appear at the Palace on the 20th of January, 2014.

The Claimant stated that when he got to the Onojie's Palace on the 20th of January 2014, in obedience to the said summons, the Defendants stated their case, maintaining that the 1st defendant was the rightful Chief Priest of Idumu-Odion, Ukoni-Uromi. That when he wanted to state his own case, the Onojie of Uromi prevented him from uttering a word but instructed him to vacate his position and official residence as Chief Priest to enable the 1st defendant, take over as Chief Priest of Idumu-Odion, Ukoni-Uromi on or before the 21st of January, 2014. According to him, the Onojie of Uromi immediately mandated the defendants and their collaborators to ensure that he was evicted from his official residence and stripped of his position as Chief Priest of Egbaken shrine of Idumu-Odion, Ukoni-Uromi on or before the 21st of January 2014.

He stated that when he saw the desperation of the defendants in executing the order of the Onojie of Uromi, he quickly rushed to the Amedokhian District Customary Court Uromi, to institute Suit No: ADCC/16/2014 whereupon he filed a motion for interim injunction which was granted on the 21st of January 2014, hence the defendants could not evict him and interfere with his position as Chief Priest of Idumu-Odion, Ukoni-Uromi.

He stated that although hearing in Suit No: ADCC/16/2014 had not commenced, he decided to discontinue same vide a notice of discontinuance dated the 17th of November 2014 to enable this Honourable Court properly determine the contentious issues, before it.

The claimant stated that his great grandfather, Pa. Egbikor and his grandfather, Pa. Oyimeror were Chief Priests of Egbaken Shrine, Idumu-Odion, Ukoni-uromi, during their lifetime and that his great grandfather, late Pa. Egbikor was also the father of the 1st defendant's grandfather, late Pa. Oyimeror.

He stated that his grandfather, late Pa. Oyimeror had three children including late Pa. Edonmhen the Claimant's father, late Pa. Thomas Ukoni, the 1st defendant's father and late Pa. Egbokhaebho.

He stated that Pa. Edonmhen and Pa. Egbokhaebho pre-deceased Pa. Oyimeror leaving behind, Pa. Thomas Ukoni, the 1st defendant's father, now deceased.

That after the death of Pa. Oyimeror, Pa. Ugege was appointed the acting Chief Priest of Egbaken Shrine at the instance of Thomas Ukoni, the 1st defendant's father, pending the performance of the final burial rites of Pa. Oyimeror by Thomas Ukoni to enable him to assume the position of Chief Priest of the Egbaken Shrine.

He said that upon the death of Pa. Ugege, one Pa. Iboi Okoduwa was appointed the acting Chief Priest again at the instance of Thomas Ukoni the 1st defendant's father. That while Pa. Iboi Okoduwa was acting as the Chief Priest, he invited the 1st defendant's father, to perform his father's funeral rites and take over the position of Chief Priest of Idumu-Odion, Ukoni-Uromi. He stated that the 1st defendant's father was equally invited by the elders of Idumu-odion including late Pa. Usiahon, late Pa. Iyere, late Pa. Ehimen, late Pa. Aghemelo and others, to return home from Inemen Ugboha where he spent substantial part of his life to come and perform the burial rites of his deceased father, Pa. Oyimeror to entitle him to the position of Chief Priest and to inherit the property of his deceased father, in line with the prevailing Esan Native law and custom of Ukoni-Uromi.

He stated that the 1st defendant's father, Pa. Thomas Ukoni eventually heeded the call of the elders of Idumu-Odion, Ukoni-Uromi and returned home, but he could not perform the burial rites of his deceased father before his eventual demise sometime in 1987.

The Claimant stated that after the death of the 1st defendant's father, the elders of Idumu-odion, Ukoni-Uromi invited one Enaholo Okodede to assume the position of Chief Priest in acting capacity which said invitation was honoured by Enaholo Okodede.

He said that while Enaholo Okodede was acting as the Chief Priest of Idumu-Odion, Ukoni-Uromi, people were dying in large numbers whereupon the aforementioned elders summoned a meeting of the Egbikhor family members sometime in August 1990, to discuss the installation of a substantive Chief Priest of Idumu-Odion, Ukoni Uromi.

The Claimant stated that at the said Egbikor family meeting, which was attended by all members of the Egbikor family lineage including the claimant, late Pa. Gregory Ebhodaghe, the head of the Egbikor family in consultation with other members of the family from Egbikor family lineage and Joseph Iboi, selected and presented the Claimant as the rightful person for the position of Chief Priest being the eldest surviving male grandchild of Pa. Oyimeror

whereupon the claimant immediately performed the burial rites of his grandfather and father in line with Esan Native Law and Custom of Ukoni-Uromi.

The claimant stated that having performed the final burial rites of his deceased father, Pa. Edonmhen and that of his deceased grandfather, Pa. Oyimeror, he was thereafter installed as the Chief Priest (Ohen) of Egbaken Shrine of Idumu-odion, Ukoni-Uromi on the 30th of September, 1990. He stated that the process for his installation commenced on the 23rd of September 1990 and ended on the 30th of September 1990 with the presentation of his staff of office (Ukhure) to him by the Ikegbele, (Chief messenger) at the instance of the elders and Odionwele of Idumu-Odion, Ukoni-Uromi.

The Claimant stated that during the process of his installation as the Chief Priest of Egbaken Shrine, Idumu-odion, Ukoni-Uromi, all the married daughters of Idumu-Odion, Ukoni-Uromi were invited home to play their traditional role in his installation ceremony as the substantive Chief Priest of Egbaken Shrine as demanded by custom.

The Claimant stated that when the married daughters of Idumu-Odion, Ukoni Uromi arrived home, they went to the Egbaken Shrine, the official residence of the Claimant swept same, removed all the cowries and painted the entire Shrine with native chalk as a mark of purification as demanded by Custom. The married daughters of Idumu-Odion, Ukoni Uromi thereafter washed all the cowries earlier removed from the Egbaken Shrine, bounded the cowries together with a thread and thereafter collected the symbolic traditional stick from the Ikegbele, Pa. Ikhayere as demanded by custom.

The Claimant stated that the married daughters of Idumu-Odion, Ukoni-Uromi, thereafter decorated the traditional stick with the cowries symbolizing the authority and Ukhure (staff of Office) which they handed over to the Ikegbele for onward transmission to the Claimant. He stated that the Ikegbele thereafter presented the Ukhure, (Staff of Office) to him at the instance of the Odionwele and in the presence of elders of Idumu-Odion, Ukoni-Uromi. He said that after the presentation of the Ukhure to him, he in turn presented a she-goat to the Odionwele and elders of Idumu-odion, Ukoni-Uromi through the Ikegbele, Chief messenger.

He stated that the she-goat presented by him to the Odionwele and elders of Idumu-Odion, Ukoni-Uromi was thereafter slaughtered by the Ikegbele who used the blood to offer prayers for him as the Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi as demanded by custom. He said that the she-goat was thereafter prepared, some of which was shared amongst the Odionwele and elders of Idumu-Odion, while the other part was used to prepare a meal for other members of the community as part of the final ceremony for his installation as the Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni Uromi. He maintained that with the aforesaid festivity, his installation as the substantive Chief Priest of Egbaken Shrine became complete, final and irreversible.

The Claimant stated that under Esan Native Law and custom of Idumu-Odion, Ukoni-Uromi relating to succession to the position of Chief Priest of Egbaken Shrine, once a substantive Chief Priest has been installed as in his own case, he cannot be removed from his position until he dies.

He explained that with the performance of the final burial rites of his deceased father and grandfather as well as his installation as Chief Priest of Egbaken Shrine Idumu-Odion, Ukoni-Uromi, he became and remains the owner of the large expanse of land left behind by his deceased grandfather Pa. Oyimiror, by virtue of inheritance and his position as Chief Priest of Egbaken shrine, Idumu-Odion, Ukoni-Uromi. He said that customarily, the Chief Priest is the traditional head of Idumu-Odion and the owner of all Egbaken land in Idumu-Odion, Ukoni-Uromi. That under Esan Native Law and Custom of Idumu-Odion, Ukoni, Uromi, nobody occupies the position of Chief Priest of Egbaken shrine without performing the final funeral rites of his deceased grandfather or father as the case may be. That nobody inherits a deceased person's property without performing his final funeral rites.

The Claimant pointed out that the 1st defendant who is laying claim to the position of Chief Priest of Egbaken Shrine of Idumu-Odion, Ukoni-Uromi, has neither performed the final burial rites of his deceased father nor that of his deceased grandfather in line with the prevailing Esan Native Law and Custom of Idumu-Odion, Ukoni-Uromi. He said that the defendants and other persons are merely witch-hunting him because of his refusal to support them in respect of a dispute between Odogbe Quarters and Egbagha Quarters on the one part and Idisoke Quarters of Ukoni-Uromi on the other part.

In support of his defence to the Claimant's claim and in proof of his counter-claim, the 1st Defendant called four witnesses, namely, Mr. Odion Imoisili i.e. DW1, Davidson Omokhuale i.e. DW2, Joseph Obiye i.e. DW3 and John Obehioye i.e. DW4.

The gist of the Defendants' case is that the Claimant and the Defendants are principal members of Idumu-Odion Community, Ukoni – Uromi and the 1st Defendant derived the right to be installed into the office of Chief Priest by inheritance from his late father i.e Pa. Ukoni Eigbibhalu.

According to the Defendants, under Esan native law and custom as applicable in Ukoni-Uromi an only surviving son or male child can inherit his late father's estate or hereditary traditional stool, position or title whether or not he has performed his late father's final burial rites as required by custom.

They maintain that ascension to the position or title of Chief Priest of Egbaken juju shrine is hereditary and the right to inherit same is by primogeniture and the right to produce the Chief Priest of Egbaken juju shrine resides in the family or lineage of Egbikor in Idumu-Odion. That the rightful person to hold and perform the duties of Chief Priest of Egbaken juju shrine, Idumu-Odion, Ukoni-Uromi is Mr. Thomas Ukoni Eigbibhalu i.e the 1st Defendant in this case.

According to the Defendants, the Claimant was appointed in September, 1990 to be acting as interim Chief Priest of Egbaken juju shrine, Idumu-Odion, Ukoni – Uromi pending when the 1st Defendant who was then a minor would come of age to occupy the position that rightfully belongs to him. They maintain that the Claimant herein was never installed by the elders and people of Idumu-Odion and Ukoni – Uromi as the substantive Chief Priest.

That soon after the Claimant was appointed to be acting as Chief Priest of Egbaken juju shrine the elders and people of Ukoni discovered that the Claimant was making arrangements and putting plans in place to permanently occupy the position of Chief Priest which rightfully belongs to the 1st Defendant who was then away from home and in reaction the entire people of: (a) Idumu-Odion; (b) Idumu-Esolon; and Idumu-Akpogho – all in Ukoni village, Uromi protested and refused to participate in the necessary rites during the planned burial rites organized by the Claimant.

They maintained that the Claimant has no right to sell or alienate any of the property forming part of the estate accruable to the holder of the position/title of Chief Priest of Egbaken juju shrine. That part of the estate of the rightful holder of the position or title of Chief Priest of Egbaken juju shrine include lands and buildings, proceeds from homages, sacrifices and other paraphernalia of office of Chief Priest of Egbaken juju shrine e.t.c.

They alleged that the first person to hold and occupy the position of Chief Priest of Egbaken juju shrine, Idumu-Odion, Ukoni – Uromi in living memory was Pa. Egbikor who was a native of Odogbe, Idumu-Odion, Ukoni – Uromi. That Pa. Egbikor, in his life time, gave birth to Pa. Oiyimheror as his eldest surviving male child. That upon the death of Pa. Egbikor his eldest surviving son, Pa. Oiyimheror performed the necessary final burial rites in accordance with Esan Native Laws and Custom as applicable in Ukoni - Uromi and inherited the entire estate of his father, Pa. Egbikor and which estate included the land estate and hereditary position/title of Chief Priest Egbaken juju shrine now in dispute in this case. That Pa. Oiyimheror gave birth to Pa. Eigbibhalu and Pa. Edomhen in that order of seniority. That Pa. Eigbibhalu was the eldest of the two children of Pa. Oiyimheror and survived Pa. Oiyimheror as his eldest surviving son/male child when the latter died.

That upon the death of Pa. Oiyimheror, his eldest surviving son, Pa. Eigbibhalu performed the necessary customary burial rites in accordance with Esan Native laws and Custom as applicable in Ukoni – Uromi and consequently inherited the estate of his late father which estate included the land estate and hereditary position/title of Chief Priest Egbaken juju shrine now in dispute in this case which was earlier held by Pa. Egbikor, Pa. Oiyimheror and Pa. Eigbibhalu as his predecessors in office.

That Pa. Eigbibhalu in his life time had two children namely Ukoni and one Mrs. Theresa Unuane nee Eigbibhalu. While Pa. Edonmhen had the Claimant as his only son.

That in line with Esan Native Law and Custom Pa. Eigbibhalu gave a portion of the land he inherited from his late father to his younger half-brother i.e. Pa. Edonmhen since they had the same father but different mothers.

That when Pa. Eigbibhalu died, his eldest surviving son called Ukoni Eigbibhalu who was the father of the 1st Defendant was not at home at Idumu-Odion, Ukoni – Uromi at that time. That when he eventually came home from his station, Pa. Ukoni Eigbibhalu did the customary final burial rites of his late father in accordance with Esan Native Law and Custom as applicable in Idumu-Odion, Ukoni - Uromi and consequently inherited the entire estate of

his late father and also succeeded him and ascended to the position of Chief Priest of Egbaken Shrine.

That because he was not permanently and ordinarily resident at Ukoni - Uromi, Pa. Ukoni Eigbibhalu approached the elders and principal members of Idumu-Odion, Ukoni – Uromi to seek for and accordingly obtained their permission in line with custom to delegate his functions as Chief Priest of Egbaken juju shrine to one Pa. Ugege, a native of and member of Idumu – Odion community to be acting for him and on his behalf as Chief Priest of Egbaken shrine since he was not resident at home in Ukoni – Uromi.

That having obtained the consent of the community Pa. Ukoni Eigbibhalu appointed Pa. Ugege to act on his behalf as Chief Priest of Egbaken juju shrine and Pa. Ugege accepted the offer and consequently acted in that regard on behalf of Pa. Ukoni Eigbibhalu and received homages of yams, bush meat, goats, fowls, money, items of clothing, cowries, native chalks e.t.c due to the Chief Priest from worshippers and followers of the Egbaken juju shrine and disposed of same as directed by Pa. Ukoni Eigbibhalu.

That Pa. Ukoni Eigbibhalu later took ill and died in his place of business and Pa. Ugege then ceased to act as Chief Priest of Egbaken shrine. That at the time Pa. Ukoni Eigbibhalu died, his eldest surviving son who is the 1st Defendant in this case was a minor.

That in line with Esan native laws, customs and tradition as applicable in Ukoni – Uromi, the elders and principal members of Idumu-Odion community made up of elders of Odogbe, Idumu –Isoke, Ebagha, Idumu – Esolon and Idumu-Akpogho met and appointed the oldest person in the lineage of Egbikor in the person of Pa Iboi Okoduwa to act as the Chief Priest of Egbaken juju shrine pending when the 1st Defendant would come of age to take up his rightful place as Chief Priest of Egbaken juju shrine and Pa. Iboi Okoduwa accepted and accordingly acted as Chief Priest of Egbaken juju shrine on behalf of the 1st Defendant in this case.

That unfortunately, not quite long after he assumed the position and started acting as Chief Priest of Egbaken juju shrine, Pa. Iboi Okoduwa died while the 1st Defendant was still a minor. The next eldest person in Egbikor lineage who was selected and chosen by the community to act as Chief Priest pending when the 1st Defendant would come of age, i.e Pa Obiye Okoekhian who was then in Lagos declined the offer because according to him he was not resident at home and could therefore not effectively perform the duties of Chief Priest of Egbaken juju shrine from Lagos.

The next person in the lineage of Egbikor who could have also been chosen i.e Pa. Augustine Iyere – the 3rd Defendant was approached by the community to assume the position of Chief Priest of Egbaken juju shrine in acting capacity and on behalf of the 1st Defendant but he also declined the offer on the ground that he is a Christian and that he cannot perform idol rituals and sacrifices which are part of the duties of the Chief Priest and to accept to act as Chief Priest of Egbaken juju shrine as requested by the community would conflict with his Christian beliefs and background.

That the community then had to look for and approach another person in Egbikor lineage to act as Chief Priest of Egbaken shrine pending when the 1st Defendant will come of age and come home to take his rightful place as Chief Priest of Egbaken shrine.

That it was in that circumstance that the community had to send Pa. Augustine Iyere i.e the 3rd Defendant and one Mr. Gregory Ebhodaghe to approach Mr. Monday Edomhen i.e the Claimant who is also from Egbikor family/lineage to take up the position and act as Chief Priest of Egbaken shrine on behalf of the 1st Defendant pending when the 1st Defendant would be prepared to take up what belongs to him by inheritance i.e as Chief Priest of Egbaken juju shrine.

That among the elders that were present and presided when Mr. Ukoni Egbibhalu performed the final burial rites of Pa. Egbibhalu in accordance with Esan Custom as applicable in Ukoni – Uromi and inherited Pa. Egbibhalu's estate, including the position of Chief Priest of Egbaken juju shrine were Pa. Okodurele (as Odion –Egbe), Pa. Oni, Pa. Okokoni, Pa. Aghemhenlo (all of whom are now late), the 2nd and 3rd Defendants, Mr. Odion Imoisili and many others.

That under Esan Native Law and Custom relating to inheritance as applicable in Ukoni – Uromi where a person is the only surviving male child of a deceased estate owner, he inherits the estate of his late father whether or not he does the final burial rites of his father since he has nobody contending with him with respect to such estate. That it was in line with the above stated rule of Esan Custom that the 1st Defendant i.e Mr. Thomas Ukoni Egbibhalu automatically inherited the estate of his late father and the hereditary position of Chief Priest of Egbaken juju shrine when the latter i.e Pa. Ukoni Egbibhalu died intestate some years ago.

That the three quarters in Ukoni – Uromi that worship Egbaken juju shrine are: (a) Idumu-Odion;(b) Idumu-Esolon; and (c) Idumu-Akpogho and the position of Chief Priest of Egbaken juju shrine resides with Egbikor family/lineage of Idumu-Odion, Ukoni – Uromi. That the 1st Defendant is a member of Egbikor family/lineage of Idumu-Odion, Ukoni – Uromi and it is now his turn to inherit, occupy and perform the duties and function of Chief Priest of Egbaken juju shrine, Idumu-Odion, Ukoni – Uromi.

They reiterated that the other persons who at one time or the other acted as Chief Priest of Egbaken shrine on behalf of the rightful owners at one time or another are: Pa. Ugege Eboikhuemhen; Pa. Iboi Okoduwa; and Pa. Enabholo Okodede. That none of the foregoing persons later claimed exclusive right or ownership to the position of Chief Priest of Egbaken juju shrine which they once occupied in acting capacity. That when a person is appointed to act as Chief Priest of Egbaken juju shrine, such a person holds the position at the pleasure and authority of the rightful owner of the position.

That when the Claimant was installed to act as Chief Priest on behalf of the 1st Defendant he was instructed by the community to open a bank account in the name of the minor 1st Defendant into which all monies accruable to him as the rightful Chief Priest of Egbaken juju shrine would be paid for his benefit. That he was however permitted to take and use the

perishable items and also eat of the fruits of the economic trees belonging to the 1st Defendant as Chief Priest of Egbaken juju shrine.

That the Claimant was never authorized to sell or take for himself what rightfully belongs to the 1st Defendant. That the community was therefore surprised to find later that the Claimant was now laying false claim of ownership to the position of Chief Priest of Egbaken juju shrine and dispossessing the 1st Defendant of his inheritance and at the same time selling off parcels of land forming part of the land estate due to the 1st Defendant via inheritance from his late father including the portion of land now in dispute in this case.

That the Claimant was told from the very beginning of his appointment that he was being appointed to oversee and act on behalf of the 1st Defendant and help to oversee the property of the 1st Defendant due to him by inheritance from his late father.

That when the Claimant was appointed as Chief Priest in acting capacity he had not done the final burial rites of his late father. That soon after he assumed position as acting Chief Priest of Egbaken juju shrine he came and informed the community that he wanted to do the burial rites of his late father.

That when the elders gathered and the Claimant said that he wanted to perform the burial rites of his late father in the house and on the portion of land forming part of the ancestral land and estate of the 1st Defendant and which estate contains the ruins of the house of Pa. Eigbibhalu, the elders told him that the property in question belongs to the 1st Defendant and that the Claimant cannot perform his late father's burial rites thereat.

That the elders and community members of Idumu-Odion refused to participate in any such burial rites and also protested on the ground that it was the ruins of Pa. Eigbibhalu and that the final burial rites and Ogbe title ceremony of Egbikor, Oiyimenror, and Eigbibhalu had earlier on been done on the said house and land he was proposing to use for the burial rites of his late father. That the elders and community members dispersed and refused to partake in any such burial rites and the burial rites were not done again because the elders refused to perform the rites for the Claimant.

That the Claimant proceeded to start laying false claim of title to the position of Chief Priest of Egbaken juju shrine as of right and also started to appropriate the house, land and other entitlements due to the 1st Defendant as the rightful Chief Priest of Egbaken juju shrine as his own and the community reported the Claimant's action and conduct to the Onojie of Uromi.

That the Onojie invited the Claimant and members of the community for customary arbitration in his palace and after hearing from the parties and their witnesses, the Onojie of Uromi ruled that the position of Chief Priest of Egbaken juju shrine does not belong to the Claimant and that he should continue to maintain his status as acting Chief Priest on behalf of the 1st Defendant pending when he comes to assume the position by himself.

That the Onojie then advised the Claimant to eat of the fruits of the economic trees belonging to the 1st Defendant on the land and if he sells any of the fruits he should keep the

proceeds for the up-keep and education of the 1st Defendant. He also told the Claimant not to sell any of the land estate or house belonging to the 1st Defendant as Chief Priest of Egbaken juju shrine.

That later the 1st Defendant came home and the community held a meeting and organized a welcome party to receive him as the Chief Priest. That the Claimant failed to come to the village square to participate in the ceremony.

That when the community danced and jubilated and heralded the 1st Defendant to the shrine which is close to the house of the 1st Defendant where the claimant presently resides, the Claimant and his children carried sticks and offensive weapons to confront and assault some members of the community that were there including Elder Edaghe Okodonor who is the eldest man in the community.

That when the community saw the conduct and behaviour of the Claimant as stated above, they decided to go and again report the matter to the Onojie of Uromi for the second time when it became clear to them that the Claimant was not ready to vacate the position of Chief Priest of Egbaken juju shrine for the 1st Defendant and handover the properties in his position and vacate the house of the 1st Defendant for him.

That the Onojie of Uromi again re-affirmed his earlier decision and asked the Claimant to handover and vacate the position of Chief Priest and house of the 1st Defendant for him. That the Claimant did not want to comply with the decision of the Onojie and hence he went to sue the 1st Defendant and other members of the community to the District Customary Court Amendokhian over the matter i.e over the question of who is the rightful Chief Priest of Egbaken juju shrine. That while that case was pending, the Claimant herein served the Defendants with the processes in this suit.

At the close of evidence, the learned counsel for both parties filed their written addresses and adopted same.

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

- 1. WHETHER THE CLAIMANT HAS ESTABLISHED HIS CASE ON THE PREPONDERANCE OF EVIDENCE ENTITLING HIM TO THE JUDGMENT OF THIS HONOURABLE COURT?**
- 2. WHETHER THE 1ST DEFENDANT'S CLAIM TO THE POSITION OF CHIEF PRIEST OF EGBAKEN SHRINE IS NOT SPURIOUS AND BASELESS?**

Arguing his Issue 1, the learned counsel submitted that that the claimant has led credible and unchallenged evidence in proof of his claim. He submitted that the Claimant's evidence did not merely touch on his installation as the substantive Chief Priest of Egbaken Shrine, but also dwelt extensively on the process and procedure for his installation as the substantive Chief Priest of Egbaken Shrine in September 1990.

He said that the Claimant told the Court that he was presented with a staff of office (Ukhure) by the Chief Messenger (Ikegbele) on the 30th of September 1990. That he gave evidence of how he commenced preparations for the customary rites for his installation as Chief Priest on the 23rd of September 1990 until the 30th of September 1990 when he was presented with the staff of office. He further highlighted the role of the married daughters of Idumu-Odion, Ukoni Uromi and his corresponding role in paragraphs 30 – 37 of his Statement on Oath.

He submitted that as weighty as the above pieces of evidence, the defendants did not challenge same during cross-examination. That the law is trite that where evidence is unchallenged and uncontroverted as in the instant case, the Court is bound to act on it provided it is credible and he relied on the case of *Kayode Ventures Ltd V Minister of Federal Capital Territory (2010) Vol. 181 LRCN page 69 at pages 110 JJ & 111AF*.

He further submitted that where a party who has the opportunity to challenge a piece of evidence through cross-examination as in the instant case refuses to do so, such evidence is deemed to have been admitted by his adversary. See the case of *Ikare Community Bank (Nig.) Ltd. V. Ademuwagun (2005) 7 NWLR part 924, page 275 at P. 294, paras G – H*.

Learned counsel posited that the claimant led evidence to the effect that nobody assumes the position of Chief Priest without performing the final burial rites of his deceased father under Esan Native Law and Custom of Ukoni Uromi. That this piece of evidence was corroborated by the DW3 when he told the Court that under Esan Native law and Custom applicable in Ukoni Uromi, performance of final burial rites is mandatory for purposes of inheritance and by extension, entitlement to the position of Chief Priest. He submitted that where the evidence of the defence supports that of the claimant, as in the instant case, the claimant is bound to utilize it. See the case of *Arijie V Arijie (2018) Vol. 279 page 1 at page 34 PZ*.

He submitted that CW1, Joseph Iboi corroborated the entire evidence of the claimant. That the CW1 told the Court that under Esan Native Law and Custom of Idumu-Odion, Ukoni Uromi, nobody occupies the position of Chief Priest without first performing the final burial rites of his father. That since the 1st defendant is yet to perform the burial rites of his father and grandfather, he cannot lay any claim to the position of Chief Priest of Egbaken Shrine currently occupied by the claimant.

He submitted that the evidence of the CW1 was not challenged under cross-examination. That the proper time to cast aspersion on the evidence of a witness is during cross-examination and not afterward. See the case of *Reynolds Construction Company (Nigeria) Limited V Edomwonyi (2003) 4 NWLR part 811 page 513 at P. 532, paras D.E*. On treatment of evidence not challenged through cross-examination, he also cited the case of *Universal Trust Bank Nigeria Ltd V Ajagbule (2006) 2 NWLR part 965, page 447 at P. 491, paras. B – C*.

He submitted that the evidence of the Defendants' witnesses particularly that of the DW1, Odion Imoisili and DW3 Joseph Obiye Okeshan, has fully vindicated the Claimant's

position that he is the rightful Chief Priest of Egbaken Shrine having been duly installed in line with Esan Native Law and Custom of Ukoni Uromi. He said that while the DW1 told the Court that the Claimant is the current holder of the Staff of Office (Ukhure) in line with the evidence of the claimant in paragraph 28 of his Statement on Oath, the DW3 told the Court under cross examination that the staff of office is not given to an acting Chief Priest. He further submitted that the evidence of the DW3 to the effect that once an “Ukhure” Staff of Office is presented to the Chief Priest, it cannot be retrieved, makes mockery of the 1st Defendant’s claim to the position of the Chief Priest of Egbaken Shrine.

On potency of evidence procured during cross-examination, learned counsel referred to the case of *Gaji V Paye (2003) 8 NWLR part 823, page 583 at Pp. 603 – 604, paras. F – B, 611, paras A – B.*

He submitted that the aforesaid piece of evidence by the DW3 on the issue of the presentation of Ukhure to a deserving holder of the position of Chief Priest and the fact that it is not given to an acting Chief Priest, has finally and effectively settled the issue before this Honourable Court as to whether or not, the claimant was installed as the Chief Priest of Egbaken Shrine. He submitted that the issue of “Ukhure”, is the *litis contestatio*, i.e. the live issue to be decided by this Honourable Court in arriving at the justice of this case. He referred to the case of *Babatunde V Pan Atlantic Shipping and Transport Agencies Ltd (2008) 11 WRN, page 1 at P. 49, lines. 30 – 35*, where the Supreme Court defined the Latin term “*litis contestatio*” as follows:

“Litis Contestatio means the process by which a legal issue emerges from the opposing statements of parties”

He submitted that the issue before the Court on the essence and purport of presentation of staff of office (Ukhure) should be considered by this Honourable Court as it will in no small measure assist this Honourable Court to determine whether the occupation of the position of Chief Priest by the claimant is on an acting or substantive capacity. On duty of Court to consider the issues submitted to it for adjudication, he cited the case of *Opuiyo V Omoniwari (2007) 39 WRN page 1 at Pp. 10 – 11 lines 45 – 5.*

On meaning of issue, he referred to the case of *Teriba V Adeyemo (2010) 47 WRN page 155 at P. 170, line 25* where the Supreme Court held thus:

“It is settled that an issue is a point that has arisen in the pleadings of the parties which forms the basis of the dispute or litigation which requires resolution by a trial Court”.

He submitted that where a party’s case is neither challenged nor controverted, his evidential burden of proof is discharged minimally. See the case of *Chami V United Bank for Africa (2010) 18 WRN page 1 at Pp. 19 – 20 lines 45 – 5.*

He further submitted that the refusal of the defendants to proffer any evidence in rebuttal of the claimant’s case and in proof of the 1st defendant’s counter-claim, is an overwhelming

admission of the totality of the claimant's claim and evidence led thereon. On the meaning of admission, he 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 therefore submitted that since the claimant has established his case through credible evidence and on the balance of probabilities, issue one should be resolved in the affirmative.

ISSUE TWO: Whether the 1st defendant's claim to the position of Chief Priest of Egbaken Shrine, is not spurious and baseless?

On issue two, learned counsel submitted that the 1st defendant's claim to the position of Chief Priest of Egbaken Shrine is spurious, bare and baseless. He further submitted that where a party refuses to lead evidence in proof of his counter-claim, he is deemed to have abandoned same. See the case of *Olonade V Sowemimo (2006) 2 NWLR part 963 page 30 at P. 40, para. G.*

He submitted that by the nature of a counter-claim which is a cross action containing reliefs, such counter-claim becomes stale where no evidence is led to prove it as the duty of the defendant in the circumstance is just to defend the claimant's case, no more, no less. See the case of *Bankole V Dada (2003) 5 NWLR page 40 at 51 – 52.*

Counsel submitted that the defendants' statements on oath, particularly those of the 2nd and 3rd defendants who filed same before this Honourable Court, remain moribund as they failed to lead any evidence on them. See the case of *Ibrahim V Okutepa (2015) All FWLR part 785, page 331 at 336.* He submitted that not until Statements on Oath are adopted in Court by the deponents of such documents they remain lifeless and cannot be acted upon by Court. See the case of *Idris V ANPP (2008) 8 NWLR Part 1088, Page 153.*

He submitted that the evidence of the defendants' witnesses is anchored on hearsay, contradictions and inexplicable lacuna. He said that the DW3 who deposed to a 66 paragraph Statement on Oath admitted during cross-examination that he was present in Court when the DW1 testified and that all the facts contained in his statement on oath were related to him by members of the Idumu-Odion Community of Ukoni Uromi. On meaning and import of hearsay evidence, he cited the case of *Onovo V Mba (2014) 14 NWLR (Pt 1427) 391, 417.*

On the issue of the defendants' inability to prove the rule of custom which they, heavily relied on, counsel submitted that while the DW1 and DW4 maintained in their Statements on Oath that there is an exception to the strict requirement of performance of final burial rites for the purposes of inheritance, the DW3's evidence under cross-examination however reveals that it is a mandatory requirement devoid of any exception under the prevailing rule of Esan Native Law and Custom applicable to Ukoni. On burden of proof of custom, he cited the cases of *Fatoba V Ogundahunsi (2003) 14 NWLR PART 840, PAGE 323 AT Pp. 347 para C. D – F* and *Orlu V Gogo-Abite (2010) 181 LRCN page 193 at 205 UZ.*

He further submitted that the defendants' witnesses were inconsistent in their evidence before the Court and that this speaks volume of the tendentious claim of the 1st defendant to the position of Chief Priest of Egbaken Shrine. On the duty on a party to be consistent in stating

and proving his case, he relied on the case of *Yusuf V Adegoke (2008) 40 WRN page 1 at P. 46 lines 40 – 45.*

Furthermore, he posited that while the DW1 maintained in paragraph 46 of his Statement on Oath that where a male child is the only surviving child of a deceased estate owner, he is entitled to inherit the estate whether or not he performs final burial rites of his deceased father, he however admitted during cross-examination that the rightful person to the position of the Chief priest must perform the necessary ceremonies before he can inherit his father's property.

On the issue of contradiction and inconsistency, he submitted that while the DW1 told the Court under cross-examination that the 1st defendant is up to twenty years, the DW4 however stated in his Statement on Oath that the 1st defendant is over twenty years. But under cross-examination, the DW4 told the Court that the defendant was born in the early eighties and later told the Court that the 1st defendant is more than twenty five years.

He submitted that the above pieces of evidence of the DW1, DW3 and DW4 are both inconsistent and contradictory. On whether the Court can pick or choose which evidence to believe or disbelieve, he cited the case of *Adegbayi V Ishola (2003) 11 NWLR part 831 page 343 at 350 – 351.*

He posited that the pertinent question at this stage is that if the 1st defendant was twenty years old as at November 2018 when the DW1 gave evidence, it follows that when the Claimant assumed the position of the Chief Priest of Egbaken Shrine in September 1990, the 1st defendant was not born. He pointed out that the 1st defendant who ought to clear this conflict refused to give evidence. On effect of defendants' 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.*

He submitted that where there are inherent contradictions in the evidence of witnesses as in the instant case of the defendants, this Honourable Court should treat such evidence with a pinch of salt and relied on the case of *Fatoba V Ogundahunsi (Supra) page 234 at Pp. 347, Paras. D – F.* He further submitted that the DW4 who had earlier told the Court during cross-examination that a fifteen year old person is not matured enough to be installed as the Chief Priest of Egbaken Shrine, later told the Court under re-examination that there is no age limit provided under Esan Native Law and Custom of Ukonu Uromi for a person to be installed as Chief Priest of Egbaken Shrine. He said that this is even more curious in the light of the defendants pleadings and evidence on oath of their witnesses which hinged the inability of the 1st defendant to assume the position of Chief Priest on the ground that he was an infant of about two years old when his father died hence the claimant was appointed in an acting capacity. He submitted that this amounts to irreconcilable contradiction which makes the entire evidence of the DW4, unworthy of belief. See the case of *Akande V Oyewole (2003) 6 WRN page 36 at 40 – 41.*

He submitted that no evidence was led by the defendants or their witnesses to explain why the claimant's continuous occupation of the position of Chief Priest since September 1990 was not challenged until January 2014 after spending a period of twenty four years on the stool. He said that this has become pertinent in view of the fact that the DW1 told the Court under cross-examination that there is no age limit in the installation of a person as Chief Priest. He said that the DW3 also told the Court under cross-examination that as from age fifteen, a prospective Chief Priest can be installed as the Chief Priest. That the DW4 told the Court under cross-examination that the 1st defendant was born in the eighties and further told the Court during re-examination that there is no age requirement for someone's installation as Chief Priest. Counsel posited that the following questions are begging for genuine answers:

1. If the above pieces of evidence are anything to go by, why was the 1st defendant not installed since there was no age barrier?
2. Why was the 1st defendant in slumber for twenty four years before struggling to become the Chief Priest when no inhibiting factors existed?
3. Why did the 1st defendant refuse to depose to a Statement on Oath and lead evidence in proof of his counter-claim in respect of a position directly affecting his interest?

In answering the above questions, he submitted that the conduct of the defendants particularly the 1st defendant, merely speaks of vindictiveness rather than genuine claim to the position of Chief Priest of Egbaken Shrine. He said that this position is reinforced by the fact that apart from the refusal of the 2nd and 3rd defendants to also give evidence before the Court, the DW4, a native of another community, precisely Amedokhian village who owes more loyalty and allegiance to his community, was brought in as a witness to merely repeat all the depositions already contained in the Statements on Oath of the DW1 and DW3 without any new or distinctive facts.

He submitted that the evidence of the DW1 to the effect that no ceremony is required during installation of a substantive Chief Priest, is not only fanciful and ridiculous but devoid of any logic. He submitted that this piece of evidence is antithetical to common sense, common course of natural events and human conduct as the term "installation" for the purpose of assumption of office as Chief Priest, would have totally lost its meaning and relevance if a Prospective Chief Priest could merely ascend the stool of Chief Priest of Egbaken Shrine and occupy same without more. He referred to *Section 167 of the Evidence Act 2011*.

He submitted that if the evidence of the claimant is put alongside that of the defendants on an imaginary scale of justice, that of the claimant will preponderate and tilt more on the side of justice than that of the defendants which he alleged is empty and weightless. On how to determine which evidence preponderates more when put on an imaginary scale, he referred to the case of *Idoghor V Okagbare (2015) 11 WRN, page 55 at Pp. 83 – 85, lines. 25 – 15*.

Finally, he submitted that in view of the fact that the defendants' case is manifestly weak, contradictory and incredible, issue two should be resolved in the affirmative.

In his written address, the learned counsel for the Defendants/Counter-Claimants, **R.E.Orukpe Esq.** formulated the following issues for determination:

1. ***Whether from the evidence before this Honourable Court, the Claimant has proved his case on the balance of probability or on the preponderance of evidence to warrant the judgment of this Honourable Court in his favour?
And conversely:***
2. ***Whether from the evidence before this Honourable Court, the 1st Defendant/Counter-claimant has proved his counter-claim against the Claimant on the balance of probability or on the preponderance of evidence to warrant the judgment of his Honourable Court in his favour?***

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE ONE:

Whether from the evidence before this Honourable Court, the Claimant has proved his case on the balance of probability or on the preponderance of evidence to warrant the judgment of this Honourable Court in his favour?

Arguing issue one, the learned counsel submitted that in civil cases such as the instant case the standard of proof is on the balance of probabilities or on the preponderance of evidence. He submitted that the main issue in the Claimant's claim and the 1st Defendant's counter-claim borders on the question of who is the rightful person as between the Claimant and the 1st Defendant, to occupy the position of Ohen or Chief Priest of Egbaken shrine in Idumu-Odion, Ukoni – Uromi.

He posited that the other reliefs such as relief (iii) of the Claimant's Further Amended Statement of Claim and reliefs (d), (e) and (f) of the Defendants' Amended Joint Statement of Defence are only ancillary to the main claim i.e. the rightful person entitled to occupy the position and perform the duties and functions of Chief Priest a.k.a Ohen of Egbaken shrine.

He submitted that having pleaded that the position of Chief Priest of Egbaken shrine is hereditary and reserved for members of Egbikor family in Idumu Odion, Ukoni – Uromi, for the Claimant to be entitled to the judgement he must lead credible evidence and prove among others the following:-

- (a) That he is a member of Egbikor family or lineage;
- (b) That the line of succession or inheritance with respect to the position of Chief Priest of Egbaken shrine (which is subject matter of litigation in this case) has devolved on him;
- (c) That he has performed the requisite customary burial and installation rites; and
- (d) That he was validly installed as the substantive Chief Priest of Egbaken shrine as he alleged.

Learned counsel submitted that unless the Claimant discharged the burden of proof with respect to (a) and (b) above, whatever burial and installation rites he performed with respect to

(c) and (d) above would go to no issue and he would not be entitled to the reliefs he claims before this Honourable Court.

He submitted that even though the Claimant and his sole witness have led evidence to the fact, and was conceded by the defence, that the Claimant is a member of Egbikor family or lineage, he maintained that the Claimant did not lead credible evidence to prove that the line of succession by inheritance to the disputed position of Chief Priest of Egbaken shrine has devolved on him and this he failed to establish either by his pleadings or through his evidence before this Honourable Court in this proceedings.

He submitted that since the Claimant has not successfully traced a convincing line of succession or inheritance down to himself from Pa. Egbikor who was the 1st Chief Priest with respect to the contentious position of Chief Priest of Egbaken shrine, the burial or installation rites which the Claimant claimed to have carried out in this case goes to no issue and cannot avail him with a respect to the reliefs sought as per his claim.

He submitted that in the instant case the Claimant by the averment contained in paragraph 3 of his extant Statement of Claim and also by paragraph 4 of his Written Statement on Oath, stated that the succession to the position of Chief Priest is by inheritance. Also he submitted that by the uncontroverted pleadings and evidence of the Defendants in this case particularly by paragraphs 7 of the Defendants' Amended Joint Statement of Defence it was clearly stated and admitted by the Claimant that the right to produce the Chief Priest of Egbaken juju shrine is hereditary and reserved exclusively for members of Egbikor family or lineage in Idumu-Odion, Ukoni – Uromi.

He submitted that while it is not in dispute that the Claimant and the 1st Defendant are members of Egbikor family in Idumu-Odion, Uromi, the Claimant has not discharged the burden of proving that he is the rightful person by inheritance, to occupy the position and perform the duty of Chief Priest of Egbaken shrine in Idumu-Odion, Ukoni – Uromi.

He submitted that it is trite law that parties in a case are bound by pleading filed in the suit and the burden of proof on the pleadings rests on any party, whether Claimant or Defendant who substantially asserts the affirmative of an issue in controversy between the parties. For the above proposition of the law he relied on the case of ***OLANIYAN & ORS VS OYEWOLE & L ORS (2011) 14 NWLR PT 1268 at page 445.***

He contended that the Claimant did not establish that he became entitled to the position of Chief Priest of Egbaken shrine by inheritance, having pleaded in paragraph 5 of his Statement of Claim and paragraph 4 of his Written Statement on Oath that the position of Chief Priest of Egbaken shrine is hereditary. He said that the Claimant also failed to plead and trace an unbroken line of inheritance from Pa. Egbikor down to himself.

According to him, the averments in paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the Claimant's Statement of Claim did not disclose an unbroken line of inheritance from Pa. Egbikor down to the Claimant. He said that the Claimant particularly by paragraph 27 of his Statement of Claim and also paragraph 26 of his Written Statement on Oath

specifically stated that it was at Egbikor family meeting that late Pa. Gregory Ebhodaghe, the head of Egbikor family in consultation with other members of Egbikor family and Joseph Iboi that he was selected and presented as the rightful person for the position of Chief Priest being the eldest surviving male grandchild of Pa. Egbikor whereupon he proceeded to perform burial and installation rites in September, 1990.

He posited that the Claimant's sole witness i.e. Joseph Iboi who testified as CW 1 in this case, stated clearly in paragraph 6 of his Written Statement on Oath dated the 29th day of June, 2018 that he was the one who nominated and presented the Claimant for the position of Chief Priest of Egbaken shrine in August, 1990.

He said that the questions begging for an answers from the Claimant's pleadings and evidence on oath by himself and also by his witness are: why would the elders of his family and Idumu-Odion community invite and appoint one Enaholo Okedede as acting Chief Priest of Egbaken as per paragraphs 24 and 26 of his Claimant Statement of Claim after the death of Pa. Thomas Ukoni i.e. the father of the 1st Defendant when the Claimant assertion in this case is that he became the Chief Priest by virtue of his status as the eldest surviving grandchild of Pa. Oiyimeror?; Why did the elders of his family and Idumu-Odion who knew the family tree by-pass the Claimant who was then at Uromi to go and install a regent as Chief Priest of Egbaken Shrine when the Claimant was not then an infant or away from Uromi.

Counsel posited that the Claimant by the averments in paragraphs 22, 23 and 24 of the his Statement of claim, maintained that when Oiyimeror died, the 1st Defendant's father i.e. Pa. Thomas Ukoni became the eldest male child of Pa. Oiyimeror and he was then at Inemen – Ugboha and he was invited by the Elders of Idmum-Odion to return home to perform the burial rites of his deceased father and assume his rightful place or position as Chief Priest of Egbaken Shrine and he heeded the call but could not perform the burial rites before his death in 1987. He said that under cross examination, the Claimant and his sole witness admitted that it was the said Pa Ukoni that appointed Pa. Ugege Eboikhuemhen, Iboi Okoduwa and Enaholo Okedede as regents or in acting capacity to act on his behalf as Chief Priest of Egbaken shrine because he was not at home at Ukoni at the time. That they also admitted that under custom when the rightful person to occupy the position of Chief Priest is not around, a person can be appointed to act on his behalf.

He therefore submitted that if indeed the Claimant became entitled to be installed as the Chief Priest of Egbaken shrine upon the death of Pa. Ukoni i.e the father of the 1st Defendant, he would have been invited and installed or even if he was not in Ukoni, he would have been the one to appoint Okedede Enaholo as regent to the position of Egbaken shrine upon the death of Pa. Ukoni i.e. the father of 1st Defendant.

He further submitted that while the Claimant under cross-examination stated that it was the community that sent a delegation which included the 3rd Defendant to invite him to come and perform some rites and become the chief priest because the father of the 1st Defendant did not perform the rites and it was his turn to be installed as Chief Priest since he is from Egbikor lineage, in paragraphs 26 and 27 of his Amended Statement of Claim and also in paragraphs

25 and 26 of his Written Statement on Oath, the Claimant stated that it was Pa. Gregory Ebhodaghe, the head of Egbikor family in consultation with other members of Egbikor family and Joseph Iboi that selected and presented him as the rightful person for the position of Chief Priest being the eldest male grandchild of Pa. Oiyimeror .

He posited that the Claimant's witness i.e. Joseph Iboi who testified as CWI stated that he was one of the members of Egbikor family who nominated and presented the Claimant for the position of Chief Priest of Egbaken Shrine in August, 1990. He therefore submitted that while the Claimant stated that the position of Chief Priest of Egbaken Shrine is by inheritance, the evidence of the Claimant is to the effect that he was selected and presented by members of Egbikor family as the rightful person for the position of Chief Priest by virtue of his being the eldest male grandchild of P. Oiyimeror. He submitted that a person who is entitled to a hereditary stool or position does not require to be selected and presented for a hereditary position/stool.

He submitted that even through the Claimant pleaded and deposed on oath that the position of Chief Priest of Egbaken juju shrine is by inheritance, he never gave evidence to establish the mode or manner of inheritance neither did he lead evidence to trace an unbroken line of inheritance from Pa. Egbikor to himself to entitle him to the reliefs he is seeking before this Honourable Court.

He submitted that the Claimants pleadings particularly paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of his Further Amended Statement of Claim did not establish any clear line of inheritance in favour of the Claimant. Also that the facts deposed to in paragraphs 16 to 27 of his Written Statement on oath did not also support any claim of inheritance in favour of the Claimant.

Learned counsel submitted that assuming but not conceding that his foregoing submissions were misplaced, the Claimant's case would still collapse like a pack of cards judging by his averments in paragraphs 17, 18, 19, 20, 21, 22, 23 and 24 of his further Amended Statement of claim for the reasons and arguments which he further advanced.

Advancing his arguments, he submitted that in paragraphs 19, 20 and 23 of the Claimant's Further Amended Statement of Claim, the Claimant averred that Pa. Oiyimeror had three children namely: (a) Pa. Edomhen i.e. Claimant's father (b) Pa. Thomas Ukoni i.e the 1st Defendant's father and (c) Pa. Egbokhaebho. The Claimant averred that Pa. Edomhen and Pa. Egbokhaebho pre-deceased their father i.e. Pa. Oiyimeror thereby leaving behind Pa. Thomas Ukoni i.e the 1st Defendants father as the only surviving male child of late Pa. Oiyimeror and the right to inherit the estate of Pa. Oiyimeror devolved on him by the line of inheritance.

He therefore submitted that since the right to perform burial rites and inherit the estate of late Pa. Oiyimeror eluded Pa. Edomhen i.e the Claimant's father because he pre-deceased his father i.e Oiyimeror, the Claimant in that circumstance cannot claim that the line of inheritance devolved on him as eldest surviving grandchild of Oiyimeror as to qualify him to

ascend the position of Chief Priest of Egbaken shrine and perform the burial rites he claimed to have performed.

He submitted that the situation or position would have been different if the Claimant's father had survived Pa. Oiyimeror as his eldest surviving male child but was only unable to perform his late father's i.e Pa. Oiyimeror's burial rites before his death. That it is only in such a situation that the Claimant would have been entitled to perform the burial rites of Pa. Oiyimeror and that of his father i.e. Pa. Edomhen and inherit the estate now in dispute.

He submitted that since Pa. Edomhen pre- deceased Pa. Oiyimeror and lost the opportunity to perform burial rites and inherit the estate of Pa. Oiyimeror which included the now disputed position of Chief Priest, the Claimant cannot seek to put something upon nothing by claiming that he did the burial rites of Pa. Oiyimeror which had eluded his father. He said that the undisputed fact in this case is that the right to perform the final burial rites for Pa. Oiyimeror had eluded the Claimant's father and cannot enure to the benefit of the Claimant as a grandchild of Pa. Oiyimeror when the lineage of Pa. Thomas Ukoni has not become extinct. He submitted that on the legal maxim of *nemo dat quod non habet*, the Claimant cannot claim to have performed the final burial rites of Pa. Oiyimeror as to entitle him to inherit the estate of Pa. Oiyimeror.

Furthermore, he submitted that since the Claimant posited that it is possible for a grandchild to do the burial rites of his father and that of his grandfather as to entitle such a grandchild to inherit estate of a deceased grandfather, it is only logical that it is the 1st Defendant who should have the right to do the burial rites of his late father i.e. Pa. Thomas Ukoni and that of Pa. Oiyimeror which had enured in favour of the 1st Defendant's father i.e. Pa. Ukoni (now late) before his death and thereby inherit the disputed position of Chief Priest.

He further submitted that the DW 4 in this case stated categorically that since Pa. Edomhen pre-deceased his father, the line of inheritance to the estate of Pa. Egbikor and the line of inheritance with respect to the position of Chief Priest of Egbaken shrine eluded the children of Pa. Edomhen and his lineage including the Claimant in this case.

He said that the crux of the Claimant's claim to the disputed position of Chief Priest of Egbaken Shrine is premised upon the failure of the Pa. Thomas Ukoni to perform the burial rites of his father before his death and as a result the right to perform burial rites fell on the line of grandchildren and that the Claimant became the eldest surviving grandchild and became entitled to perform burial rites and ascend the position of Chief Priest.

He submitted that the above assertion by the Claimant was stoutly denied by the Defendants and the 1st Defendant did not only plead and trace an unbroken line of inheritance from Pa. Egbikor down to himself, he pleaded in paragraph 26 – 39 and particulars in paragraphs 29 and 40 of his Amended Joint Statement of Defence, that his father Pa. Ukoni returned home from his station and performed the customary burial rite of his late father as applicable in Idumu-Odion Ukoni - Uromi and consequently inherited the entire estate of his

father and also succeeded and ascended to the position of Chief Priest of Egbaken shrine and the Defendants named Pa. Okodurele (as Odion Egbe), Pa. Oni, Pa. Okokoni, Pa. Aghemhenlo (all whom are now late) 2nd and 3rd Defendants and Mr. Odion Imosisli (who testified as DWI in this case) as those who presided and/or witnessed respectively the burial ceremony performed by his late father i.e. Pa Ukoni (now late). He posited that the evidence of DWI i.e. Odion Imoisili confirmed the fact that the 1st Defendant's father performed the above stated facts.

He posited that the Claimant's assertion that he was validly installed as the substantive Chief Priest of Egbaken shrine was stoutly denied by the Defendants in paragraphs 33 to 39, 51 – 55 of their Amended Joint Statement of Defence wherein they stated that the Claimant was only appointed as Chief Priest in acting capacity on behalf of the 1st Defendant and also the Written Statements on Oath of their witnesses particularly DW1 i.e. Odion Imoisili and DW4 i.e. John Obehioye corroborated the pleadings in the above stated paragraphs of the Defendants' Statement of Defence.

He submitted that the Defendants by paragraphs 56 – 63 of their Amended Joint Statement of Defence stated that soon after the Claimant was appointed as acting Chief Priest on behalf of the 1st Defendant, the Claimant came and informed the community that he wanted to do the burial rites of his late father and when the elders had gathered for the ceremony, the Claimant said he wanted to do the burial rites on the ancestral land containing the ruins of the house of Pa Eigbibhalu and the elders told him that the property in question belong to the 1st Defendant and that he cannot perform the burial rites of Pa Edomhen on the said premises. That when he insisted, the community members dispersed and refused to participate and the burial ceremony was not done for the Claimant. He said that the averments referred to above were not controverted by the Claimant and the Court is thus entitled to take those averments as unchallenged and admitted.

On the issue of the burial rites of Pa. Oiyimeror allegedly performed by the Claimant, he posited that the Claimant under cross examination stated that before a person performs burial rites in Uromi, the elders of his quarter and the Onojie of Uromi must be aware of it and that if the burial rites is eventually performed, the elders and the Onojie will also be aware.

He said that the Claimant under cross examination stated that when the subject matter of this suit was brought before the Onojie of Uromi for customary arbitration, that he was not allowed by the Onojie to state his case before the Onojie gave judgment against him in favour of the 1st Defendant.

Counsel therefore questioned that if it is true that the Claimant performed the burial rites of his father and that of Pa. Oiyimeror to the knowledge of the Onojie of Uromi, how come the same Onojie gave judgment against him with respect to the estate (including the disputed position of Chief Priest of Egbaken shrine) he claims to have inherited consequent upon the performance of the alleged burial rites?

He said that to compound the Claimant's case, his witness i.e. CW1 Joseph Iboi stated under cross examination on the issue stated that the Onojie did not deliver any judgment on the matter contrary to the evidence of the Claimant that judgment was given on the matter.

He therefore urged the Court to hold that the Claimant never did any burial rites for Pa. Oiyimeror as he alleged.

He submitted that it is trite law that the evidential burden of proof in a civil case is fixed by the state of averments in pleadings and also what is admitted need no further proof. For the above proposition of the law, he relied on the case of – ***OLANIYAN & 3 ORS VS. OYEWOLE & 4 ORS (2011) 14 NWLR PT. 1268 AT PG 445 RATIO 4*** and the provision of ***S.135 (1) and (2) and S.136 of the Evidence Act, Laws of the Federation of Nigeria*** that he who asserts must prove.

He submitted that it is trite law that the onus of proof in civil matters shifts and rests on the party whose case would fail if no further evidence is led on the issue in controversy between the parties in the case and for the above proposition of the law, he relied on the case of ***OLANIYAN & ORS vs OYEWOLE & ORS (SUPRA)***.

He said that in the instant case, the 1st Defendant having stated that his father (now late) performed the customary burial rites and inherited the position of Chief Priest of Egbaken and went further to name witnesses to the event and called one of them as witness, the position of the 1st Defendant became stronger when the Claimant and his witness admitted the case of the 1st Defendant when they testified on oath and under cross examination by stating that by the applicable custom in Idumu-Odion, Ukoni Uromi is that when the rightful person to assume the position of Chief Priest of Egbaken Shrine is not around, a person can be appointed as regent to hold the position pending when the rightful person will be installed.

He said that the Claimant and his witness testified that Pa. Ugege Eboikhuemen, Pa. Iboi Okoduwa and Pa. Enaholo Okodede acted as regent to the position of Chief Priest of Egbaken shrine at different times and that they were all appointed by and held the position on behalf of the 1st Defendant's father i.e. Pa. Ukoni.

He submitted that it is trite law that a person cannot delegate the powers which he does not possess and the 1st Defendant's father could not have appointed regents and delegated powers to them to act on his behalf while he was away from Ukoni – Uromi if he was not a substantive Chief Priest or if he had not been installed as Chief Priest of Egbaken shrine prior to when he appointed Pa. Ugege Eboikhuemen, Pa. Iboi Okoduwa and Pa. Enaholo Okodede to act as regents at different times as admitted by the Claimant and his sole witness both in the statement of claim, Written Statements on Oath and evidence on oath before this Honourable Court. He referred the Court to the testimony on oath of the Claimant and his witness under cross-examination.

He contended that Pa. Ukoni would not have been allowed to appoint 3 regents to the positions of Chief Priest of Egbaken shrine if the Claimant's assertion was true to the effect that Pa. Thomas Ukoni did not perform the burial rites of his late father.

He pointed out that the Claimant pleaded in paragraph 42 of his Further Amended Statement of Claim that under Esan Native Law and Custom of Idumu-Odion Ukoni – Uromi, nobody occupies the position of Chief Priest of Egbaken shrine without performing the final funeral rites of his deceased father or grandfather as the case may be. He maintained that before the 1st Defendant's father i.e. Pa. Ukoni appointed regents to act for him as Chief Priest of Egbaken Shrine, he must have performed the burial rites of his late father and inherited the position he was delegating to regents as mentioned above.

He therefore urged the Court to hold that Pa. Thomas Ukoni i.e. the 1st Defendant's father performed his late father's burial rites and he could not have in his life time been able to appoint three (3) persons at different times and in succession to hold and function as regents on his behalf with respect to the position of Chief Priest of Egbaken shrine without challenge from anybody if he did not perform burial rites of his late father.

We submit that our assertion as submitted above is strengthened by the pieces of evidence by the Claimant's witness i.e Joseph Iboi who stated under cross examination that the Claimant was in Uromi when the 1st Defendant's father i.e Pa. Thomas Ukoni died. Also the Claimant as per paragraph 25 of his Further Amended Statement of Claim stated that after the death of the 1st Defendant's father i.e. Pa. Thomas Ukoni, the elders of Idumu-Odion, Ukoni – Uromi invited Enaholo Okedede to assume the position of Chief Priest in acting capacity and Pa. Enaholo Okedede accepted the job. CWI stated under cross examination that when Pa. Thomas Ukoni died he was interred at Idumu-Odion, Ukoni – Uromi and he participated in the interment.

He posited that it cannot be said that the elders and members of Egbikor family including the CWI who performed the interment of Pa. Thomas Ukoni i.e. the 1st Defendant's father did not know the rightful person in the line of succession to the position of Chief Priest of Egbaken Shrine when they invited Enaholo Okedede to come and act as regent to the position of Chief Priest of Egbaken shrine when the Claimant, according to CWI, was in Uromi to the knowledge of members of Egbekor family.

He said that there was no evidence from either the Claimant or his witness that the said Enaholo Okedede acted as regent to the position of Chief Priest of Egbaken Shrine on behalf of the Claimant in this case. Also that there is no evidence that the Claimant was an infant at the time Pa. Ukoni died in 1987 or that Pa. Enaholo Okedede acted as regent to the position of Chief Priest of Egbaken shrine on behalf of the Claimant. According to him, the only logical inference that can be drawn from the appointment of Pa. Enaholo Okedede as regent to the position of Chief Priest of Egbaken shrine is that he acted on behalf of the 1st Defendant who was admitted by the Claimant and his witness i.e. CW I (Joseph Iboi) that the 1st Defendant was about 2 years old when his father i.e. Pa. Thomas Ukoni died hence the elders of Idumu-Odion and Egbikor family had to appoint a regent to act on behalf of the 1st Defendant pending when he would come of age.

He submitted that if the above reasoning were not true, it is the Claimant who would have appointed Pa. Enaholo Okedede as regent after the death of Pa. Thomas Ukoni. He said

that there is no evidence that the Claimant was a minor when Pa. Thomas Ukoni died in 1987. That the Claimant claimed that he did the customary installation ceremony in 1990 i.e. 3 years after the death of Pa. Thomas Ukoni. He pointed out that the Claimant, curiously, failed to provide any explanation why Pa. Enaholo Okedede was appointed as regent by the Elders of Idumu-Odion and members of Egbikor family after the death of the 1st Defendant's father when he was already an adult and was living in Uromi when Pa. Ukoni died and Pa. Enaholo Okedede was appointed as regent to the position of Chief Priest of Egbaken Shrine.

He submitted that the explanation can only be found in the averments of the Defendants in paragraphs 33 and 34 of their Amended Joint Statement of Defence which averred that at the time the 1st Defendant's father died, the 1st Defendant was only about 2 years old and in line with the custom and tradition of Ukoni – Uromi, the elders and principal members of Idumu-Odion met and appointed a regent to act as Chief Priest of Egbaken Shrine pending when the 1st Defendant would come of age.

He submitted that the Defendants pleaded and led credible evidence to prove that under Esan Native Law and custom as applicable in Ukoni - Uromi, when a man is the only surviving male child of his late father or deceased estate owner, he can inherit the estate or his late father's estate whether or not he has done the customary final burial rites of his father since there is nobody or other child or blood brother contending with him with respect to such estate. He said that this exception to the general rule relating to inheritance under Esan Native Law and custom as applicable in Idumu-Odion, Ukoni - Uromi was clearly and copiously pleaded in paragraphs 5 and 41 of the Defendants' Amended Joint Statement of Defence and also deposed to in paragraphs 11 and 46 of the Written Statement on Oath by DWI i.e Odion Imoisili and in paragraphs 14, 15, and 16 of the Written Statement on Oath of DW 4 i.e John Obehioye and those averments and depositions were not controverted by the Claimant and his witness.

He submitted that by the provisions of S.70 of the Evidence Act, Laws of the Federation of Nigeria it is provided that in deciding questions of customary law which has not already been proved or judicially noticed the opinions of traditional rulers, persons having special knowledge of the particulars custom or book or manuscript recognized as legal authority by the people indigenous to the locality in which such law or custom applies can be relied upon. He said that the above provisions of the Evidence Act was also amplified in the cases of:-

- 1) ***TATU VS. ESTATE OF LATE ISAH ALHAJI ADAMU AND ANOTHER (2015) 13 NWLR PT 1476 at p 364;***
- 2) ***ONWUCHEKWA VS ONWUCHEKWA (1990) 5 NWLR PT 194 at pg 739 ratio 7; and***
- 3) ***ADEOGUN AND 2 OTHERS VS. EKUNRIN AND 6 OTHERS (2004) 2 NWLR PT 856 at pg 52 ratios 1 & 2***

He submitted that the DW 4 deposed to the facts in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of his Written Statement on oath that he is a member of Egbikor family, that he was born in 1941 i.e over 78 years ago and that he is familiar with Esan Native Law

and Custom relating to intestate inheritance and clearly stated that an only surviving male child or son of a deceased estate owner can inherit such estate after the death of the original estate owner i.e. his late father even when he has not performed customary final burial rites since there is no sibling contending with him. He said that in spite of the above copiously pleaded rule of custom and written depositions of the Defendants' witnesses, the Claimant did not consider it necessary to file either a Reply to the Statement of Defence or a Defence to the 1st Defendant's counter claim.

He submitted that in the case *IWOHA & ANOR VS NIPOST LTD & ANOR (2003) 8 NWLR PT. 882 at p.308 ratio 5* the court held that when an averment in a Statement of Defence has not been controverted by the averments in a Statement of Claim, it becomes imperative for the Claimant to file a Reply to Statement of Defence and where he fails to do so the court can take it that such a claimant has either admitted such facts or he has no defence to issues thereby raised.

He submitted that in the case of *USMAN Vs GARKE (2003) 14 NWLR PT 840 at page 261* rationales 6, 7 and 8 the court held that where a Defendant counter - claims against the Plaintiff, the latter is duty bound to file a Reply in Defence to the Counter-claim i.e Defence to the Counter-claim, otherwise the court is entitled, in fact obliged, to assume that the Plaintiff has no defence to the Counter-claim and may enter judgment for the Defendant accordingly.

He further submitted that in the case of *OKOEBOR VS. POLICE COUNCIL (2003) 12 NWLR PT 834 at p. 444* the Court held that facts in pleadings and evidence not controverted or challenged by the adverse party is deemed admitted and needs no further proof.

He said that in the instant case, the Claimant did not controvert those copious averments and pieces of evidence referred to above neither did he file a Reply to the Statement of Defence or a Defence to the Counter claim of the 1st Defendant in this case. He therefore urged the Court to find for the 1st Defendant as per his Counter-claim in this case.

Learned counsel submitted that it is the duty of this Court to evaluate the evidence proffered on both sides of the case before it by placing such pieces of evidence side by side on an imaginary scale so as to determine in whose favour the scale tilts. He submitted that the preponderance of evidence in this case tilts more in favour of the 1st Defendant/Counter-claimant.

With respect to the Claimant's averments in paragraphs 42, 43 and 44 of his Further Amended Statement of Claim to the effect that under the custom of Ukoni nobody inherits property of a deceased or occupies the position of Chief Priest of Egbaken Shrine without performing the customary final burial rites of his deceased father and grandfather in line with custom, he submitted as follows:-

- (a) That from the 1st Defendants counter-claim in this suit he is only asking this Honourable Court to declare that he is the proper person entitled to occupy the position of and perform the duties of Chief Priest of Egbaken shrine and it is only when he has

been able to establish his claim before this Honourable Court that the need to do the requisite customary final burial rites and installation procedure will arise;

- (b) That the uncontroverted evidence before this Honourable Court, particularly paragraph 16 of the Written Statement on oath of the DW4 is to the effect that there is no time frame within which a person is required or obliged to perform his deceased father or grandfather's final burial rites. Thus, time does not run against a prospective heir until his death.

On the issue of Ukhure, he submitted that assuming but not conceding that the custom of Ukoni-Uromi stipulates that once an "Ukhure" staff of office is presented to a person as Chief Priest it cannot be retrieved even when wrongly acquired or given, that where a rule of custom operates contrary to the principles of natural justice, equity and good conscience, the Court has the power to strike it down and do justice to find out whether the person in possession of the Ukhure lawfully or rightly became in possession of same taking into account the facts and circumstances of the particular case and where the court finds that it was wrongly presented or possesses, it can order for a reversal and set it aside.

He submitted that in the instant case the DW I under cross examination stated that it was because the Ukhure of Egbaken shrine was wrongly acquired by the Claimant and the Claimant refused to vacate the position of Chief Priest of Egbaken Shrine which rightly belongs to the 1st Defendant that is why the parties are in Court.

On the issue that the 2nd and 3rd Defendants failed to lead evidence in support of their Written Statements on Oath and they thereby became moribund he submitted that there is nothing in law which compels a party to an action in Court to testify to prove or disprove a fact in issue where the case can be successfully established without oral evidence of the party. For this view, he relied on the case of ***NIGERIA AGRICULTURAL & CO-OP BANK LTD vs ADEAGBO (2004) 14 NWLR PT 894 at p.551.***

He submitted that the case at hand borders essentially on custom and right of inheritance and the 2nd and 3rd Defendant did not counter-claim and are not laying any claim to the contentious position of Chief Priest of Egbaken shrine in this case and therefore not duty bound to lead any evidence on the matter.

On the issue of discrepancies in the present age ascribed to the 1st Defendant/Counter Claimant, he submitted that such discrepancy is neither a material contradiction or fatal to the case of the Defendants particularly the 1st Defendant. Also that the CWI and Claimant in his pleadings and evidence particularly under cross-examination admitted that the 1st Defendant was an infant of about 2 years old when his father died in 1987.

He referred to the case of ***ONISAODU & ANOR VS CHIEF ELEWUJU & ANOR (2006) 13 NWLR PT 998 at p.517 ratio 3*** where the Court held that where a witness called by a party gives evidences that is favourable to the case of the adverse party such pieces of evidence would amount to an admission against interest and the adverse party can take advantage of such piece of evidence. He said that in the instant case the Claimant in paragraph 24 of his Further Amended Statement of claim and also by paragraph 23 of his Written

Statement on oath stated that the 1st Defendant's father i.e. Pa. Thomas Ukoni died in 1987. Under cross examination the Claimant and his sole witness testified that the 1st Defendant was 2 years old when his father died and in paragraph 33 of the Defendants' Amended Joint Statement of Defence, the Defendants averred that the 1st Defendant was a minor when his father died.

He therefore submitted that the age of the 1st Defendant was clearly ascertainable and was not in controversy in this case.

On the issue that the Claimant had been occupying the position of Chief Priest since 1990 and it was only in 2014 that the Defendants came to challenge him, he submitted that the clear evidence of the Defendants was to the effect that the Claimant was appointed in acting capacity pending when the 1st Defendant would come of age. He said that the dispute only arose when the Claimant later started to appropriate the estate of the 1st Defendant to himself as if it was his right and when he refused to hand over what rightly belongs to the 1st Defendant. He said that the Defendants were not in any way guilty of undue delay and the Claimant has not shown that this case which is purely a customary dispute is statute barred.

On the failure of the 1st Defendant to depose to a Written Statement on Oath and lead evidence in proof of his counter claim, he submitted that the subject matter of litigation in the Claimants claim and also the counter-claim is not one in which the 1st Defendant is duty bound to offer oral testimony to prove or disprove. He maintained that the issues in controversy in both cases were such that he could successfully establish through witnesses as he has done and without the necessity of oral testimony on his part. He relied on the case of *N A C B LTD vs. ADEAGBO (Supra)*.

Finally on issue one, learned counsel submitted that the Claimant has failed to establish his claim against the Defendants before this Court on the preponderance of evidence and he urged the Court to dismiss the Claimant's case together with the reliefs sought thereby. He urged this Honourable Court to resolve issue one against the Claimant in this case and consequently dismiss his claim before this Honourable Court.

ISSUE TWO:

Whether from the evidence before this Honourable Court, the 1st Defendant/Counter-claimant has proved his counter-claim against the Claimant on the balance of probability or on the preponderance of evidence to warrant the judgment of this Honourable Court in his favour?

On issue two, learned counsel submitted that the 1st Defendant has proved his counter-claim on the preponderance of evidence and he therefore urged the Court to give judgment in favour of the 1st Defendant with respect to the reliefs set forth in his counter-claim against the Claimant in this case.

In support of his legal arguments in respect of issue two, he also adopted the facts and legal arguments he proffered in respect of issue one. He submitted that unlike the Claimant in this case who in his main claim is asking the Court to validate his purported installation in 1990

as the substantive Chief Priest of Egbaken shrine, the 1st Defendant in this Counter-claim is principally urging the Court to declare that he is the proper person entitled to occupy and perform the duties and functions of the Chief Priest a.k.a Ohen of Egbaken juju shrine, Idumu-Odion, Ukoni – Uromi.

Learned counsel submitted that since there is a consensus ad idem between the Claimant and the Defendant from their pleadings that succession to the position of Chief Priest of Egbaken shrine is hereditary and that the position is reserved for members of Egbikor family or lineage in Idumu-Odion Ukoni in order to succeed with respect to reliefs (a) , (b) and (c) of his counter-claim, the 1st Defendant must establish the following factors:-

- (a) That he is a native of Idumu-Odion, Ukoni-Uromi and also a member of Egbikor family or lineage; and
- (b) Trace an unbroken line of succession and/or inheritance and show that the line of inheritance with respect to the disputed position of Chief Priest of the said Egbaken Shrine has devolved on him.

He submitted that it is only after the 1st Defendant/Counter-claim has discharged the burden of proof with respect to the above mentioned factors that he can proceed to perform the requisite customary rites of installation with respect to the dispute position of Chief Priest of Egbaken shrine. He posited that from the pleadings and evidence adduced in this case, it is not in dispute that the 1st Defendant/Counter-claimant is a native of Idumu-Odion, Ukoni – Uromi and also a member of Egbikor family or lineage.

On the issue of inheritance, he submitted that the 1st Defendant has successfully traced an unbroken line of inheritance from Pa. Egbikor who was the first Chief Priest of Egbaken shrine down to himself as shown by the averments contained in paragraphs 6, 7, 8, 13, 15 – 41, 44 and 45 of the Defendants’ Amended Joint Statement of Defence and also the whole gamut of facts contained in the Written Statements on Oath of the Defendants’ four (4) witnesses who testified for the 1st Defendant in this case.

He submitted that the alleged family tree or genealogy of Egbikor lineage pleaded by the Claimant was contradicted under cross examination. That while the Claimant pleaded in paragraphs 17, 18, 19 and 20 of his extant Statement of Claim that Pa. Egbikor is the great grandfather of the 1st Defendant, the CW1 under cross examination stated in the concluding portion of his answers to cross examination questions that Pa. Egbikor is the grandfather of the 1st Defendant.

He therefore urged the Court to prefer the family tree or genealogy of Pa. Egbikor lineage as pleaded by the Defendants and also prefer their evidence on the matter to that of the Claimant and his witness. He submitted that having successfully established his claim to the disputed position of Chief Priest of Egbaken shrine, the 1st Defendant adumbrated the events which led to the dispute between him and the Claimant with respect to the position of Chief Priest of Egbaken shrine and stated in paragraph 73 of the Defendants’ Amended Joint Statement of Defence that the Claimant is a usurper and has no valid claim to the position of Chief Priest of Egbaken shrine and therefore not entitled to the reliefs he claimed in this case.

With respect to reliefs 76 (a) (b) and (c) of the 1st Defendants' Counter-Claim, learned counsel submitted that the 1st Defendant has proved his claim on the preponderance of evidence and on the balance of probability so that when the Court evaluates the totality of evidence adduced by the Claimant and Defendants and put them side by side on an imaginary scale of justice, the scale would tilt in favour of the 1st Defendant with respect to his counter claim.

With respect to the reliefs contained in paragraph 76 (d) and (f) of the Counter-claim, he submitted that those reliefs relate to stool properties and are ancillary to the main claim of who, as between the Claimant and the 1st Defendant, is the rightful Chief Priest of Egbaken Shrine. Thus he posited that the success of the 1st Defendant with respect to the main question of who is the rightful Chief Priest of Egbaken would weigh heavily in the mind of the Court in deciding reliefs 76 (d), (e) and (f). He submitted that the 1st Defendant as per the averments in paragraphs 13, 14, 17, 20, 23, 29, 31, 42 (a) 42 (b) 49, 50, 51, 57, 60, 61, 62, 63, 67, 68,69, 70, 72, 74, and 75 and the totality of the evidence of his witness established his claim with respect to reliefs 76 (d), (e) and (f) of his Counter-claim.

He further submitted that the 1st Defendant first filed his Counter-claim in this case along with the Defendants' Joint Statement of Defence on the 13th day of June, 2016 before the Defendants later filed a motion to amend their Joint Statement of Defence and Counter-claim and same was subsequently granted by this Honourable Court.

He submitted that in spite of the above stated pleadings, averments and depositions in this case the Claimant did not deem it necessary to file either a Reply to Statement of Defence or a Defence to Counter claim. He therefore urged the Court to accordingly find for the 1st Defendant as per reliefs 76, (d), (e) and (f) of his Counter claim as same were not challenged by the Claimant in this case. For this view, he relied on the cases of:

1. ***IWOHA & ANOR VS NIPOST LTD & ANOR (SUPRA)***
2. ***USMAN Vs GARKE (SUPRA)***
3. ***OKOEBOR VS. POLICE COUNCIL (SUPRA)***

On the whole, he urged the Court to resolve issue two in favour of the 1st Defendant Counter-claimant and give judgment in his favour as per the reliefs contained therein.

On the issue of general damages for N1,000,000.00 (One Million Naira) claimed by the 1st Defendant/Counter-claimant as per paragraph 76 (f) of his counter-claim, he submitted that it is settled law that general damages are presumed by law as the direct natural consequences of the acts complained of by the party claiming for general damages. According to him, the aim of general damages is to compensate the claimant for the harm and injury caused by the Defendant and in assessing general damages, the court would take into consideration the surrounding circumstances and the conduct of the parties. See the case of – ***UKACHUKWU vs UZODINMA (2007) 9 NWLR PT 1038 at p.167***

He submitted that in the instant case the 1st Defendant pleaded various acts of the Claimant which formed the foundation of his claim for general damages particularly paragraph 60, 72, 74 and 75 of the Defendant's Amended Joint Statement of Defence. He submitted that those averments were not controverted by the Claimant and he therefore urged the Court to give judgments in favour of the 1st Defendant with respect to his Counter-claim since the Claimant did not file any defence to Counter-claim and never also filed any Reply to Statement of Defence. For this view, he relied on the cases of:-

1. IWOHA & ANOR VS NIPOST LTD & ANOR (SUPRA)
2. USMAN Vs GARKE (SUPRA)
3. OKOEBOR VS. POLICE COUNCIL (SUPRA)

He submitted with respect to the Claimant's contention that the 2nd and 3rd Defendants were present when he was allegedly installed that the Defendants copiously countered the said assertion in paragraphs 56 – 59 of their Amended Joint Statement of Defence and also in their witnesses' Written Statements on Oath before this Court.

On the issue that the 3rd Defendant carried the head of cow which the Claimant allegedly used by the Claimant for the burial ceremony of his late father, he submitted that the issue did not arise as it was never pleaded by the Claimant in his Further Amended Statement of Claim and any such evidence, if given, would go to no issue.

On the issue that the Defendants did not personally adduce evidence during trial, he submitted that from the facts and circumstance of this case, there is no legal obligation on the Defendants to adduce oral evidence in court if they can do so through witnesses as they have done in this case. For this view, he relied on the case of *NIGERIA AGRICULTURAL & CO-OP BANK LTD vs ADEAGBO (SUPRA)*.

Furthermore, counsel submitted that the Address of Counsel cannot and does not take the place of evidence, thus the Claimant's counsel's Written Address sub-head 4.11 where it was alleged that the DW4 i.e Odion Imoisili stated under cross examination that it is not the eldest man in Idumu-Odion Ukoni – Uromi that is appointed as Chief Priest under Esan Native Law and custom of Ukoni did not in any way contradict the averments in paragraphs 39 and 41 of the Defendants' Amended Joint Statement of Defence because what was pleaded in those paragraphs is that it is not the eldest man in Egbikor lineage that is appointed as Chief Priest and also there were abundant evidence on the part of the Claimant and Defendants that the position of Chief Priest is reserved exclusively for members of Egbikor lineage in Idumu-Odion, Ukoni – Uromi and that it is hereditary and not by appointment.

He submitted on the issue of Ukhure that even though the DW1 stated that the Ukhure of Egbaken shrine is presently in the possession of the Claimant, he stated clearly under cross examination in this case that it was because it rightly belongs to the 1st Defendant and the Claimant in wrongly in possession of same that the parties are in court with respect to this matter.

With respect to the Claimant's averments in paragraphs 42, 43 and 44 of his Further Amended Statement of Claim to the effect that under the custom of Ukoni nobody inherits property of a deceased or occupies the position of Chief Priest of Egbaken Shrine without performing the customary final burial rites of his deceased father or grandfather in line with custom, he submitted that from the 1st Defendants Counter-claim in this suit he is only asking this Honourable Court to declare that he is the proper person entitled to occupy the position of and perform the duties of Chief Priest of Egbaken shrine and it is only when he has been able to establish his claim before this Honourable Court that the need to do the requisite customary final burial rites and installation procedure with respect to the disputed stool of Chief Priest of Egbaken Shrine will arise. Thus, he maintained that the question that the 1st Defendant has not done the final burial rites for his late father does not arise at this stage and from the evidence on record in this case time does not run against an heir with respect to the performance of final burial rites until such an heir dies. He posited that the uncontroverted evidence before this Honourable Court, particularly paragraph 16 of the Written Statement on Oath of the DW4 is that there is no time frame within which a person is required or obliged to perform his deceased father or grandfather's final burial rites.

Finally, he urged the Court to resolve issue two in favour of the 1st Defendant and grant his Counter-claim in this Suit.

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 observe that the 1st Defendant filed a Counter-Claim in this suit so I am of the view that the two issues for determination in this suit are as follows:

- 1) *Whether the Claimant has proved his case on the preponderance of evidence to warrant the judgment of this Court in his favour?*
- 2) *Whether the 1st Defendant/Counter-Claimant has proved his counter-claim against the Claimant on the preponderance of evidence to warrant the judgment of this Court in his favour?*

I will now proceed to resolve the two issues seriatim.

ISSUE 1:

Whether from the evidence before the Court, the Claimant has proved his case on the preponderance of evidence to warrant the judgment of this Court in his favour?

It is settled law that customary law is an issue of fact which must strictly be proved. See: *Otaru v. Otaru (1986) 3 NWLR pt 26 page 14*; and *Ajibi v. Olaewe (2003) 1 NWLR pt.822 page 237at 273*. What the law requires for proof of matters of customary law is cogent, reliable and credible evidence.

Section 16 the Evidence Act provides that the burden of proving a custom law lies upon the person alleging its existence. See also *Agbara v Amara (1995) 7 NWLR Part 410 Page 712 at 728 Para F-G*.

In the case of *Ajibi v. Olaewe (2003) 1 NWLR pt.822 page 237at 273* it was held thus: - **'Matters that are associated with or related with native law and custom or customary law on Chieftaincy are to be strictly proved by calling cogent reliable and credible evidence.'**

In the case of *ABDULLAHI OGWU OMAYE & ANOR v. USMAN OMAGU & ORS (2007) LPELR-3558(CA)*, the court held that in the event of a chieftaincy based on custom - the onus will be on a contestant to prove the customary law regulating the appointment to the chieftaincy and also prove that his appointment was made according to the customary law.

In the instant case, the Claimant's case is that his installation as the substantive Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni – Uromi in September 1990 is valid, subsisting and in tandem with the Esan native law and custom of Idumu-Odion, Ukoni-Uromi.

Essentially, the main contest in this suit is for the position of Chief Priest of Egbaken juju shrine of Idumu-Odion in Uromi. The other reliefs are consequential on the outcome of the main contest. From the evidence adduced by both parties, it is apparent that the parties are in agreement on the genealogies of both the Claimant and the 1st Defendant. They have a common ancestry. Their progenitor was one Pa. Egbikor, who was alleged to be the first person to occupy the position of Chief Priest of Egbaken juju shrine. Pa. Egbikor's eldest surviving son was one Oiyimheror.

Upon the death of Pa. Egbikor, the said Oiyimheror performed the necessary final burial rites in accordance with Esan Native Laws and Custom as applicable in Ukoni - Uromi and inherited the entire estate of Pa. Egbikor including the position of Chief Priest of Egbaken Shrine. The said Oiyimheror was the father of Pa. Eigbibhalu and Pa. Edomhen. Pa. Eigbibhalu was the eldest of the two children of Pa. Oiyimheror and emerged as his eldest surviving son when the latter died.

However, there is a major disagreement between the parties on the subsequent events after the demise of Pa. Oiyimheror. According to the Claimant, upon the death of Pa. Oiyimheror, his eldest surviving son, Pa. Eigbibhalu (the 1st Defendant's father) failed to perform the final burial rites of his father in accordance with Esan Native laws and Custom as applicable in Ukoni – Uromi to enable him inherit the estate of his late father and also occupy the position of Chief Priest of Egbaken juju shrine. He said that the elders had to appoint someone as the acting Chief Priest pending when he would perform the final burial rites.

On the other hand, the 1st Defendant has maintained that his father performed the customary final burial rites of his late father in accordance with Esan Native Law and Custom as applicable in Idumu-Odion, Ukoni - Uromi and consequently inherited the entire estate of his late father and also succeeded him and ascended to the position of Chief Priest of Egbaken Shrine. According to him, because he was not resident at Ukoni - Uromi, his father obtained the permission of the elders and principal members of Idumu-Odion, Ukoni – Uromi to delegate his functions as Chief Priest of Egbaken juju shrine to one Pa. Ugege, a native of Idumu – Odion community to be acting for him and on his behalf as Chief Priest of Egbaken shrine.

According to the Defendants, at the time Pa. Ukoni Eigbibhalu died, his eldest surviving son who is the 1st Defendant in this case was a minor. They maintained that the Claimant was appointed by the elders to hold the position of acting Chief Priest pending when the 1st Defendant would become matured enough to assume the position of substantive Chief Priest.

Therefore a crucial issue to be determined in this suit is whether the Claimant was appointed in an acting capacity or whether his appointment was substantive as he is contending. It is settled law that where there are before the Court for the purpose of proving a particular fact in issue two conflicting versions of facts, the trial Court must evaluate the evidence to make appropriate findings of fact. Evaluation of evidence is an indicator that the Court correctly approached and considered every relevant evidence in reaching its decision. See: **MISS HELEN EGBUCHE v. MR. PATRICK OKECHUKWU EGBUCHE (2013) LPELR-22512(CA)**.

Evaluation of evidence is basically the assessment of facts by the trial Court to ascertain which of the parties to a case before it has more preponderant evidence to sustain his claim. The evaluation involves the reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. See **IKHINMWIN vs. ELEMA (2014) LPELR (23322) 1 at 32**. In the case of **Lagga v. Sarhuna (2008) 16 NWLR (Pt. 1114) 427 @ 460 F-G**, the Supreme Court per Muhammad JSC observed thus:

"Now in evaluating any piece of evidence placed before it by parties, a Court of law is duty bound to consider the totality of the evidence led by each of the parties. It shall then place it on an imaginary scale of justice to see which of the two sides weighs more creditably than the other. Thus evaluation of evidence entails the assessment of same so as to give value or quality to it. Evaluation of evidence by a trial court should necessarily involve a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other."

Evaluation of evidence entails the assessment of that evidence so as to give value or quality to it. Evaluation demands that the evidence adduced by both parties is assessed and weighed so as to give probative value or quality to it.

I will now evaluate the evidence of the parties in order to give value to the evidence adduced by each party.

On the part of the Claimant, he adduced copious evidence in his attempt to establish his claim that he was duly installed as the substantive Chief Priest. He traced his genealogy from his great grandfather, Pa. Egbikor to his grandfather, Pa. Oyimeror who were previous Chief Priests of Egbaken Shrine, Idumu-Odion, Ukoni-uromi, during their lifetime. He admitted the fact that the 1st defendant and he had the same grandfather and great grandfather. Furthermore, that their grandfather, late Pa. Oyimeror had three children including late Pa. Edonmhen the Claimant's father and late Pa. Thomas Ukoni, the 1st defendant's father. According to him, after the death of Pa. Oyimeror, the 1st defendant's father, Thomas Ukoni being the eldest son of their grandfather, was supposed to perform the final burial rites to enable him to assume the position of Chief Priest of the Egbaken Shrine. He said that the 1st defendant's father could not perform the burial rites of his deceased father before his eventual demise sometime in 1987.

The Claimant maintained that after the death of the 1st defendant's father, the elders of Idumu-odion, Ukoni-Uromi invited one Enaholo Okodede to assume the position of Chief Priest in acting capacity which said invitation was honoured by Enaholo Okodede.

He said that while Enaholo Okodede was acting as the Chief Priest of Idumu-Odion, Ukoni-Uromi, people were dying in large numbers whereupon the aforementioned elders summoned a meeting of the Egbikhor family members sometime in August 1990, to discuss the installation of a substantive Chief Priest of Idumu-Odion, Ukoni Uromi.

The Claimant stated that at the said Egbikhor family meeting, he was selected and presented as the rightful person to occupy the position of Chief Priest being the eldest surviving male grandchild of Pa. Oyimeror whereupon he performed the burial rites of his grandfather and father in line with Esan Native Law and Custom of Ukoni-Uromi and was thereafter installed as the Chief Priest (Ohen) of Egbaken Shrine of Idumu-odion, Ukoni-Uromi on the 30th of September, 1990. He maintained that the process for his installation commenced on the 23rd of September 1990 and ended on the 30th of September 1990 with the presentation of his staff of office (Ukhure) to him by the Ikegebele, (Chief messenger) at the instance of the elders and Odionwele of Idumu-Odion, Ukoni-Uromi.

The evidence of the alleged installation of the Claimant as substantive Chief Priest requires a close and critical scrutiny. It is important to observe that the evidence of the Defendants' witnesses particularly that of the DW1, Odion Imoisili and DW3 Joseph Obiye Okeshan, appears to have corroborated the Claimant's assertion that he was installed as the substantive Chief Priest. In his evidence under cross examination, the D.W 1 admitted that there is an Ukhure (staff of office) domiciled in the Egbaken shrine presently which is in the possession of the substantive Chief Priest. He however added that the Ukhure is in the possession of the Claimant hence they are in Court to ask him to relinquish it.

Furthermore, the D.W.3 categorically stated that the Ukhure is reserved for the Chief Priest of Egbaken Shrine in Ukoni, Uromi and that once the Ukhure is given to a Chief Priest, it cannot be retrieved from him until he dies.

I am of the view that the above pieces of evidence are very much in support of the Claimant's case. It is settled law that where the facts of the defendant's case supports the claimant's case, the claimant can capitalize on the facts in the defendant's case that supports his case to establish or prove his case. See *HRH SALIHU TANKO EMIR OF KAGARA & ORS v. ADAMU BABANGIDA ISAH KUSHERKI (2018) LPELR-46965(CA)*.

Again in the case of *ENGINEER AUGUSTINE EZEANI v. MR. INNOCENT ANIUNOH (2012) LPELR-19940(CA)*, the Court of Appeal posited thus: "***It is trite that a plaintiff is to succeed on the strength of his case and not on the weakness of the case of the defendant. However, where, as in this case, the evidence of the defendant is in support of the plaintiff's case, the plaintiff is entitled to rely on and take benefit of such evidence.***"

The Claimant's evidence did not merely touch on his installation as the substantive Chief Priest of Egbaken Shrine, but also dwelt extensively on the process and procedure for his installation as the substantive Chief Priest of Egbaken Shrine in September 1990.

However, on the part of the Defendants, there is no evidence to show that the father of the 1st Defendant was ever installed or functioned as the substantive Chief Priest of Egbaken

Shrine in Ukoni, Uromi. The evidence of the Defendants was that the father of the 1st Defendant was far away from home while some other people were deputizing for him. Furthermore, no evidence was led to show that the Ukhure (staff of office) was ever in his possession.

I am of the view that on the issue of the credibility of evidence on the matter of the installation of the Claimant as the substantive Chief Priest of Egbaken Shrine, the evidence of the Claimant appears more credible. In one breath, the Defendants admitted that the Ukhure (staff of office) is reserved for the Chief Priest of Egbaken Shrine and that once it is given to a Chief Priest, it cannot be retrieved from him until he dies. In another breath, they maintained that they are in court to retrieve the staff of office from him. They cannot approbate and reprobate at the same time.

Furthermore, I agree with the submission of the learned counsel for the Claimant that the issue of “Ukhure”, is the live issue to be decided by this Court in arriving at the justice of this case. Also that the evidence of the DW3 that the Ukhure is in possession of the Claimant has effectively settled the issue of the installation of the Claimant as the Chief Priest of Egbaken Shrine.

Consequently, juxtaposed with the evidence of the Defendants, I am of the view that the evidence of the Claimant is more worthy of belief than that of the Defendants for the following reasons:

- (i) There is uncontroverted evidence from both sides that the Ukhure (staff of office) which is the insignia of authority of the substantive Chief Priest is in possession of the Claimant;
- (ii) There is nothing to show that the Claimant acquired the Ukhure either surreptitiously or illegally, without the consent of the elders of the community;
- (iii) The evidence of the Claimant of the circumstances culminating in his emergence as Chief Priest were corroborated by the evidence of the Defendants;
- (iv) The evidence on both sides is that the 1st Defendant has not performed the final burial rites of his late father. The preponderance of evidence adduced at the trial by the Claimant is that under Esan native law and custom, the eldest son of a deceased Esan man must perform the final burial rites before he can inherit his father's property. Although the Defendants alleged that there is an exception to this rule, they did not satisfactorily establish the alleged exception that the first son of a deceased Esan man can inherit his father's properties and ascend to the office of Chief Priest of the Egbaken Shrine when he has not performed the final burial rites of his father. The law is that the burden of proof of custom is on the person alleging its existence. - See **Section 14 (1) Evidence Act 2011**. See the case of **Fatoba V Ogundahunsi (2003) 14 NWLR PART 840, PAGE 323 AT Pp. 347 para C. D – F**. Furthermore, custom should be strictly proved, see **Orlu V Gogo-Abite (2010) 181 LRCN page 193 at 205 UZ**. Under cross examination, the D.W. 3 even admitted that under Esan native law and custom performance of final burial rites is necessary for a first son to inherit his father's property;
- (v) Furthermore, during the trial, the issue of the age of the 1st Defendant was a recurring decimal. The issue of age becomes quite pertinent in the light of the

Defendants pleadings and evidence on oath which hinged the inability of the 1st Defendant to assume the position of Chief Priest on the ground that he was an infant when his father died hence the Claimant was appointed in an acting capacity. There were speculations on when the 1st Defendant actually attained the age of majority to qualify him to assume the position of Chief Priest. It must be observed that the age of the 1st Defendant is a fact which is peculiarly within the knowledge of the 1st Defendant.

Section 140 of the Evidence Act, 2011 provides as follows:

“When a fact is especially within the knowledge of any person, the burden of proving that fact is upon him”.

See also: *Igbele Vs The State (2004) 15 NWLR (896) 314 @ 339 H; Adeniji Vs The State (2001) 13 NWLR (730) 375 @398 B – G;*

One would have expected the 1st Defendant to testify at the trial to clarify these controversies. Curiously, he did not even file any deposition, neither did he testify and no explanation was given for his failure to testify. I am of the view that his failure to testify to clarify the controversies surrounding his age further weakened the defence of the Defendants.

On the preponderance of evidence, I am of the view that the Claimant has sufficiently established the fact that he was installed as the substantive Chief Priest of Egbaken Shrine. Issue 1 is therefore resolved in favour of the Claimant.

ISSUE 2:

Whether the 1st Defendant/Counter-claimant has proved his counter-claim against the Claimant on the preponderance of evidence to warrant the judgment of this Court in his favour?

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 by 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 1st Defendant *inter alia* counter-claimed against the Claimant as follows:-

(a)A DELARATION that the 1st Defendant/Counter-Claimant is the rightful person entitled to occupy the position and perform the duties and functions of Chief Priest, a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi, a place within the jurisdiction of this Honourable Court;

(b)AN ORDER of perpetual injunction restraining the Claimant/Defendant to counter-claim from parading himself as Chief Priest and performing the duties and functions of Chief Priest a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;

(c)AN ORDER of perpetual injunction restraining the Claimant/Defendant to counter-claim from interfering with the 1st Defendant's rights and position and performing the duties and functions of Chief Priest a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;

(d)A Declaration that the 1st Defendant in his capacity as the Chief Priest a.k.a Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi is the rightful person entitled to apply for and be granted Statutory Right of Occupancy over the parcels of land/properties forming parts of the land/estate of the rightful Chief Priest a.k.a Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi;

(e)An Order directing the Claimant/Defendant to counter-claim to render account and hand over to the 1st Defendant/Counter-Claimant the proceeds from the counter-claimant's illegal and unauthorized sale of portion of land and/or property forming part of the estate of the 1st Defendant including the sum of N1,000,000.00 (One Million Naira) unlawfully received by the Claimant/Defendant to counter claim from one Mr. Raymond Ebhodaghe in respect of 1st Defendant's land measuring 100ft by 150ft lying, situate and being at Idumu-Odion, Ukoni-Uromi sold by the Claimant/Defendant to counter – claim to the said Mr. Raymond Ebhodaghe on the 12th day of March, 2011;

(f)The sum of N1, 000,000.00 (One Million Naira) being general damages suffered by the 1st Defendant/Counter Claimant as a result of the Claimant/Defendant to Counter-Claim's usurpation of the 1st Defendant's position as Chief Priest of Egbaken juju shrine since year 2014 and for the illegal and unauthorized sale of the 1st Defendant's land and property, unlawful appropriation of the 1st defendant's entitlement as Chief Priest of Egbaken juju shrine.

In proof of his counter-claim, the 1st Defendant did not testify in person but he called witnesses.

The Claimant has raised some salient issues on the failure of the 1st 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. He submitted that where a party refuses to lead evidence in proof of his counter-claim, he is deemed to have abandoned same and relied on the case of *Olonade V Sowemimo (2006) 2 NWLR part 963 page 30 at P. 40, para. G.*

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.”

While it is conceded that a counter-claim 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)**.

Thus, the objections raised by the learned counsel for the Claimant on the above points are 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 like the Claimant, the Counter-Claimant must prove his claim against the Claimant before obtaining judgment on the counter-claim.

In Relief (a), the Counter-Claimant is seeking *a DELARATION that the 1st Defendant/Counter-Claimant is the rightful person entitled to occupy the position and perform the duties and functions of Chief Priest, a.k.a. Ohen of Egbaken Juju shrine, Idumu-Odion, Ukoni-Uromi, a place within the jurisdiction of this Honourable Court*. I am of the view that Relief (a) is the principal relief in the counter-claim. The other reliefs are merely consequential reliefs. Having made some salient findings in favour of the Claimant under Issue 1, it is evident that Relief (a) herein cannot be granted. My previous findings of fact are to the effect that the Claimant is the rightful person to occupy the position and perform the duties and functions of Chief Priest of Egbaken Juju shrine in Idumu-Odion, Ukoni-Uromi.

As already observed, Reliefs (b) to (f) naturally flows from Relief (a) and they are also bound to fail. In the event I hereby resolve Issue 2 in favour of the Claimant.

Having resolved the two issues for determination in favour of the Claimant, I hereby dismiss the Counter-Claim of the 1st Defendant and grant the Claimant's Claims as follows:

- (i) A declaration that the installation of the Claimant as the substantive Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni – Uromi in September 1990 is valid, subsisting and in tandem with the Esan native law and custom of Idumu-Odion, Ukoni-Uromi;*
- (ii) A declaration that the Claimant is the rightful Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi having been properly installed in accordance with Esan native law and custom of Ukoni-Uromi;*
- (iii) A declaration that the Chief Priest of Egbaken Shrine is the traditional head of Idumu-Odion and the owner of all the landed property attached to the stool of Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi;*
- (iv) A perpetual injunction restraining the 1st Defendant from presenting and/or parading himself as the Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi; and*

(v) An order of perpetual injunction restraining the Defendants, their agents, servants and privies from further interfering with the Claimant's position as the substantive Chief Priest of Egbaken Shrine, Idumu-Odion, Ukoni-Uromi.

The sum of N100, 000.00 (one hundred thousand naira) costs is awarded in favour of the Claimant.

Hon. Justice P.A.Akhihero

24/03/21

COUNSELS:

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

R.E.ORUKPE ESQ-----DEFENDANT/COUNTER-CLAIMANT