

IN THE HIGH COURT OF JUSTICE  
IN THE UROMI JUDICIAL DIVISION  
HOLDEN AT BENIN CITY  
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,  
JUDGE, ON THURSDAY THE  
23<sup>RD</sup> DAY OF SEPTEMBER, 2021

BETWEEN:

SUIT NO: HCU/30/2016

EVANS EKANOBOSILE-----CLAIMANT

AND

1. UROMI MICROFINANCE BANK NIGERIA LTD  
(NOW PALMERA MICROFINANCE BANK NIGERIA LTD ----- DEFENDANTS/  
2. MR. CHRIS OMOFOMA .O. OMIJEH COUNTER-CLAIMANTS

JUDGMENT

The Claimant instituted this suit *vide* a Writ of Summons and Statement of Claim dated the 4<sup>th</sup> day of November, 2016, seeking the following reliefs:

- (a) A declaration that the actions by the Defendants by holding unto the claimant's late father's title documents over properties at No. 46, Ubiaja Road, Uromi, which same is situate at Uwalor Okpere Quarters, EguareUromi, sealing up the Claimant's late father's ware house inherited by the Claimant and entering the said warehouse, removed 200 bags of cement, sold and converted the proceeds are unlawful;*
- (b) An order returning the said title documents to the Claimant;*
- (c) N500,000.00 (Five Hundred Thousand Naira) only being the amount paid to the Defendants based on the misrepresentation of facts that his late father was indebted to him;*
- (d) N500,000.00 (Five Hundred Thousand Naira) only being the monetary value of the said 200 bags of cement at the rate of N 2,500.00 (Two Thousand, five Hundred Naira) only for a bag;*
- (e) N60,000,000.00 (Sixty Million Naira) only exemplary damages against the Defendants;*
- (f) N30,000,000.00 (Thirty Million Naira) only as general damages; and*
- (g) Perpetual injunction restraining the defendants by themselves, their servants, agents assigns and/or privies whomsoever and howsoever from selling, tempering with the properties or interfering or acting in any manner inconsistent with the rights or interests of the claimant on the aforesaid properties.*

By the Defendants Joint Statement of Defence and Counter-Claim filed on the 9th day of December, 2016, the Defendants inter alia counter-claimed against the Claimant as follows:-

- (a) A declaration of this honourable court that the collateral securities used by the Claimant's father, Thomas Ekanobosele to secure the balance outstanding in the overdraft facility granted to him in Account No. 11010001085, with the 1st Defendant remains a valid transaction for which the Defendants are entitled to realize the collateral security in default of repayment; and*
- (b) N 10,000,000.00 (Ten Million Naira) general damages for defamation of the 2nd defendant/counter claimant's character by the claimant which defamation is contained in the claimant solicitor's letters to the defendants particularly the one dated 19/9/2016.*

At the hearing, the Claimant testified and called two witnesses to wit: CW1 and CW2. He also tendered some documents as Exhibits "A", "B", "C", "D" & D1, "E", "F", "G" and "H".

On behalf of the Defendants, the 2nd Defendant testified and they called 3 other witnesses.

The Claimant's case is that he is the eldest son of Mr. Thomas Ekanobosele who died intestate on the 6th of February, 2016. That upon the demise of his father, he performed all the necessary burial rites and inherited his late father's properties including his house at No. 46, Ubiaja Road, Uromi.

That after the said burial, the 2nd Defendant called the Claimant and told him that his late father was a very close friend to him and also a customer of the 1st Defendant, a Micro-Finance Bank having its registered head office at Uromi. The Claimant alleged that the 2nd Defendant informed him that his father's title documents were with him and that he was free to come and collect them at any time.

He said that surprisingly, while the burial rites of his late father were still ongoing, he received a letter dated 18th April, 2016 from the 1st Defendant, signed by the 2nd Defendant and one Stephen Inede, informing him that his late father was indebted to the 1st Defendant to the tune of N4, 466,055.18 (Four Million, Four Hundred and Sixty Six Thousand Fifty-five Naira, eighteen kobo).

The Claimant alleged that while he was still mourning his late father, the Defendants kept calling him on the issue of his father's indebtedness and threatened to sell his father's properties. He said that he wrote a letter dated the 30th of May, 2016 to the Defendants appealing for a reduction of the alleged indebtedness. The letter was admitted as Exhibit "A" at the trial. He said that in reply to the said letter, the Defendants wrote him a letter dated 29th June, 2016 stating a reduction of the said indebtedness. The reply was admitted as Exhibit B.

He said that the 2nd defendant continued to mount pressure on him to liquidate the debt to avoid the Defendants selling the said properties. That due to the pressure from the Defendants, he paid the sum of N500, 000.00 (Five Hundred Thousand Naira) in two instalments into the Defendants' account in the month of August, and September, 2016. At the trial he tendered two Deposit slips as Exhibits D and D1 respectively.

The Claimant alleged that inspite of the aforesaid payments, the Defendants, particularly the 2nd Defendant continued to mount pressure on him to settle the debt. He said that the 2nd Defendant called him and offered to purchase his father's property for the sum of N10, 000,000.00 (Ten Million Naira) to enable him settle the debt from the proceeds of the sale. He said that at this stage, he became suspicious of the loan transaction and requested the 2<sup>nd</sup> Defendant to furnish him with a copy of the loan agreement between his late father and the bank. He said that the 2nd Defendant told him to look for it in his father's house and that when he searched the house, he did not find any loan agreement. He said that he thereafter instructed his lawyer to write a formal letter to the Defendants to request for a copy of the

loan agreement and his lawyer wrote a letter dated the 19<sup>th</sup> of September, 2016 which was admitted as Exhibit E at the trial.

He said that upon receipt of Exhibit E, the Defendants wrote a reply letter dated 23<sup>rd</sup> September, 2016 which was admitted as Exhibit F. He said that despite the series of demand, the Defendants refused to furnish him with the Loan Agreement so he instructed his lawyer to write another letter demanding the return of his late father's title documents; the sum of N500, 000.00 (Five Hundred Thousand Naira) which he earlier paid to them; and the monetary value of the 200 bags of cement which the Defendants removed from his late father's warehouse without his consent. The letter which is dated the 6<sup>th</sup> of October, 2016 was admitted as Exhibit G. He said that the Defendants' counsel wrote another letter dated the 18<sup>th</sup> of October, 2016 (Exhibit H) without meeting any of the said demands.

He alleged that between the months of August and September, 2016, the Defendants sealed up his late father's warehouse for three weeks and only allowed him to open it after collecting the said sum of N500,000.00 (Five Hundred Thousand Naira) which he paid to them. That they also removed 200 bags of cement from the warehouse, sold them and allegedly used the proceeds to offset part of the purported indebtedness. According to the Claimant at that time a bag of cement was being sold for N2, 500.00 (Two Thousand Five Hundred Naira).

The Claimant alleged that the Defendants' actions of withholding his late father's title documents, sealing up the warehouse, selling 200 bags of cement and keeping the proceeds of sale to themselves, has caused him serious embarrassment and untold hardship.

In their defence and in proof of their Counter-Claim, the Defendants led evidence to dispute the Claimant's claims and to prove their Counter-Claim.

The Defendants case is that the Claimant's late father Mr. Thomas Ekanobosele was a customer of the 1<sup>st</sup> Defendant and upon his request, the 1<sup>st</sup> Defendant regularly gave him overdraft facilities on his account.

That before his demise, he obtained an overdraft facility of N2,800,000.00 (Two Million, Eight Hundred Thousand Naira) from the 1<sup>st</sup> defendant which had risen to the sum of N4,466,055.18 (Four Million, Four Hundred and Sixty-Six Thousand and Fifty-Five Naira, Eighteen Kobo) as at the 29<sup>th</sup> of February, 2016 including the capital and interests accruing on the capital

That when the Claimant's father (hereinafter referred to as "the deceased") requested for the overdraft, the 1<sup>st</sup> Defendant demanded for a security for the said overdraft, and he complied with their demand by handing over the Deeds of purchase of his landed property situate at Ualor Okpere Quarters, No. 46 Ubiaja Road, Uromi to the 1<sup>st</sup> defendant. The two copies of the deceased's Deeds of Transfer were admitted as Exhibits "I" and "J" at the trial.

That in the course of the transaction between the deceased and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant requested him to formalize his overdraft transaction with it as the practice and he made a written application for a loan renewal on the 29<sup>th</sup> of March 2012.

That thereafter, the deceased issued some cheques on the account with which he paid for some products such as cement and some other services. At the trial, the Defendants tendered photocopies of a bundle of cheques of Uromi Micro Finance Bank Limited and they were admitted as Exhibit K.

They said that the deceased subsequently asked for a further renewal of the overdraft facility in the month of March 2012 and the letter for the renewal of the overdraft dated 29/3/12 was admitted as Exhibit L. That consequent upon the said Application for a Renewal of the overdraft, an Offer Letter dated the 18<sup>th</sup> day of April, 2012 was issued. The said letter was admitted as Exhibit L1.

They alleged that consequent upon the offer of a further overdraft which was granted to the deceased, he made an absolute Transfer of ownership of his landed property situate at

Ualor Okpere Quarters, Uromi, inclusive of the building on it to the 1<sup>st</sup> Defendant and he handed over the title documents to the 1<sup>st</sup> defendant as security for the loan. The document titled Absolute Transfer of Ownership of Landed Property was admitted in evidence as Exhibit M.

That later in the year 2012, the deceased again applied for a renewal of the existing overdraft in a letter dated the 15th October, 2012 and the said application was approved by an offer letter dated 18th October, 2012. The application dated 15/10/2012 was admitted as Exhibit N.

According to the Defendants, when they granted the request for renewal of the overdraft, the 1<sup>st</sup> Defendant demanded for additional collateral security to compliment the other securities earlier deposited by the deceased.

That at this the time, the deceased's business was witnessing a downturn because he was suffering from an undisclosed illness which hindered his remittances to the 1<sup>st</sup> Defendant in discharge of his overdraft liabilities.

That the deceased's indebtedness was rising while the capital was attracting interest and on the 10th of December, 2015, the 1<sup>st</sup> Defendant made a demand for additional collateral security to secure the debt which had risen to the sum of N4,187,874.01 as at 31st of October, 2015.

The Defendants alleged that they made several oral demands for the deceased to liquidate the debt but he could not pay until he died in 2016 with the outstanding debt of the sum of N4, 466,055.18 as at 29th February, 2016. That the Claimant has paid a total of N500, 000 (five hundred thousand naira) in two instalments of N250, 000 (two hundred and fifty thousand naira) each in partial settlement of the debt.

They maintained that the Claimant at his own request got all the details of his father's indebtedness from the 1<sup>st</sup> Defendant before he opted to defray the debt and made a part-payment of the sum of N500,000.00 (Five Hundred Thousand Naira) and later reneged on his promise to pay the balance and decided to sue the Bank.

According to them, they never put any pressure on the Claimant to sell his late father's house because his late father already transferred ownership of the property to the 1<sup>st</sup> defendant before his demise. That before his death, the deceased instructed his son Emmanuel to accompany some staff of the 1<sup>st</sup> Defendant to open up his store at No. 46 Ubiaja Road, Uromi to have access to the three bags of cement in the store for sale to get money to add to what he had for purchase of recommended drugs. That the three bags of cement were actually sold after the store had been forced open as the deceased could no longer trace where the keys to the store were kept.

They maintained that the deceased deposited his title deeds with the 1<sup>st</sup> defendant purely as security for the overdraft and that at no time were the documents brought to the 1<sup>st</sup> defendant for safe-keeping for fear of the documents being stolen or tampered with by his wife.

Upon the conclusion of evidence, the learned counsel for both parties filed their final written addresses which they adopted as their final arguments in support of their respective claims.

In his written address, the learned counsel for the Defendants/Counter-Claimants, *L. Okojie Esq.* formulated six issues for determination as follows:

- i. Is the Defendant as a financial Institution entitled to receive and grant loan to a needy customer;*
- ii. Was the claimant's late father a customer to the Bank having a customer/Bank relationship;*

- iii. *Does this customer /Banker relation transcend into asking for and granting of loan/overdraft to the claimant's father by the defendant;*
- iv. *If there was a loan and overdraft, agreement what were the term of transaction;*
- v. *Where the term of such loan/overdraft agreement include to provide collateral from the receiver of such loan/overdraft?(sic) And by what means or method was this collateral to be provided by the borrower; and*
- vi. *Whether it is conscionable when the defendant asked for and received the title document of No 46 Ubiaja Road, Uromi as collateral for the security of the said loan from the claimant's father. See Dr M. O. Omodijevs Federal Mortgage Bank & 2 others (2001) 40 WRN PT18 RF 1 P. 120. Whether the defendant was right in taking over No 46 Ubiaja Road, Uromi when there was default in payment of the loan.*

Thereafter, the learned counsel articulated his arguments on all the issues together.

Opening his arguments, he submitted that based on mutual agreement by the deceased and the Defendants, the Defendants were free to deal with the collateral security in order to recover the money loaned to the deceased.

Learned counsel submitted that there is a valid contract between the deceased and the Defendants which is binding on both parties. He posited that a person who is not privy to a contract cannot vitiate such a contract and he cited the following cases:- *Omidiji M.O. Dr vs Federal Mortgage Bank and others (2001) 40WRN P118 Rtn 2 P 120; Cross River State Water Board VS Nuejen Consulting Engineering Ltd & 3 others (2006) NWLR P589 Rtn 4 P593; and Golden Const. Co. Ltd vs Stateco (Nig) Ltd (2004) NWLR (PT 1408) P171.*

Furthermore, he submitted that as a general rule a contract cannot impose obligations arising under it on any person except the parties who are privy to the contract. He said that the Claimant presented himself as the eldest surviving son entitled to inherit the deceased's property or assets. That upon the demise of his father, he was given constructive notice of his late father's indebtedness to the Defendants.

He contended that the claimant can only inherit his father's assets which were left unencumbered by sale or Mortgage as in the case of the property at No 46 Ubiaja Road, Uromi.

He posited that upon his inheritance of his father's assets, he was informed of his father's indebtedness to the Defendants. That the Claimant took certain steps to defray the indebtedness and asked for an interest waiver of the late father's loan/overdraft from the Defendant. That the house and premises known as No 46 Ubiaja Road Uromi had already been used as security for the loan granted by an act of absolute transfer by the deceased to the Defendant to secure the loan. That by this singular act, the Defendants already had a lien over the property and were empowered to deal with the property as they deemed fit in the event of non-payment of the loan/overdraft.

That the Claimant in his desire to retrieve and inherit the said property volunteered to pay off the deceased's debt and he asked for a waiver which was granted after which he volunteered to pay what his late father owed by instalments. That the Claimant paid the sum of N500, 000 (Five Hundred Thousand naira) in two instalments and later resiled on the agreement to pay the balance.

He pointed out the Claimant could not have shifted the terms of his agreement with the defendants after part – performance of the said agreement by paying N500,000 in two instalments with the expectation to pay off the late father's indebtedness to the Defendant.

On the allegation that two hundred bags of cement were removed by the Defendants from the deceased's shop, he submitted that the Claimant failed to prove that such an event actually took place.

He said that the Claimant also failed to tell this Court whether he discovered this theft before his agreement to pay his late father's debt or after. That he also failed to make a report

of this apparent act of stealing to the police as such an act would ordinarily be tainted with criminality.

Finally, he submitted that the Claimant did not suffer any form of damage and as such, his entire suit should be dismissed.

In his own written address, the learned counsel for the Claimant, *Idemudia Ilueminosen Esq.* formulated three issues for determination as follows:

1. ***Whether from the totality of pleadings and evidence in this case, the Defendants are right to hold on to the Claimant's late father's title documents over the properties inherited by the Claimant, sealing up the warehouse and entering the said warehouse without the consent of the Claimant and removing 200 bags of cement and selling same.***
2. ***In the circumstance of this case, whether the Claimant is not entitled to his reliefs sought.***
3. ***Whether the Defendants have proved their counter claim in this suit.***

Thereafter, he marshalled his arguments on the three issues.

#### **ISSUES ONE AND TWO:**

Arguing issues one and two together, he submitted that from the pleadings and evidence on record, it is wrong and unlawful for the Defendants to hold on to the title documents of the properties inherited by the Claimant from his deceased father, to seal/lock up the Claimant's warehouse and to enter and remove 200 bags of cement from the said warehouse without the consent of the Claimant. That this amounts to self-help on the part of the Defendants.

He posited that on the 16<sup>th</sup> of January 2019, the Claimant adopted his written statements on oath filed and gave a vivid account of what transpired between him and the Defendants. He said that upon the death of the Claimant's father, the 2<sup>nd</sup> Defendant called the Claimant and informed him that his late father was his very close friend and that his title documents were with him and that he could collect same whenever he wanted.

He further posited that on the 18<sup>th</sup> April, 2016, the 2<sup>nd</sup> Defendant and Stephen Inede (DW4) wrote a letter (exhibit "C") to the Claimant informing him that the deceased was indebted to the 1<sup>st</sup> Defendant. That this letter was written to the Claimant while he was still mourning his late father. That when the Defendants mounted pressure on him and threatened to sell the deceased's properties, the Claimant paid a total sum of N 500,000.00 (Five Hundred Thousand Naira) in two instalments upon the mistaken belief that the deceased was actually indebted to the 1<sup>st</sup> Defendant. He said that these pieces of the Claimant's evidence were corroborated by the CW1, Ehidiamen Eseigbe, in his written statement on oath of 14<sup>th</sup> November, 2016 particularly paragraphs 10, 11, 13, 14, 15, 16 and 17 thereof.

Counsel posited that it is also on record that it was when the 2<sup>nd</sup> Defendant requested the Claimant to sell the properties in issue for N10,000,000.00 (Ten Million Naira) that they became suspicious and demanded for the documents relating to the purported loan or overdrafts granted to the deceased. That in spite of the repeated demands, the defendants failed to produce the alleged loan documents.

Learned counsel maintained that the deceased never obtained any loan or overdraft facility from the defendants and that he only gave his title documents to the 2<sup>nd</sup> defendant as his close friend to keep due to the domestic problems he had with his last wife. He maintained that this piece of evidence was never challenged nor controverted by the

defendants and it is deemed admitted in law by the defendants. See *EBEINWE V. STATE (2011) 7 NWLR (PT. 1246) 402 at 416 para D and MONKOM V. ODILI (2010) 2 NWLR (PT. 1179) 419 at 442 paras D-E.*

Counsel submitted that his position was more fortified by the evidence of the DW4, Stephen Inede, now the General Manager of the 1<sup>st</sup> Defendant, when under cross examination he admitted thus:

***“For someone or customer to obtain loan or overdraft facilities from the 1<sup>st</sup> defendant, such customer must first apply for the facilities. The application is a precondition for the grant of loan from the bank”.***

He submitted that it is trite law that evidence procured under cross-examination is as valid and authentic as evidence in chief. See: *ADEWUSI V. ADESHINA (2018) ALL FWLR (PT. 935) P. 1298 AT P. 1322 PARA G.* He said that the Defendants did not produce any application for the purported loan. He posited that the alleged application for loan or overdraft is vital to ascertain whether he actually took a loan and that if the said application is tendered, it would be against the Defendants and he relied on *section 167 (D) of the Evidence Act* and the case of *EKAIDEM V. STATE (2012) ALL FWLR (PT.631) P. 1587 AT P 1612 PARAS G-H.*

He submitted that there the evidence of DW4 that the application for loan is a precondition for the grant of loan or overdraft facility by the 1<sup>st</sup> Defendant supports the case of the Claimant. That it is settled law that where defendant’s evidence supports the Claimant’s case, the trial court is entitled to treat such evidence as an admission and the Claimant is entitled to rely on same in the reinforcement of his case. See *AIGUOKUNRUEGHIAN V. IMARUGHERU (2018) ALL FWLR (PT. 951) P. 1898 AT PAGES 1930-1931 PARAS. H-A.*

Furthermore, learned counsel referred to paragraph 24 of the Defendants’ Joint Statement of Defence and Counter Claim where the Defendants pleaded that the Claimant’s late father while maintaining his account took several overdraft facilities from the 1<sup>st</sup> Defendant and paid. He pointed out that evidence of this fact was given by the 2<sup>nd</sup> Defendant at paragraph 34 of his written deposition adopted on the 14<sup>th</sup> February, 2019.

Counsel posited that the Defendants never tendered the statement of account of the deceased to show the inflow and outflow of the alleged loan or overdraft taken by the deceased. He referred to the case of *KEKONG V. STATE (2018) ALL FWLR (PT. 923 P. 68 AT PAGE 96 PARAS. A-C* where the apex court held that the court cannot act on any document or fact that is not evidence before it in the determination of any disputed facts or matter before it. He also cited the cases of *TERAB V LAWAL (1992) NWLR (PT.231) P. 569* and *OGUEBIE vs F.B.N Plc (2020)All FWLR (PT. 1061) P. 361 AT PAGE 399 PARA B.*

Again, he submitted that even if the defendants had tendered the statement of account, it would still not have advanced their case since there is no evidence of how they arrived at the debit balance of N 4,466,055.18 (Four Million, Four hundred and Sixty-Six Thousand Fifty-Five Naira and Eighteen Kobo). He said that there should be evidence showing the breakdown of how much of the debt is interest to enable the court appreciate what is before it. That the defendants’ assertion that the deceased was indebted to them was not proved. See *BILANTE INTERNATIONAL LTD V. NDIC (2012) 15 NWLR (PT. 1270) P. 407 AT PAGES 428-429 PARAS E-B AND BIEZAN EXCLUSIVE GUEST HOUSE LTD V. UNION HOMES SAVINGS & LOANS LTD (2011) 7 NWLR (PT. 1246) PAGE 246 AT 286 PARAS E-H.*

Counsel referred to the evidence of the DW 4 under cross examination when he stated thus:

***“The total amount of overdraft and accrued interest as at the time this Suit was instituted was N 4,466,055.18 (Four Million, Four hundred and Sixty-Six Thousand, Fifty-Five Naira and Eighteen Kobo). He did not pay. He will pay in and withdraw. He paid something, but I do not know the amount”.***

He also referred to Section 131 of the Evidence Act, 2011 (as amended) on the burden of proof and submitted that the Defendants failed to show or establish what the deceased borrowed, what he re-paid, what was left unpaid (if any) and how they arrived at the sum of N 4,466,055.18 (Four Million, Four hundred and Sixty-Six Thousand, Fifty-Five Naira and Eighteen Kobo) as the deceased’s debit balance.

He referred to the cases of **UNITY BANK PLC V. AHMED (2020) ALL FWLR (PT. 1040) P.955 AT PAGE 974 PARA G. RATIO 6; WEMA BANK PLC V. OSILARU (2008) 10 NWLR (PT. 1094) P.150** and **ACCESS BANK PLC vs SAIDON AFRICA LTD (2017) ALL FWLR (PT.910)P.270 AT P.289 PARAS. G-H,**

Counsel posited that the Defendants merely dumped Exhibit “K”, a bundle of cheques on the Honourable Court without more. That it is not for the court to start sorting out the cheques for the Defendants as there appears to be no link between the purported loan or overdraft facilities and the bundle of cheques.

He emphasised that it is settled law that a person tendering documents has the duty to demonstrate the purpose of the document. See **MADAYI V. LAORI (2019) ALL FWLR (PT. 1019) P. 866 AT 886-887, PARAS H-A RATIO 3 AND ORJI V INEC (2020) ALL FWLR (PT. 1025) P. 343 AT 441-442, PARAS C-D.**

He further submitted that the defendants’ act of sealing the Claimant’s inherited warehouse stocked with cement and removing the 200 bags of cement found in the warehouse by the defendants is oppressive and reprehensible. He said that the actions of the Defendants/Counter Claimants caused the Claimant shock, embarrassment, inconvenience and that this is why the Claimant is seeking for exemplary damages.

He submitted that it is trite law that exemplary damages must be expressly pleaded and it is sufficient if the facts pleaded supports the award as decided in **EMMANUEL UKPAI V. MRS. FLORENCE OMOREGIE & ORS (2019) LPELR, 47206 (CA)** and he urged the Court to grant the exemplary damages in favour of the Claimant.

### **ISSUE 3:**

#### **WHETHER THE DEFENDANTS HAVE PROVED THEIR COUNTER CLAIM IN THIS SUIT.**

Arguing this issue, the learned counsel adopted his arguments and submissions on issues one and two and submitted that from the evidence on record, the Defendants/Counter Claimants failed woefully to prove their counter claims.

He referred the Court to the reliefs of the Defendants in paragraph 62 (4) of their Joint Statement of Defence and Counter Claim and submitted that the Claimant has demonstrated clearly that there is no loan or overdraft in existence between the Defendants and the deceased.

Again, he reiterated that the Defendants did not lead evidence of any application for loan or overdraft purportedly made them by the deceased. He referred to the evidence of the DW4, that an application for loan or overdraft is sine qua non to the grant of such loan or



overdraft. He emphasised that where a party makes an admission against his interest such admission will be admissible against the person. See *KAMALU V. UMUNNA (1997) 5 NWLR (PT. 505) P. 321 AT PAGE 337, PARA G.*

Furthermore, he submitted that there is also no evidence of the statement of account of the deceased to demonstrate how they arrived at the debit balance of N4, 466,055.18 (Four Million, Four hundred and Sixty-Six Thousand Fifty-Five Naira and Eighteen Kobo). He therefore submitted that the Defendants failed to establish relief (a) of their Counter Claim.

He said that relief (b) of their Counter Claim borders on defamation and that the basic ingredient of defamation is publication. That in order to succeed the Counter-Claimant must prove the fact of publication to a third party. He said that the law requires that the third party must not only be named but must also be clearly identifiable and identified. See *OMO-AGEGE V. OGHOJA FOR (2011) 3 NWLR (PT. 1234) P. 341 AT PAGES 354-355 PARAS G-A.*

He submitted that the Defendant's pleadings and evidence did not comply with the requirement of the law because there is no scintilla of evidence showing that the 2<sup>nd</sup> defendant/counter claimant established publication of the alleged defamation. That the Claimant through his solicitor merely wrote exhibit "E" to the Defendants chronicling all that transpired and a demand for the documents relating to the purported loan or overdraft facilities to ascertain the veracity or otherwise of the existence of such facilities which the defendant refused to furnish.

Finally he submitted that the Defendants/Counter Claimants failed to prove their counter claim and he urged the Court to dismiss it.

Upon a careful examination of the Issues formulated by learned counsel for the parties, I observe that the Defendants filed a Counter-Claim in this suit so I am of the view that the two issues for determination in this suit are simply 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? and*
- 2) *Whether the Defendants/Counter-Claimants have proved their counter-claim against the Claimant on the preponderance of evidence to warrant the judgment of this Court in their favour?*

I will now proceed to resolve the two issues seriatim

#### **ISSUE ONE:**

*Whether 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 the burden of proof in a civil case is always on the claimant, to prove to the satisfaction of the Court the assertions made in his pleadings and the onus of proving his case is by the preponderance of evidence. The failure of the defendant to prove his defence cannot alleviate the primary burden on the claimant See- *Umeojiako Vs Ezenamuo (1990) 1 NWLR (Pt 126) 253, Ogunyade Vs Osunkeye (2007) 15 NWLR (Pt 1057) 218, Oyeneyin Vs Akinkugbe (2010) 4 NWLR (Pt 1184) 265.*

By *Sections 131 - 134 of the Evidence Act 2011*, it is the Claimant in an action that has the legal burden of establishing his claim. This is the evidential burden of proof. It is only after the Claimant has adduced sufficient credible evidence that the burden of proof would shift to the Defendant. The shifting of the burden of proof is as enshrined in *Section 136 of the Evidence Act 2011* and it provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

In the instant case, the Claimant is seeking *inter alia*, a declaration that the actions of the Defendants by holding unto the claimant's late father's title documents over properties at No. 46, Ubiaja Road, Uromi, sealing up his ware house, entering the said warehouse, removing 200 bags of cement which they sold and converting the proceeds of sale are unlawful. Consequently, he is seeking an order for the Defendants to return the said title documents to the Claimant, return of the sum of N500,000.00 (five hundred thousand naira) which he paid to the Defendants, damages and a perpetual injunction.

Sequel to the foregoing, the burden is on the Claimant to prove that the Defendants' alleged acts of withholding his late father's title documents, sealing up his ware house, entering the said warehouse, removing 200 bags of cement which they sold and converting the proceeds of sale were all unlawful.

In proof of his case, the Claimant led evidence that upon the demise of his father, the Defendants informed him that the deceased was indebted to the 1st Defendant to the tune of N4,466,055.18 (Four Million, Four Hundred and Sixty Six Thousand Fifty-five Naira, eighteen kobo). That due to the pressure from the Defendants, he paid the sum of N500,000.00 (Five Hundred Thousand Naira) in an attempt to start liquidating the debt.

The Claimant alleged that at a stage he became suspicious of the loan transaction and requested the 2<sup>nd</sup> Defendant to furnish him with a copy of the loan agreement between his late father and the bank but he was never obliged with a copy of the loan agreement.

He also led evidence that sometime between the months of August and September, 2016, the Defendants sealed up his late father's warehouse, removed 200 bags of cement from the warehouse, sold them and allegedly used the proceeds to offset part of the purported indebtedness.

In this suit, the Claimant is seriously contending that the Defendants alleged acts in relation to his late father's properties were unlawful. However, the Defendants are seriously disputing the claims and they are insisting that the deceased was indebted to the 1<sup>st</sup> Defendant before his demise and that they have a right to withhold his title documents until the debt is settled.

The cardinal issue to be determined at this stage is whether the deceased was in fact indebted to the 1<sup>st</sup> Defendant before his demise and whether the debt is still outstanding.

This brings us back to the issue of the burden of proof. The law is that the burden of proof rests on the person who asserts a fact. See *Alh. Karim Laguro & Anor v. Honsu Toku (1992) 2 SCNJ 201*. The legal burden is always fixed by the pleadings at the beginning of a case and rests on the party asserting an affirmative. See *Chief Gordon Joe Young Jack v. Chief Rit Whyte (2001) 6 NWLR (Pt. 709) Page 266*. However, the evidential burden of proof shifts when evidence given by one party gives rise to a presumption favourable to it and unless rebutted satisfies the court that the fact sought to be proved is established. Thus, the evidential burden can shift from one party to another as the scale of the evidence preponderates. See: *Elema v. Princess Akenzua (2000) 13 NWLR. (Pt.683) Page 92; Higrade Maritime Services v. 1st Bank (1991) 1 NWLR (Pt. 167) Page 290; David Itauma v. Friday Akpe-Ime (2000) 7 S.C.N.J. 40, (2002) 12 NWLR (Pt.680) 156*.

At the trial, the Claimant led evidence to establish the fact that his deceased's father's title documents are presently with the 1<sup>st</sup> Defendant. In his additional deposition made in response to the Statement of Defence and Counter-Claim, the Claimant alleged that the deceased gave his title documents to the 2nd defendant who was his close friend to keep for him because of some domestic problems he was having with his second wife.

Incidentally, the Defendants admitted the fact that the 1<sup>st</sup> Defendant is in possession of the title documents and tendered photocopies of the title documents which were admitted in evidence as Exhibits "I" and "J" at the trial. Thus the Claimant has established the initial burden to establish the fact that 1<sup>st</sup> Defendant is presently in possession of the deceased's title documents. The question now is whether the Defendants are justified for withholding the title documents when the deceased's heir has made a demand for them. The issue really is whether the title documents were delivered to the Defendants simply for safekeeping as alleged by the Claimant, or they were deposited with them as security for overdraft facilities as alleged by the Defendants.

At this stage the burden must shift to the Defendants to justify why they are withholding the deceased's title documents. In their defence, the Defendants led evidence to establish the fact that the Claimant's late father was a customer of the 1st Defendant and upon his request, the 1st Defendant regularly gave him overdraft facilities on his account.

That before his demise, he obtained an overdraft facility of N2,800,000.00 (Two Million, Eight Hundred Thousand Naira) from the 1st defendant which had risen to the sum of N4,466,055.18 (Four Million, Four Hundred and Sixty-Six Thousand and Fifty-Five Naira, Eighteen Kobo) as at the 29th of February, 2016 arising from interests which had accrued on the capital

According to the Defendants, when the deceased requested for the overdraft, the 1st Defendant demanded for a security for the said overdraft, and the deceased complied by handing over the Title Deeds (Exhibits "I" and "J") as security for the overdraft.

The Defendants further led evidence that in the course of the transaction the 1st Defendant requested the deceased to formalize the overdraft transaction and he made a written application for a loan renewal on the 29th March 2012. The photocopy of the Application for Renewal of Overdraft signed by the deceased was admitted in evidence as Exhibit "L".

They said that thereafter, the deceased issued some cheques on the account, to withdraw money to pay for some goods and services. At the trial, the Defendants tendered photocopies of some of the alleged cheques which were admitted as Exhibit K.

They said that the deceased subsequently asked for a further renewal of the overdraft facility in the month of March 2012 and the letter for the renewal of the overdraft dated 29/3/12 was admitted as Exhibit L. They alleged that consequent upon the said Application for a Renewal of the overdraft, an Offer Letter dated the 18th day of April, 2012 was issued and the offer letter was admitted as Exhibit L1.

They alleged that consequent upon the offer of a further overdraft which was granted to the deceased, he made an absolute Transfer of ownership of his landed property situate at Ualor Okpere Quarters, Uromi, inclusive of the building on it to the 1st Defendant and he handed over the title documents to the 1st defendant as security for the loan. The document titled Absolute Transfer of Ownership of Landed Property was admitted in evidence as Exhibit M.

According to the Defendants, later in the year 2012, the deceased applied for a renewal of the existing overdraft in a letter dated the 15th October, 2012 and the said application was approved by an offer letter dated 18th October, 2012. The application dated 15/10/2012 was admitted as Exhibit N.

According to the Defendants, when they granted the request for renewal of the overdraft, the 1st Defendant demanded for additional collateral security to compliment the other securities earlier deposited by the deceased.

They stated that at this the time, the deceased's business was witnessing a downturn because he was suffering from an undisclosed illness which hindered his remittances to the 1st Defendant in the discharge of his overdraft liabilities.

According to them, the deceased's indebtedness was rising while the capital was attracting interest and on the 10th of December, 2015, the 1st Defendant made a demand for additional collateral security to secure the debt which had risen to the sum of N4,187,874.01.

The Defendants alleged that they made several oral demands for the deceased to liquidate the debt but he could not pay until he died in 2016, leaving an outstanding debt of the sum of N4, 466,055.18 as at 29th February, 2016. They maintained that upon his request, the Claimant was given all the details of his father's indebtedness to the 1st Defendant and he opted to defray the debt and made a part-payment of the sum of N500,000.00 (Five Hundred Thousand Naira) before he reneged on his promise to pay and decided to sue the Bank.

Clearly, in relation to the alleged indebtedness of the deceased to the 1<sup>st</sup> Defendant, there is conflict between the evidence of the Claimant and the Defendants. While the Defendants are maintaining that the deceased was indebted to the bank before his demise, the Claimant has maintained that the deceased is not owing the bank hence he is laying claim to the title documents together with the sum of N500,000.00 (five hundred thousand naira) which he paid in partial settlement of the alleged debt.

The first point to be resolved at this stage is whether the deceased actually deposited his title deeds with the 1<sup>st</sup> Defendant as security for any overdraft.

An overdraft facility presupposes that the customer does not have in his account the money he seeks to withdraw therefrom. The grant of the facility enables him to use cheques to withdraw the money not in his account or in excess of what is in his account. Usually, the bank does not pay the total sum of the facility into the account of the customer. It simply allows the customer to overdraw the account to the limit of the amount granted as overdraft facility. See *A.CB. Ltd. v. Egbunike and Anor (1988) 4 NWLR (Pt. 88) 350 at 365.*" See also *Afribank Nig. PLC V Onyima & Anor (2004) 2 NWLR (pt. 858) 654 (CA); Ishola V Societe Generale Bank Nig. Ltd (1997) LPELR- 1547(SC).*

In the instant case, the learned counsel for the Claimant made heavy weather of the failure of the Defendants to tender the application for overdraft. He contended that the alleged application for loan or overdraft is vital to ascertain whether the deceased actually took a loan from the bank. On this point, I am of the view that the failure of the Defendants to tender the deceased's initial application for an overdraft facility may not be fatal to their case. In their defence, they explained that initially, the transaction was not formalized but in the course of the transaction, the 1st defendant requested the deceased to formalize his overdraft transaction with it according to practice and he made a written application for a loan renewal on the 29th of March 2012. The pertinent question to ask at this stage is: When can a request for an overdraft facility be said to have been made? As a matter of fact, to say that where there was no initial letter of application, there was no application is quite a misconception. This is because, terms of a contract are either express or implied. In the case of *ODUMOSU VS ACB LTD. (1976) 9 - 10 SC 241 @ 244. (REPRINT EDITION)* the apex Court held inter alia -

***"A customer may borrow from the bank by way of loans or by way of overdraft. A loan is a matter of special agreement...An agreement for an overdraft must be supported by a good consideration and it may be express or implied. Drawing a cheque or accepting a bill payable by the bankers where there are no funds, sufficient to meet it, amounts to a request***

*for overdraft."* See also the case of *AFRIBANK NIG PLC V ONYIMA (2004) 2 NWLR (PART 858) 254 @ 677.*

The learned authors *Megrah and Ryder* in their book *Pagets Law of Banking 8th Edition at page 132* elucidated on the issue thus: *"the drawing of a cheque or accepting a bill payable at the bank when there are no funds sufficient to meet it, is presumably a request for an overdraft."*

In the instant case, in their bid to prove that there was a contract of overdraft between the deceased and the 1<sup>st</sup> Defendant, the Defendants tendered some relevant documents evidencing the transaction. It would be expedient for me to recapitulate on the relevant documentary evidence in this regard.

According to the Defendants, when the deceased requested for the overdraft, the 1st Defendant demanded for a security for the said overdraft, and the deceased deposited his title Deeds (Exhibits "I" and "J") as security for the overdraft. They also tendered a photocopy of an application for Renewal of Overdraft signed by the deceased which was admitted in evidence as Exhibit "L". Again, they tendered photocopies of some of the alleged cheques which were drawn on the said account, admitted as Exhibit K. Furthermore, the Defendants testified that the deceased subsequently asked for a further renewal of the overdraft facility in the month of March 2012 and they tendered a letter for the renewal of the overdraft dated 29/3/12 which was admitted as Exhibit L. They alleged that consequent upon the said Application for a Renewal of the overdraft, an Offer Letter dated the 18th day of April, 2012 was issued and the offer letter was admitted as Exhibit L1. According to them, consequent upon the offer of a further overdraft which was granted to the deceased, he made an absolute Transfer of ownership of his landed property situate at Ualor Okpere Quarters, Uromi, inclusive of the building on it to the 1st Defendant and he handed over the title documents to the 1st defendant as security for the loan. The document titled Absolute Transfer of Ownership of Landed Property was admitted in evidence as Exhibit M. Again, the Defendants alleged that later in the year 2012, the deceased applied for a renewal of the existing overdraft in a letter dated the 15th October, 2012 and the said application was approved by an offer letter dated 18th October, 2012. The application dated 15/10/2012 was admitted as Exhibit N.

In the face of the host of documentary evidence adduced by the Defendants in this case, the Claimant made some feeble attempts to deny the existence of any overdraft contract between the 1<sup>st</sup> Defendant and the deceased. He insisted that the deceased merely handed over his title documents to the 2<sup>nd</sup> Defendant for safe keeping. However, the Claimant did not tender any document to support his position. He merely relied on his ipse dixit.

On the other hand, the Defendants case is heavily fortified and supported by documentary evidence. It is settled law that documentary evidence is the best form of evidence because they are not only unassailable but are more authentic than oral evidence.

In the case of *Ogbeide vs. Osifo (2009) 3 NWLR (pt. 1022) 423 at 441*, the Court of Appeal held inter alia.

*"Documentary evidence is the yard stick or hanger by which to assess the veracity of oral testimony or its credibility."*

Also in *Babatunde vs. Model Industries Nig. Ltd (2004) 9 NWLR (Pt. 879) 614 at 627* the Court held thus:

*"Where again as in the instant case, a trial Court is not left with only the oral testimonies of the parties but as well as documentary evidence which tell the same story, it is the law that the veracity of the oral testimony shall be tested against the documentary evidence which is evidence of a permanent nature."*

See also *Fashanu vs. Adekoya (1974) 1 All NLR 9pt. 1) 35, Kimdey vs. Military Governor of Gongola State (1988) 2 NWLR (pt.77) 445.*

Again in the case of *EGHAREVBA v OSAGIE (2009) 18 NWLR (Pt 1173) 299* the Supreme Court per *OGBUOGU J.S.C.* held thus:

***"It is now settled that documentary evidence is the best evidence. It is the best proof of the contents of such document and no oral evidence, will be allowed to discredit or contradict the contents thereof except where fraud is pleaded."***

It is worthy of note that in the course of this trial, the Claimant himself, tendered some documentary evidence which tacitly admitted the existence of the overdraft transaction between the deceased and the 1<sup>st</sup> Defendant. He tendered a letter dated the 30th of May, 2016 which he wrote to the Defendants, wherein he acknowledged the debt of the sum of N4, 466,055.18 (four million, four hundred and sixty six thousand and fifty five naira, eighteen kobo) and he appealed for a reduction of the alleged indebtedness. The letter was admitted as Exhibit "A" at the trial. In the said Exhibit "A", the Claimant stated thus: ***"I know my father was a friend and an esteemed customer to the Bank, and already I have been informed that my father Thomas Ekanobosele took a loan worth the sum of N4, 466,055.18 (four million and sixty-six thousand fifty five naira, eighteen kobo). I am appealing to the Board, Management to sympathize with me, especially to reduce the amount down for me since my father is no longer alive because this untimely death of my father pains me at this stage."***

Furthermore, at the trial, the Claimant admitted that he subsequently paid the sum of N500, 000. 00 to settle part of the deceased's indebtedness to the 1<sup>st</sup> Defendant and he tendered two Deposit slips as Exhibits D and D1 respectively.

I am of the view that Exhibits "A", "D" and "D1" wherein the Claimant tacitly admitted the indebtedness of the deceased constitutes an admission against the interest of the Claimant. This term was defined in the case of *Seismograph Services Nig. Ltd v Eyuafe 9-10 SC 135 at 146*, by *Idigbe JSC*, as follows:

***"...A statement oral or written, made by a party to a civil proceeding and which statement is adverse to his case is admissible in the proceedings as evidence against him of the truth of the facts asserted in the statement..."***

Again in the case of *Lateef Atobatele Ali v United Bank For Africa Plc (2014) LPELR-22635(CA)*, *Amina Augie JCA* (as she then was) expounded as follows:

***"An admission is an express or implied concession by a party of the truth of an alleged act; it is a statement made by a party that is adverse to his case. It is admissible against the maker as truth of the fact asserted and in civil cases, they are evidence of facts asserted against but not in favour of such party...It is presumed that no man would declare anything against himself unless it was true... Thus, a party is entitled to rely on his opponent's admission as an admission against interest to defeat his opponent's claim."***

On the effect of an admission against interest, in the case of: *KAMALU & ORS V. DANIEL NWAKUDU UKA UMUNNA & ORS (1997) LPELR-1657 (SC) YAKUBU, J.C.A* stated thus: ***"The law is well settled that where there are admissions against interest such admissions will be admissible against a person, such evidence shall be viewed in relation to the entire evidence before the Court"***.

From the totality of the evidence before the Court, it is evident that the Claimant's simplistic assertion that he later suspected that his father was not indebted to the bank because the 2<sup>nd</sup> Defendant allegedly offered to purchase his father's house is quite unfounded because the title documents were already with the 1<sup>st</sup> Defendant together with the document which is titled: "ABSOLUTE TRANSFER OF OWNERSHIP OF LANDED PROPERTY" which was signed between the Deceased and the 1<sup>st</sup> Defendant and admitted in evidence as Exhibit "M" at the trial.

Furthermore, the Claimant's explanation that his father's title documents were handed over to the Defendants for safe keeping appears quite ridiculous in the face of the weight of documentary evidence in support of the overdraft transaction. It is trite law that documentary

evidence is the best evidence and extrinsic evidence cannot be admitted to contradict, add, or vary the provisions contained in a document. See: **SECTION 128 (1) OF THE EVIDENCE ACT 2011**. See also the case of *EGHAREVBA v OSAGIE supra*.

In the light of the foregoing, I am quite satisfied that the deceased gave his title documents to wit Exhibits "I" and "J" as security for the overdraft facilities which he took from the 1<sup>st</sup> Defendant. It is now settled law that a mere deposit of title deeds as security for a loan constitutes an equitable charge over the land or property. See: **MATHEWS VS. GORDAN (1861) 31 LJ CH. 282**. It was aptly held by the Supreme Court in **YARO VS. AREWA CONSTRUCTION LTD (IN RECEIVERSHIP) (2007) LPELR - 3516 (SC)**.

Presently, there is nothing to show that the Claimant has liquidated the overdraft which his deceased father obtained from the bank. In the absence of proof of liquidation of the debt, the Defendants cannot be compelled to release the title documents to the Claimant. I am of the view that the 1<sup>st</sup> Defendant has a lien over the title deeds in their possession. A Lien is a right over the property of someone in the possession of the lien holder, the right which comes into existence either by contract or the operation of law. The Supreme Court defined it in the case of **AFROTEC TECHNICAL SERVICES (NIGERIA) LTD. V. MIA & SONS LTD. & ANOR. (2000) LPELR - 219 (SC)** thus:

**"A lien, broadly speaking, is a right to retain that which is in one's possession belonging to another till certain demands of the person in possession are satisfied."**

I think it is morally unconscionable for the Claimant to be demanding for the return of the securities and the part payment of the debt when he has not liquidated the outstanding debt. In the case of *Afribank Ltd. vs. Alade (2000) 13 NWLR (685) 591*, it was held that a debtor who benefited from a loan or overdraft from a bank has both the moral and legal duty and obligation, express or implied, to repay it as and when due. See also *National Bank of Nigeria vs. Shoyoye (1977) 5 SC. 181*.

Sequel to the foregoing it is apparent that the Claimant's claim for an order for the Defendants to return the said title documents to him is bound to fail. Furthermore, the additional claims for the return of the sum of N500, 000.00 (Five Hundred Thousand Naira) already paid and the sum of N500, 000.00 (Five Hundred Thousand Naira) being the monetary value of the said 200 bags of cement allegedly sold by the Defendants cannot be granted because they are all predicated on the fact that there was no overdraft facility given to the deceased by the Defendants. Of course, the claims for damages and perpetual injunction cannot also succeed because they are also based on the same faulty foundation. It is trite law that you cannot put something on nothing and expect it to stay there, it will collapse. See: *Macfoy v. U.A.C. Ltd. (1962) AC 152 at 160*.

In the event, I am of the view that the Claimant has not proved his case on the preponderance of evidence to warrant the judgment of this Court in his favour. Issue one is therefore resolved in favour of the Defendants.

## **ISSUE TWO:**

***Whether the Defendants/Counter-Claimants have proved their counter-claim against the Claimant on the preponderance of evidence to warrant the judgment of this Court in their 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 Defendants/Counter-Claimant 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 as: **"... 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 Defendants *inter alia* counter-claimed against the Claimant as follows:-

- (a) *A declaration of this honourable court that collateral securities used by the Claimant’s father, Thomas Ekanobosele to secure the balance outstanding in the overdraft facility granted to him in NO. 11010001085, with the 1st Defendant remains valid transaction for which the Defendants are entitled to realize the collateral security in default of repayment; and*
- (b) *N 10,000,000.00 (Ten Million Naira) general damages for defamation of the 2nd defendant/counter claimant’s character by the claimant which defamation is contained in the claimant solicitor’s letters to the defendants particularly the one dated 19/9/2016.*

In this Counter-Claim, the burden is on the Defendants/Counter-Claimants to lead credible and cogent evidence to establish the two claims enumerated above.

As pertaining to the declaration that the collateral securities used by the Claimant’s father to secure the outstanding overdraft facility remains a valid transaction for which the Defendants are entitled to realize the collateral security in default of repayment, I must observe that I have already made findings of fact to the effect that the deceased’s title documents are being withheld by the Defendants as security for the outstanding overdraft. So long as the Claimant remains in default on the repayment of the overdraft, the Defendants are entitled to withhold the title deeds as collateral security in default of payment.

Consequently, the first arm of the Defendants’ Counter-Claim will be granted.

Coming to the claim of *N 10,000,000.00 (ten million naira)* general damages for defamation, I must point out that in an action where the Claimant or a Counter - Claimant, as in the instant case, claims damages for Defamation, be it libel or slander, the law requires him to plead in his pleadings and prove by credible and cogent evidence the essential elements of the tort of Defamation, namely: That the words complained of are defamatory; That the words complained of referred to the Claimant; That the words complained of were published by the Defendant, and the resultant damages in case of slander except where it is actionable per se without proof of damages. See the following decisions on the point: *Nsirim V. Nsirim (1990) 3 NWLR (Pt. 1380) 285; Din V. African Newspapers of Nig. Ltd (1990) 3 NWLR (Pt. 139) 392; Onu V. Agbese (1985) 1 NWLR (Pt. 4) 704; Onyejike V. Anyasor (1992) 1 NWLR (Pt. 218) 437; and Iloabachie V. Phillips (2000) 14 NWLR (Pt. 6860) 43.*

Thus, the duty on the 2<sup>nd</sup> Defendant/Counter - Claimant in this present action for damages for Defamation as alleged by him is to prove that the words contained in the Claimant’s solicitor’s letters to the Defendants particularly the one dated 19/9/2016 were defamatory of him and most importantly that they were published of him by the Claimant. The real test is whether under the circumstances in which the words were alleged to have been published reasonable persons to whom the publication was made would be likely to understand it in a defamatory sense. It follows therefore, if the words complained of were not published, then no matter and notwithstanding how gravely defamatory they may appear to be, an action for damages for Defamation is bound to fail. See: *Clerk & Lindsell on Torts, 11th Edition @ p. 711. See also Access Bank Plc V. MFCSS (2005) 3 NWLR (Pt. 913) 460; Koko V. Midwest Newspaper (1977) 11 NSCC 11; Awoniyi V. AMORC (1990) 6 NWLR (Pt. 154) 42; Katto V. CBN (1999) 6 NWLR (Pt. 607) 390. Akufere V. Sketch Publishing*



*Co. Ltd. (1971) 1 UILR 13 @ p. 15. Dalumo V. The Sketch Publishing Co. Ltd. (1972) 1 All NLR 130.*

I have carefully perused the pleadings and evidence of the Defendants/Counter-Claimants, including the Claimant's solicitor's letters to the Defendants particularly the one dated 19/9/2016 in line with the requirements of the law on proof of Defamation, particularly libel as alleged by him and I am unable to find any defamatory materials therein. Furthermore, I observed that the letters were written to the 2<sup>nd</sup> Defendant and was not published to any third party. In an action for Defamation, failure to prove 'publication' would amount to failure to make out even minimum proof, or more aptly put, prima facie case against the adverse party. Furthermore, to succeed in libel, there must be proof by evidence of a third party, of the effect of the alleged publication on him, which was lacking in this case. See *Iwueke v Imo Broadcasting Corporation (2005) 17 NWLR Part 955 Page 447 at 482.*

Publication to a third party is of the very essence of the tort of defamation, and the onus is on the party alleging defamation to prove that the offending words were in fact published to a third party. In defamation matters, the mere making of the defamatory statement to the Claimant does not constitute a cause of action as the defamatory statement must be published to a third party. The reason for this is that defamation does not consist in what the Claimant thinks of himself but of the opinion that others hold of him.

In other words, the Claimant is under a burden to prove that the defamatory statement was published to a third party and the law requires that the third party must not only be named but must also be clearly identifiable and identified. Once a publication is not properly pleaded and proved, the case is bound to collapse. It is publication that gives such a case its cause of action. See the cases of *Giwa v. Ajayi (1993) 5 NWLR (Pt. 294) page 433 and Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) page 285 at 297 - 298.*" In the absence of any evidence of publication I hold that the Counter - Claim of the 2<sup>nd</sup> Defendant for defamation was dead on arrival.

From the foregoing, I hold that the Counter-Claim only succeeds in part and Issue Two is partly resolved in favour of the Defendants/Counter-Claimants.

On the whole, the Claimant's Claims are dismissed and the Defendants/Counter-Claimants Claims succeeds in part and is granted as follows:

*A declaration that the collateral securities used by the Claimant's father, Thomas Ekanobosele to secure the balance outstanding in the overdraft facility granted to him in Account No. 11010001085, with the 1st Defendant remains a valid transaction for which the Defendants are entitled to realize the collateral security in default of repayment.*

*The sum of N200, 000.00 (two hundred thousand naira costs is awarded in favour of the Defendants/Counter-Claimants.*

*Hon. Justice P.A.Akhihero  
24/09/21*

**COUNSELS:**

***I. ILUEMINOSEN ESQ -----CLAIMANT***

***L.OKOJIE ESQ-----DEFENDANTD/COUNTER-CLAIMANTS***

