

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIRO
ON TUESDAY
THE 16TH DAY OF MAY, 2023.

BETWEEN: **SUIT NO. B/495/2020**
MR. UYIOSA OGBEMUDIA.....CLAIMANT
AND
MR. ALEANDER OGBEMUDIA.....DEFENDANT

JUDGMENT

The Claimant instituted this suit against the Defendant vide a Writ of Summons and Statement of Claim, dated and filed on the 14th of September, 2020.

However, by the Claimant's amended extant Statement of Claim, he is claiming against the Defendant as follows:

- (a) A Declaration that the Claimant has a right in and over the six (6) rooms mentioned and described in the Addendum of the will of late Pa Omorose Ogbemudia as his legacy in the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City;***
- (b) A Declaration that the Defendant's refusal to deliver up possession of the rooms bequeathed to the Claimant in the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City. Upon several demands by the Claimant, amount to trespass to the Claimant's possessory rights of the real chattel;***

- (c) *An Order mandating the Defendant to deliver up possession of the rooms bequeathed to the Claimant in the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City;*
- (d) *An Order of perpetual injunction, restraining the Defendant, his servants, agents, privies and personal representatives from further acts of trespass to the possessory rights of the Claimant, in and over the rooms mentioned in the Will of late Pa. Omorose Ogbemudia as his legacy in the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City;*
- (e) *An Order for Damages of N2,000,000.00 (two million naira) for detention or refusal to deliver up possession of the rooms (real chattel) upon demand; and*
- (f) *An Order for special damages of N1, 890,000.00 (one million, eight hundred and ninety thousand naira) being the proceeds of rent accrued from the rooms since January 2012 when the Claimant made his first demand for possession, till September 2020 when this suit was filed. And the proceeds of rent from when this suit was filed to the date of judgment to be computed and included.*

Upon receipt of the originating processes, the Defendant filed a Statement of Defence and Counter-Claimed against the Claimants as follows:

- (a) *A declaration that the defendant being the eldest son of his deceased father Pa Omorose Ogbemudia, a Benin man, is the proper person to inherit his late father Igiogbe having duly buried his father in accordance with Benin Customary rites.*
ALTERNATIVELY: That he, as the eldest son, and having duly buried his late father, is entitled to be the first to make a choice from the list of the late father's estate in accordance with Benin Customary Laws of inheritance;
- (b) *Consequently, a declaration that the defendant is by inheritance the owner and in possession of house No. 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City where the claimant is claiming 6 rooms in this suit and therefore that he is the person entitled to a Statutory Right of Occupancy in and over the said house;*

(c) An Order of Perpetual Injunction restraining the claimant by himself, his servants, agents, privy or privies from further laying claim to or doing anything whatsoever inconsistent with the right of the defendant over the said house; and

(d) N1, 000,000 (One Million Naira) being general damages in that the claimant and his agents trespassed unto the defendant's house which has been in undisturbed possession of the defendant.

At the hearing, the Claimant testified, called five witnesses, tendered one exhibit and closed his case.

The Claimant's case as can be gleaned from the evidence which he led at the trial is that late Pa. Omorose Ogbemudia, who was the father of the parties was the owner of a house at number 12 Nekpenekpen Street, off 1st East Circular Road, Benin City. He alleged that upon the demise of their father, he inherited six (6) rooms in the said house vide a purported Will and Addendum.

At the trial, the Claimant tendered the original copy of the Will and the Addendum as Exhibit A. Furthermore, two of the alleged witnesses who signed the Will, to wit: Omokaro Felix and Monday Ighile testified as C.W 1 and C.W. 5 respectively.

The Claimant alleged that the Defendant was privy to the contents of the Will and has since taken possession of his legacy under the Will. That despite repeated demands by the Claimant; the Defendant has refused to deliver up possession of the six rooms allegedly bequeathed to the Claimant.

In his defence, the Defendant testified and called one witness. In his defence, the Defendant maintained that his late father never made any Will before his demise. According to him, he is the eldest son of his father while the Claimant is the 5th born.

The Defendant alleged that his family had resolved the issue of sharing of his late father's properties by appealing to him (Defendant) to give the Claimant a parcel of land measuring 50 feet by 100 feet at Obaretin and the sum of N100,000 (One Hundred Thousand Naira) in addition. He said that the Claimant rejected the offer.

He stated that the purported Will tendered as Exhibit A was forged and made for the purpose of this case. He listed the particulars of the forgery to be as follows:

- (i) The purported Will was not properly executed and does not meet the standard of a Will;
- (ii) The defendant's father never signed on the purported Will and the addendum to the Will;
- (iii) A cursory look at the purported addendum of 17/8/2008 reveals that the write up never came from his late father. No interpreter's name, signature and the defendant's father right's impression;
- (iv) The purported Will and the addendum to the Will were manipulated by the claimant in connivance with some of their relations for the purpose of this case.

According to the Defendant, sometime in the year 2004 his late father made a pronouncement on how his property would be shared among his children while he was very healthy and the family complied with his instructions after his demise. That by 17/8/2008 when the purported addendum to the Will was written, their late father was already very aged and had gone senile.

He alleged that after the death and burial of his father, in accordance with Benin Customary Laws and as expressly approved by His Majesty, Oba Erediauwa II, Oba of Benin of blessed memory, he was given the opportunity by the family as the eldest son of his father to choose between house No. 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City and the house at Obaretin Community, Sapele Road, Benin City as his inheritance.

He said that he decided to choose house 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City as his inheritance from his late father and he only took possession of the said house by inheritance as the eldest son of his late father. He maintained that house No. 12, Nekpen-nekpen Street is the place where his late father was buried and constitutes his father's Igiogbe under Benin native law and custom.

Upon the conclusion of the Defendant's case, both counsel filed their final written addresses which they adopted as their final arguments in support of their respective cases.

In his final address, the learned counsel for the Defendant, *F.C, Jarikre Esq.* formulated 5 issues for determination as follows:

- (i) Whether from the totality of evidence adduced in this case it can be said that Late Pa. Omorose Ogbemudia died testate;*
- (ii) Whether from the totality of the evidence adduced in this case it can be said that the alleged Will dated 16/9/2006 and Addendum dated 17/8/2008 represent the intention of Late Pa. Omorose Ogbemudia;*
- (iii) Whether the relief as prayed and contained in the claimant's Writ of Summons and Statement of Claim especially reliefs "e" and "f" are worth the consideration of this Honorable Court;*
- (iv) Whether from the totality of evidence adduced in this case the claimant successfully proved his case as required by law; and*
- (v) Whether as the first son of Late Pa. Omorose Ogbemudia, the defendant has the right of first choice to choose before any other child from the list of properties of his late father.*

Thereafter, learned counsel argued the issues seriatim.

ISSUE ONE:

WHETHER FROM THE TOTALITY OF EVIDENCE ADDUCED IN THIS CASE IT CAN BE SAID THAT LATE PA. OMOROSE OGBEMUDIA DIED TESTATE

Arguing this issue, learned counsel submitted that in the claimant's effort to prove that his late father wrote a Will he tendered two documents a **"Will" dated 16/9/2006** and an **"Addendum" dated 17/8/2008**. That in furtherance of the Claimant's effort to mislead this Honourable Court, he tendered the said documents as a single document and was admitted collectively as **Exhibit "A"** portraying a false impression that the documents were made by one Barrister Iyalekhue.

He submitted that by virtue of **Section 131, 132 and 133 of the Evidence Act, 2011** he who asserts must prove and whoever desires judgment in his favour must establish his case on the preponderance of credible and legally admissible Evidence and he relied on the case of *Onovo V. Mba (2014) 14 NWLR, Part 1427, Page 391 at 414 Para A-B*.

He submitted that there is nothing before court to show that Barrister Iyalekhue prepared the addendum dated 17th day of August, 2008 which purportedly

made the Claimant to be entitled to six (6) rooms out of the 14 rooms at House No. 12 Nekpenekpen Street, Off 2nd East Circular Road, Benin City.

He submitted that the burden of proving a fact rests on the party who asserts the affirmative of the issue and not upon the party who denies it. That a negative is usually incapable of proof and he relied on the case of *Omisore V. Aregbesola (2015) 15 NWLR, Part 1482, Page 1 at 273 Para A-B*.

He contended that apart from the Claimant and his allies no other person knew of the alleged Will and Addendum. He said that even the Claimant's witness CW3 (**Grace Ali**) testified under cross examination that her father never told her that he wrote a Will even though she was very close to her father. He said that no elder of the late Pa. Omorose Ogbemudia's family knew of any Will.

He submitted that from the totality of evidence adduced in this case it cannot safely be said that late Pa. Omorose Ogbemudia died testate.

Furthermore, counsel posited that neither the purported "**Will**" nor the purported "**Addendum**" or even the combination of both is good enough to be properly referred to as a Will in law. He said that the documents failed to meet the standard of a proper Will known to law. He therefore urged the Court to discountenance both documents.

ISSUE TWO:

WHETHER FROM THE TOTALITY OF THE EVIDENCE ADDUCED IN THIS CASE IT CAN BE SAID THAT THE ALLEGED WILL DATED 16/9/2006 AND ADDENDUM DATED 17/8/2008 REPRESENT THE INTENTION OF LATE PA. OMOROSE OGBEMUDIA

Counsel submitted that late Pa. Omorose Ogbemudia who the claimant and his allies alleged wrote the Will and Addendum was an illiterate and the said Exhibit did not have any illiterate jurat.

He submitted that by virtue of **Section 3 of the Illiterates Protection Law**, the person who writes any letter or document at the request of an illiterate shall also write his own name and address on the letter or document. He said that such shall be equivalent to a statement that he had the instruction of the illiterate to write the document and if the letter or document purports to be signed or marked by the illiterate or that he had read the same and explained same to the illiterate before the thumbprint or signature.

He said that the object of the **Illiterate Protection Act or Law** as the case may be is to protect and safeguard illiterates from fraud and exploitation and he relied on the cases of *Ituama V. Akpe-Ime (2000) 12 NWLR, Part 680, Page 156 at 175 Para E-F; UBN PLC V. IDRISU (199) 7 NWLR, Part 609 Page 105 at 121 Para F-H.*

He posited that in the instant case, there is nothing to show that anybody read the contents of the alleged Will and the Addendum to Pa Omorose Ogbemudia in the language he understood before he placed his right thumb impression on the signature column.

He submitted that in the absence of a valid illiterate jurat included in the purported Will of 16/9/2006 and the Addendum of 17/8/2008 it cannot be said that the deceased understood the contents of the alleged Will and Addendum and same represented his intention. He urged the Court to so hold.

ISSUE THREE:

WHETHER THE RELIEF AS PRAYED AND CONTAINED IN THE CLAIMANT’S WRIT OF SUMMONS AND STATEMENT OF CLAIM ESPECIALLY RELIEFS “E” AND “F” ARE WORTH THE CONSIDERATION OF THIS HONORABLE COURT.

Counsel posited that the nature of the reliefs sought by the claimant is for detinue . He said that assuming without conceding that the Claimant is entitled to the six (6) rooms at House No. 12, Nekpenekpen Street as alleged, an award for damages for detinue can only be entertained if the action is brought to court not later than six years from when the cause of action arose. He referred to the case of *Chigbu V. Tonimas (Nig) Ltd (2006) 9 NWLR, Part 984, Page 189 at 214, Para E-G*, where the Supreme Court held per **Mahammed JSC** thus:

“Time begins to run in detinue case from when the cause of action arose. If there is no demand by the owner from the person in possession of the chattel and a refusal to give up; then in six years the remedy of the owner is barred. Time begins to run from the time of the demand and a definite refusal”

He said that by the Claimant’s own showing, he made several demands since January 2012 on the Defendant for possession of the said rooms but the Defendant unconditionally refused to give up possession. He referred to **paragraph 7 of the claimant’s statement on oath sworn to on the 14th day of September, 2022.**

Counsel submitted that from the time the Claimant made his first demand in January, 2012 till September, 2020 when he filed this suit is eight years which renders the action and claim for detinue time barred.

Based on the foregoing, he submitted that this Court lacks the jurisdiction to entertain this suit and he urged the Court to so hold.

ISSUE FOUR:

WHETHER FROM THE TOTALITY OF EVIDENCE ADDUCED IN THIS CASE THE CLAIMANT SUCCESSFULLY PROVED HIS CASE AS REQUIRED BY LAW

Counsel posited that the first two reliefs as prayed by the Claimant are declaratory reliefs which can only be granted if the Court is satisfied that the party is entitled to such discretion.

He submitted that the claimant was not able to discharge the burden of proof on him to convince this Honourable Court that late Pa Omorose Ogbemudia understood the contents of exhibit “A” before he appended his right thumb impression to the documents.

Also, he posited that the Claimant was not able to convince the Court that the contents of Exhibit A were actually the real intentions of late Pa. Omorose Ogbemudia because of the absence of a jurat.

He referred to the case of *Ogundalu V. MacJob (2015) 8 NWLR, Part 1460, Page 96 at 123 Para A-B* where the Supreme Court held per Rhodes-Vivour JSC thus:

“The grant of declaration is discretionary and the power should all times be exercised with caution. Declaration should only be made when the court is satisfied that the party seeking it is entitled to have the courts discretion exercised in his favour.”

ISSUE FIVE:

WHETHER AS THE FIRST SON OF LATE PA. OMOROSE OGBEMUDIA, THE DEFENDANT HAS THE RIGHT OF FIRST CHOICE TO CHOOSE BEFORE ANY OTHER CHILD FROM THE LIST OF PROPERTIES OF HIS LATE FATHER

Learned counsel submitted that as the eldest son, the Defendant has the right to make a choice before any other child on which of the houses he wants. He said that during his life time, Pa. Omorose Ogbemudia had two houses, House No. 12, Nekpenekpen Street, Off 2nd East Circular Road, Benin City which was the first house he built on the parcel of land measuring 50 feet by 100 feet but wrongly stated in clause 2 of the alleged Addendum dated 17/8/2008 to be 100 feet by 150 feet.

He said that the other house is his residence at Obaretin. That since the house at No. 12 Nekpenekpen Street is of a higher value than the house at Obaretin, the Defendant rightly exercised his right as the first son by choosing house No. 12, Nekpenekpen Street, Benin City to the exclusion of any other person.

He submitted that the right of the Defendant to choose the property he prefers has long been given recognition by the Oba of Benin and the Chiefs of Benin kingdom. On this score he referred the Court to the book titled: **“A SUPPLEMENT TO THE HANDBOOK ON SOME BENIN CUSTOMS AND USAGES, PROERTY SHARING” Page 3, Paragraph H, issued by the Benin Traditional Council, on the authority of the Omo’Oba Erediuwa, Oba of Benin.**

He said that it is a settled that the Oba of Benin is the authority and custodian of Benin Customary Laws and traditions and he urged the Court to so hold.

In conclusion, he urged the Court to dismiss the Claimant’s claim and grant the Defendant’s counter-claim.

In his Final Written Address, the learned counsel for the Claimant, *E.O.Amiens Esq.* formulated 3 issues for determination as follows:

- 1. Whether or not the Claimant has an immediate right of possession to the six rooms (real chattel) bequeathed to him by his late father, all other beneficiaries of the Will having taken possession of their legacy, including the Defendant;*
- 2. Whether or not the Claimant is entitled to the relief sought; and*
- 3. Whether or not the Igiogbe of late Pa. Omorose Ogbemudia is the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City*

Thereafter, learned counsel argued the three issues seriatim.

ISSUE 1:

Whether or not the Claimant has an immediate right of possession to the six rooms (real chattel) bequeathed to him by his late father, all other beneficiaries of the Will having taken possession of their legacy, including the Defendant?

Arguing issue one, he submitted that the documentary evidence before this honourable Court is the Will of late Pa. Omorose Ogbemudia, wherein the Claimant was bequeathed, particularly in paragraph (2) of the addendum in the Will, the real chattel of the possession of six rooms in the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City.

He said that the oral evidence of witnesses called, corroborated the Claimants testimony and there was no evidence to controvert or negate the fact that it was the Will before this Honourable Court that was relied upon in the distribution of the estate of late Pa. Omorose Ogbemudia

He said that from the totality of evidence before this Honourable Court, the Claimant has an immediate right of possession in and over the six rooms as bequeathed to him in the said Will, all other beneficiaries having taken possession of their legacy therein, including the Defendant.

ISSUE 2:

Whether or not the Claimant is entitled to the relief sought?

Counsel referred to The Black's Law Dictionary 11th Edition which defines "chattel real" as; a real property interest that is less than a freehold or fee, such as a leasehold estate. The most important chattel real is an estate for years in land, which is considered a chattel because it lacks the indefiniteness of time essential to real property- Also termed real chattel.

He said that the clear statement of paragraph (2) of the addendum in the said Will, expresses the lack of indefiniteness of time over the possession of the six rooms bequeathed to the Claimant, to the extent that the possessory rights may not survive the claimant, making it a mere real chattel.

He posited that the Court of appeal, Ilorin Division, in the case of *Afribank(Nig.) PLC v. Aminu Ishola Investment Ltd* stated that chattels are either personal or real. That in the case of *Ordia v. Piedmont (Nig.) Ltd*. The court held that Detinue is based on the defendant's wrongful detention of plaintiff's chattel, with the evidence of defendant's refusal to deliver up the chattel on demand by the plaintiff.

Again he posited that the Supreme Court in *Neka B.B.B. Manufacturing Co. Ltd. v. ACB Ltd.* held that in an action for detinue, a plaintiff can claim for specific restitution of chattel, or in default, its value and damages for its detention up to the date of judgment.

He posited that with the above authorities and the uncontroverted evidence of the Claimant's demand for possession of the real chattel, and the unconditional refusal by the Defendant, the Claimant is entitled to the relief sought in this suit

ISSUE 3:

Whether or not the Igiogbe of late Pa. Omorose Ogbemudia is the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City?

Counsel posited that it has been judicially noticed that the Igiogbe is the principal house of a deceased bini man in which he lived and died. That in the case of *Arase v. Arase*, the court held that the principal house in which the deceased lived in his lifetime and died is called the igiogbe, which always passed by way of inheritance on distribution to the eldest son.

He submitted that with the evidence before this Honourable Court, the principal house in which the deceased testator lived and died is his house at Obaretin, Benin-Sapele Road, Benin City. He referred to a litany of cases on igiogbe and posited that none of them stated that the Igiogbe is the house where a deceased bini man was buried. That the only witness called by the Defendant, confirmed under cross examination that a bini man's house where he lived and died is called the igiogbe.

He therefore submitted that the property known and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City does not constitute the igiogbe of late Pa. Omorose Ogbmudia.

In conclusion he urged the Court to grant the reliefs sought by the Claimant.

I have carefully considered all the processes filed in this suit, together with the evidence led in the course of the hearing and the address of the learned Counsel for the parties.

In this suit, since the Defendant filed a Counter-Claim against the Claimant, I am of the view that there are two issues for determination in this suit to wit:

- (i) Whether the Claimant is entitled to the reliefs claimed in this suit; and*
- (ii) Whether the Defendant/Counter-Claimant is entitled to the reliefs claimed in this suit.*

I will proceed to resolve the two issues seriatim.

ISSUE 1:

Whether the Claimant is entitled to the reliefs claimed in this suit/

In this suit, the Claimant's Claim against the Defendant is inter alia, for a declaration that the Claimant has a right in and over the six (6) rooms mentioned in his father's will and for an Order directing the Defendant to deliver up possession of the rooms bequeathed to the Claimant.

In essence, the substratum of Claimant's case is for the tort of detinue. Detinue is a common-law action to recover personal property wrongfully taken or withheld by another. The essence of detinue is that the defendant holds on to property belonging to the claimant and fails to deliver the property to the claimant when a demand is made. The cause of action in detinue is the refusal of the defendant to return the goods to the claimant after the claimant must have made a demand for them. See the following decisions on the point: *Kosile Vs Folarin (1989) 3 NWLR (Pt 107) 1; Labode Vs Otubu (2001) LPELR-1731 (SC); and Enterprise Bank Ltd Vs Aroso (2014) 3 NWLR (Pt 1394) 256 at 298.*

The tort of detinue arises where there is a wrongful detention or retention of the possession of Claimant's chattel by the Defendant, it is immaterial how possession of the chattel was acquired. What is requisite is an unlawful detention, a demand for its return and a refusal to return. See *LABODE V. OTUBU & ANOR (2001) LPELR - 1731 (SC).*

A claim for detinue will be successful where the following ingredients are established, that:

- (i) The Claimant has an immediate right to the possession of the goods or chattel;
- (ii) The Defendant is in actual possession of the goods or chattel;
- (iii) The Claimant has made a demand for these goods or chattel; and
- (iv) The Defendant has failed, refused or neglected to deliver up possession of the goods or chattel to the Claimant.

See the case of ***J.E. OSHEVIRE LTD V. TRIPOLI MOTORS (1997) LPELR - 1584 (SC)***.

Before, I resolve this first issue on its merit, I think it will be expedient for me to determine a serious point of objection raised by the learned counsel for the Defendant on the competence of this suit.

According to the learned counsel, the Claimant made several demands since January 2012 on the Defendant for possession of the said rooms but the Defendant refused to give up possession. He seriously posited that from the time the Claimant made his first demand in January, 2012 till September, 2020 when he filed this suit is eight years which renders the action and claim for detinue time barred.

Based on the foregoing, he submitted that this Court lacks the jurisdiction to entertain this suit and he urged the Court to so hold.

On this issue relating to the limitation of time, the provisions of the Limitation Law as applicable to Edo State is quite relevant. ***Section 4(1) of the Limitation Law of Bendel State, now applicable to Edo State of Nigeria*** provides as follows:

“4 (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) Actions founded on simple contract or on tort”

As I have already observed in this judgment, the Claimant’s suit is for the tort of detinue. Furthermore, it is an undisputed fact that the Claimant in paragraph 7 of his Deposition categorically stated that he made several demands since January 2012 on the Defendant for possession of the said rooms but the Defendant unconditionally refused to give up possession.

Thus, as the learned counsel for the Defendant rightly submitted, from the time the Claimant made his first demand in January, 2012 till September, 2020 when he filed this suit covers a period of eight years which is clearly beyond the six years period of limitation for the institution of actions founded on tort such as detinue.

It is settled law that in detinue, time begins to run from the time of the demand and a definite refusal. See the case of ***Julius Berger Nigeria Plc v. Omogui (2001) 15 NWLR (Pt.736) 401 Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1***; and ***CHIGBU V. TONIMAS NIG. LTD. & ANOR (2006) LPELR-846(SC) (PP. 27-28 PARAS. E)***.

From the foregoing, it is evident that this suit, for the tort of detinue filed in year 2020 was filed two years beyond the limitation period. By the clear provisions of *Section 4(1) of the Limitation Law of Bendel State, now applicable to Edo State of Nigeria* in conjunction with the decisions already cited in this judgment the Claimant's claim for detinue is statute barred.

In view of this finding, Issue 1 is resolved in favour of the Defendant/Counter-Claimant.

ISSUE 2:

Whether the Defendant/Counter-Claimant is entitled to the reliefs claimed in this suit

In his Counter-Claim, the Defendant counter-claimed against the Claimant seeking the following reliefs:

- (a) A declaration that the defendant being the eldest son of his deceased father Pa Omorose Ogbemudia, a Benin man, is the proper person to inherit his late father's Igiogbe having duly buried his father in accordance with Benin Customary rites.***
ALTERNATIVELY: That he, as the eldest son, and having duly buried his late father, is entitled to be the first to make a choice from the list of the late father's estate in accordance with Benin Customary Laws of inheritance;
- (b) Consequently, a declaration that the defendant is by inheritance the owner and in possession of house No. 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City where the claimant is claiming 6 rooms in this suit and therefore that he is the person entitled to a Statutory Right of Occupancy in and over the said house;***
- (c) An Order of Perpetual Injunction restraining the claimant by himself, his servants, agents, privy or privies from further laying claim to or doing anything whatsoever inconsistent with the right of the defendant over the said house; and***
- (d) N1, 000,000 (One Million Naira) being general damages in that the claimant and his agents trespassed unto the defendant's house which has been in undisturbed possession of the defendant.***

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/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*"

Thus in this Counter-Claim, the burden is on the Defendant/Counter-Claimant to lead credible and cogent evidence to establish the claims enumerated above.

It is now settled law that under Benin Customary Law, the principal house in which a deceased Benin man lived in his life time and died is called "Igiogbe" and at his death his eldest son, after performing all the ante and post funeral and burial ceremonies will automatically inherit it. See the following decisions on the point: *Arase v. Arase (1981) 5 S.C. 33 at 62; Olowu & Ors v. Olowu & Anor (1985) 12 S.C. 84, (1985) 3 NWLR (Pt. 13) 372; and Idehen & ors v. Idehen & ors (1991) LPELR-1416(SC) (Pp. 68-69 paras. C).*

In the instant suit the following facts are not in dispute:

- I. The Defendant is the eldest son of his father while the Claimant is the 5th born.
- II. In his lifetime, the parties' father lived and died in Obaretin Village but was eventually buried in his house at No.12 Nekpenekpen Street, Benin City.

In his evidence at the trial, the Defendant maintained that the purported Will tendered as Exhibit A was forged and made for the purpose of this case. He listed the particulars of the forgery.

According to the Defendant, after the death and burial of his father, in accordance with Benin Customary Laws and as expressly approved by His Majesty, Oba Erediauwa II, Oba of Benin of blessed memory, he was given the opportunity by the family as the eldest son of his father to choose between house No. 12, Nekpenekpen Street, Off 2nd East Circular Road, Benin City and the house at Obaretin Community, Sapele Road, Benin City as his inheritance.

He said that he decided to choose house 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City as his inheritance from his late father and he only took

possession of the said house by inheritance as the eldest son of his late father. He maintained that house No. 12, Nekpen-nekpen Street is the place where his late father was buried and constitutes his father's Igiogbe under Benin native law and custom.

On the allegation of the Defendant that the Will was forged, it is settled law that forgery is a criminal offence and it is settled law that when there is an allegation of crime in a civil suit, such must be specifically pleaded and particulars of the crime must also be pleaded and it must be prove beyond reasonable doubt. That is the standard of proof of a crime. See *Section 135(1) of the Evidence Act, 2011; BABATUNDE & ANOR V. BANK OF THE NORTH LTD & ORS (2011) LPELR-8249; NGWAKWE & ORS V. NGWAKWE (2018) LPELR-46125(CA) (PP. 28 PARAS. B).*

In the instant case, two of the witnesses to the Will and the Addendum testified before me to prove the authenticity of the will. The two alleged witnesses who signed the Will are Omokaro Felix and Monday Ighile who testified as C.W 1 and C.W. 5 respectively. They testified before me with candour and their testimonies were not discredited under cross examination. I accept their evidence in proof of the authenticity of the Will. I am of the view that the Defendant did not lead sufficient evidence to prove beyond reasonable doubt that the Will was forged.

A careful examination of the contents of the Will reveals some salient facts. The relevant clause of the Will is Clause 2 of the Addendum which states as follows:

“2. The house lying and situate at No. 12 Nekpenekpen Street, off Second East Circular Road, Benin City sited on a plot of land measuring 100ft X 150ft (One hundred feet by One hundred and fifty feet) with 14 rooms is shared between Mr. Alexander Ogbemudia and Mr. Uyiosa Ogbemudia: Mr. Uyiosa Ogbemudia is to take six (6) rooms of the left hand side of the house out of the building while the remaining rooms and the building housing the entire rooms is willed to my elder son Mr. Alexander Ogbemudia. Mr. Uyiosa Ogbemudia shall continue to collect tenement levy from the rooms pending the time he so wish to let off possession of the rooms. Doing so, the house shall automatically belong to Mr. Alexander Ogbemudia.”(Underlining, mine)

A careful scrutiny of the above Clause 2 shows clearly that six rooms in the house at No. 12 Nekpenekpen Street was given to the Claimant for a limited period to enable him collect rents for that period after which he is expected to relinquish

possession of same to the Claimant who becomes the absolute owner of the entire property.

Already, I have made a finding under issue one that the Claimant's right of action to recover possession of the six rooms is already statute barred so it is apparent that even on the basis of the Will, the Defendant is quite entitled to inherit the entire house.

On the issue of the right of the Defendant to inherit his late father's Igiogbe having buried his father in accordance with Benin Customary law, it is settled law that this is the true position under Benin Customary Law.

However what appears to be quite uncertain is whether in fact the house at No. 12 Nekpenekpen Street can be classified as the deceased's Igiogbe. The Claimant's evidence is that his deceased father lived and died at Obaretin Village near Benin City. It is settled law that under the Bini Customary Law, the principal house in which the deceased Benin man lived in his life time and died is called "Igiogbe" and at his death his eldest son, after performing all the ante and post funeral and burial ceremonies will automatically inherit it. See *Arase v. Arase (1981) 5 S.C. 33 at 62*.

In the instant case, it is not certain whether the deceased actually lived and died at No. 12 Nekpenekpen Street, what is certain is that he was eventually buried there. I think it is because of this uncertainty that the Defendant alternatively claimed that he, as the eldest son, and having duly buried his late father, is entitled to be the first to make a choice from the list of the late father's estate in accordance with Benin Customary Laws of inheritance.

At the trial, the Claimant did not lead any evidence to dispute the right of the Defendant to choose any other property instead of the Igiogbe. As the learned counsel for the Defendant rightly posited, the right of the Defendant to choose the property he prefers has long been given recognition by the Oba of Benin and the Chiefs of Benin kingdom. See the book: **“A SUPPLEMENT TO THE HANDBOOK ON SOME BENIN CUSTOMS AND USAGES, PROERTY SHARING”** issued by the Benin Traditional Council, on the authority of the Omo'Oba Erediwa, Oba of Benin.

Sequel to the foregoing, I hold that on the preponderance of evidence, the Claimant is entitled to a declaration that he is entitled to inherit the house at No. 12 Nekpenekpen Street.

On the relief of a perpetual injunction against the Claimant, it is settled law that once the main claim is proved, an order of injunction becomes necessary to restrain further breach of the right of the party. See: ***ADEGBITE VS. OGUNFAOLU (1990) 4 NWLR (PT. 146) 578; BABATOLA VS. ALADEJANA (2001) FWLR (PT. 61) 1670 and ANYANWU VS. UZOWUAKA (2009) ALL FWLR (PT. 499) PG. 411.***

In the event, I hold that the Defendant is entitled to a perpetual injunction to restrain the Claimant by himself, his servants, agents, privy or privies from further laying claim to or doing anything whatsoever inconsistent with the right of the Defendant over the said house.

On the claim for the sum of N1,000, 000:00 (One Million Naira) as general damages for trespass, it is settled law that general damages are presumed by law as the direct natural consequences of the acts complained of by the Claimant against the Defendant. The assessment of general damages is not predicated on any established legal principle. Thus, it usually depends on the peculiar circumstances of the case. See: ***Ukachukwu vs. Uzodinma (2007) 9 NWLR (Pt.1038) 167; and Inland Bank (Nig.) Plc vs. F & S Co. Ltd. (2010) 15 NWLR (Pt.1216) 395.***

The fundamental objective for the award of general damages is to compensate the Claimant for the harm and injury caused by the Defendant. See: ***Chevron (Nig.) Ltd. vs. Omoregha (2015) 16 NWLR (Pt.1485) 336 at 340.***

Thus, it is the duty of the Court to assess General Damages; taking into consideration the surrounding circumstances and the conduct of the parties. See: ***Olatunde Laja vs. Alhaji Isiba & Anor. (1979) 7 CA.*** The quantum of damages will depend on the evidence of what the Claimant has suffered from the acts of the Defendant.

Where as in the instant case, the Defendant did not give sufficient particulars of what he suffered from the Claimant's action; he can only be entitled to nominal damages.

Sequel to the foregoing, Issue Two is resolved in favour of the Defendant/Counter-Claimant. His Counter-Claim succeeds and it is granted as follows

(a) A declaration that the Defendant being the eldest son of his deceased father and having duly buried his late father, is entitled to be the first to make a

choice from the list of the late father's estate in accordance with Benin Customary Laws of inheritance;

(b) Consequently, a declaration that the Defendant is by inheritance the owner and in possession of house No. 12, Nekpen-nekpen Street, Off 2nd East Circular Road, Benin City where the Claimant is claiming 6 rooms in this suit and therefore that he is the person entitled to a Statutory Right of Occupancy in and over the said house;

(c) An Order of Perpetual Injunction restraining the Claimant by himself, his servants, agents, privy or privies from further laying claim to or doing anything whatsoever inconsistent with the right of the Defendant over the said house; and

(d) N500, 000 (Five Hundred Thousand Naira) being general damages in that the Claimant and his agents trespassed unto the Defendant's house which has been in undisturbed possession of the Defendant.

Costs is assessed at N200, 000.00 (Two Hundred Thousand Naira) in favour of the Defendant/Counter-Claimant.

P.A.AKHIHIERO JUDGE

16 /05/2023

COUNSEL:

E.O.Amiens Esq. -----Claimant.

F.C. Jarikre Esq-----Defendant.

