

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA

IN THE UROMI JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIERO,

ON TUESDAY THE 12TH
DAY OF MARCH, 2024

BETWEEN:

SUIT NO. HCU/30/2013

1. MR. JUDE OSINDE } ----- CLAIMANTS
2. REV. FATHER SIMON PETER OSINDE }

AND

MR. GABRIEL OSINDE ----- DEFENDANT

JUDGMENT

In this suit, by their Amended Statement of Claim, the Claimants are claiming against the Defendant as follows:-

- (i) *A declaration that the Claimants are the rightful owners of the property and have the statutory right of occupancy over the landed property measuring 659.50 square metres containing a bungalow which consists of 3 stores at the front, 4 one-room-and-a-parlour, situated at No. 30 Mission Road, Uromi, which is well known to both parties and it is within the jurisdiction of this Honourable Court;*
- (ii) *The sum of N3,000,000.00 (Three Million Naira) only being general damages for trespass on the said property above stated, cost of litigation and all deprivations suffered by the 1st Claimant; and*

- (iii) Perpetual injunction restraining the Defendant, his agent(s), servant(s) privies and whosoever is claiming through him from trespassing or further trespassing on the said property.***

The Defendant in response to the Claimant's suit filed his Amended Statement of Defence in which he Counter-Claimed against the Claimants as follows:

- (i) A declaration of this Honourable Court that the Defendant is the proper person entitled to apply for and be granted statutory rights of occupancy in respect of the piece/parcel of land containing a building thereon, measuring approximately 659.3 Square Meters, as clearly delineated in Property Survey Plan No. WE 3902 on 13th day of February 1978, which is also the subject matter of Certificate of Occupancy NO BDSR 3979 of 22nd day of November 1984, lying and situate at No. 30 Mission Road, Uromi, an area within the jurisdiction of this Honourable Court;***
- (ii) An order setting aside the purported Deed of Assignment dated the 21st of January 2009 on grounds of falsification and forgery;***
- (iii) The sum of N5, 000,000.00 (Five Million Naira) being general damages for acts of incursion by the Claimants unto the said piece/parcel of land/building thereon; and***
- (iv) A perpetual injunction restraining the Claimants, their servants, agents and privies from further encroaching unto the said piece/parcel of land and building thereon situate at No. 30 Mission Road, Uromi.***

In proof of their case, the Claimants testified, called witnesses and tendered some documents.

The Claimants case as can be gleaned from their evidence is that the Defendant and themselves are uterine siblings. The Defendant being the eldest, while the 1st and 2nd Claimants are the 6th and 7th children of their late father, Mr Patrick Ajegbelen Osinde, JP who had eleven surviving children in his life.

The Claimants alleged that they are joint owners of the landed property measuring 659.50 square metres containing a bungalow which consists of 3 stores at the front, 4 one-room-and-a-parlour, situated at No. 30 Mission Road, Uromi, which is the subject matter of this suit, having purchased same from their father in his life time.

They traced their late father's root of title to the land and narrated how he erected the building on the land.

The claimants stated that they bought the disputed property from their late father, for the sum of ₦5,000,000.00 (Five Million Naira only) on the 21st of January, 2009 as evidenced by a Deed of Assignment signed by their late father which was admitted in evidence as Exhibit "A"

at the trial. They also tendered an Application for Governors consent to the transaction also signed by their father, admitted as Exhibit "E". They said that the purchase of the property was witnessed by two of their siblings, Mrs. Caroline A. Okuonghae (Nee Osinde) and Prof. (Mrs) Lucy Okukpon (Nee Osinde).

They alleged that after purchasing the property in 2009, the 1st Claimant reserved two stores to sell electrical materials, confectioneries and other food items and they told their father to continue to collect the rents from the property as their contributions to his upkeep and their late father collected the rents till his demise in December 2012.

The Claimants informed the Court that their late father sold some of his landed properties in his lifetime, including the one in dispute which they purchased from him. They tendered a Deed of Transfer in respect of one of such transaction as Exhibit "N".

They alleged that there were three houses, including their late father's 'Igiogbe' in their village at Arue, and other landed properties, which their father did not sell before his demise, all of which the Defendant has since acquired.

They stated that a day after their late father's burial, the Defendant called a meeting in their late father's house at Arue, Uromi, where he demanded that some of the stores in the building at No. 30 Mission Road, which is now in dispute, should be given to his wife. They alleged that it was at that meeting that Prof. (Mrs.) Lucy Okukpon (nee Osinde); the surviving eldest daughter of their late father informed the Defendant that their late father had sold the property to the Claimants.

The Claimants alleged that after the burial ceremony of their father they held a meeting with the tenants on the 25th day of January, 2013 to inform them of the change of ownership and that in that meeting the Claimants delivered letters to the tenants, which formally notified them that they are now the legitimate owners of the property; and that the tenants should not pay rents to any other person. They tendered copies of the letters as Exhibits "G" to "G5" at the trial.

The Claimants alleged that in spite of the fact that the Defendant had been informed that they are the present owners of the property, the Defendant still went ahead to collect rents from the tenants of the said property under the guise that he is the first son.

The Claimants said that they instructed their counsel to write to the tenants to demand the arrears of rents being owed to the Claimants since the demise of their father. Copies of the letters were admitted as Exhibits "H" to "H5" at the trial. Thereafter, there were exchanges of correspondences between the Claimants' counsel and the Defendant's counsel on the matter.

The Claimants alleged that on the 7th day of November 2013 the Defendant invaded the disputed premises with some thugs, including his son to beat up the 1st Claimant; and in the

ensuing violence, they destroyed and stole his wares and illegally padlocked his stores thereby preventing him from his means of livelihood.

Thereafter, the 1st Claimant allegedly reported the violent conduct of the Defendant and his son at the Uromi Divisional Police Headquarter and two policemen were deployed to invite them for questioning. Upon their arrival at the scene, the two policemen were allegedly beaten up by the Defendant's son and his thugs.

The Claimants alleged that it took the intervention of the police who, after investigation, instructed the 1st Claimant to break the padlocks the Defendant used to lock up the 1st Claimant's stores to enable him to continue to carry on his business in the premises.

The Claimants alleged that as a result of the aforesaid violent conduct of the Defendant and his agents, the Defendant and his accomplices were charged to the Magistrate Court at Uromi and were convicted for several offences. A certified true copy of the judgment was admitted as Exhibit "L" at the trial.

At the trial, the Defendant gave evidence in proof of his defence and Counter-Claim and called witnesses.

From the evidence adduced at the trial, the Defendant's case is that he is the eldest surviving male child of his deceased father, Pa Patrick Ajegbenlen Osinde who died intestate on the 28th day of December 2012.

He stated that under the prevailing Esan Native Law and Custom of Isua Village, Arue-Uromi where his deceased father hailed from, he is the rightful person to inherit the property of his deceased father after performing his final funeral rites.

According to the Defendant, during the lifetime of his deceased father, the 1st Claimant and he lived with their father in a building at No. 16A Ujoero Street, Uromi where his deceased father resided until his death. He said that it was after the death of his father that the 1st Claimant relocated on his own to Wisdom Road, Uromi.

The Defendant maintained that his deceased father never transferred the land/building in dispute, to the Claimants.

He alleged that at a family meeting held on the 10th of January 2013 which was attended by the children of his deceased father, the 1st Claimant did not lay any ownership claim to the land/building in dispute or any other property of their deceased father.

He said that at the family meeting, it was resolved that the properties of their deceased father belong to the Defendant who shall hold same in trust for himself and his siblings and thereafter, share same amongst them. He maintained that under the prevailing Esan Native Law and Custom of Isua Village, Arue-Uromi where his deceased father hailed from, he is the

rightful person to inherit the property of his deceased father after performing his final funeral rites. He tendered the document containing the family resolution as Exhibit “M”.

He alleged that between the 11th and 15th of January 2013, he performed his deceased father's final funeral rites entitling him to inherit all his father's property including the property now in dispute.

The Defendant alleged that Prof. (Mrs.) Lucy Okukpon who was present at the said meeting of 10th January 2013 but could not sign the resolution being a married daughter of the Osinde's family, did not raise the issue of the sale of the disputed land by their deceased father to the Claimants. He said that at another family meeting of the Osinde family held at Isua, Arue on the 17th of January 2013, nobody raised the issue of the transfer of the property in dispute to the Claimants by their late father.

The Defendant alleged that after their father's death, the Claimants in connivance with Prof. (Mrs.) Lucy Okukpon (nee Osinde) and Mrs. Caroline Okuonghae,(nee Osinde), broke into their deceased father's room and removed the title documents of the property in dispute.

The Defendant stated that under the prevailing Esan Native Law and Custom of Isua,Arue Uromi, the transfer of a man's property whether through sale or outright gift must be done in the presence of the eldest male child and other male children of the family as well as the man's kinsmen.

Furthermore, he maintained that under Esan native Law and Custom of Arue, a father is forbidden from selling his property to his child or children but can only give it to them as a gift. He said that it is a taboo for a father to sell his property to his children under Esan native Law and Custom of Arue.

He alleged that during his lifetime, his deceased father observed all the customs applicable in Arue, Uromi including the rule which forbids a man from selling his property to his children.

The Defendant maintained that the Deed of Assignment which was admitted as Exhibit “A” was forged by the Claimants with the assistance of their privies including Prof. (Mrs.) Lucy Okukpon and Mrs. Caroline Okuonghae. He alleged that the signature of his late father on Exhibit “A” is not the authentic signature of their father.

Furthermore, the Defendant pointed out that the Claimants were never put in physical possession of the building in dispute by their late father during his life time.

Again, the Defendant stated that he started to collect rent in January 2013 after the death of his father as of right without any challenge from the Claimants until this dispute arose. He also alleged that since January 2009 when the Claimants purportedly acquired the building in

dispute, no notice was given to the tenants by the Claimants informing them of the change of ownership of the property until the letters written by their lawyer after the death of their father.

He alleged that their deceased father never introduced the Claimants to the tenants in the said property, as the new owners of same until his death in December 2012.

The Defendant alleged that when the 1st Claimant was laying ownership claims to the building in dispute, he decided to lock up the stores in the disputed land and this prompted him to enter the property for which he was subjected to arrest and prosecution by the police.

He said that during the pendency of this suit, the 1st Claimant resorted to self-help and forcefully broke into the building in dispute which he has been occupying till date.

The Defendant alleged that since the death of their father in December 2012, he has been exercising acts of ownership and control in respect of the building in dispute. According to him, during the demolition of structures along Mission Road Uromi as a result of the ongoing dualisation of Uromi/Agbor Road, the 1st Claimant wrote a letter to the Federal Ministry of Lands & Urban Development, Federal Secretariat Benin-City, demanding for compensation in respect of the disputed land, part of which was affected by the said dualisation in his purported capacity as the owner of the disputed land.

He alleged that when the Federal Ministry of Lands & Urban Development investigated the ownership claim of the 1st Claimant to the land/building in dispute, it discovered that the disputed land belongs to the Defendant who was thereafter paid compensation for the said land in dispute, part of which was affected by the dualisation exercise.

The Defendant maintains that the family resolution of January 10th 2013 which the 1st Claimant endorsed alongside other persons, is binding on the Claimants, himself and the entire members of the Osinde family of Isua, Arue Uromi.

He alleged that he is the proper person entitled to apply for and be granted statutory rights of occupancy in respect of the disputed piece/parcel of land.

Upon the conclusion of evidence the learned counsel for the parties filed their Final Written Addresses which they adopted as their final arguments in support of their respective cases.

In his final written address, the learned counsel for the Defendant, **Dr. P.E. Ayewoh-Odiase**, formulated two issues for determination as follows:

- (i) Whether the Claimants have fully discharged their evidential burden of proof entitling them to the judgment of this honorable court?; and***
- (ii) Whether the Defendant has proved his counter-claim on the balance of probability entitling him to the relief sought?***

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE ONE:

Whether the Claimants have fully discharged their evidential burden of proof entitling them to the judgment of this Honourable Court?

Arguing this first issue, learned counsel submitted that the Claimants' ownership claim to the land in dispute is bare, spurious and unfounded. He posited that in order to succeed in a claim for declaration of title, the Claimant must prove the following:

- (a) The precise nature of the title claimed, that is to say, whether it is title by virtue of original ownership, or customary grant or conveyance or sale by customary law or long possession or otherwise; and***
- (b) Evidence establishing title of the nature claimed must be credible, convincing and unequivocal".***

See *Obineche v Akusobi (2010) 30 WRN, Page 117 at p.137 lines 25-50*

He further submitted that from the incredible and irreconcilable evidence of the Claimants and their witnesses, it is obvious that the Claimants' ownership claim is shrouded in mystery and conjecture because they could not lead any evidence of genuine purchase of the land in dispute. He said that the CW1, Mrs. Caroline Okuonghae told the Court under cross-examination that although she signed as a witness to her father, money was not paid to her father, the alleged Assignor in her presence. He said that the CW1 further told the Court that although the purported document of title was signed in the solicitor's office, money was however not paid in the solicitor's office. Furthermore, she admitted that although her father operated several bank accounts during his lifetime, the purchase price for the property in dispute was allegedly paid by cash.

Counsel submitted that from the evidence of the CW1 elicited under cross-examination, the Claimants have failed to establish that they acquired the land in dispute genuinely through purchase. On the onus on the party alleging purchase of land, he referred the Court to the following decisions: *White Diamond Property Development Company Ltd V Trade Wheels Ltd (2022) 8 NWLR Part 1832, Page 247; Ibude V Saidi (2021) 10 NWLR Part 1785, Page 567 at Pp. 580, paras. A; C – 5; 583 – 584 paras. B – F*. He concluded that there is no credible evidence that the purchase price was ever paid by the Claimants to their deceased father in respect of the land in dispute.

He submitted that it is incredible that the Claimants' father who operated several bank accounts could opt for physical cash payment of five million naira in the face of daunting security challenges. On the meaning of incredible evidence he cited the case of *Irawo-Osan V Folarin (2008) 49 WRN, Page 127 at P. 150 lines 5 – 10*.

He submitted that production of purchase receipt in the instant case is not admissible to prove title but payment of money which the Claimants have failed to establish and he cited the case of *Adekunle V Ibru (2021) 2NWLR Part 1759, Page, 46 at P. 85 paras. C -D.*

Furthermore, he submitted that where the document of title has been challenged as in the instant case, the Claimants have a duty to prove the source of their vendor's title which they failed to and he cited the case of *Holloway V Jimoh (2020) 2 NWLR Part 1707, Page 27.*

Learned counsel submitted that the purported purchase of the land in dispute is an afterthought. He said that the 1st Claimant told the Court under cross-examination that there was a family meeting summoned by his father's kinsmen over his father's property and that his father's kinsmen were informed about the purported sale of the property, but the 2nd Claimant informed Court that his father's kinsmen were not informed about the purported sale.

He submitted that from the evidence of the Claimants, it is clear that the purported purchase of the land in dispute is not only dubious but an afterthought. On the meaning of afterthought, he relied on the case of *Okoroafor V Emeka (2015) 34 WRN, Page 46 at Pp. 121 lines 40 – 50.*

Counsel posited that the conduct of the claimants during the said family meetings and the execution of the said resolution leave much to be desired as same does not accord with the common course of natural events and human conduct and he cited *Section 167 of the Evidence Act.*

He submitted that from the resolution signed by the Claimants which is binding on the parties, it is within the rights of the Defendant to own, administer and inherit all his father's properties including the land in dispute and the Claimants are estopped from laying ownership claim to the land in dispute which was never separated from the properties of their deceased father. He further submitted that there is no evidence that the Claimants were ever put in possession of the land in dispute. He submitted that acquisition and possession must coexist to establish title to land through purchase. He said that the CW1 and the Claimants admitted under cross-examination that their deceased father was in possession of the land in dispute and was collecting rents until his death and the Defendant took possession thereafter.

On the meaning and essence of possession, he referred the Court to the cases of *Mogagi V Cadbury Fry (Export) Ltd 1907 -1978 Vol. 1 Supreme Court Judgments on Lands, Pages 356 at 357;* and *Oyadare V Keji & Ors (2005 - 2009) Vol. 5 SCJL Page 2.*

Learned counsel submitted that the Claimants established under cross-examination that apart from the Defendant's act of collecting rents from the tenants in respect of the land in dispute, compensation was paid to the Defendant by the Federal Ministry of Works during road construction which affected part of the property in dispute. He submitted that this is a positive

act of ownership. On the meaning of acts of ownership, he cited the case of *Awodi V Ajagbe (2013 - 2019) Vol. 7 SCJL Page 501 at 506* and submitted that acts of possession by the Defendant is prima facie evidence of ownership of the land in dispute. See *Onovo V Mba (2013 – 2019) Vol. 7 SCJI Page 379 at 382*.

He submitted that a party such as the Claimants, who relied on documents of title, must establish that the said documents were duly executed in their favor by an acknowledged owner of the land in dispute. He maintained that the Claimants have failed to establish that they actually acquired the property from the acknowledged owner and he relied on the case of *Adeniran V Alao (2002) FWLR Part 90, Page 1285 at P. 1317 Paras. C-J*.

Counsel submitted that a careful perusal of the family resolution and the Deed of Assignment reveals they do not complement each other as no amount of evidence can distort the clear and unambiguous intendment of the said family resolution. He referred to the case of *Ogundele V Agiri (2010) 9 WRN Page 1 at P. 22 lines 20 – 30*, where the Supreme Court held that documents when tendered and admitted in Court are more reliable and authentic than spoken words. He also cited the case of *Bunge V Governor of “Rivers State (2006) 10 M.J.S.C. page 136 at P. 184 para. D*.

He submitted that from the totality of the evidence before the Court, the document of title relied upon by the Claimants, is a product of forgery and he relied on the case of *Elias V Federal Republic of Nigeria (2021) 16 NWLR, Part 1800, Page 495 at P. 553, paras. D – F*.

Finally, he urged the Court to resolve issue one against the Claimants having failed to establish their entitlement to the land in dispute.

ISSUE TWO:

Whether the Defendant has established his title on a balance of probability to entitle him to the declaration sought?

On issue two, Learned Counsel submitted that the Defendant has led cogent and credible evidence in proof of his counter-claim before this Honorable Court. He said that the Defendant led unchallenged evidence of how he acquired the land in dispute through inheritance. That as the eldest surviving son of his deceased father, he performed his final burial rites, in accordance with Esan Native law and Custom and inherited the land in dispute amongst other properties. He said that the evidence of the Defendant was corroborated by the CW1 and CW2 as well as the family resolution signed by all the parties.

He submitted that the evidence of the Defendant is consistent with evidence of traditional inheritance which he anchored on the prevailing Esan Native Law and Custom of Isua, Arue, Uromi and he cited the case of *Iroagbara V Ufomadu (2009) 30 W.R.N, Page 1 at P. 16 lines 10 – 15*.

He submitted that the traditional evidence led by the Defendant remains un-contradicted and that where evidence of inheritance is not challenged, it can sustain a claim for declaration of title and he relied on the following decisions: *More Aikeji V Adegbosin (2003) 8 NWLR, Part 823, Page 612 at P. 635 paras. E – G*; and *Benbock Ltd V First Atlantic Bank PLC (2007) 51 WRN, Page 181 at P. 193 lines 20 - 30*.

Counsel submitted that the law is trite that once it is proved, as in the instant case, that original ownership of property is in a party, i.e., in Claimants' deceased father, the burden of proving that the said party was divested of the ownership during his lifetime, rests on the other party. See the case of *Orlu V Gogo-Abite (2010) Vol. 181 LRCN, Page 193 at P. 216 EE*.

He submitted that the Claimants have failed to prove that the original ownership of the land in dispute no longer resided with their deceased father before his demise in line with the above judicial authority.

Counsel submitted that the evidence of the Defendant and his witnesses have passed the acid test of what a Counter-Claimant must establish in order to succeed in a claim for declaration of title and he relied on the case of *Obineche V Akusobi (2010) 30 WRN Page 117 at P. 137 lines 25 – 50*.

He submitted that where two competing parties claim to be in possession of the land in dispute as in the instant case, the law ascribes possession to the one with the better title and he cited the case of *Ogbu V Wokoma (2005) 4 FWLR Part 292 at Page 2123 at P. 2146, paras. C – D*. He maintained that from the evidence before the Court, it is clear that the Defendant is the person in possession of the land in dispute and not the Claimants whose evidence is anchored purely on incredible evidence and he cited the case of *Irawosan V Folarin (2008) 49 WRN Page 127 at P. 150 lines 5 – 10*.

Counsel posited that the defendant also pleaded and relied on the Arue custom which forbids a father from selling his property to his children. He said that in proof of the said custom, the Defendant testified and called Elder Boniface Ukokobili, the DW1 and Aluede Okosodo, the DW2. He submitted that a rule of custom as in the instant case can be established through evidence and that the burden of proof lies on the person alleging the existence of such custom. He cited *Section 16 of the Evidence Act*.

He further submitted that the Defendant and his witnesses have fully established the existence of the said rule of custom in Isua, Arue, Uromi and that a custom which has not been challenged and/or declared repugnant to natural justice, equity and good conscience as in the instant case, remains binding on members of a particular community. He relied on the following decisions on the point: *Okonkwo V Okagbue (1994) 9 NWLR (Pt 368) 301 at 345*; *Idaayor V Tigidam (1995) 2 NWLR (Pt. 377) 359 at 383*; *Mashuwareng V Abdu (2003) 11 NWLR (pt. 831) 403 at 416*; *Dakur V Dapal (1998) 10 NWLR (pt. 571) 573 at 583 – 584*.

Counsel submitted that from the evidence of the DW1 whom the CW4 acknowledged to be a custodian of the Native Law and Custom in Arue, Uromi, this Honorable Court can rely on the evidence of the DW1 to form its opinion about the existence of the said rule of custom and rely on same in resolving the issue in controversy. He relied on *Section 73(1) & (2) of the Evidence Act*.

Counsel submitted that the CW4 who was brought from another community in Uromi, cannot controvert the binding rule of custom in Isua, Arue, Uromi. He said that the CW4 told the Court under cross-examination that there is no record of sale of property by a father to his children in Arue, Uromi and that nobody has ever told him about such incident. He said that he also admitted under cross-examination that he did not visit Isua, Uromi to find out the position of the custom prohibiting the sale of property by a father to his children. He therefore urged the Court to regard the evidence of the CW4, a native of Ebhoiyi, Uromi as highly unreliable as he is not grounded in the Native Law and Custom of Isua, Arue, Uromi forbidding the sale of property by a father to his children.

Furthermore, counsel submitted that the evidence of the DW2 and the Defendant touching on inheritance as well as the rule of custom forbidding sale of property by a father to his children was neither challenged nor controverted. He submitted that where evidence of a party is not challenged or controverted by the opposite party who had opportunity to do so, the Court is bound to act on such uncontroverted evidence provided it is credible as in the instant case and he relied on the following decisions: *Boye Industries Limited V AdisaSowemimo (2022) 3 NWLR Part 1817 Page 195 at 226, paras. D – E*; and *Okoebor V Police Council (2003) 12 NWLR Pt. 834 at P. 444*.

Finally, he urged the Court to resolve issue two in the affirmative.

In his final written address, the learned counsel for the Claimants *Dr. Mrs. R. O. Ehiemua* formulated three issues for determination as follows:

- (i) Whether by virtue of section 43 of the Constitution of the Federal Republic of Nigeria, 1999, the claimants as younger children of the deceased had the statutory and inalienable right to buy any property from legitimate sellers including their father who acted without coercion?*
- (ii) Whether a landed property and its appurtenances containing a building sold by the deceased person while he was alive can still form part of his estate after his death?*
- (iii) Whether from the totality of unrelated paucity of evidence adduced by the defendant respect of his counter claim, he is entitled to the judgement of this honourable court?*

Thereafter, the learned counsel argued the three issues seriatim.

ISSUE ONE:

Whether by virtue of section 43 of the Constitution of the Federal Republic of Nigeria, 1999, the Claimants as younger children of the deceased had the statutory and inalienable right to buy any property from legitimate sellers including their father who acted without coercion?

Arguing this issue, learned counsel submitted that the Claimants have an inalienable right to buy a property from a legitimate seller anywhere in Nigeria. She submitted that the right of the Claimants to acquire property from any legitimate seller including their deceased father who acted without coercion is a constitutional right guaranteed under ***section 43 of the Constitution of the Federal Republic of Nigeria, 1999*** which provides that subject to the provisions of the Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

Counsel submitted that the evidence and testimonies led at the trial by the Claimants and their witnesses were cogent, reasonable and probable and were not contradicted by the Defendant during the trial and she relied on the case of ***Arab Construction Ltd v Isaac (2012) LPELR 9787 (CA)***.

She submitted that the Claimants' ownership claim to the property in dispute is neither 'difficult to understand' nor is it 'an opinion formed by guessing'. She said that they specifically pleaded that they bought the property now in dispute from their late father for the sum of ₦5,000,0000 (Five Million Naira) in their Further Amended Statement of Claim particularly in paragraphs 5 and 8 and also in paragraph 6 of their Further Amended Reply to the Statement of Defence/Defence to Counter-Claim. That the Claimants' depositions on oath and those of their witnesses also affirmed the fact that the Claimants bought the property in dispute for the sum stated and this piece of evidence was not contradicted in any form. She referred to the Deed evidencing receipt of payment (Exhibit A), signed by their late father, the Claimants and that the Defendant's uterine sisters, Mrs Caroline Okuonghae (CW1) and Prof. (Mrs.) Okukpon (CW2), signed as witnesses.

She maintained that the CW1, had signed and witnessed for their late father in his similar transactions with other people and they tendered '**Exhibit N**' which was not contradicted by the Defendant as proof of one of such transactions.

She submitted that the Claimants led evidence to prove that from the time of purchase, the property in dispute ceased to be part of their father's remaining large estate which devolved upon the Defendant for inheritance. She referred the Court to the evidence of Mrs Caroline Okuonghae Nee Osinde (CW1); Prof. Lucy Adesomon Okukpon Nee Osinde (CW2) and Barr. (Mrs.) Edetubu Ogbemudia Odia (CW3) who drafted the deed evidencing payment receipt and whose testimony, integrity, professional knowledge and status were not debunked or contradicted by the Defendant under cross examination, likewise those of the CW 1 and CW 2.

Counsel submitted that the Defendant did not lead any evidence nor bring any sibling to disprove the Claimants' case; rather he brought two distant kinsmen (DW1 and DW2) who came to express their perceived rule of custom. She said that under cross examination, the DW2 admitted that he was never privy to any of their late father's transactions. Furthermore, she said that the DW1 (the Odionwele or traditional head of the litigants' quarter in the village) under cross examination significantly admitted to the court that an Isua-Arue man is at liberty to deviate from the rule of custom as it relates to Esan Native Law and Custom.

Counsel posited that the family resolution document ('**Exhibit M**') was the only documentary evidence of the Defendant during trial. She pointed out that the property in dispute was not listed in Exhibit M as part of the larger estate of their father which devolved on the Defendant. She said that the DW1 affirmed this fact under cross examination.

Counsel submitted that the Defendant's reference to the Supreme Court's decisions in *White Diamond Property Development Company v Trade Wheels Ltd (2022) 8 NWLR part 1832, page 247* and *Ibude v Saidi (2021) 10 NWLR part 1785, page 567 at pp580, paras A; C-5; 583-584 paras B-F*, cited in paragraph 4.04 of the Defendant's Final Written Address, does not help his defence.

She submitted that, one of the two judicial authorities, in *Ibude v Saidi* which was relied upon by the Defendant did not state all the elements that must be present for a deed to pass the 'acid test' in determining title. She submitted that '**Exhibit A**' which is the Deed of Assignment in this case fulfils all the conditions above, except the second element, which deals with 'stamping' and 'registration'. She said that '**Exhibit A**' is genuine and valid; that the grantor had the capacity and authority to make the grant; that the grantor also had what he purported to grant; and that '**Exhibit A**' had the effect claimed by the holder of the instrument.

Counsel submitted that although '**Exhibit A**' is "an unregistered registerable instrument", she referred to the case of *Benjamin v Kalio (2018) 15 NWLR (Pt 7641) 38* where the Supreme Court held that an **unregistered 'registerable instrument is admissible' as proof of title in accordance with the Evidence Act which considers the admissibility of a document based on relevancy.**

She submitted that the Deed of Assignment ('**Exhibit A**') also rests on a very strong and essential alternative pillar as it is equally pleaded as a payment receipt evidencing transaction between the late Pa. Patrick Ajegbelen Osinde (the vendor) and the claimants (buyers). See paragraphs 5, 7, & 8 of the claimants' Further Amended Statement of Claim and paragraph 10 (i & ii) of their Further Amended Reply to Statement of Defence/Defence to Counter Claim. She said that '**Exhibit A**' therefore confers on Claimants, long possession (like the 1st Claimant who has been doing business in the property before and after 2009 they bought it till date) an equitable interest which is as good as a legal interest and which can only be defeated by a purchaser of the land for value without notice of any prior equity. See *Tewogbade v Obadina*

(1994) NWLR (Pt. 338) 326. Also see *Adeyemo v Ida* (1998) 4 NWLR (Pt. 546) 504; *Nsigbe v Mgbema* (2007) LPELR – 2065 SC; *Agboola v U. B. A. Plc* (2011) 11 NWLR (Pt. 1258) 375 at p. 406 paras E-G; 407 para H; 415 paras F-H ; *Gbadamosi v Akinloye* (2013) 15 NWLR (Pt.1378) 455, 480 Paras C-F ; *Ojobor v Ovegheni* (2021) LPELR – 5 3413 (CA).

She submitted that the defendant did not even come to court with a better title but with a merely contrived excuse of inheritance.

Counsel submitted that the transaction between the Vendor of the property in dispute and the Claimants was a private contractual agreement and in the case of *Ibrahim v Obaje* (2019) 3 NWLR (Pt 1660) P. 389, particularly p.413, paras B-D, the Supreme Court held that “*the intention of the parties should be given due respect in a private contractual agreement. This is paramount, and the contrary should not be forced on them.*”

Learned counsel submitted that the Claimants led evidence to show that after purchasing the property from their deceased father, they chose to honour him by telling him to continue to collect the rents as their contributions to his upkeep, which their late father did till his death; but the 1st claimant reserved two stores for himself for his business that he still uses till date.

She denounced the Defendant’s claim of being in possession and enumerated the steps taken by the Claimants to stop the Defendant from illegally assuming possessions of the property in dispute, which is not his.

Counsel posited that the Claimants led evidence to show that their late father spent the proceeds of the sale on his property which he was building in his village in Arue, Uromi, where he was later interred after his demise. They also led evidence that as at 2009, their late father was agile, hale and hearty and was not mentally incapacitated at the time he sold the property to them without any undue influence or coercion from the Claimants.

She submitted that the option to pay cash, which was canvassed by the Defendant’s counsel in his address was at the discretion and request of the vendor in the transaction. She submitted that the issue of mode of payment was not even pleaded in any of the paragraphs of the Defendant’s Amended Statement of Defence/Counter-Claim, yet the Claimants still decided to answer him.

Addressing the Court on the alleged forgery of the document of transfer, counsel submitted that the Defendant did not lead any evidence to prove the forgery during trial. She referred the Court to *Section 135(1) of the Evidence Act, 2011* which provides that “*if the commission of a crime by a party to any proceeding is directly in issue in any proceedings whether criminal or civil, it must be proved beyond reasonable doubt*”. She also cited the case of *Usman v Jabrin* (2019) LPELR- 48792(CA). She maintained that the onus of proving that Exhibit A was forged or falsified is on the Defendant and this has not been discharged.

On proof by acts of possession, counsel submitted that the 1st Claimant testified that he has been doing business on the premises for over 20 years till date, which includes the period before they bought the property from their father in January 2009, and after, till date. She said that the 1st Claimant lives there and the premises serves as his residential and official or business address and he testified that after they bought the property from their father, he reserved two stores to sell electrical materials, confectionaries and other food items.

She further submitted that to prove their rights of ownership to the property in dispute, the Claimants formally wrote to the tenants intimating them about the change of ownership. The letters to the tenants were tendered and marked Exhibits G, G1, G2, G3, G4 and G5 respectively. Furthermore, a tenancy agreement issued to one of the tenants was tendered and marked Exhibit F. She said that none of these was contradicted by the Defendant in the course of the trial.

Finally, she urged the Court to resolve Issue 1 in favour of the Claimants having established their rightful claim to the property in dispute.

ISSUE TWO:

Whether a landed property and its appurtenances containing a building sold by the deceased person while he was alive can still form part of his estate after his death?

Arguing this issue, learned counsel submitted that the Defendant's right to inherit and to share amongst his siblings any of his late father's property after performing the final burial rites do not extend to properties disposed of by their deceased father in his life time. She submitted that such properties do not and cannot form part of the estate of the deceased.

Learned counsel contended that the family resolution (Exhibit M) which the Defendant is relying upon as proof of his title must fail on the following grounds:

- (a.) The property in dispute was not listed in the family resolution document;
- (b.) It was not stated in Exhibit M that their deceased father never sold the property in dispute to the Claimants or that the property is still part of their father's estate; and
- (c.) The content of Exhibit M debunks the claim of the first son's right to inherit according to Isua-Arue custom as pleaded in paragraphs 5 and 44 of the Defendant's Amended Statement of Defence/Counter Claim.

Learned counsel reviewed the evidence of the Defendant's witnesses and submitted that the Defendant was not able to prove that his late father did not sell the property in dispute to the Claimants.

Furthermore, learned counsel submitted that assuming without conceding, that, inheritance was a relevant issue in this case, that the Defendant as Claimant in his counter claim failed to establish the required grounds for such a claim as stipulated by the **Supreme Court in *Anyafulu v Meka* (2014) 7 NWLR (Pt. 1406), page 396 particularly at pages 416, paras D-F; page 430, paras A-C, F-G** where the Supreme Court held that: **“a plaintiff who claims ownership of land through inheritance must plead and give evidence of persons who have held title or on who title devolved on in respect of the land before the plaintiff took control of the land.”**

She emphasised that the family resolution (Exhibit M) relied upon by the Defendant failed to contradict and invalidate Exhibit A which is the deed of Assignment evidencing receipt of payment between the late patriarch and the Claimants in this suit. She further submitted that the Defendant cannot use oral evidence to vary the content of Exhibit M as the law is settled that oral evidence cannot be used to vary the content of a written document and she cited the case of *Ayorinde v Kuforiji*(2022)12 NWLR(Pt.1843) pg 43 at 119 Paras A-C.

She urged the Court to resolve this second issue in favour of the Claimant.

ISSUE THREE:

Whether from the totality of traditional evidence adduced by the Defendant in respect of his counter claim, he is entitled to the judgement of this honourable court?

Counsel submitted that the foundation of the Defendant’s counter claim which rested on custom and traditional belief in inheritance collapsed during cross examination as elaborately explained under issue two of the Claimants’ counsel’s address.

She submitted that the Defendant’s position is that the transfer of a man’s property whether through sale or outright gift must be done in the presence of his eldest male child, other male children of the family and as well as the man’s kinsmen under the prevailing native law and custom of Isua, Arue Uromi. She said that the Defendant’s only two witnesses (DW1 and DW2) who are his kinsmen, under cross examination, admitted that they were not present when the Defendant’s deceased father sold his other property to other buyers. She reiterated that the DWI also admitted under cross examination that an Isua-Arue man is at liberty to deviate from Isua-Arue custom.

She further submitted that the Claimants’ witness, Chief Hamilton Ibadin (CW4) who is a paramount chief in the palace of the King of Uromi under which kingdom is Isua-Arue, reaffirmed under cross examination that under Esan Native Law and Custom also applicable to Arue, a man is at liberty to sell his property to any person including his children. He also stated

that there is no custom that says it must be done in the presence of his eldest male child, other male children and his kinsmen.

She submitted that the CW4's testimony corroborated the DW1's statement under cross examination that an Isua-Arue man can deviate from the custom of Isua-Arue. She submitted that in the absence of any of the vitiating elements of a contract, the land transaction between Pa Osinde and the Claimants is valid and should be upheld by this Honourable Court and resolve Issue 3 against the Defendant.

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

Upon a careful examination of the Issues formulated by learned counsel for the parties, I observed that the Defendant filed a Counter-Claim in this suit so I am of the view that the two issues for determination in this suit are:

- 1) Whether the Claimants have proved their Claims against the Defendant in this suit?
and***
- 2) Whether the Defendant/ Counter-Claimant is entitled to the reliefs which he seeks in his Counter-Claim?***

I will now proceed to resolve the two issues.

ISSUE 1:

Whether the Claimants have proved their Claims against the Defendant in this suit?

In a claim for a declaration of title to land, the burden is on the Claimant to satisfy the Court that he is are entitled, on the evidence adduced by him, to the declaration which he seeks.

The Claimant must rely on the strength of his own case and not on the weakness of the defendant's case. See: *Ojo vs. Azam (2001) 4 NWLR (Pt.702) 57 at 71; and Oyeneyin vs. Akinkugbe (2010) 4 NWLR (Pt.1184) 265 at 295.*

It is now settled law that there are five ways of proving ownership of land. These are as follows:

- I. By traditional evidence;
- II. By the production of documents of title;
- III. By proving acts of ownership;

IV. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition be the owner of the land in dispute; and

V. By acts of long possession and enjoyment of the land.

See: *Idundun vs. Okumagba (1976) 9-10 S.C. 227.*

The point must be made that any one of the five means will be sufficient to prove title to the land as each is independent of the other. See: *Nwosu vs. Udeaja (1990) 1 NWLR (Pt.125) 188; and Anabaronye & Ors. vs. Nwakaihe (1997) 1 NWLR (Pt.482) 374 at 385.*

In the instant suit, from the evidence led, the Claimants appear to be relying on the second and third means of proof. To wit: proof by the production of documents of title and by acts of ownership.

On the first means of proof of their title to the disputed property, the Claimants led evidence of how they bought the property from their late father, for the sum of ₦5,000,000.00 (Five Million Naira only) on the 21st of January, 2009 and they tendered a Deed of Assignment signed by their late father which was admitted in evidence as Exhibit “A” at the trial. They also tendered an Application for Governors consent to the transaction also signed by their father, admitted as Exhibit “E”. They said that the purchase of the property was witnessed by two of their siblings, Mrs. Caroline A. Okuonghae (C.W 1) and Prof. (Mrs) Lucy Okukpon (C.W 2).

The Claimants alleged that after the burial ceremony of their father they held a meeting with the tenants on the 25th day of January, 2013 to inform them of the change of ownership and that in that meeting the Claimants delivered letters to the tenants, which formally notified them that they are now the legitimate owners of the property. Copies of the letters were admitted as Exhibits “G” to “G5” at the trial.

The Claimants said that they instructed their counsel to write to the tenants to demand the arrears of rents being owed to the Claimants since the demise of their father and copies of the letters were admitted as Exhibits “H” to “H5” at the trial.

At the trial, the Defendant seriously contended that their late father never sold the land to the Claimants during his life time. He sought to invalidate the Claimants’ purported document of title and maintained that the Deed of Assignment Exhibit A was forged. Furthermore, he contended that under the Esan Native Law and Custom of the Arue people of Uromi, it is forbidden for a father to sell his property to his children.

It is clear that forgery is a criminal offence. By the contention of the Defendant, it is apparent that that he has made an allegation of crime against the Claimants. *Section 135(1) of the Evidence Act 2011* stipulates as follows:

“135 (1) If the commission of a crime by a party to any proceedings is directly in issue in any proceedings civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person had been guilty of a crime or wrongful act is subject to the provisions of section 139 of this Act, on the person who assert it whether the commission of such act is or is not directly in issue in the action.

(3) If the prosecution proves the commission of a crime beyond reasonable doubt the burden of proving reasonable doubt shift on to the defendant.”

It is clear from the foregoing provision of the Evidence Act that forgery being criminal in nature, must be proved beyond reasonable doubt. The burden is on the person who asserts that a person is guilty of a crime. In this suit that burden must be discharged by the Defendant who alleged forgery in the procurement of Exhibit A, the Deed of Assignment.

In an attempt to discharge this burden, the Defendant sought to prove that the signature of their late father was forged.

In the first place, the offence of forgery is committed when a person who makes a false document or writing knowing it to be false and with intent that it may in any way be used or acted upon as genuine whether in Nigeria or elsewhere to the prejudice of any person or with intent that any person may in the belief that it is genuine be induced to do or refrain from doing any act whether in Nigeria or elsewhere is said to forge the document or writing.

In order to prove forgery, the person whose signature or writing was forged is usually an essential and material witness to prove that the handwriting or signatures did not belong to him and was not made by him. That person must be called to state that he was not the author of the disputed writing and failure to call him to deny or confirm that his handwriting or signature is fatal to the case of the prosecution. See the case of *Alake v The State, (1992) NWLR (pt.265) 261.*

In the instant case, the author of the disputed signature is deceased, so the Defendant could not call him as a witness. What the Defendant did was to deny that the purported signatures of his father on the Deed of Assignment (Exhibit A) and the Application for Governor’s Consent (Exhibit E) were not signed by his father. Apart from himself, the Defendant did not call any member of his family to corroborate his allegation that his father’s signatures on the aforesaid documents were forged. The evidence adduced by the Defendant in proof of the alleged forgery appears palpably weak.

Under cross examination, in a bid to establish the alleged forgery, the Defendant stated as follows:

“I see Exhibit A and I see the signature of the Assignor. The signature of the Assignor is suspicious because it is not the signature of my late father it is forged. I think it was forged because on the 17th of January 2013, the 1st Claimant told the members of the Otoké family that this Deed of Assignment was not ready and that Professor Mrs. Lucy Okupon and the 2nd Claimant were still processing this Deed of Assignment. After I had completed the final burial rites of my late father when I asked further why the Deed of Assignment was not ready he said he did not know why it was delayed. I am not a trained signature expert. I see the letter from my late father to the Probate Registrar. The signature on Exhibit A is different from the signature on this letter.”

I am of the view that the evidence adduced by the Defendant in proof of the alleged forgery falls short of the standard of proof beyond reasonable doubt required to prove the criminal allegation of forgery.

In a further attempt to invalidate the alleged Deed of Assignment, the Defendant’s counsel contended that under the Esan Native Law and Custom of the Arue people of Uromi, it is forbidden for a father to sell his property to his children. He called two witnesses who testified about that alleged forbidden practice. Incidentally, the Claimants also called witnesses who refuted the Defendant’s assertion that it is forbidden for a father to sell his property to his children in Arue, Uromi,

It is settled law that proof of customary law in any particular case is governed by the provisions of ***Section 16 of the Evidence Act, 2011***. That section provides as follows:

- “1. A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence;***
- 2. The burden of proving a custom shall be upon the person alleging its existence.”***

Thus, the burden is on the Defendant to prove the existence of the custom that forbids a father from selling any of his property to his son. The provision of the Evidence Act establishes two methods of proof of a Customary Law: by Judicial notice and by Evidence.

Judicial Notice: Section 17 of the Evidence Act states that a Custom may be judicially noticed when it has been adjudicated upon by a superior Court of record.

Thus, where the Court has ruled on a particular Custom, it is said to have been judicially noticed and requires no further prove. In this suit, none of the parties cited any case where the court has adjudicated on this alleged custom which forbids a son from purchasing his father’s property. Thus, I cannot take judicial notice of such a custom.

Proof by Evidence: Section 18(1) of the Evidence Act 2011 provides that where a custom cannot be established by judicial notice; it shall be proved as a fact. Such a Custom may be proved either through: Witnesses, Expert opinion, Book or Manuscript.

In the instant case, the Defendant called witnesses to support his assertion that it is forbidden under Arue Customary law for a son to purchase his father's property. Incidentally, the Claimants also led evidence to show that under Esan native law and custom, a father is at liberty to sell any of his property to any person, including his children.

As a matter of fact in their evidence in chief, two of the deceased's daughters who allegedly signed the purchase agreement as witnesses to wit: Mrs. Caroline A. Osinde (C.W 1) and Prof. (Mrs) Lucy Okukpon (C.W 2) explained that before the purchase, their late father informed them of his intention to sell the disputed property to any of his sons or to any other person. They alleged that a week later, their father called to inform them that the Claimants have agreed to jointly purchase the property in order to ensure that the property remains within the family. These two witnesses testified before me with candour and I found them to be respectable and responsible members of the family who appeared willing to assist the Court to discover the truth. I believe the evidence of the C.W 1 and 2 in this regard and I completely disbelieve the evidence of the Defendant in denial of the alleged transaction.

Curiously, it seems that the Defendant although he is the first son, he appeared quite detached, distant and disconnected from his father and his siblings. The Claimants led evidence which was un-contradicted to show that during their father's life time, the relationship between the Defendant and their late father was rather frosty. There were allegations of hostilities between them. So it was not altogether surprising that his late father reached out to the Defendant's siblings when he evinced his intention to sell the disputed property and appears to have left the Defendant in the dark about the transaction. That is why he did not seem to be aware of the transaction until after his father's demise when he attempted to include the property among his late father's estate.

From the evidence adduced at the trial, there is obviously a serious division in the family, with the Defendant standing alone on one side of the divide. During this hearing, I tried to encourage settlement but all attempts at settlement proved abortive as each party was determined to continue with the bitter feud. As a matter of fact, this suit actually accentuated and accelerated the hostility between the Defendant and his uterine siblings. This is quite an unfortunate development after the demise of their father, more so when their aged mother is still alive. In the true African setting, the Defendant ought to fill the gap after their father's demise and assume the fatherly role as the head of the family. Unfortunately, they all failed to sheathe their swords and give peace a chance.

In a salient bid to dislodge the Defendant's case, in her written address, the learned counsel for the Claimants submitted that the Claimants have an inalienable right to buy a

property from a legitimate seller anywhere in Nigeria. She submitted that the right of the Claimants to acquire property from any legitimate seller including their deceased father who acted without coercion is a constitutional right guaranteed under *section 43 of the Constitution of the Federal Republic of Nigeria, 1999* which provides that subject to the provisions of the Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

Thus, by virtue of *section 43 of the Constitution* which is under Chapter IV of the Constitution dealing with fundamental rights, every citizen is free to acquire and own property in any part of Nigeria without any discrimination. He should not for any political, religious, social or economic reasons be deprived of this right, irrespective of his tribe or language.

It is settled law that the Constitution of the Federal Republic of Nigeria is the supreme law and any other law (including customary law) which is inconsistent with the Constitution shall to the extent of its inconsistency be void. See *section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999*. In the recent case of *Anekwe vs. Nweke (2014) LPELR-22697* the Supreme Court held that any custom that infringes on the provision of Chapter IV of the Constitution is void. See also the case of *OLORUNTOBA-OJU & ORS V. DOPAMU & ORS (2008) LPELR-2595(SC) (PP. 29 PARAS. C)*.

Applying the foregoing constitutional principles to the instant case, I am of the view that even if there is any such custom which prohibits a person from purchasing the property from a vendor merely because the vendor is the father of the purchaser, such a custom is a direct infringement of the right to acquire property as guaranteed by the provisions of *section 43 of the Constitution* and such a custom is void. I there agree entirely with the learned counsel for the Claimants that the alleged purchase of the disputed property by the Claimants from their late father cannot be invalidated by any such alleged prohibitory custom.

In a spirited attempt to discredit the evidence of purchase of the disputed property, the very learned counsel for the Defendant tried to raise some further doubts about the alleged transaction.

While disputing the alleged purchase, counsel contended that there is no credible evidence that the purchase price was ever paid by the Claimants to their deceased father in respect of the land in dispute. He maintained that the Claimants' did not lead any documentary evidence of payment of cash into any of their father's bank account. He maintained that it is incredible that the Claimants' father who operated several bank accounts could opt for physical cash of five million naira in the face of daunting security challenges.

In respect of the issue of lack of documentary evidence to prove payment of cash, I am of the view that the submission appears incongruous, for cash payment indicates that the payment was not conducted through any bank channel such as bank transfer or deposit that would have

generated such documentary proof of payment from the bank. On the issue of the incredibility of the evidence of the cash payment of such a huge sum, I think that the deceased has a right and discretion to accept a cash deposit instead of the apparently safer mode of payment through the bank. In any case, the argument of the Defence counsel about the absence of documentary proof of payment appears faulty because the Deed of Assignment clearly contained a receipt clause in acknowledgement of the payment of the purchase price of N5 million by the Claimants to their late father. From the totality of the evidence before me, I am satisfied that the Claimants paid the sum of N5 million as purchase price of the disputed property. I am also satisfied that the Deed of Assignment, Exhibit A is sufficient documentary evidence of payment.

In this suit it is evident that the salient document of title of the Claimants is the Deed of Assignment, Exhibit A which is a registrable instrument of title which is not yet registered.

It is settled law that a purchaser of land who has paid and taken possession of the land by virtue of a registrable instrument which has not been registered acquires an equitable interest which can only be defeated by a purchaser for value without notice of the prior equity. See the following cases: *Agboola vs. U.B.A. Plc. (2011) 11NWLR (Pt.1258) 375 at 415; Dauda vs. Bamidele (2000) 9 NWLR (Pt.671) 199 at 211; and Goldmark (Nig.) Ltd. vs. Ibafon Co. Ltd. (2012) 10 NWLR (Pt.1308) 291 at 349-350.g*

In the recent case of: *Atanda vs. Commissioner for Lands and Housing, Kwara State & Anor. (2018) 1 NWLR (Pt.1599) 32 at 55, Sanusi JSC*, delivering the lead judgment of the Supreme Court restated the position thus:

“A registrable instrument which has not been registered is also admissible only to establish or prove equitable interest or to prove payment of purchase price.”

Flowing from the foregoing, I am of the view that although Exhibit A, *per se* cannot establish legal title to the property in dispute, it will suffice to vest an equitable interest on the Claimants, which can only be defeated by a purchaser for value without notice of the prior equity. From the evidence adduced by both parties, the Defendant was laying claim to the disputed property not as a purchaser for value without notice of the prior equity of the Claimants but by virtue of his alleged right of inheritance as the first son of their father. His alleged right of inheritance cannot extend to a property which his father has disposed of for valuable consideration. Clearly, from the time the deceased signed Exhibit A after receiving the purchase price, the disputed property ceased to be a part of his estate. In the event, I hold that in the absence of a purchaser for value without notice of the prior equity of the Claimants, Exhibit A will suffice to establish the Claimants’ title to the disputed property.

On the proof by acts of ownership and possession, the Claimants led evidence to prove that immediately after the purchase of the land, the 1st Claimant reserved two stores to sell electrical materials, confectioneries and other food items and they told their father to continue to

collect the rents from the property as their contributions to his upkeep and their late father collected the rents till his demise in December 2012. From this uncontroverted evidence of the 1st Claimants using two rooms for his business and allowing their father to continue to collect the rent, I am of the view that the Claimants assumed constructive possession of the property through the 1st Claimant and the tenants. This amounts to acts of possession which is one of the ways of proving title to land. This is further proof of the Claimants' title. See: **Section 35 of the Evidence Act, 2011** and the case of: ***Alikor vs. Ogwo (2010) 5 NWLR (Pt.1187) 281 at 312.***

Although the Defendant led evidence to show some acts of possession through the collection of compensation from the Federal Government in respect of the property and rents from the tenants, it is settled law that where two competing parties claim to be in possession of the land in dispute as in the instant case, the law ascribes possession to the one with the better title. See the case of ***Ogbu V Wokoma (2005) 4 FWLR Part 292 at Page 2123 at P. 2146, paras. C – D.*** I hold that the Claimants are the ones in legitimate possession of the property since they have a better title to the property than the Defendant.

Sequel to the foregoing, I hold that the Claimants have established their title to the disputed property.

At the trial, the Claimants led evidence to prove that on the 7th day of November 2013 the Defendant invaded the disputed premises with some thugs including his son to beat up the 1st Claimant; and in the ensuing violence, they destroyed and stole his wares and illegally padlocked his stores thereby preventing him from his means of livelihood.

The Defendant was subsequently convicted for certain offences in relation to the invasion of the said property. I hold that the alleged invasion of the property by the Defendant amounts to trespass.

On the relief of a perpetual injunction against the Defendant/Counter-Claimant, it is settled law that once trespass has been proved, an order of injunction becomes necessary to restrain further trespass. 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.***

Consequently, the Claimants are entitled to an order of perpetual injunction to restrain the Defendant from any further trespass on the land.

Lastly, on the award of the sum of N3, 000,000.00 (Three Million Naira) as general damages for trespass on the said property, cost of litigation and all deprivations suffered by the 1st Claimant, it is settled law that the fundamental objective for the award of damages is to compensate the Claimant for the harm and injury caused by the Defendant. See: ***Chevron (Nig.) Ltd. vs. Omoregha supra.***

Thus, it is the duty of the Court to assess the 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.

At the trial, the Claimant testified of how Defendant and his thugs beat up the 1st Claimant, destroyed and stole his wares and illegally padlocked his stores.

I am of the view that the 1st Claimant will naturally expend some funds to restore the stolen and destroyed items and for his treatment for the alleged assault. He is therefore entitled to some reasonable compensation to cover all these expenses. Generally the trial court has discretion as to the quantum of damages it would award in a claim of damages for trespass. See: *U.B.N. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt.421) pg. 558; Solanke v. Ajibola (1969) 1 NMLR pg. 45; ACB Ltd v. Apugo (2001) 5 NWLR (pt.707) pg. 653; and YENEYIN & ANOR V. AKINKUGBE & ANOR (2010) LPELR-2875(SC)*.

In the instant case, I will exercise my discretion to award a reasonable sum as general damages to compensate the 1st Claimant.

On the whole, I hold that Issue One is resolved in favour of the Claimants.

ISSUE 2:

Whether the Defendant/ Counter-Claimant is entitled to the reliefs which he seeks in his Counter-Claim?

In his Counter-Claim, the Defendant counter-claimed against the Claimants seeking reliefs for declaration, perpetual injunction and damages.

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 Claimants. 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."

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

I am of the view that since it is the same property which the Claimants are claiming which the Defendant is also claiming in his counter claim, I cannot grant the Claimants Claims in the main Claim and turn round to uphold the Defendant's Counter Claims.

In the case of *UWAGBOE OSAGIE & ORS V IGBINOSUN OBAZEE & ORS (2013) LPELR - 21994 (CA)* the Court of Appeal, while pronouncing on whether a counter-claim would fail where the main claim succeeds held, per *LOKULO-SODIPE JCA* on pages 44 - 45 paragraphs F - E as follows: - *"As already stated by me, Appellants are very correct regarding their analysis of a counter-claim. The Appellants would however appear to have seriously misapprehended the manner of a trial in an action with a counter claim to the extent that they would appear to believe that evidence adduced in a case with a counter claim is compartmentalized or categorized into "evidence in the main suit" and "evidence in the counter claim" as it were. All that is required in a trial on pleadings is for the trial Court to identify the matters on which parties have joined issues and call for resolution and use the evidence adduced before it on the said issues... to resolve the issues in dispute...Therefore since the evidence adduced in the main claim is upheld then it follows that the counter-claim (though a separate claim that can stand on its own) is left bereft of evidence to support it. Therefore it is my finding on this issue that the learned trial Judge was right in dismissing the Appellants' counter claim."*

The law is that where the facts are intertwined and interwoven as regards a Claimant's action and a Defendant's counter claim, the success of the Claimant's claim would mean the failure of the Defendant's counter claim. See: *Aunam (Nig.) Ltd Vs UTC (Nig) Ltd (1995) 4 NWLR (Pt 392) 753, Unokan Enterprises Ltd Vs Omuvwie (2005) 1 NWLR (Pt. 907) 293, 315 at 316, Ago Vs Federal Mortgage Finance Ltd (2013) LPELR 22820(CA), Digital Security Technology Ltd Vs Andi (2017) LPELR 43446(CA), Ebibokofie Vs Tume (2018) LPELR 45620(CA), Iyua Vs Paul (2019) LPELR 47226(CA), Rikichi Vs Gambo (2019) LPELR 47676(CA).*

In view of the foregoing, I am of the view that it would be a worthless exercise to consider the merits of the Defendant's Counter-Claim at this stage. Having upheld the Claimants Claims, the Defendant's Counter-Claim is deemed to have failed and it is accordingly dismissed. Issue 2 is therefore resolved in favour of the Claimants.

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

- (i) *A declaration that the Claimants are the rightful owners of the property and have the statutory right of occupancy over the landed property measuring*

659.50 square metres containing a bungalow which consists of 3 stores at the front, 4 one-room-and-a-parlour, situated at No. 30 Mission Road, Uromi, which is well known to both parties and it is within the jurisdiction of this Honourable Court;

- (ii) The sum of N2,000,000.00 (Two Million Naira) only being general damages for trespass on the said property above stated, cost of litigation and all deprivations suffered by the 1st Claimant; and*
- (iii) Perpetual injunction restraining the Defendant, his agent(s), servant(s) privies and whosoever is claiming through him from trespassing or further trespassing on the said property.*

The sum of N200, 000.00 (Two Hundred Thousand Naira) costs is awarded in favour of the Claimants.

Hon. Justice P.A. Akhiero

Judge

12/03/24

COUNSEL:

DR. (MRS) R.O. EHIEMUA-----CLAIMANTS

DR. P.E. AYEWOH-ODIASE-----DEFENDANT/COUNTER-CLAIMANT

