

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 FRIDAY THE 23RD DAY OF MAY, 2025.

BETWEEN:

SUIT NO. B/678/2019

MR. OSADOLOR OLAYE

(Claiming as the eldest son

Of late Madam Airhumwunde

Aghaleladia and Suing through

his lawful attorney Mr. Joseph Adeghe)

-----CLAIMANT

AND

1. MRS. DOROTHY OLAYE

2. MR. EGBOBAMWONYI OVENSERI

(as executors of the Last Will and

Testament of Madam Airhumwunde

Olaye – Deceased)

3. The Probate Registrar,

High Court of Justice, Benin City.

-----DEFENDANTS

JUDGMENT

The Claimant instituted this suit vide a Writ of Summons and Statement of Claim filed on the 6th of December, 2019. However, the Claimant's extant Statement of Claim is his Amended Statement of Claim filed on the 18th day of March, in which he claimed against the Defendants as follows:

- a) A Declaration that the Claimant as the eldest son of late Madam Airhunmwunde Aghaleladia is entitled to inherit without question the house known as No. 1, Osaretin Street, Off Upper Sokponba Road, Benin City of his late mother, Madam Airhunmwunde Aghaleladia having performed the final obsequies of the said mother under the Benin Native Law and Custom and therefore the Claimant is the one entitled to statutory right of occupancy of the said house;*
- b) An order setting aside Clause 5 of the purported Last Will and Testament of Late Madam Airhunmwunde Olaye for being null and void under Benin Native Law and Custom;*
- c) A Declaration that the purported Last Will and Testament of Madam Airhunmwunde Olaye (Deceased) dated 10th day of March, 2008 is invalid and of no effect whatsoever in that it is tainted with fraud and duress, for not being the act of the deceased as well as for non-compliance with the relevant statutory requirement relating to Wills;*
- d) An Order of this Honourable Court setting aside/nullifying the purported Last Will and Testament of Madam Airhunmwunde Olaye (Deceased) dated 10th day of March, 2008; the said Will and Testament being invalid and of no effect whatsoever in that it is tainted with fraud and duress, for not being the act of the deceased as well as for non-compliance with the relevant statutory requirements relating to Wills.*

The 1st and 2nd Defendants on their part filed a Joint Statement of Defence and Counter - Claim on the 5th day of May, 2022 and Counter-Claimed against the Claimant as follows:

- 1) A DECLARATION that the last Will and Testament made by the late Madam Airhunmwunde Aghaleladia Olaye on the 10th day of March, 2008 charging, dividing or distributing the residue of her property (real/personal) to the beneficiaries of the deceased estate is valid and properly executed and not contrary to the Benin customary law of inheritance;*
- 2) The sum of N500,000:00 for cost of litigation against the Claimant; and*
- 3) PERPETUAL INJUNCTION, restraining the Claimants, their agents, privies or otherwise whatsoever from trespassing, entering or further interfering with the one room and store on the right side of the bungalow shared to the 1st Defendant.*

The 3rd Defendant (Probate Registrar) filed his Statement of Defence on the 30th of November, 2021.

The Claimant adduced evidence in support of his claim through his lawful Attorney and the CW 1 and tendered four exhibits in support of his case as follows:

- Exhibit “A” - A copy of the Power of Attorney.
- Exhibit “B” - A certified copy of the Last Will and Testament.
- Exhibit “C” - A certified copy of the death certificate of the testatrix
- Exhibit “D” - A copy of an Oba’s approval in the name of the testatrix

From the evidence adduced at the hearing, the Claimant’s case is that the Claimant is the eldest surviving son of one Madam Arhumwunde Aghaleladia (Deceased) who died on the 3rd of May, 2017 and the 1st Defendant is the Claimant’s younger sister of the same parents.

The 2nd Defendant is alleged to be the only surviving executor of the purported last Will and Testament of the Claimant’s late mother.

According to the Claimant, upon the demise of his mother, he financed her burial which was conducted in accordance with the Benin Native Law and Custom and the said burial was presided over by the then Okaegbe of the family.

The Claimant alleged that before her demise, his late mother repeatedly complained of the attempts of the 1st Defendant to make her sign a purported Will allegedly prepared by the 1st Defendant.

He alleged that his late mother never briefed or hired the services of any lawyer in her life time to prepare any Will.

He also alleged that the purported Will was made at the instance of the 1st Defendant who briefed the Law Firm of M.O. Iguodala & Co. to prepare the Will in the name of Madam Airhumwunde Olaye which was not his mother’s official name.

The Claimant alleged that the 1st Defendant attempted to make his mother to sign the purported Will sometime in the year 2008.

He said that sometime about the 7th of January, 2019, he served the 1st Defendant with a seven days’ Notice of the Owner’s Intention to Apply to Court to Recover Possession in respect of the Claimant’s house which is the subject matter of the purported Will in this suit.

He said that upon receiving the said seven days’ notice, the 1st Defendant informed the Claimant that the room and the store in the said property at No. 1, Osaretin

Street, off Upper Sokponba Road, Benin City, which is the subject matter of this suit belongs to her pursuant to the Will purportedly prepared by her lawyer M.O. Iguodala Esq. which she alleged was in the possession of her lawyer at that time.

He alleged that upon the expiration of the said seven days' Notice, when the 1st Defendant refused to deliver possession of the said one room and store in the said property, the Claimant instituted a suit at the Area Customary Court, Idogbo to evict her from the property.

He alleged that while the suit was pending at the Area Customary Court, the 3rd Defendant called to inform him that a Will was lodged at the Probate Registry in the name of Madam Airhunmwunde Olaye and that same will be read on the 14th day of June, 2019.

The Claimant maintained that the property in dispute was given to him by his late mother to the exclusion of every other person.

He said that the purported Will was read on the 14th of June, 2019 and he tendered a certified copy of the Will which was admitted as Exhibit "B" at the hearing.

The Claimant maintained that his late mother never made the purported Will which was prepared in the name of Madam Arhunmwunde Olaye which was not the actual name of his mother. He said that his mother's name was Madam Arhunmwunde Aghaleladia as contained in all her official documents, including the Oba's approval of the said property. He tendered a photocopy of the Oba's Approval which was admitted as Exhibit "D" at the trial.

The Claimant maintained that his late mother bore her late husband's family surname which is Aghaleladia and not her husband's first name which is Olaye.

He maintained that the 1st Defendant made their late mother to thumb print the purported Will under duress and his mother reported the 1st Defendant's conduct to the family before her demise.

He alleged that the executors, witnesses and interpreter of the purported Will are not known to the members of his mother's family.

He said that the Will is tainted with fraud, and is invalid because:

- a) The alleged witnesses to the WILL that is MR. EGBOBAMWONYI OVENSERI and MR. OWOMWENHIYERE ERAHUYI did not witness the execution of the WILL in each other's presence, nor in the presence of the Claimant's deceased mother who purportedly thumb impressed the WILL;

- b) The purported thumb impression of the Claimant's deceased mother and the name, Madam Airhunwunde Olaye are false;
- c) The 1st Defendant obtained the thumb impression of the deceased with threat;
- d) The 1st Defendant as an alleged beneficiary was in possession of the purported Will and had knowledge of the contents prior and after 10/03/2008 when it was allegedly executed;
- e) The purported will failed to comply with Benin Native Law and Custom;
- f) Their deceased mother had two houses at No. 1 and No. 1b, Osaretin Street, off Upper Sokponba Road, Benin City and she lived and died at No. 1, Osaretin Street, off Upper Sokponba Road, Benin City, which under Benin Native Law and Custom is to be inherited exclusively by the Claimant having performed the obsequies of his late mother; and
- g) The Claimant's late mother in her life time personally shared the property known as No. 1, Osaretin Street, off Upper Sokponba Road, Benin City to the Claimant as her eldest son to the exclusion of any other person and gave No. 1B, Osaretin Street, Off Upper Sokponba Road, Benin City; to her second son, the Claimant's younger brother, Mr. Ekuase Olaye, to the exclusion of any other person and to the knowledge of his siblings and members of extended family.

In their joint defence in this suit and in proof of their Counter-Claim, the 1st Defendant testified and called one witness who testified as the DW 1.

From their evidence, the case of the 1st and 2nd Defendants is that that Madam Arhunmwude Aghaleladia Olaye is one and the same person as Madam Airhunmwude Aghaleladia.

The 1st Defendant alleged that her late mother was buried in accordance with Benin Native Law and Custom and an Okaegbe presided over the burial.

The 1st Defendant informed the Court that she contributed to her mother's burial as required by Benin Native Law and Custom and that her late mother never reported or complained to the Claimant that she attempted to make her sign or thumb print any document or will during her lifetime.

She denied tormenting her mother and maintained that she had a harmonious and happy relationship with her late mother before her demise.

She maintained that her late mother made a Will on the 10th of March 2008 and validly executed same.

She alleged that under the Will her mother bequeathed a room and store on the right side of her property at No. 1 Osaretin Street off Upper Sokponba Road Benin to her.

She alleged that she never briefed the office of M.O. Iguodala and Co. to prepare the will but that her mother briefed the Law Firm by herself.

She said that she got to know about the Will when she was contacted by the probate registry of the High Court Benin City after the death and burial of her mother.

She maintained that her late mother never gave the property in dispute to the Claimant while she was alive and that under Benin native law and custom the house where a Benin woman lives and died is not regarded as Igiogbe.

She stated that under Benin native law and custom, female children are entitled to inherit their mother's property.

The 1st Defendant alleged that she has not seen the Claimant for a long time and she could not have told the Claimant of her ownership of the room and the store devised to her under the Will.

She maintained that the Will was not fraudulently made.

In defence of this suit, the 3rd Defendant adduced evidence in support of its defence through one Mrs. Akhere Osarumwense, a staff of the Probate Registry of the Edo State High Court who testified as the D.W.3.

In her evidence, the D.W. 3 told the Court that the last Will and Testament of Madam Airhunmwunde Aghaleladia dated the 10th of March, 2008 was lodged by one Mrs. I.O. Edegbe of the Law Firm of M.O.Iguodala & Co., on the 16th day of June, 2019. She identified the Will already tendered by the Claimant which was admitted as Exhibit "B".

The witness testified that the Will was read to the children, executors and other close relations of the Testatrix's family on the 14th day of June, 2019. She tendered a copy of those in attendance at the reading of the Will which was admitted as Exhibit "F".

The witness also tendered the following documents:

Exhibit "E" - An application for the reading of the Will;

Exhibit "G" - An application for certified copy of the Will;

Exhibit “H” -An application for a certified copy of the Will by the Claimant’s counsel; and

Exhibit “I” - An application to conduct search of the Will.

She alleged that no Caveat was filed at the probate Registry.

The witness informed the Court that none of the parties has applied for Letters of Administration and that the Will was not proved before the Claimant took out the Writ of Summons against the Defendants.

Upon the conclusion of the evidence, the learned counsel for the Claimant and the 1st and 2nd Defendants 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 1st and 2nd Defendants, ***M.O. Iguodala Esq.*** formulated two issues for determination as follows:

- (i) Whether the Claimant has made out a case of fraud regarding Exhibit B, the purported Will particularly against the 1st and 2nd Defendants so as to disprove the Claimant of the use of the entire property; and***
- (ii) Whether the purported Will was properly executed having regard to the provisions of the Wills Law of Edo State and the evidence before this Honourable Court.***

Thereafter, the learned counsel argued the two issues seriatim.

Arguing the first issue, the learned counsel submitted that the burden of proving the validity and due execution of Exhibit “B” rests on the 1st and 2nd Defendants who are the propounders of the Will but that the duty of proving the fraud alleged is on the Claimant.

He said that to discharge the burden of proof of the validity of the Will and due execution of same, the Defendants pleaded the necessary facts in paragraphs 10, 11, 18 and 19 of their Joint Statement of Defence and in paragraphs 5, 10, 11, 18 and 19 of the 1st Defendants deposition on oath and adduced cogent and credible evidence through the DW2 to prove the validity and due execution of Exhibit “B”.

He said that the DW 2 who is the legal practitioner who prepared Exhibit “B” (the Will) gave a graphic account of how he took instructions from the Testatrix and confirmed that she was of sound mind and knew exactly what she wanted to do. He said that the DW2 gave clear evidence on the due execution of Exhibit “B”.

He said that the Defendants ex-facie have shown that Exhibit 'B' was validly made and duly executed in compliance with the requirements of the Wills Laws in every respect.

He referred the Court to the case of ***IDEHEN V. IDEHEN 1991 6 NWLR (PT. 1910 382 AT 418 Paras D-E*** where the Supreme Court set the standard for validity of a Will.

He submitted that it is settled law that a person subject to customary law can make a Will once she has the testamentary capacity and he cited ***Section 3(1) of the Wills Law of the defunct Bendel State 1976, now applicable in Edo State.***

Again, learned counsel submitted that the concept of Igiogbe which is that the principal property of a deceased Benin man accommodating his ancestral staff passes to his eldest surviving male child at his death is not applicable to a deceased Benin woman's property. He said that a Benin woman is at liberty to make a Will and dispose of her property as she wishes and no customary limitation is placed on her right to dispose of her property.

He submitted that once the formalities and the formal requirements for making a Will prescribed in ***Sections 6 and 7 of the Wills Law*** are complied with, the Will is regarded as valid.

He referred to the case of ***DAWODU V. ISIKALLI 2019 4 NWLR (PT. 1663) 409 AT 416 PARAS D-G*** where the Supreme Court interpreted the provisions of ***Section 4 of the Wills Law of Lagos State*** which is *impari materia* with ***Section 6 and 7 of the Wills Law of Bendel State 1976 as applicable in Edo State*** and held that no will shall be valid unless:-

- (a) It is in writing;
- (b) It is signed by the testator or signed in his name by some other persons in his presence and by his discretion in such a place on the Will so that it is apparent on the face of the Will that the testator intended to give effect by the signature of the writing signed as his Will;
- (c) The testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time;
- (d) The witnesses attest and subscribe the Will in the presence of the testator but no form of attestation or publication shall be necessary;
- (e) The Will having been shown by the propounders to be ex-facie valid, complying with the requirements of the Wills Law in form and in substance and made more credible by the evidence of the DW1 and DW2 the legal

practitioner, the burden of proving the invalidity and lack of due execution shifts to the Claimant.

Learned counsel submitted that the allegation of fraud and forgery are imputations of crime in a civil matter and the burden of proof required is beyond reasonable doubt. He said that the 1st and 2nd Defendants have denied the allegations of fraud and forgery and the terse imputation of crime.

He said that the Claimant has failed to prove the allegations of fraud and forgery beyond reasonable doubt as required by law.

He maintained that there are no particulars of fraud and forgery. He said that the courts have emphasized how allegations of fraud can be proved in a number of cases. He referred to the case of **TRADE BANK PLC V. PHARMATEK IND. LTD 2020 8 NWLR (PT. 1725) 124 AT 159 – 160 PARAS H – A** where the Supreme Court posited as follows:

“My Lords, the law is settled that where a party alleges fraud, in any proceedings, civil or criminal not only must the particulars be specifically pleaded, the allegation must be proved beyond reasonable doubt. The burden of proof is on he who makes the allegation.

Fraud implies a willful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.

Fraud for the purposes of civil law includes acts, omissions and concealments by which an undue and unconscientious advantage is taken of another”

Learned counsel also relied on the case of **NTEILE V. IRAWAJ 2021 16 NWLR (PT. 1803) 411 AT 462 PARAS C – F.**

He posited that the allegation of the forgery of the signature of the testatrix is an imputation of crime which requires proof beyond reasonable doubt even in a civil matter. He said that the Claimant has not furnished any particulars of forgery and has also not strictly proved same to discharge the burden placed on him by law. Again, he relied on the case of **A.C.N. V. LAMIDO 2012 8 NWLR (PT. 1303) 560 AT 591 PARAS F – G.**

Counsel submitted that from the available legal evidence, the 1st and 2nd Defendants who are the propounders of the Will have been able to demonstrate prima facie that Exhibit ‘B’ is valid and complies with the requirement of the Wills Law in form and in substance. He said that the burden of proving otherwise shifts

to the Claimant who has failed woefully to prove that burden including the heavier burden of the allegation of the crime of fraud and forgery.

ISSUE 2:

Whether the purported Will was properly executed having regard to the provisions of the Wills Law of Edo State and the evidence before this Honourable Court.

Learned counsel submitted that to prove due execution of the Will, the 1st and 2nd Defendants called the DW2 who gave a graphic and detailed account of how the testatrix gave him oral instruction to prepare Exhibit 'B'. He stated how the witnesses and the testatrix executed the Will in his presence and that at the time of executing the Will; the testatrix knew exactly what she wanted to do.

He submitted that a Will can only be challenged on grounds of due execution and lack of testamentary capacity. He said that the evidence of due execution and sound disposing mind of the testatrix as adduced by the DW2 corroborates the validity and genuineness of Exhibit "B".

He said that the DW2 was not cross examined on the due execution of Exhibit 'B' and that in law, this amounts to a tacit acceptance of the fact of due execution of Exhibit 'B'.

He referred to the cases of ***OLOWU V. BUILDING STOCK LTD 2018 1 NWLR (PT. 1601) 343 AT 399 PARAS H – A; F.B.N. PLC V. M. O. NWADIALU & SONS LTD 2016 18 NWLR (PT. 1543) 1 AT 34 – 35 PARAS G – D; and ISAAC GAJI & ORS V. EMMANUEL D. PAYE (2003) 8 NWLR (PT. 823) 583 AT 805 PARAS A – C.***

Counsel posited that since the DW2 gave unbroken chain of evidence of due execution of the Will, the Claimant having asserted the negative, ought to have called the surviving witness (2nd Defendant) to testify to frontally rebut the evidence of the DW2 that the testatrix signed in the presence of the two witnesses who also signed the Will as required by law.

He said that in the absence of any evidence from the aforesaid witness, the evidence of the DW2 remains unchallenged and uncontroverted.

He said that the evidence of the DW3 who identified Exhibit "B" as a certified copy of a Will lodged with the 3rd Defendant who had custody of same until the Will was read also strengthened the case of the 1st and 2nd Defendants.

He said that the D.W 3 gave evidence of the official lodging of the Will, the lawful custody of the Will and the steps taken to ensure the reading of the Will.

He submitted that Exhibit ‘B’ being a certified copy enjoys the presumption of genuineness in law. He relied on the case of **ALIYU V. NAMADI 2023 8 NWLR (PT. 1885) 161 AT 203 PARAS A – C** where the Supreme Court exposted thus:

Section 146 (1) of the Evidence Act, 2011 provides thus:

“146(i) The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by an officer in Nigeria who is duly authorized in that behalf to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf”

Furthermore, he submitted that the presumption of regularity of official acts enures in favour of Exhibit “B” having passed through the lawful custody of the 3rd Defendant. Again, he relied on the decision of the Supreme Court in the case of **AMAH V. F.R.N 2019 6 NWLR (1667) 160 AT 187 PARAS F – G**.

In conclusion, he urged the Court to dismiss the Claimant’s case and grant the Counter Claim of the 1st Defendant.

In his final written address, the learned counsel for the Claimant, ***O.Okhigbochie Esq.*** formulated two issues for determination as follows:

- (i) Whether the Claimant has made out a case of fraud regarding Exhibit B, the purported Will particularly against the 1st and 2nd Defendants so as to deprive the Claimant of the use of the entire property; and***
- (ii) Whether the purported Will was properly executed having regard to the provisions of the Wills law of Edo State and the evidence before this Honourable Court.***

In his written address, the learned counsel for the Claimant argued the two issues together.

Opening his arguments, he submitted that ***section 6 of the Wills Law Cap.172 Laws of the defunct Bendel State 1976 as applicable to Edo State*** which provides for how a valid Will should be executed states as follows:

“No will shall be valid unless it shall be in writing and executed in manner hereafter mentioned, that is to say, it shall be signed at the foot or end thereof by the testator or by some other persons in his presence and at his direction and

such signature shall be made or acknowledged by the testator in the presence of two or more witnesses who shall attest and subscribe the Will in the presence of the testator, but no form of attestation shall be necessary”

He said that the Claimant pleaded in paragraph 26 of his extant Statement of Claim dated 1st of March, 2022 and testified that the Will is tainted with fraud and therefore invalid for failure to comply with ***section 6 of the Wills Law Cap. 172 Laws of the defunct Bendel State 1976 as applicable to Edo State.***

He listed the particulars of fraud to be as follows:

- 1) That the alleged witnesses to the Will that is Mr. Egbobamwonyi Ovenseri and Mr. Owomwenhiyere Erahuyi did not witness the execution of the Will in each other presence, nor in the presence of the Claimant’s deceased mother who purportedly thumb impressed the Will;
- 2) The purported thumb impression of the claimant’s deceased mother and the name, Madam Airhunwunde Olaye are false, the 1st Defendant Obtained same with threat and or without the consent of the claimant’s mother;
- 3) The Claimant’s deceased mother is Madam Airhunmwunde Aghaleladia as contained in all her vital documents including the Oba’s approval in respect of the said property, the subject matter of the purported Will.

Counsel referred the Court to the evidence of the CW2 Mr. Joseph Adaghe who stated that the Claimant’s late mother never made a Will and that the purported Will was prepared for the 1st Defendant in the name of Madam Arhunmwunde Olaye which was never her actual or official name. He said that the witness maintained that the deceased’s real name is Madam Airhunmwunde Aghaleladia as contained in all her official documents including the Oba’s approval to the property in dispute in this suit.

Learned counsel also referred the Court to the evidence of the CW1 Mrs. Okhwarobo Mary Ikponmwonsa who testified that their late mother Madam never briefed any lawyer to prepare the purported Will.

He said that the witness also testified that in her lifetime, their late mother repeatedly complained about the 1st Defendant’s threats to force her to sign the purported Will which he alleged is a forgery.

Counsel posited that the 1st Defendant could not effectively debunk these pieces of evidence in her defence.

Counsel posited that the Claimant led evidence to show that the 2nd Defendant is not known to his mother and that as at the year 2008 when the purported Will was

prepared the 1st Defendant was the owner and or in possession of two personal houses within the same geographical location with the subject matter of this suit.

He maintained that the 1st and 2nd Defendants could not debunk these pieces of evidence, therefore the evidence remains uncontested and he urged the Court to act upon the uncontroverted evidence of the Claimant. He referred the court to Exhibit “D” and the evidence of the 1st Defendant, the D.W 2 M.O. Iguodala Esq. and the 3rd Defendant which revealed that they became aware during the pendency of this suit that the official and or actual name of the Claimant’s late mother is Madam Arhunmwunde Aghaleladia. He urged the Court to discountenance their attempts to amend the name of the deceased in the course of trial being an afterthought.

He submitted that the evidence of the DW1, DW2 and DW3, supports the evidence of the Claimant.

He posited that the Claimant led evidence that the alleged witnesses to the Will, that is Mr. Egbobamwonyi Ovenseri and Mr. Owomwenhiyere Erahuyi did not witness the execution of the Will in each other’s presence nor in the presence of the Claimant’s deceased mother who purportedly thumb printed the Will.

He submitted that the executors and witnesses to the purported Will i.e. Mr. Egbobamwonyi Ovenseri and Mr. Owomwenhiyere Erahuyi did not challenge this piece of evidence.

Again, he posited that both the CW1 and the Claimant testified that the said witnesses and the interpreter of the said purported Will are not known to their late mother and or family. He pointed out that the 2nd Defendant deliberately refused to appear in court to challenge this piece of evidence or testify. He said that the refusal of the witnesses to testify in this suit is a confirmation of the Claimant’s evidence that the witnesses are not known and or do not exist and that the purported Will was forged.

He urged the Court to deem admitted the unchallenged and positive evidence of the Claimant and he relied on the case of ***OKOEBOR V POLICE COUNCIL (2003) 12 NWLR 483.***

Counsel submitted that this being a civil matter, the burden of proof on the Claimant is discharged on the balance of probability or on the preponderance of evidence.

He finally urged the Court to set aside the Will and grant the Claimant’s claims.

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 am of the view that the two issues for determination in this suit are:

- (i) Whether the Claimant has proved his Claims on the preponderance of evidence to enable the Court to grant his reliefs; and*
- (ii) Whether the 1st and 2nd Defendants have proved their Counter-Claims on the preponderance of evidence to enable the Court to grant their reliefs.*

I will now proceed to resolve the two issues for determination seriatim.

ISSUE 1:

Whether the Claimant has proved his Claims on the preponderance of evidence to enable the Court to grant his reliefs?

In all civil suits, the burden of proof is on the Claimant. *Section 131(1) of the Evidence Act, 2011* States thus:

"Whoever desires any Court to give judgment as to any legal right to liability dependent on the existence of facts which he asserts must prove that those facts exist."

Furthermore, *Subsection (2) of the same section* provides: *"when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

It means that 'He who asserts must prove his assertion.' The judicial decisions on this point are innumerable. See the following cases: *Kwasalba (Nig.) Ltd. Vs. Okonkwo (1992) 1 NWLR (Pt. 218) 407 @ 417; Imana Vs. Robinson (1979) 3 - 4 SC. 1 and Osawaru Vs. Ezeiruka (1978) 6 - 7 SC 135.*

In this case, the burden of proof lies with the Claimant who has come to Court to challenge the validity of the WILL in dispute to prove his assertions against the said WILL which was admitted in evidence as Exhibit "B".

Thus the burden is on the Claimant to substantiate by evidence the allegations which he has made against the validity of Exhibit "B". See the case of *Nsefik Vs. Muna (2007) 10 NWLR (Pt. 1043) 502 @ 516, F – G.*

Upon a careful examination of *Paragraph 31 of the Claimant's extant Statement of Claim*, the Claimant is seeking the following reliefs:

- a. *A Declaration that the purported Last Will and Testament of madam Arhunmwunde Olaye (deceased) dated 10th day of March, 2008 is invalid and of no effect whatsoever in that it is tainted with fraud and duress, for not being the act of the deceased as well as for non-compliance with the relevant statutory requirements relating to Wills.*
- b. *AN ORDER of this Honourable Court setting aside/nullifying the purported Last Will and Testament of Madam Arhunmwunde Olaye (Deceased) dated 10th day of March, 2008; the said Will and Testament being invalid and of no effect whatsoever in that it is tainted with fraud and duress, for not being the act of the deceased as well as for non-compliance with the relevant statutory requirements relating to Wills.*

Thus from his pleadings, the Claimant has the burden of proving that the Will is invalid by reason of fraud and duress, for not being the act of the deceased as well as for non-compliance with the relevant statutory requirements relating to Wills.

By his pleadings and his evidence, the Claimant has raised the allegation of fraud and forgery which are allegations of the commission of crimes. By virtue of the provisions of *Section 135 of the Evidence Act, 2011*, if the commission of crime by a party is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. See the cases of *Andrew Vs. INEC (2018) 9 NWLR (Pt. 1625) 507 @ 551, Para. H and 559 Para. E*; and *MAC-PHILIPS & ORS v. LLOYD & ORS (2023) LPELR-60418(CA)(Pp. 29 paras. D)*.

The question now is whether, the Claimant has discharged the burden to prove beyond reasonable doubt that the Will was actually tainted with fraud and obtained under duress.

At the hearing, the Claimant led evidence that before her demise, his late mother repeatedly complained of the attempts of the 1st Defendant to make her sign a purported Will allegedly prepared by the 1st Defendant. He alleged that his late mother never briefed or hired the services of any lawyer in her life time to prepare any Will.

The evidence of the alleged complaints of the Claimant's late mother that the 1st Defendant made some attempts to compel her to sign a purported Will appears too weak to sustain the proof of fraud or forgery which must be proved beyond reasonable doubt. The issue becomes more compounded in view of the fact that the

Will carries the alleged thumb impression of the deceased Testatrix. It will require some kind of forensic evidence to prove that the thumb impression on the Will is not that of the Claimant's mother.

The evidence adduced by the Claimant to substantiate his criminal allegations appears quite scanty and sketchy. He did not lead any direct or circumstantial evidence of how the thumb impression was made on the Will, whether his mother was forced to thumb print it, or whether some other person thumb printed the said Will. I think these criminal allegations should have been reported to the law enforcement agencies to enable them conduct a thorough investigation into the allegations of forgery and fraud. As it stands, the evidence of the alleged thumb printing is now a matter of conjectures, speculations and suspicion. It is settled law that suspicion no matter how strong cannot take the place of legal proof. See the case of ***SIMTALEX (NIG) LTD & ANOR V. FBN PLC (2024) LPELR-62139(CA) (PP. 47 PARAS. A)***.

In defence of the allegations of criminality in the making of the Will, the 1st and 2nd Defendants called the lawyer who prepared the Will as a witness and he testified as the D.W. 2 in this case. In paragraphs 3 to 8 of his deposition, the D.W. 2 Mohammed Osayemwenre Iguodala Esq. stated as follows:

3. *That the late Madam Airhumwude Aghaleladia Olaye during her life time approached me in my office in the course of my professional duty as a legal practitioner to prepare her Will;*
4. *That I took her instructions down in writing and interacted with her and found out that she had sound mind and knew exactly what she wanted to do;*
5. *That the contents of the Will was read and interpreted in Edo Language by one Mr. A.O. Idahosa and late Madam Airhumwude Aghaleladia Olaye understood it perfectly and she executed by an impression of her thumb print in the presence of her witnesses;*
6. *That upon the death and burial of the testator my firm wrote to notify probate Registry to the High Court of Justice, Edo State to confirm and communicate the date fixed for the reading of the Will to the executors and the family members of the testator and the children and beneficiaries of the Will;*
7. *That the Will was read in the probate registry of the High Court of Justice, Edo State and admitted to probate;*
8. *That the Will fully complied with the Will's law of Bendel State as applicable in Edo State in form and substance.*

It is pertinent to note that the evidence of the D.W. 2 was not contradicted by the Claimant in any material particular. Furthermore, the witness was unshaken by the cross examination of the learned counsel for the Claimant.

From the very lucid evidence of the witness, it is apparent that the deceased Testatrix made her Will voluntarily, following due process.

Upon a juxtaposition of the evidence adduced by the Claimant to substantiate his criminal allegations with the evidence of the D.W. 2, it is apparent that the allegations of forgery and duress have crumbled like a pack of cards. The evidence adduced by the Claimant falls far short of the proof beyond reasonable doubt which is required to establish allegations of the commission of crimes.

I believe the evidence of the D.W. 2 that the deceased Testatrix briefed him to prepare her Will and the contents of the Will was read and interpreted in Edo Language to her and that she understood it perfectly and executed same by an impression of her thumb print in the presence of her witnesses.

From the foregoing, I hold that the challenge to the validity of the Will on the ground of forgery, fraud and duress cannot be sustained by the evidence adduced by the Claimant in this suit.

In this suit, the Claimant is also challenging the validity of the Will on the grounds that:

a) The alleged witnesses to the Will that is Mr. Egbobamwonyi Ovenseri and Mr. Owomwenhiyere Erahuyi did not witness the execution of the WILL in each other's presence, nor in the presence of the Claimant's deceased mother who purportedly thumb impressed the Will; and

b) The purported will failed to comply with Benin Native Law and Custom because the house at No. 1 Osaretin Street which is in dispute is where the Claimant's mother she lived and died which under Benin Native Law and Custom is the Igiogbe which is to be inherited exclusively by the Claimant having performed the obsequies of his late mother.

On the allegation that the witnesses to the Will did not witness the execution of the Will in each other's presence, nor in the presence of the Claimant's deceased mother, I have already made a finding of fact that I believe the evidence of the D.W. 2, the lawyer who prepared the Will and who was present when the Testatrix and her witnesses signed the document. He confirmed that the two witnesses and the Testatrix signed the Will while they were all present. Thus, the challenge of the Claimant on this ground is bound to fail.

In respect of the other challenge that the Will did not comply with Benin Native Law and Custom on the inheritance of a woman's Igiogbe, the Claimant and the 1st Defendant gave conflicting evidence at the trial.

At the hearing of this case, the Claimant's Lawful Attorney asserted that under Benin Customary Law, the house where a Benin woman lived and died is classified as her Igiogbe which can only be inherited by her eldest son.

Contrariwise, the 1st Defendant testified that under Benin native law and custom the house where a Benin woman lives and died is not regarded as Igiogbe. She maintained that the Claimant cannot lay claim solely to their late mother's property because under Benin native law and custom, female children are not disinherited from inheriting their mother's property.

The question of whether the house where a Benin woman lived and died can be classified as her Igiogbe which can only be inherited by her eldest son is a matter of customary law. The law is that the burden of proof of custom is on the person alleging its existence. Native Law and Custom, being a question of fact, must be proved by the person alleging its existence unless it had been judicially noticed. See ***Section 14 of the Evidence Act 2011***. See also the following cases: ***Giwa V. Erinmilokun (1961) All NLR 294 @ pp. 378 - 379***; ***Ogiemwanre & Ors V. Abiodun (2020) LPELR - 52242 (CA)***; ***Amu & Anor V. Adolor (2022) LPELR - 56796 (CA)***; and ***Ahemba & Ors V. Akosu (2023) LPELR - 60479 (CA)***.

The alleged custom on the Igiogbe of a Benin Woman has not been judicially noticed so the Claimant has the burden to prove it before this Court more so, when the 1st Defendant denied the existence of such a custom. Apart from the *ipse dixit* of the Claimant's Lawful Attorney on the alleged custom, the Claimant did not lead any cogent evidence to prove the existence of such a custom. In the circumstance, I hold that the Claimant has failed to prove the existence of such a custom. So this ground of challenge to the Will cannot be sustained.

The substratum of the Claimant's reliefs appears to be contingent on the invalidation of the Will of his deceased mother which apparently gave the 1st Defendant some rights in the house which was bequeathed to the Claimant under the Will. Since the Claimant has failed to invalidate the Will, his reliefs cannot be granted.

Consequently, issue one is resolved against the Claimant and his Claims are dismissed.

ISSUE 2:

Whether the 1st and 2nd Defendants have proved their Counter-Claims on the preponderance of evidence to enable the Court to grant their reliefs?

It is settled law that a Counter Claim is a separate, independent and distinct action from the main claim. The burden of proof is on the Counter Claimant to prove the Counter Claim by credible evidence just as in the main claim. See: ***DOZZY GROUP OF COMPANIES LTD V. OKEKE (2016) LPELR-41522(CA) (PP. 15 PARAS. C).***

Though an offshoot of the main claim, to be entitled to judgment on the Counter Claim, the Counter Claimants like the Claimant in the main action must succeed on the strength of their Counter-Claims and not on the failure or weakness of the Claimant's case. The onus of proof on the Counter-Claimants is not discharged by the failure of the Claimant's case.

The onus of proof lies on the Counter-Claimant to prove the averments in his Counter-Claim on the preponderance of evidence. See ***Unokan Ent. Ltd V. Omuvwie (2005) 1 NWLR (Pt. 907) 293; Usman V. Garke (2003) 14 NWLR (Pt. 840) 261 and Ogbonna V. A.G. Imo State (1992) 1 NWLR (Pt. 220) 647.***

In this suit, the Counter-Claimants are seeking a declaration that the aforesaid Will is valid, properly executed and not contrary to the Benin customary law of inheritance. They are also claiming damages and seeking a perpetual injunction to restrain the Claimant his agents and privies from trespassing, entering or further interfering with the one room and store which was shared to the 1st Defendant under the Will.

In spite of the independent and distinct nature of the Counter-Claim from the main Claim of the Claimant as in this case, where however the claims of the respective rival parties are the direct opposite of each other, it is evident that the dismissal of the main claim will invariably be advantageous to the success of the Counter-Claim. See the case of ***OKAFOR & ANOR V. OKAFOR & ANOR (2016) LPELR-40457(CA)(PP. 82-83 PARAS. D).***

Coming to the instant case, while considering the main Claim, I made some salient findings on the validity of the Will to the effect that same was made by the Testatrix without violating any established Benin Native Law or Custom.

In their Counter-Claim, the Counter-Claimants' first relief is a declaration that the Will is valid and properly executed and not contrary to the Benin customary law of inheritance.

It is settled law that the conditions for the validity of a Will are as follows:

- 1) *The Will is in writing;*
- 2) *It is signed by the testator or signed in his name by some other person in his presence and by his direction in such place of the Will so that it is apparent that the Testator on the face of the Will intended to give effect by the signature to the writing signed as his Will;*
- 3) *The testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time; and*
- 4) *The witnesses attest and subscribe to the Will in the presence of the testator but no form of attestation or publication shall be necessary.*

See *Section 6 of the Wills Law, Cap. 72, Laws of Bendel State of Nigeria, 1976 as applicable to Edo State.*

See the following cases: *-Iyamu v. Alonge (2007) LPELR-8689 (CA), pp. 18-19, paras F-D, Ajakwe v. Ajakwe & Ors (2016) LPELR-41086 (CA), pp. 9-10, paras D-C, Okafor & Anor v. Okafor & Anor (2016) LPELR-40457 (CA), pp. 53-54, para D.*

Where on its face a Will appears duly executed, the Court may pronounce it valid on the basis on the presumption of regularity. The maxim is *Omnia praesumuntur rite essa acta* (all things are presumed to have been done rightly).

Furthermore, in this suit the 1st and 2nd Defendants led evidence through the DW2 of how the testatrix and the witnesses executed the Will in his presence and that at the time of executing the Will, the testatrix knew exactly what she was doing.

Furthermore, as the learned counsel for the 1st and 2nd Defendants rightly submitted, the evidence of the official lodging of the Will in the lawful custody of the 3rd Defendant and the tendering of Exhibit ‘B’ which is a certified copy raises the presumption of genuineness in law under *Section 146 (1) of the Evidence Act, 2011* which provides thus:

“146(i) The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by an officer in Nigeria who is duly authorized in that behalf to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf”

Again, Exhibit “B” is covered by the presumption of regularity of official acts having passed through the lawful custody of the 3rd Defendant.

Section 168(1) of the Evidence Act, 2011 stipulates that: "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

See the case of ***DAMABARA V. A-G OF THE FEDERATION & ANOR (2021) LPELR-56480(CA)(PP. 26-27 PARAS. E).***

From the foregoing, I hold that the Counter-Claimants have established the fact that the Will was made and executed in compliance with the law and in accordance with Benin Native Law and Custom.

The Counter-Claimants are also seeking for costs of N500, 000.00 (Five Hundred Thousand Naira) to cover their litigation expenses.

In the case of ***Mbanugo v Nzefili (1998) LPELR - 5483 (CA)*** the Court of Appeal explained that the award of costs is to compensate the successful party for some of the loss incurred in litigation. See also the cases of ***Halo Ltd v Brown (1973) 2 SC 14 and Reg. Trustees of Ifejolu v Kuku (1991) 5 NWLR (Pt 189) 65***; and ***Chijioke V Soetan (2006) 10 NWLR (Pt 990) 179***.

I think the claim for the sum of N500, 000.00 (Five Hundred Thousand Naira) for the cost of litigation is quite moderate.

Finally, I hold that the Counter-Claimants are entitled to the grant of a perpetual injunction to restrain the Claimant from interfering with the rights of the 1st Defendant in respect of her share of the property.

On the whole, this second issue is resolved in favour of the Counter-Claimants.

In conclusion, the Claimant's claims are dismissed and the Counter-Claims of the 1st and 2nd Defendants are granted as follows:

- 1) A DECLARATION that the last Will and Testament made by the late Madam Airhunmwunde Aghaleladia Olaye on the 10th day of March, 2008 charging, dividing or distributing the residue of her property (real/personal) to the beneficiaries of the deceased estate is valid and properly executed and not contrary to the Benin customary law of inheritance;***
- 2) The sum of N500,000:00 for cost of litigation against the Claimant; and***
- 3) PERPETUAL INJUNCTION, restraining the Claimant, his agents, privies or otherwise whatsoever from trespassing, entering or further interfering***

with the one room and store on the right side of the bungalow shared to the 1st Defendant.

P.A.AKHIHIERO
JUDGE
23 /05/2025

COUNSEL:

O. Okhigbochie Esq-----Claimant.

M.O. Iguodala Esq-----1st & 2nd Defendants

Ekan Okojie Esq.-----3rd Defendant