**MR. FRANK OMORODION IGORI**

**V.**

**MASTER OTASOWIE IGORI AND OTHERS**

IN THE COURT OF APPEAL (BENIN JUDICIAL DIVISION)

THE 25TH DAY OF JUNE, 2013

SUIT NO: CA/B/195/2009

**LEX (2013) - CA/B/195/2009**

OTHER CITATIONS

2PLR/2013/114

(2013) LPELR-21027(CA)

**BEFORE THEIR LORDSHIPS**

HELEN MORONKEJI OGUNWUMIJU

SIDI DAUDA BAGE

AYOBODE OLUJIMI LOKULO-SODIPE

**BETWEEN**

MR. FRANK OMORODION IGORI - Appellants

AND

1. MASTER OTASOWIE IGORI

2. MASTER OSASERE IGORI

3. MISS IZIENGBE IGORI

4. MISS ENIYE IGORI (Defending by their Mother Mrs. Grace E. Igori)

5. MRS. GRACE E. IGORI

6. HON. JUSTICE C.O. IDAHOSA

7. MR. VICTOR AIMUFUA

8. MRS. F. INIKORO (All Executors and Executrix of the Will of Mr. Andrew Agbontaen Igori)

9. THE PROBATE REGISTRAR High Court of Justice, Sapele Road, Benin City - Respondents

**REPRESENTATION**

G.E. Ezomo with him I.K. Igbonigbor and C.N. Mbakwe Esq. For the Appellants

Chief F.O. Orbih, SAN with him P.E. Ebuehi Esq.,

W. W. Uche Esq. and K.O. Adesotu Esq.for 1st - 8th Respondents

The Probate Registrar, High Court of Justice, Benin City for 9th Respondents For the Respondents

***ORIGINATING STATE***

*Edo State: High Court (P.I. Imoedemhe J-Presiding)*

**CONNECTED AREAS OF PRACTICE**

1. Estate Planning

2. Customary Law

3. Family Law

4. Women and Children

**ISSUES FROM THE CAUSE(S) OF ACTION**

ESTATE ADMINISTRATION: - Application for declaration to set aside specific clauses of a will for being null and void for non-compliance with the relevant statutory requirements relating to WILLS – Application for a declaration asserting interests over property arising from Law of succession over the express terms of a will – Relevant considerations – How treated

CUSTOMARY LAW - BINI CUSTOMARY LAW: - Concept of Igiogbe in Benin Custom - Home where the deceased's father lived in his life time which is inherited by his eldest surviving son - Upon the death of a father, the eldest son takes over his estate as a trustee for all the deceased's children pending the performance of the second (final) burial rites - After the performance of these rites, the eldest son automatically inherits the main seat of the deceased father: the house where the deceased lived, died and was buried which does not vest unless the second burial rites are performed by the eldest child

CHILDREN AND WOMEN LAW: Children and customary rights of inheritance – Distribution of interests in property via Will and demands of Benin Customary Law – How modern lifestyles is shaping judicial interpretation relating to customary inheritance rights – Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

COURT **-** DUTY OF COURT: - Duty of court of law in all proceedings before it to admit and act only on legal evidence - Where a trial court inadvertently admits evidence which is inherently inadmissible – Duty not to act on it but rather to discountenance it - When a document is unlawfully received in evidence at the trial court whether an appellate court has inherent jurisdiction to expunge and discountenance the document even though there was no objection to its admissibility at the trial court

EVIDENCE - PRIMARY EVIDENCE: - Duty of court to reject inadmissible evidence arising from its duty to act only legal evidence - Primary evidence as the production of the document itself - S. 86(1) EA, 2011 - Secondary evidence as evidence which requires foundation failing which only little weight attaches to it - S.88 of the Evidence Act 2011 – Whether photocopy of a document is admissible when proper foundation has been laid for it – Need for defendant to tender original if he wants to debunk correctness of photocopy evidence - Public document – Need for every public document to be proved by producing a Certified True Copy of the said document - See S.112 of the Evidence Act Cap 112 - S.105 of the Evidence Act 2011 - S.90(1)(c) of the Evidence Act 2011 – Whether the only acceptable secondary evidence of a public document is a certified true copy of the document and none other

INTERPRETATION OF STATUTE - RULES OF INTERPRETATION:- Legal principle that terms in a document must be interpreted in the whole context of the document and not in isolation - Whether the word "caretaker" can be given the meaning of a ‘rent collector’ where a testator did not imply that the said caretaker was his rent collector

INTERPRETATION OF STATUTES: - S. 86(1) EA, 2011 - S.88 of the Evidence Act 2011 –See S.112 of the Evidence Act Cap 112 - S.105 of the Evidence Act 2011 - S.90 (1)(c) of the Evidence Act 201

WORDS AND PHRASES - "ABODE", “CARE-TAKER”

**MAIN JUDGMENT**

HELEN MORONKEJI OGUNWUMIJU, J.C.A.: (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of Honourable Justice P.I. Imoedemhe of the Edo State High Court, sitting at Benin City, delivered on Tuesday, the 21st day of April, 2009.

The facts that led to this appeal are as follows:

The Appellant (as Plaintiff in the trial court) filed this suit claiming the following reliefs, as contained in paragraph 12 of the statement of claim on Pg. 7 of the record.

"12. WHEREOF the plaintiff claims as follows:

(a) A declaration that in accordance with Bini Customary Law of succession, the plaintiff as the eldest surviving son of the deceased succeeds exclusively at all events to the houses and premises known as No. Ajibola-Aluko Street, off Okota Road, Isolo, Lagos, Lagos State, Nigeria the house/premises where the deceased lived and died which was his last place of abode otherwise, known as Igiogbe.

(b) A declaration to set aside clauses B, C, D, E and (i) of the WILL dated 29/8/2003 of the ("Deceased") who died on the 26th June, 2006 at Lagos, Lagos State Nigeria for being null and void for non-compliance with the relevant statutory requirements relating to WILLS.

(c) A declaration that plaintiff is the one entitled to statutory Right of Occupancy in respect of all that houses/premises known as No. 1, Ajibola-Aluko Street, Off Okota Road, Isolo, Lagos, Lagos State Nigeria.

(d) An order for 1st to 5th defendants to render account to the plaintiff in respect to all rent collected and to be collected from the said houses/premises from 26th day of June, 2006 when the deceased died until the determination of the suit.

(e) An order of perpetual injunction restraining the defendants from administering expending disposing of or dealing in any way whatsoever with the said houses/premises known as No. 1, Ajibola-Aluko Street, Off Okota Road, Isolo, Lagos, Lagos State Nigeria.

The learned trial judge dismissed the case in the [entirety] in the judgment at pages 84-103 of the record of proceedings. Being dissatisfied with the judgment, the appellant filed this appeal.

In the brief settled by Mrs. E.J. Omoregie, and filed on 19/6/2009, the appellants identified five issues for determination as set out below:

1. Whether the learned trial judge was right when he admitted inadmissible documentary evidence exhibit D6.

2. Whether the appellant's constitutional right to fair hearing was unduly prejudiced by the learned trial judge when he failed and/or refused to pronounce on the issues canvassed before him.

3. Whether the learned trial judge was right when he held that the appellant failed to prove that the deceased testator lived and died in the house in dispute.

4. Having regard to the totality of the evidence on record, whether the learned trial judge rightly evaluated the evidence before dismissing the appellant's case.

5. Whether the learned trial judge was right when he held that the appellant failed to prove the extra territorial application of the Bini Customary Law on Igiogbe.

The learned counsel for the respondents in the brief settled by Chief Ferdinand Orbih, SAN identified four issues for determination as set out below:

1. Whether on the state of the pleadings of the parties to this suit and the evidence adduced by them, the admissibility of Exhibit D6 occasioned any miscarriage of justice, Ground 1.

2. Whether or not the learned trial judge properly evaluated the evidence before coming to the conclusion that the house at No. 1, Ajibola-Aluko Street, Off Okota Road, Isolo, Lagos, was not the Igiogbe of late Mr. Andrew Agbontaen Igori, and that the house at No. 3, Obosa Street, Benin which the testator willed to his first son, was his Igiogbe, Grounds 2, 3, 5, 6 and 7.

3. Whether or not the learned trial judge properly evaluated the evidence relating to "Eke no ma eghele Ero Igiogbe" in the judgment, the subject matter of this appeal.

4. Whether or not the learned trial judge was right when he followed the decision of the Honourable Court in Egharevba v. Oruonghae (2001) 11 NWLR (Pt. 724) t 336 and held that the Customary Law of Igiogbe has no extra territorial application, Ground 4.

Having read the judgment of the learned trial judge and the notice of appeal filed by the appellant which was transmitted at Pg. 104 -107 of the record, I am of the view that I am constrained to rephrase the issues for determination as distilled by both counsel and to reduce the duplicity in the issues so as to address the complaints set out in the notice of appeal. The two issues I feel are germaine for determination are as follows:

(1) Whether in view of the pleadings, evidence adduced by the parties during trial, the wrongful admission of Exhibit D6 occasioned miscarriage of justice.

(2) Whether the learned trial judge properly evaluated all evidence adduced by the appellant and applied the correct legal precedents before coming to the conclusion that the house in controversy was not the Igiogbe of the testator.

ISSUE ONE:

(1) Whether in view of the pleadings, evidence adduced by the parties during trial, the wrongful admission of Exhibit D6 occasioned miscarriage of justice.

This issue is the Appellant's Issue 1 and the Respondents' Issue one also.

Learned appellant's counsel argued that when the 5th defendant was testifying before the learned trial judge, she tendered exhibit D6 without any objection. Counsel argued that exhibit D6 is a Photostat copy of a reference letter from University of Benin Teaching Hospital (UBTH) Benin City, public institution owned by the Federal Government of Nigeria by virtue of the fifth Schedule part 11 item 15 of the 1999 Constitution of the Federal Republic of Nigeria, University of Benin Teaching Hospital that issued exhibit D6 is a public institution. Counsel argued that, it is trite law that before a Photostat copy of a document like Exhibit D6 which emanates from a public institution can be admitted in evidence, it shall be certified by virtue of S.109-113 of the Evidence Act. Also by S.97(2)(c) of the Evidence Act only a Certified True Copy of a secondary document can be tendered in court.

Counsel cited the following cases of Unity Life and Fire Insurance Co. Ltd. V. IBWA Ent. (2001) 7 NWLR Pt. 713 at 610 Pg. 626; Egbue v. Araka (1996) 2 NWLR Pt. 433 Pg. 688 at 703; Kuti v. Alashe (2005) 17 NWLR Pt. 955 at 625 Pg. 645-646 para F-A and Omonyin v. Omotosho (1961) ANLR Pt. 11 Pg. 304 at 305; Anyaebosi v. R.T. Briscoe Nig. Ltd (1987) 3 NWLR Pt. 59 P9.87 para C-D.

Learned appellant's counsel argued that since Exhibit D6 was inherently inadmissible, it should be expunged along with all the findings made on the record by the learned trial judge in that regard.

Learned senior counsel for the respondents while conceding that exhibit D6 is a public document, argued that foundation was laid for its admissibility and it was tendered without objection by counsel on the other side. Senior counsel argued that since the document was admitted without objection, it is too late in the day to complain about it. He cited Vera Ezomo v. N.N.B. & Anor. (2007) All FWLR Pt.368 Pg. 1032 at 1065. Counsel also argued that paragraph 11D of the 1st - 8th Respondents' Amended Statement of Defence which stated that when the testator took ill, he was taken to the University of Benin Teaching Hospital (UBTH) for treatment from where he was referred to LUTH in Lagos was admitted in paragraph 6 of the Appellant's Reply to the Statement of Defence. Learned senior counsel for respondents submitted that from the pleadings of both parties on the issue of referral of the testator to LUTH, there is agreement on that issue of fact, Exhibit D6 was mere surplusage as what is admitted need no further proof. He cited S.75 of the Evidence Act and Federal Ministry of Health v. Comet Shipping Agencies Ltd. (2009) 9 NWLR Pt. 1145 Pg. 193 at 214 paras F-G; Ekpemupolo v. Edremoda (2009) 8 NWLR Pt.1142 Pg. 166 pp. 196 paras F-G.

Learned senior counsel for the respondents in the alternative argued that even if Exhibit D6 was admitted in error, given the state of the pleadings, the admission and consideration of Exhibit D6 by the trial judge did not occasion miscarriage of justice. He cited NBC Plc v. Pemola Olarewaiu (2007) All FWLR Pt. 364 Pg. 360.

There is no doubt that the court of law is expected in all proceedings before it to admit and act only on legal evidence. Where a trial court inadvertently admits evidence which is inherently inadmissible, the court has a duty not to act on it but rather to discountenance it. Thus, if a document is unlawfully received in evidence at the trial court, an appellate court has inherent jurisdiction to expunge and discountenance the document even though there was no objection to its admissibility at the trial court.

The argument of learned senior counsel for the respondents that because foundation was laid by DW2 - 5th Respondent to the effect that she could not get a copy of the original of exhibit D6, and that it is too late at this stage to object to its admissibility, the document was thus admissible, is, with the greatest respect, misconceived.

Exhibit DG is a photocopy of the referral letter issued by UBTH a public institution owed by the Federal Government and it is therefore within the meaning of a public document as provided under S.102 of the Evidence Act 2011. Its criteria for admissibility of documents are pleadings, relevance and admissibility in law. Okonji v Njokanma (1999) 12 SCNJ 295; (1999) 14 NWLR Pt.638 Pg. 250. Thus the court has a duty to reject inadmissible evidence arising from its duty to act only legal evidence. See International Bank of West Africa Ltd. V. Imano (2001) 3 SCNJ Pg. 160; (2001) 3 SC Pg. 182. Primary evidence is the production of the document itself. S. 86(1) EA, 2011. Secondary evidence requires foundation if not little weight attaches to it. See A.G., Oyo v. Fairlakes (1989) 5 NWLR Pt. 121 Pg. 255; S.88 of the Evidence Act 2011. Thus photocopies of a document is admissible when proper foundation has been laid for it. See Habib Nig. Bank v. Koya (1992) 7 NWLR Pt. 251 Pg. 43 Pg. 55-56 where a photocopy has been pleaded by the plaintiff and admitted by the defendant, it is admissible. If the defendant wants to debunk its correctness, he must tender the original. See Nwanji v. Coaster Services (2004) All FWLR Pt.219 Pg. 1150 at 1162. In any event every public document must be proved by producing a Certified True Copy of the said document. See S.112 of the Evidence Act Cap 112 and S.105 of the Evidence Act 2011. In Lawal v. Magaji & Ors. This court upheld the fact that a photocopy of a Certified True Copy is not admissible as against the decision in Iheonu v. Obiukwu (1994) 1 NWLR Pt. 322 Pg. 594 at 601-603. In Araka v. Egbue (2003) 17 NWLR Pt. 848 Pg. 1 at 18 the Supreme Court re-emphasized that by virtue of S. 97(2)(c) of the Evidence Act now S.90(1)(c) of the Evidence Act 2011, the only acceptable secondary evidence of a public document is a certified true copy of the document and none other. Thus, whether there was an objection to its admissibility or not, a photocopy of a public document not certified is inherently inadmissible and if admitted must be expunged from the record. The fact that foundation was laid for its admissibility is irrelevant where it is inherently inadmissible. A photocopy of an uncertified public document is inherently inadmissible. Exhibit D6 is hereby expunged from the record.

Nevertheless, paragraph 11d of the 1st-8th Defendants/Respondents' Amended Statement of Defence at Pg 39 of the record states as follows:

'The testator who lives in Benin took ill, and was taken to the University of Benin Teaching Hospital (UBTH) for treatment, the doctors at UBTH referred him to Lagos University Teaching Hospital, Lagos (LUTH) for further treatment."

The Plaintiff/Appellant in their Reply brief to the Defendants/Respondents Amended Statement of Defence stated thus in paragraph 6 as follows:

'The plaintiff admits paragraph 11d of the Amended Statement of Defence only to the extent that when testator took ill, he was taken to UBTH, Benin City where he was referred to LUTH, Lagos by the doctors but denies that the testator took ill while he was living in Benin."

Thus, both parties agreed as to the fact of the referral of the testator by the UBTH to the LUTH.

It is trite that what is admitted needs no further proof. See General Buhari v. INEC & Ors. (2008) 12 SCNJ 1; (2008) 18 NWLR Pt. 1120 Pg. 246; Veepee Industries Ltd. v. Cocoa Industries Ltd. (2008) 4 SCNJ 482; (2008) 13 NWLR Pt. 1105 Pg. 486; UBA v. Jargaba (2007) 5 SCNJ 127; (2007) 11 NWLR Pt. 1045 Pg. 247.

On page 93 of the record, the learned trial judge in evaluating the evidence of witnesses referred to the evidence of DW2 in relation to exhibit D6 as follows:

"She said he lived there in his lifetime and was buried there when he died. She said her husband illness started while in that house and he was taken to the UBTH, Benin City and after a series of tests he was diagnosed to have cancer and was referred to LUTH in Lagos."

The court referred to her tendering exhibit D6 at Pg. 95 of the record. I am of the view and I agree with learned senior counsel for the respondents that the tendering of exhibit D6 was mere surplusage. At Pg. 100 and 101 of the record, the learned trial judge referred to the facts of the referral as admitted by both parties in evaluating his evidence. This court having expunged Exhibit D6 from the record, is still convinced that the learned trial judge was entitled to rely on the evidence of both parties on the fact of the referral of the testator from UBTH to LUTH and to make any evaluation of evidence and come to certain findings of fact in that regard. In fact the position of the law is that the wrongful admission of a document is inconsequential where the court did not duly rely on the document in its judgment. That is so in this case. See Okonji v. Njokanma (1999) 14 NWLR Pt. 638 Pg. 250; (1999) 12 SC Pt. 11 Pg. 150. The findings by the trial court as stated on Pg. 100 and 101 of the record cannot be expunged being made on admitted facts in the pleadings and the evidence on oath of the parties particularly PW3 and DW2. The admission of said facts in evidence has not occasioned miscarriage of justice being properly admitted, evaluated and no perverse conclusions having been drawn from them. The first issue is resolved against the appellant.

ISSUE TWO:

Whether the learned trial judge properly evaluated all evidence adduced by the appellant and applied the correct legal precedents before coming to the conclusion that the house in controversy was not the igiogbe of the testator

The different facets of whether or not the learned trial judge evaluated the evidence adduced before the court include a complaint that the learned trial judge was wrong to arrive at the conclusion that the testator did not live and die in the house in dispute, and that the learned trial judge was wrong to conclude that the appellant did not prove the extra territorial application of the Bini Custom of "Igiogbe."

On the question of whether or not the learned trial judge was right in holding that the testator did not live in the house in dispute during his lifetime and did not die there, learned counsel for the appellant argued that Exhibit A - the Will of the testator shows that the Testator was living in the house in Lagos as at 29/8/2003. The testator in clause 1 of Exhibit A gave his first address as No. 1 Ajibola Aluko Street, Off Okota Road, Isolo, Lagos and then also as No. 3 Obosa Street Off Adolo College Road, Ugbowa, Benin City. Counsel argued that Exhibit A shows that the testator lived in the house in controversy and this documentary evidence is a hanger on which to hang the plaintiffs/appellant's oral evidence that the testator lived in the house in Lagos. He argued that the 5th Respondent had admitted during cross examination that the testator tived in the house in dispute from March, 2006 till 23/6/2006 from where he was taken to LUTH where he died on 26/6/2006. Counsel reminded us that exhibit A was made on 29/8/2003 and that exhibit A was made in Lagos. He opined that the failure to consider the fact that exhibit A was made in Lagos was a grave error on the part of the learned trial judge. Learned Appellant's counsel argued that the evidence of the 5th Respondent cannot vary the clear words in Exhibit A. Counsel submitted that the failure of learned trial judge to pronounce on the attestation regarding the dates, place and address of where the deceased lived and died caused miscarriage of justice. Learned counsel argued that the evidence of the 5th defendant whom the court believed was that the testator retired to his Bini house in 1988 and that the testator never lived in the house in Lagos and same had been occupied by tenants since 2001. Exhibit A which the court refused to consider contradicted the evidence of 5th defendant which shows clearly that the testator was living in the house in Lagos as at 29th day of August, 2003 when he made the Will - Exhibit A before he died on 26/6/2006.

Counsel cited the following cases Artra Industries Ltd. v. NBC 1 (1997) 1 NWLR Pt. 483 at 574 Pg. 592-593 paras H-A; Kimdey v. Governor of Gongola State (1988) 2 NWLR Pt. 771, at 445 Pg. 473 paras B-D; IBW Ltd. v. John Ehue Const. Ltd. (2004) 7 NWLR Pt. 873 at 613 Pg. 613 - 614 paras F-A; Jimoh v. Akande (2009) 5 NWLR Pt. 1135 at 549 Pg. 583 para H; 584 paras D-H.; B. Stabilini & Co. Ltd. v. Obasi (1997) 9 NWLR Pt. 520 Pg. 293 at 305 para G-F; B. Manfang Nig. Ltd. v. M.S.O.I. Ltd. (2007) 14 NWLR Pt. 1053 Pg. 109 at 137-138 paragraph H; Fabumiyi v. Obaje (1968) NMLR 242 at 243 ratio 3.; Alabi v. Lawal (2004) 2 NWLR Pt. 856 Pg. 134 at 149 paras C-F; Obodo v. Olomu (1987) 3 NWLR Pt. 59 Pg.111 at 113 paras F-H.

Counsel urged the court to hold that the appellant's right to fair hearing had been infringed by the failure of the trial judge to pronounce on the issue that if the testator was living at the Benin house he would not have made the direction relating to the caretaker as one does not employ a caretaker for the house where one lives.

Learned appellant's counsel argued that it is settled law that where the facts found by the court of trial are wrongly applied to the circumstances of the case or where the inferences drawn from those facts are erroneous or indeed where the findings of facts are not reasonably justified or supported by the credible evidence given in the case, the Court of Appeal, is in as much a good position to deal with the facts and findings as the court of trial.

Learned appellant's counsel also argued that even though the learned trial judge did not disbelieve the evidence of PW1 and PW2, that a Bini deceased man must have both lived and died in a particular house before it can qualify as his Igiogbe, and that the Igiogbe of a man can be outside Benin kingdom, the learned trial judge was wrong to have held that the Plaintiff/Appellant did not prove the extra territorial application of "Igiogbe" outside Benin kingdom. He argued that the evidence of PW1 and PW2 were called to prove just that. Counsel argued that the learned trial judge refused to consider and apply the principle in the Bini saying "Eke no ma Eghele ero Igiogbe" which means that "wherever a Bini man settles, lives and succeeds is his Igiogbe".

Learned appellant's counsel argued that the evidence adduced by the Appellant during the trial supports the case of the appellant that where a Bini man lived and died is his Igiogbe. He cited Edokpolor v. Bendel Insurance & Co. Ltd. (1997) 2 NWLR Pt. 486 at 131 Pg. 140,- 141 paragraph G-A; Akinola v. Olowu (1962) 1 All NLR n.224; Agidigbi v. Agidigbi (1986) 6 NWLR Pt. 454 Pg.300 at 312 paras B-D; Idehen v. Idehen (1991) 6 NWLR Pt. 198 Pg. 382 at 409 para. G; Egharevba v. Oruonghae supra at Pg. 336-337.

Learned appellant's counsel argued that the learned trial judge wrongly imported his own decision suo muto when he held inter alia that a Bini man must have lived a substantial part of his life in a particular house and died there to constitute such a house his Igiogbe. The meaning of the incident of Igiogbe as decided in the case of Agidigbi v. Agidigbi is where a Bini man lived and died and not that he must lived there substantially. Counsel insisted that there learned trial judge misapplied Egharevba v. Oruonghae supra.

Learned Respondents' counsel in response argued that the finding of the learned trial judge that there was no over whelming evidence that the testator lived in the house in dispute, must be considered in the context of paragraph 9 of the appellant's statement of claim. In paragraph 9 of the statement, the appellant had claimed that the testator lived and died in the house in Lagos and was only brought to Benin for his burial. This was denied in paragraphs 2, 7, 9, 10 and 11 of 1st-8th Defendants/Respondents' joint statement of defence. Issues were joined on this point and according to the respondents counsel, that was the real issue in controversy between the parties. Learned respondents' counsel argued that there was nothing special or significant about the use of the premises in dispute as one of the addresses of the testator. This is because, from the state of the pleadings there was no dispute at all about the fact that both the house in dispute and the house in Benin at No.3, Obosa Street, Benin City were owned by the testator. The point of disagreement or divergence was where he lived a substantial part of his life. While the plaintiff said that he lived a substantial part of his life at Lagos, the 1st-8th Respondents maintained that it was the Benin house where he lived the substantial part of his life and maintained as his Igiogbe.

Counsel further insisted that there is nothing in Exhibit A to the effect that the testator was living in Lagos, in the house in dispute, or that he lived there from August, 2003 until when he was admitted to LUTH on the 23rd day of June 2006. Counsel pointed out that Exhibit A was signed by two witnesses who gave their addresses as No.89 M.M. Way, Benin City. It was also signed by learned counsel, T.E. Ogbeide Ihama, Esq. who also gave his Benin office address. He then submitted that the place of execution of a document is a material fact and if the appellant wanted to rely on it as he is now doing in this appeal, he should have pleaded that fact and led evidence on it. There was neither pleading nor evidence as to where Exhibit A was executed.

Counsel urged us to look at the facts and to hold that since the evidence of DW2 did not contradict or vary exhibit A, then there has been no violation of S.132 of the Evidence Act.

On the issue of lack of fair hearing as argued by learned appellant's counsel, learned respondents counsel replied that since the appellant was given an opportunity to present his case, there was no breach of fair hearing. He cited Francis O. Esitgbe v. Friday Agholor (1990) 7 NWLR Pt. 161 Pg.234 at Pg. 250 - 251; Rector, Kwara State Polytechnic v. Adefua (2008) AII FWLR Pt. 431 Pg.914 at 981.

Learned respondents' counsel submitted that the testator had described the house in Benin City as his abode and we should regard same as his permanent home. He cited Oku v. Oku (1999) 8 NWIR Pt. 616 Pg. 672 at 680. Learned counsel also argued that the saying "Eke no ma Eghele Ero igiogbe" was properly evaluated by the learned trial judge who refused to accept the concept as put forward by the appellant, since there was no proof that the testator lived and found prosperity in Lagos while living in the property in dispute. He cited imade v. Otabor (1988) 56/57 LRCN 3116 at 3134; Abudu v. Eguakun (2003) 110 LRCN 1694 at 1697 which he maintained state the established authorities on the principle of "igiogbe" which said authorities cited above do not recognize the concept of "Eke No. Ma Eghele Ero igiogbe". Counsel commended to us the precedent in Egharevbav. Orounghae (2000) 11 NWLR Pt.724 Pg.318 at 337 to the effect that the concept of "Igiogbe" has no extra territorial application outside Benin kingdom.

The main thrust of the complaints in this issue as raised by learned appellant's counsel is that the learned trial judge did not properly evaluate the evidence proferred by the appellant as plaintiff at the trial court and erroneously concluded that the appellant did not prove his claim on a balance of probabilities.

The first complaint is that the learned trial judge did not properly evaluate the importance of Exhibit A - the testator's will to arrive at the conclusion that the contents of Exhibit A did not show that the testator lived most of his life in the house in dispute. At page 100 of the record, the learned trial judge found as follows:

"Apart from saying that his father hired a rented apartment at Lagos, the plaintiff did not however state that the house where the testator lived a substantial part of his life at Lagos before his death was the house in dispute. Beyond the evidence elicited from the 5th defendant under cross examination, that when the testator was referred to LUTH, she took him first to the house in Lagos, from where he was attending hospital intermittently before the testator's death at LUTH, there is no evidence he lived in the house."

It seems to me that if the Appellant pleaded in paragraph 9 of his statement of claim that the testator lived for over 50 years in Lagos and did not return to Benin, but lived and died in his house in Lagos, then the appellant was obliged to prove same. I agree that a careful look at Exhibit A shows that it is clause 1 of said exhibit the testator put as his address the addresses of both houses. I have read the record, I cannot see where there is any evidence from any witness at all that the testator lived in the disputed house for the largest part of his life or even the later part of his life. A look at Exhibit A shows that the two witnesses gave their addresses as living in Benin City. The interesting aspect of this case is that the house in Benin was devised to the appellant while the house in dispute situated in Lagos was devised to the 1st - 4th respondents. What is most intriguing is that the appellant did not make the case at the trial court that the house in Benin and the house in dispute both constituted the "Igiogbe" of the testator. I have read the evidence of DW2-5th Respondent and I have to agree that it did not vary or contradict exhibit A since there is no single paragraph in exhibit A wherein the testator stated that he had lived and died in the disputed property.

I must also say with the greatest respect to appellant's counsel that I find completely misconceived the argument that the learned trial judge failed to pronounce on the attestation regarding the name, place, and address of where the testator lived and died and thus denied the appellant fair hearing. The only situation when an allegation of denial of fair hearing can be made is where a learned trial judge by his conduct during the trial demolished one or both of the twin pillars of fair hearing. They are: Audi Altaram Partem - "Hear the other side" and Nemo Judex in Causa Sua "You cannot be a judge in your own cause". The learned trial judge has done nothing to tamper with the twin pillars of fair hearing and I think strongly it is unfair to whip up that issue when there is no basis for it. The fact that a trial judge did not agree as to the probative value of the evidence adduced before him, does not tantamount to violation of the rights of a party.

On the issue that the testator's reference to a "caretaker" in his Will in relation to the Benin house means that the Benin houses was rented out to tenants, I cannot quite jump to that conclusion. In fact, it gives one quite a contrary impression. At Pg.4 clause 3 of Exhibit A the testator provided thus:

'That the caretaker in charge of my abode at No. 3, Obosa Street, Off Adolor College Road, Ugbowo, Benin City should be allowed without payment of rent to live in the boys quarter behind the main house till such a time he decides to park out willingly for he takes care of my said entire compound."

The testator deliberately used the word "abode" and stated that the caretaker be allowed to stay on in the compound not as "caretaker" to collect rent but in recompense for his previous service of taking care of the said entire compound. The word "abode" is defined in the Blacks Law Dictionary 7th Edition at Pg. 500 as follows:

"The place where a person is physically present and that the home, to which the person intends to return and remain even though currently residing elsewhere ... also termed permanent abode."

With respect, I am afraid I cannot agree with the learned appellant's counsel on his own interpretation of the clause. The legal principle is that terms in a document must be interpreted in the whole context of the document and not in isolation. See Chief Agbareh v. Dr. Anthony Nimra (2008) 1 SCNJ 409; (2008) 2 NWLR Pt. 1071 Pg. 378. I cannot give the word "caretaker" the same meaning given by learned appellant's counsel when the testator did not imply that the said caretaker was his rent collector.

On the issue of the Benin adage "Eke no ma Eghele Ero Igiogbe" which means "Wherever a Bini man settles and lives and succeeds is his igiogbe", the learned trial judge stated at Pg.102 of the record as follows:

"As the meaning of the term "Eke no ma Eghele ero Igiogbe" as testified to by the PW2 completely omits the requirement of the testator dying in the house as stipulated by the applicable custom, I am unable to accede to the view canvassed on behalf of the plaintiff that wherever a Bini man lives and succeeds is his Igiogbe as against the position established by authorities. Nor is there any evidence before me that the testator lived in the house in Lagos and found prosperity there."

There is no doubt from the above that the learned trial judge considered the evidence of PW2 on this point and thus the evidence led by the appellant since the evidence of PW1 had been expunged by the trial judge at Pg. 45 of the record.

It seems to me that the learned trial judge by his finding that the meaning of the Benin slang "Eke no ma Eghele ero Igiogbe" as testified to by PW2 did not tally with the doctrine of "Igiogbe" which requires the deceased to have died in the house, is a refusal not to expand the frontiers of the doctrine of Igiogbe. I have to agree with the learned senior counsel for the respondents that the evidence led by the appellant on the meaning of "Eke no ma Eghele Ero Igiogbe" completely omitted the essential and settled ingredients of what constitutes "lgiogbe" in the authorities cited above i.e. Principal House where the deceased lived, died and was buried.

I must say that the introduction of the Benin slang "Eke no ma Eghele ero Igiogbe" to this case brought a new dimension or rather expanded the previous frontiers of the definition of "Igiogbe". At page 102-103 of the record this was how the learned trial judge reasoned.

"As against the case of the plaintiff on whom rests the onus of proof is the case of the 1st-8th defendants as testified to by DW1 and the 5th plaintiff (sic). In particular the testimony of the said 5th defendant that the testator retired to his house in 1988 was not challenged nor was the fact that the testator never lived in the house in Lagos and that same has been occupied by tenants since 2001. The receipts booklet for rents paid by the tenants occupying the Lagos house since 2001 which was tendered as exhibit D7 to D23 was also not challenged. The evidence of the 5th defendant which shows that the testator had lived in his Benin house and was most intimately connected with the house where he performed all the traditional ceremonies and regarded as the headquarters of his business was substantially admitted by the plaintiff. This in my view accords with the Bini custom testified to by PW2 that the way a man lived his house is taken into account by custom in determining where is his Igiogbe. I have no choice but to accept the case of the said defendants and hold that the Benin house qualified as his Igiogbe. Moreover the referral from UBTH in Benin to LUTH in Lagos as evidenced by exhibit "B" suggests clearly to me that he lived in Benin and in his house which he referred to as his abode in his will and not in Lagos."

Let me refer to some authorities in the past which tried to explain and define the concept of Igiogbe in Benin Custom. In Idehen v. Idehen (1991) 5 NWLR Pt. 198 Pg. 382, the Supreme Court defined Igiogbe under the Bini customary law per Bello CJN as follows:

"It is common ground that under Bini customary law the Igiogbe which was the home where the deceased's father lived in his life time, is inherited by his eldest surviving son."

See Arase v. Arase (1981) NSCC 101 was cited and followed in that case. See also Agidigbi v. Agidigbi (1996) 6 NWLR Pt. 454 Pg. 300; Ogiamen v. Ogiamen (1967) NSCC Pg. 189; Lawal-Osula v. Lawal-Osula (1995) 9 NWLR Pt.419 Pg.... (1995) 3 SCNJ 60. Also in the recent case of Abudu v. Eguakun (2003) 14 NWLR Pt. 840 Pg. 311, (2003) 7 SC 50. Belgore JSC held as follows:

"By the customary law of Benin, upon the death of a father, the eldest son takes over his estate as a trustee for all the deceased's children pending the performance of the second (final) burial rites. After the performance of these rites, the eldest son automatically inherits the main seat of the deceased father. That is to say, the house where the deceased lived, died and was buried. This house is called "IGIOGBE" and does not vest unless the second burial rites are performed by the eldest child. The Igiogbe passes by way of inheritance, oh distribution of the estate to the eldest son of the deceased."

The appellant as plaintiff did not lead clear evidence of where the testator lived most of his life, died and was buried. The only clear evidence on this point of fact is that elicited from the 5th respondent during cross examination at the trial court. The evidence is to the effect that the testator moved back to Benin after he retired from service, lived in the house in dispute, conducted business there, married the 5th defendant there in 1987 and gave out his daughters in marriage there. He paid his taxes in Edo State and executed contracts for the Edo State Government. I agree with the learned trial judge that the only house which meets with the definition of an Igiogbe is the Benin house where the testator lived for some years after his retirement, conducted business, took ill, was transferred to Lagos, and brought back to be buried therein. It cannot be the disputed house where there is no clear evidence that he lived for the larger part of his life or was buried in.

I am strengthened in my opinion by the case of Egharevba v. Orounghae supra to believe that the custom cannot be so arbitrarily varied as proposed by the appellant's counsel, and that the Benin custom recognizes one Igiogbe which must be situate within Benin kingdom. In the above case, this court held as follows per Ibiyeye, JCA as follows:

"It is settled that a Bini man only has one Igiogbe and such Igiogbe must be situate in Benin kingdom. Clause 9 (supra) appears to have cleared the strange introduction of more than one Igiogbe from the testator's landed property."

I have to agree with the learned Respondents' senior counsel that the case of Egharevba v. Orounghae (supra) which is authoritative on the issue of non-applicability of the concept of Igiogbe to property outside Benin kingdom has not been reversed or set aside by the Supreme Court. Consequently, following the principles of judicial precedent and stare decisis, the learned trial judge was duty bound to follow the principles enunciated in that case by this Honourable Court.

A careful and thorough consideration by my humble self of the brilliant judgment of the learned trial judge showed his Lordship's understanding of the principles of the law of evidence, his keen appreciation and understanding of the facts with consequential proper evaluation of the evidence and correct conclusions derived therefrom. I cannot see my way to disturbing the findings of facts of the trial judge. This appeal has no merit. It is hereby dismissed. I award N50,000 costs to the 1st-8th Respondents against the Appellant.

**SIDI DAUDA BAGE J.C.A**.:

I had the honour of reading in draft the leading Judgment of my learned brother H.M. OGUNWUMIJU, ICA. I agree entirely with it. I do not have any reason either to disturb the brilliant work done by the trial Judge, oh the subject matter of the appeal. The appeal has no merit, and hence also dismissed by me. I abide by the consequential order contained in the leading Judgment.

**AYOBODE OLUJIMI LOKULO-SODIPE, J.C.A**.:

I have had the privilege of reading in draft the lead Judgment prepared by my learned brother, HELEN MORONKEJI OGUNWUMIJU, JCA. His lordship has painstakingly and incisively too, dealt with the pertinent Issues that call determination of the appeal and I am in complete agreement with the exposition of the law, reasoning and conclusions in the lead Judgment. Not only do I have nothing to add to the Judgment, but also adopt the lucid lead Judgment as mine.

Accordingly, I too, cannot but affirm the well reasoned judgment of the lower court delivered on 21/4/2009 and hereby dismiss the appeal. I also abide by the order relating to costs as made in the lead Judgment.