

SUPREME COURT OF NIGERIA
23RD JANUARY, 1998. SC. 30/1993
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, JJSC.

MADAM OLUFUNSO OKELOLA APPELLANT
AND
MISS ADEBISI BOYLE RESPONDENT

***APPEALS** - Grounds of appeal - Issues for determination not arising therefrom - And arguments on any issues not predicated thereon - Will be discountenanced.*

***DOCUMENTS** - Wills - The maxim Omnia praesumuntur rite esse acta - Only applies with force - Where the Will is entirely regular and no suspicion attaches thereto.*

***EVIDENCE** - Burden of proof - Of the due execution of a Will - And the testamentary capacity to do so - Lies on the propounder of the Will - And then the onus shifts to the challenger.*

***SUCCESSION** - Wills - Due execution of - And the testamentary capacity to do so - The burden of proof lies on the propounder of the Will - Then the onus would shift to the challenger.*

***SUCCESSION** - Wills - Validity of a Will - It is essential that the testator should know and approve of its contents - Even if it is prepared by a legal practitioner.*

FACTS

One Theophilus Otemuyiwa was the owner of a landed property situate and known as 163 Igboere Road Lagos. He died intestate and was survived by three children all male, who inherited the said property as family property under Yoruba customary law.

Abiodun (hereinafter referred to as the testator) survived his other brothers. The two other brothers died intestate. However, in 1972 during the lifetime of the three brothers, the testator had made a Will devising his share in the said property to Madam Olufunso Okelola (plaintiff/appellant herein). Abiodun purportedly made another Will in 1976 in which he gave all his property to one A. Idowu George. Abiodun suffered a stroke in 1975, he was paralyzed and subsequently died in 1977. The plaintiff instituted this action against Miss Adebisi Boyle an executrix named in the purported last Will of 1976, challenging that Will or the devise made therein and seeking to validate the Will of 1972. The defendant counter-claimed.

At the conclusion of trial, the trial judge found against the two Wills and nullified the testator's two Wills. The defendant being dissatisfied appealed to the Court of Appeal, which court in a unanimous decision, allowed the appeal, set aside the judgment of the trial court and declared the 1976 Will valid. The plaintiff has now appealed to the Supreme Court against the judgment of the Court of Appeal. The plaintiff formulated five issues as calling for determination but the court reformulated them into two issues.

ISSUES FOR DETERMINATION:

1. *On whom lies the burden of proof of the due execution of a will - the propounder of the will or its challenger?*
2. *Was the due execution of Exhibit D1 (the 1976 Will) established on the evidence?*

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Issues not arising out of grounds of appeal

1. This Court has laid it down in a number of cases that an appeal will only be determined on issues arising out of the grounds of appeal before the Court and no arguments on any issues not predicated on such grounds of appeal will be countenanced. See Awosile v. Sotubo (1992) 5 NWLR 514; Agu v. Ikewibe (1991) 3 NWLR 385; the issue of locus standi does not arise from any of the Grounds of appeal before us. It is improper of

the defendant to raise it without an appeal on the point. I, therefore, discountenance all arguments in the Respondent's brief on the issue. Olumolu v. Islamic Trust of Nigeria (1996) 2 NWLR 253 (p. 139 B)

Wills - Due execution of

2. With the correct view of the law the position then would be as correctly found by the learned trial Judge, that the defendant as the propounder of Exhibit D1 (the 1976 Will) had the burden of showing Prima facie that the deceased not only duly executed the Will but also had testamentary capacity to do so. It is only after discharging that primary duty that the onus would shift to the plaintiff as the challenger of the Will to substantiate, by evidence her allegations against the making of the Will. (p. 143 G)

Wills - Validity of a Will

3. It is not enough to prove that Exh D1 was prepared by a legal practitioner, it must be shown further that the testator knew the contents of the instrument and that the contents complied with his instructions to the legal practitioner who prepared it. If Ex. D1 was not meant to be read over to the testator why did Mr. Odulana insert a jurat therein? It is admitted that the testator was an illiterate. It is self-evident that Ex. D1 was written in the English language. There was no evidence that it was read over to the testator before execution. How could one, in such circumstance, find that the testator knew the contents of the document and that they accorded with his instructions? It is essential to the validity of a Will that the testator should know and approve of its contents. (p. 150 A)

Wills - The maxim omnia praesumuntur rite esse acta

4. Where a document is ex facie duly executed the court may pronounce for it on the maxim: omnia praesumuntur rite esse acta. See: Barry v. Butlin (supra) at p. 1091. This maxim only applies with force where the document is entirely regular in form and no suspicion attaches to the Will; Nelson v. Akofiranmi (supra). But where suspicion attaches or the document cannot be said to be ex facie regular or where the testator

suffers from some disability such as deafness, blindness or illiteracy the maxim does not apply with the same force. It is known that the testator in this case was an illiterate. Ex. D1 contains a jurat to the effect that the contents were read and explained to the testator in Yoruba language but B the jurat was unsigned and contains no name of an interpreter nor evidence of such interpretation. I would not think that in such circumstance the maxim applies. (p.151 A)

C **NOTABLE POINTS OF INTEREST**
OGUNDARE JSC

1. Validity of a will - How determined

It follows that the validity or otherwise of any devise or bequest in a Will is dependent on whether the property so devised or bequeathed belonged D to the testator at the time of his death and not at the time of the making of the Will. If at the time of the death of the testator in this case, the property in dispute was still family property the learned trial Judge would be right in his decision. But as it turned out that, as at that time, the said E property belonged solely to the testator, the learned trial Judge was in error to void the 1972 Will for the reason he gave. Johnson & Ors. v. Macaulay & Anor. and Ogunmefun v. Ogunmefun relied on by the learned trial Judge are just not apposite to the facts of this case as in those cases F the properties in dispute were family property not only at the dates of the making of the Wills therein but also at the dates of the death of the testators and therefore, not disposable by them. That is not all. Clause 2 of the 1972 Will (Ex. P1) gave to the plaintiff

G *"all my property of whatsoever kind and wheresoever situate....."*

This clause would seem to embrace all the testator's real and personal estate. Even if the property in dispute, that is, 163 Igboere Road Lagos were family property at the death of the testator and its devise in H his Will would be void, this could not affect the validity of Exhibit P1 which would remain valid in respect of the testator's other property "of whatsoever kind and wheresoever." (p. 153 H)

ONUJSC

2. Wills - What the propounder should prove

As to what the respondent as the propounder of Exhibit D1 should have proved before the burden of proof could have shifted, it is the law that he

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"must show clearly by evidence prima facie, all is in order; that is to say, that there has been due execution and that the testator had the necessary mental capacity and was a free agent."

In other words, the Will must be completely free from any suspicion or suspicious circumstances whatsoever, since the existence of any suspicion or suspicious circumstances unless removed, debarred the court from pronouncing against it and so refuse probate for being per testes i.e. irregular. See also Tristram and Coote, Prob. Pr. 17th Edition.

(p. 158 F)

REPRESENTATION

P. O. Jimoh-Lasisi with A. Makama for the Plaintiff/Appellant
G. O. Kolawole for Defendant/Respondent

CASES REFERRED TO

Awosile v. Sotubo (1992) 5 NWLR 514

Elf Nig. Ltd. v. Sillo (1994) 6 NWLR 258 at p. 267

Ojiako v. Ewuru (1995) 9 NWLR 460; 469

Olumolu v. Islamic Trust of Nigeria (1996) 2 NWLR 253 at 265, 266

Adebajo v. Adebajo (1973) 1 ALL NLR 361

Singh v. Amirchand (1948) AC 161

Nelson v. Akofiranmi (1962) 1 ALL NLR 130

John v. Maja 13 WACA 290

Balogun v. Agboola (1974) 1 ANLR (Part 2) 66 at 73

Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 669

STATUTES & RULES REFERRED TO

Illiterates Protection Law s. 5

Wills Law Cap. 141 Laws of Lagos State 1973 ss. 3(1), 21

Wills Acts 1837 and 1852

LEAD JUDGMENT BY OGUNDARE JSC

By an indenture dated 2nd June 1896 and registered as No. 43 at
 B page 174 in Volume 29 of Register of Deeds kept at the Lagos Land
 Registry, one Theophilus Otemuyiwa became owner of the land and prop-
 erty situate and known as 163 Igboere Road Lagos. The said Theophilus
 Otemuyiwa died intestate some years ago leaving behind three children
 C surviving him, that is Adeniyi Otemuyiwa, Gabriel Theophilus Abiodun
 Otemuyiwa and Adekunle Otemuyiwa. The three sons, on the death of
 their father, inherited the said property which became their family prop-
 erty under Yoruba customary law.

Adeniyi died intestate in Lagos on 10th January 1975; he had no
 D issue. Adekunle also died intestate on 9th February 1976; he too was
 childless.

On 28th December, 1972 during the lifetime of the three brothers,
 Abiodun (hereinafter is referred to as the testator) had made a will devis-
 E ing his share in the property at 163 Igboere Road Lagos to Madam
 Olufunso Okelola (appellant in these proceedings). On 9th October, 1975
 Abiodun suffered a stroke and was admitted into hospital; he was paraly-
 sed and he subsequently died in June 1977. He too, like his brothers
 F before him, died childless. After the death of Abiodun, the probate regis-
 trar invited Olufunso Okelola to the reading of a will purportedly made by
 the testator on 24th February 1976 in which he gave all his property to
 one A. Idowu George. Olufunso Okelola (hereinafter is referred to as the
 plaintiff) promptly filed a caveat to the grant of probate and commenced
 G the proceedings leading to this appeal against Miss Adebisi Boyle, an
 executrix named in the said will. She claimed:

*"(1) That the Court will pronounce against the will dated 24th
 day of February, 1976 purported to be the Last Will and Testament of
 H Gabriel Theophilus Abiodun Otemuyiwa and propounded by the Defen-
 dant.*

Or in the alternative

(2) That the devise of the property at 163 Igboere Road, Lagos to

Mr. A. Idowu George in the said Will dated 24th day of February, 1976 is void.

(3) That the Court Will decree probate in Solemn form of Law and Will of Gabriel Theophilus Otemuyiwa (deceased) dated the 28th day of December, 1972."

Pleadings were filed and exchanged. The defendant, Miss Boyle, raised a counterclaim in her statement of defence, paragraph 43 of which reads:

"43. The Defendant repeats paragraphs 1-42 of her Statement of Defence and Counter-claim against the Plaintiff as follows:

1. A Declaration that the Will made by the Testator on 28th December, 1972, when his two brothers were alive, is null and void.

2. A Declaration that the Will made by the Testator on 24th February, 1976 is valid.

3. Judgment or Order that probate should be granted to the Defendant as the only available legal personal representative in respect of the Will of the Testator dated 24th February, 1976.

4. A perpetual injunction to restrain the Plaintiff from committing any trespass or further act of trespass on the Hereditament.

5. N400.00 being damages for trespass committed on the Hereditament by the Plaintiff.

6. Further judgment or order dismissing the Plaintiff's action with substantial costs.

7. Any further order or further orders as this Honourable Court may consider necessary to make in favour of the Defendant in the interest of justice."

Evidence was led at the trial by both sides. At the conclusion of trial, and after addressed by learned counsel for the parties, the learned trial Judge (oladipo Williams, J.) in a well considered judgment, found -

1. In respect of the 1972 Will (Exhibit P1) of the testator -

"There was no argument about the fact that the property at 163 Igboosere road, lagos devolved on the Testator and his brother Adekunle finally at the making of the Will Ex. P1. There was no evidence that that property was ever partitioned between the children of the original owner

Theophilus Otemuyiwa (deceased). Thus it was clear on the evidence that the Testator and his brother Adekunle who were Yorubas held undivided shares in the property purported to have been devised in the Will Ex. P1 to the plaintiff. It is trite law that a devise purporting to bequeath an undivided share in property which share was derived by descent under Yoruba customary Law is void. See E. J. Johnson and Ors. v. Macaulay & Anor. (1961) 1 ALL NLR (Pt. iv) 743 at 746. Ogunmefun v. Ogunmefun 10 NLR 82. Thus in accordance with these decisions, it is my considered view that the Testator had nothing to devise at the time that he made the Will Ex. P1 and that Will so far as it purported to bequeath an undivided share in the property at 163 Igboere Road, Lagos is void."

2. In respect of the 1976 Will (Exhibit D1) -

(a) "It must be mentioned at this stage that Adekunle the only surviving brother of the Testator had died intestate and without issue on 9th February, 1976 thus leaving the Testator at the date of the Will as the only living child of the late Theophilus Otemuyiwa the original owner of the property at 163 Igboere road, lagos."

(b) that the deceased was an illiterate person

(c) that "there was no evidence that the Will was interpreted into Yoruba (the testator's language) before he affixed his right thumb impression. The space reserved for the name of the interpreter in the jurat was blank indicating clearly that there was no interpreter."

(d) that it is "not possible at all to conclude that the testator was made to understand the contents of the Will. Where the testator's understanding of the Will at the time of the execution of a Will is doubtful, proof of mere execution is insufficient - See Billinghurst v. Vickers 161 E.R. 956, Wood v. Wood 161 E.R. 1010. In the absence of the name of the interpreter in the jurat in the Will Ex. D1 and the evidence of the said interpreter whomsoever he might be, I cannot accept the fact that testator understood the contents of the Will."

(e) that there is no sufficient evidence to hold that the thumb printing of the Will by the testator was his voluntary act.

(f) that Mr. Olu Okelola of 163 Igboere Road Lagos whom the

testator appointed as executor with the defendant was a non existent person.

(g) That "I have not been convinced and I cannot accept the fact as contended by D.W. 3 that the plaintiff is not a relation of the testator."

The learned Judge summarised his findings in these words:

"In sum I have found on the evidence that the fact that the Will EX. D1 was not translated to the testator who was an illiterate person showed that he could not have known its contents. I have found from the evidence too that the fact that a non existent person whose name resembled that of the plaintiff and who was said to be residing in the testator's house was made an executor showed that testator could not have known about that provision. Even if it could be said that the testator gave that instruction (a fact which I doubt) it would also show conclusively that the testator did not know what he was doing while executing the Will EX. D1."

He concluded:

"I find that the defendant has not discharged the onus placed on her by the law in respect of the Will EX. D1 and I find that that Will is not entitled to probate."

and proceeded to nullify the testator's two Wills. He dismissed the defendant's counterclaim and granted the plaintiff's main claim.

It was against this judgment that the defendant appealed to the Court of Appeal (Lagos Division) which Court, in a unanimous decision, allowed the appeal, set aside the judgment of the trial Court and declared the 1976 Will (Exhibit D1) valid. The plaintiff has now appealed to this Court against the judgment of the Court of Appeal upon one original and five additional grounds of appeal.

Both parties filed and exchanged their respective briefs of argument. The plaintiff formulated the following five issues as calling for determination, that is to say:

"1. Was the onus of proof in this case on the plaintiff who challenged the Will Exhibit D1 and not on the defendant who propounded it, if not could it be said that the defendant discharged the onus of proof on her as laid down in the case of Johnson v Maja and Others 13 WACA

2. *Whether the defendant proved the state of health of the testator at the relevant time considering the fact that the Court of Appeal did not disturb the findings of the learned trial judge in respect of the evidence of DW1, DW2 and DW3 in this regard which the learned trial judge found was unreliable.*

3. *Whether having regard to all the circumstances of the making of the Will Exhibit, D1 could it be said that the testator understood the contents of the Will.*

4. *Was the finding of the learned trial judge regarding Mr. Olu Okelola, a non-existent person perverse as to justify the interference of the Court of Appeal?*

5. *Is it the law that if a Will is prepared by a lawyer, the propounder of such a Will is discharged from proving that the testator understood the contents of the Will even if there are suspicious circumstances surrounding the Will?*

All these issues can be determined under two question, that is:

1. On whom lies the burden of proof of the due execution of a will - the propounder of the will or its challenger?

2. Was the due execution of Exhibit D1 (the 1976 Will) established on the evidence?

Before dealing with these two questions, I need to dispose of an issue raised in the Respondent's brief. It is stated in the brief thus:

"Having regard to the abandonment by the Appellant of her claim that Exhibit "P1", the Will under which she was a major beneficiary, should be admitted to probate, the Respondent respectfully submits that the first issue to be resolved in the present appeal is:-

(a) Does the Appellant have the locus standi to pursue this appeal?

The sub issue which arises in this regard is:-

(b) Can the Appellant, in order to attack a decision of the Court of Appeal given in respect of an appeal against a judgment of the High Court, rely on issues which she abandoned before the High Court and failed to advance in the Court of Appeal?"

When asked by the Court at the oral hearing of the appeal whether this issue arose out of the grounds of appeal before the Court, Mr. Kolawole, learned counsel for the defendant frankly conceded it that the issue of locus standi did not arise out of the grounds of appeal. He also conceded it that his client did not appeal on the point. Mr. Lasisi-Jimoh, learned leading counsel for the plaintiff had urged us to disregard all arguments in the Respondent's brief touching on the issue. B

This Court has laid it down in a number of cases that an appeal will only be determined on issues arising out of the grounds of appeal before the Court and no arguments on any issues not predicated on such grounds of appeal will be countenanced. See Awosile v. Sotubo (1992) 5 NWLR 514; Agu v. Ikewibe (1991) 3 NWLR 385; Elf (Nig.) Ltd. v. Sillo & Anor. (1994) 6 NWLR 258 at p. 267; Ojiako v. Ewuru (1995) 9 NWLR 460; 469. The issue of locus standi does not arise from any of the Grounds of appeal before us. It is improper of the defendant to raise it without an appeal on the point. I, therefore, discountenance all arguments in the Respondent's brief on the issue. Olumolu v. Islamic Trust of Nigeria (1996) 2 NWLR 253 at 265, 266. C D E

I may mention at this stage that before this appeal came up for hearing the defendant Miss Adebisi Boyle, died and was, by order of Court, substituted by Mrs. Joke Kiki.

QUESTION 1

The learned trial Judge had stated in his judgment thus:

"Now it is the law that where a will is challenged the burden of proof is on those who propound it to show by clear evidence that prima facie all is in order. Once this is done the burden will shift to those who challenged the will to substantiate the allegation they have made - see Johnson & Anor. v. Maja & Ors. 13 WACA 290." F G

Later in the judgment the learned Judge added:

"The law requires a person who propounds a Will to show that the will really expresses the mind and intention of the testator - see Tyrell v. Painton P. 151. I am of the view that a greater onus should be placed on the defendant in this case more so when her principal witness who has

taken so much under the will could not explain satisfactorily the circumstances of the will with which he was so closely connected."

This view of the law was challenged by the defendant in her appeal to the Court of Appeal. The latter Court, in the lead judgment of Awogu JCA B (with which Akpata and Babalakin JJCA, as they were then, agreed) opined:

"On the issue of testamentary capacity, it was the plaintiff who set this up also as a basis for the invalidity of Exhibit D1. The learned judge no doubt over-looked the fact that the claim was to declare Exhibit D1 as invalid and, in the alternative, to declare the devise made to George C in Exhibit D1 as invalid. The onus was therefore on the Plaintiff to prove that the testator lacked testamentary capacity. She alone testified in this regard and her evidence did not discharge the burden. True, the Defendant/Appellant chose to assume a similar burden by the second and D third claims in the counter-claim, but the burden of proof did not thereby shift. In other words, the counter-claim, save in respect of claims 3 & 4, was unnecessary for proof of the validity of the Will which the Plaintiff was challenging, but failed to dislodge. It was as if the Plaintiff, having E failed in the challenge, the learned judge then required the Defendant to prove claims one and two of the counter-claim as the Plaintiff had failed to discharge his (sic) own burden."

With profound respect to their Lordships of the Court below, they F were clearly wrong in the view they held in the above passage. Rather, the learned trial Judge was right. In Johnson & Anor. v. Maja & Ors., 13 WACA 290 at 291-292, (the leading case on the point) Lewey, J.A. delivering the judgment of the West African Court of Appeal, observed:

"On the hearing of this appeal, argument was addressed to this G Court by both Counsel upon the question as to where the onus lies in cases of this kind where one party propounds a will, and the other party challenges not only its execution, but also the mental capacity and free will of the testator. I wish to deal at once with this point, since it is of H importance in relation to each of the three grounds of challenge in this case to which I have referred, and because it was inevitably given prominence on this appeal, by reason of a passage in the judgment, where the learned Judge observed as follows:-

'A testator has every right to change his mind at any time before his death provided it is conclusively proved to the satisfaction of the court that at the time of his executing the will he was a free agent and under no influence and that the will was properly executed.'

These observations as to the burden of proof were the subject of one of the grounds of appeal, and were strongly criticised by Mr. Williams on behalf of the appellants, who are seeking, of course, to have the will upheld. It was the appellants' contention that the burden of proof lay on those who attacked the will and its execution, while Mr. Coker, for the defendant - respondent, argued that the onus was on those who propounded the will. There was thus a sharp divergence between Counsel, each of who cited a number of authorities in support of his contention. It would seem, at first sight, that those authorities are contradictory; but, on a closer examination of them, I doubt whether that can be said to be so. Mr. Coker placed great reliance on the judgment in Barry v. Butlin 12 E.R. 1090, and particularly on an observation in that case by Parke, B., to the effect that the onus probandi lies in every case upon the party propounding a will, who must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. In placing reliance on that principle, Mr. Coker was, I think, on sure ground, for it is one that cannot be challenged. But he went on to endeavour - in support of his contention as to the burden of proof - to apply to the present appeal, certain other passages in Barry v. Butlin relating to the vigilance and jealousy with which a Court must examine the evidence in support of the instrument, where there are circumstances which ought to excite the suspicion of the Court, and laying down the rule that the Court should not pronounce in favour of the will unless the suspicion is removed, and unless it is judicially satisfied that the paper propounded does express the true will of the deceased. Here, however, it seems to me that Mr. Coker was carrying his argument too far, for the circumstances in Barry v. Butlin, as in Baker v. Batt 12 E.R. 1026, which was also referred to, were very different from those in the present case, and the extended rule on which Mr. Coker relies, refers on the question of onus, to cases where the Will has been prepared by, or by the direction of, a

person who himself benefits under the will. That this is so is, I think, made quite clear in other passages in Barry v. Butlin and in the case of Craig v. Lamoureux (1920), A. C. at 356, where the application of the rule is discussed.

B The rule enunciated by Parke, B., that in every case the onus lies on the propounders of a will to satisfy the Court that the instrument is "the last will of a free and capable testator", must, however, be taken, I think, to refer only to the first stage, so to speak, of the onus; for the onus does not necessarily remain fixed; it shifts. Where there is a dispute as to a will, those who propound it must clearly show by evidence that, prima facie, all is in order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me that the burden is then cast upon those who attack the Will, and that they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence, and so forth. That, it is clear to me, must be their responsibility and nothing can relieve them of it; it is not only a rule of common sense but a rule of law, as appears from numerous authorities."

See also (1) Adebajo v. Adebajo (1973) 1 ALL NLR 361; (1973) ANLR 297; (2) Tyrell v. Painton (1894) P. 151; (3) Barry v. Butlin 2 MOO, 480; 12 E.R. 1089 at 1090 where Parke B lay down the rule in these words:

F "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present Appeal; and they have been acquiesced in on both sides. These rules are two; the first that that onus Probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.

H The second is, that if a party Writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it

is judicially satisfied that the paper propounded does express the true Will of the deceased.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl, in substance, in *Paske v. Ollatt* (2 Phill, 323); *Ingram v. Wyatt* (1 Hagg. Ecc. Rep. 388); and *Billinghurst v. Vickers* (1 Phill. 187); and is stated by that Very learned and experienced Judge to have been handed down to him by his predecessors, and this tribunal have sanctioned and acted upon it, in a recent case; that of *Baker v. Batt* (ante [2 Moo. P.C.] 317)." B C

It is strange that Awogu J.C.A. latter in his judgment, quoted with approval, from *Johnson & Anor. v. Maja & Ors.* but did not appear to have allowed himself to be guided by it. He said:

"In any event, as stated in *Johnson & Anor. v. Maja & Others.* 13 D WACA, 290:-

'Where there is a dispute as to a Will, those who propound it must clearly show by evidence that, *Prima facie*, all is in Order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, *Prima facie*, as to these matters, it seems to me that the burden is then cast upon those who attack the Will, and that they are required to substantiate by evidence, the allegations they have made as to lack of capacity, undue influence, and so forth.' " F

He used this passage to determine, quite wrongly, in my respectful view, that the onus was on the plaintiff - the challenger rather than on the defendant - the propounder of Exhibit D1. **With the correct view of the law the position then would be as correctly found by the learned trial Judge, that the defendant as the propounder of Exhibit D1 (the 1976 Will) had the burden of showing *Prima facie* that the deceased not only duly executed the Will but also had testamentary capacity to do so. It is only after discharging that primary duty that the onus would shift to the plaintiff as the challenger of the Will to substantiate, by evidence her allegations against the making of the Will.** G H

This conclusion leads me to Question (2).

QUESTION 2

The sum total of plaintiff's argument is that the defendant failed to discharge the burden laid on her to show that prima facie Exhibit D1 was
B duly executed by the testator and that at the time he had testamentary capacity to do so. The defendant argued to the contrary. It is the latter's contention that on the evidence adduced at the trial it was proved that the
C testator had testamentary capacity in that he was not impaired by his state of health not to know what he was doing. It was also contended that there were no suspicious circumstances surrounding the making of the Will, Exhibit D1.

I think the important issues to determine in this case are (a) the state of health of the testator at the time Exhibit D1 was made (b) whether
D he knew the contents of the document and (c) whether he executed it. The defendant called one Dr. Samuel Adewunmi Adedeji (DW2) to testify. He was a medical practitioner at the LUTH at the time that the testator was on admission in the hospital. It was Mr. George (DW3), the
E sole beneficiary under the Will that called Dr. Adedeji to attend to the testator. Testifying on the testator's state of health, DW2 said:

"Deceased had stroke and it should affect his brain. The case notes said that he had cerebro vascular accident."

F Earlier, he had said:

*"When I examined him, it was easy to find that he had the weakness on the right side of his body. We call it right hemiparesis. His blood pressure was 180/100. The diagnosis at that time was cerebrovascular accident. (C.V.A.) due to hypertension. It was obvious to me that he
G could not be managed in his house. He had to be taken to hospital. He was admitted into the Department of Medicine under Prof. Mabayoje. I did not treat him while he was at LUTH."*

Continuing his evidence in chief the witness said:

H *"Basically he had hypertension which resulted in Cerebral Vascular accident otherwise known as stroke. In January, 1976, he had severe weakness on the right side. On discharge by February, 1976 he was on a walking stick. He could discuss but his speech was slow. (underlining is*

mine)

The learned trial Judge, after a painstaking evaluation of the evidence of this witness had no hesitation in rejecting his evidence as to the state of health of the testator while on admission in hospital and after his discharge on 19/2/76. The learned Judge however accepted DW2's evidence about his observation that the testator had a weakness on the right side of the body. It is significant to note that Exhibit D1 was purportedly made on 24/2/76 - 5 days after the testator's discharge from hospital. For the reasons given by the learned trial Judge I am not prepared to say that he was wrong in not relying on the medical evidence of DW2 as to the state of health of the testator both in hospital and after his discharge. One thing is evident from the totality of the evidence adduced for the defence and that is that the testator suffered a stroke on or about 23/1/76 affecting his right side and causing damage to his brain; he was admitted into hospital and discharged on 19/2/76.

The plaintiff who was the testator's cousin and caretaker and who nursed him during the time of his illness, testified thus:

"At the date of that will the deceased was ill. He could not speak at all. Theophilus was paralysed at that time. On 24/2/76 he was still ill. He could not speak at all. We used to carry him to the toilet and back." Cross-examined, she deposed:

"Theophilus was admitted into hospital in 1975. I was then a cleaner at the Federal Ministry of Justice. In October 1975, Theophilus was first taken to General Hospital, Lagos and later to LUTH. On 9th October, 1975 Theophilus was admitted into General Hospital Lagos. He was there for less than a month. He spent only two weeks there. Adekunle and I took him to the General Hospital, Lagos, when his condition became worse Mr. George and I took him to LUTH. He was discharged from General Hospital Lagos before we took him to LUTH. It is not true that Mr. George took him to LUTH on 23/1/76. I know when he was discharged from LUTH. I have forgotten the date. He did not spend up to three weeks. Mr. George paid all the hospital fees. Theophilus was not well when he was discharged from LUTH. It is not true that he was discharged 'FIT AND ALERT'. He was paralysed in the left arm and

right leg."

Going by the evidence of the plaintiff one would be inclined to conclude that the testator had not, on 24/2/76, the capacity to make a will. The Court below, per Awogu J.C.A. observed:

B *"It was not enough that the testator was partially paralysed, bed-ridden and unable to feed himself."*

If anything, the evidence that the deceased was in such condition at the time Exhibit D1 was purportedly made would, in my respectful view, make it more difficult for the defendant to prove that the testator had
C testamentary capacity at the time.

The Court below considered the evidence of Abudu Ogundipe (DW4), an attesting witness to Exhibit D1 as proving that the testator had testamentary capacity at the time he made Exhibit D1. The Court,
D per Awogu JCA, said:

*"The uncontroverted evidence of DW4 was that he sat up to thumb-print the Will which he (DW4) witnessed, and thereafter he (the testator) thanked them. DW4 said he did not know that he was ill, meaning that
E the testator did not, to his layman's eyes, appear to be ill. In the context of the testamentary capacity of the testator these were the crucial moments. In the context also of the validity of the Will, it was the crucial hour."*

F DW4 testified thus:

*"I see EX. D1. I signed Ex. D1. I signed Ex. D1 in a house along Igbosere road, Lagos. On that day we were about three or four persons there. One lawyer Odulana was there. He is dead now. The man whose thumb print I witnessed was also there. There was also another man. I
G don't know his name. He too signed Ex. D1. The man who affixed his thumb impression on Ex. D1 was sitting. When we all signed and when we were going he thanked all of us including Odulana. I saw him affix his thumb impression on Ex D1. That was the man who sat down. All the
H other person were there. The man who affixed his thumb impression was talking to us. He sat down. I did not know whether or not he was ill."*

Cross-examined, the witness deposed:

"I know Lawyer Odulana before he died. I knew him before I

signed Ex. D1. He was like a brother to my employer. He lived opposite my employer. I was a clerk/sales clerk and cashier to Ademuyiwa Bookshop my employers. The late Lawyer Odulana invited me to come and witness a Will. I did not witness the Will at the lawyer's Office but in that man's house. Lawyer Odulana took me to the man's house on that day I witnessed the Will. The man who affixed his thumb impression to Ex. D1 sent Lawyer Odulana to me. I met him and the other man there. When I got there Lawyer Odulana introduced the man (the testator) to me. Odulana said the man was making his Will and that he would affix his thumb impression and that I was required to witness it. The man affixed his thumb impression in my presence and I signed. I signed before the other man signed."

Viewed against the back ground that the testator suffered a stroke on 23/1/76 affecting his brain and was admitted into LUTH; he was discharged on 19/2/76; he suffered paralysis to his right leg and arm, could it be said that DW4 was speaking the truth about the physical health of the testator? The learned trial Judge, after an exhaustive examination of the facts discerned from the evidence before him, including Exh. D1, was unable to rely on the evidence of DW4. I can find no justification for holding to the contrary. In circumstances not too different to those in the present case, the Court of Appeal (England) held in Tyrell v. Painton (supra) that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed. In that case, it would appear that the testatrix, in 1880, and again in 1884, made a will in favour of the defendant. Afterwards she became dissatisfied with him, and from 1888 to 1892 wrote repeatedly to her solicitor making serious complaints against him. On November 7, 1892, she made a will leaving her property to the plaintiff. On November 9, T.P., a son of the defendant, brought to her a Will prepared by himself, leaving her property to the defendant. This Will was executed by her in the presence of and attested by T.P. and a young friend of his, no one else being present, and the existence of this Will was not known to any one else till after the death of the testatrix on the 23rd. The only evidence adduced by the defendant, the party setting up the

later Will, was that of the attesting witnesses to such will, who were orally examined, and deposed clearly that the Will was read over to the testatrix, and that she appeared to understand it and approved of it. The President pronounced in favour of the later Will. On appeal to the Court of Appeal, the later Will was avoided. I too do not think that the evidence of DW4 was sufficient to establish that the testator from his state of health, had testamentary capacity to make Exhibit D1.

In this case, the circumstances are even more suspicious. The learned trial Judge listed some of the suspicious circumstances in these words:

" I have considered the circumstances in the plaintiff's claim in this case with great anxiety. I have tried, as shown above, to examine the evidence in support of the Will Ex. D1 with very great care having regard to the circumstances of the testator in his lifetime and the involvement of DW3. In sum I have found on the evidence that the fact that the Will Ex D1 was not translated to the testator who was an illiterate person showed that he could not have known its contents. I have found from the evidence too that the fact that a non-existent person whose name resembled that of the plaintiff and who was said to be residing in the testator's house was made an executor showed that the testator could not have known about that provision. Even if it could be said that the testator gave that instruction (a fact which I doubt) it would also show conclusively that the testator did not know what he was doing while executing the Will Ex. D1.

The executrix in the Will was the defendant and she lived next door to the testator. Her principal witness (DW3) was the person who took all the benefits in the Will of the testator whom he said had no relations. The evidence showed that he had been involved with the testator in his life time in his affairs. This does not mean that he could not take any benefit from the testator's Will but he has not satisfied me why all the circumstances as revealed by the evidence in connection with the execution of the Will should be as stated above."

These findings and inferences are adequately supported by the evidence. In addition, the learned Judge also made the following finding which

strengthened the suspicions against Ex. D1. He observed:

"Again it was depicted in the Will Ex. D1 that the testator affixed his right thumb impression on it, but the evidence which was so clear and acceptable was that the whole of the right side of the testator was weak throughout his life and must have been Weaker still at the illness for which he was treated until 19th February, 1976 five days before the date of the Will Ex. D1. In the absence of medical evidence about the state of the health of the testator at the making of the Will Ex. D1 can one believe that act of execution was a voluntary act of the testator? I do not think so when there was no sufficient evidence to rebut the allegation of the plaintiff."

Added to all these is the fact that in 1972 the testator made a Will devising his share in 163 Igboere Road to the plaintiff. The plaintiff, a cousin of the testator (as found by the learned trial Judge) and his caretaker was not mentioned in the later Will (Ex. D1) nor was the existence of this later Will made known to her or anyone outside the circle of the defendant and DW3 (a non-relation of the testator and a sole beneficiary under the Will) until after the death of the testator in 1977.

The learned trial Judge, on the preponderance of the evidence before him, concluded that the defendant on whom was the onus probandi to satisfy the conscience of the court that Exhibit D1 so propounded was the last Will of a free and capable testator, failed to discharge that burden and that, therefore, the instrument was not entitled to probate. The Court below concluded differently. That Court was of the opinion that the issue of non-interpretation of the instrument to the testator was not raised by the plaintiff but suo motu by the trial Court and that it was, in any event, misplaced as the document was prepared by a legal practitioner and was, therefore, exempted from the provisions of the Illiterates Protection Law by section 5 thereof. It was also said that the Wills Law, Cap 141 Laws of Lagos State made no provision for the interpretation of a will if it was duly executed and attested to. With respect to their Lordships of the Court below, I think their reasoning went off-tangent. **It is not enough to prove that Exh D1 was prepared by a legal practitioner, it must be shown further that the testator knew the contents**

of the instrument and that the contents complied with his instructions to the legal practitioner who prepared it. If Ex. D1 was not meant to be read over to the testator why did Mr. Odulana insert a jurat therein? It is admitted that the testator was an illiterate. It is self-evident that Ex. D1 was written in the English language. There was no evidence that it was read over to the testator before execution. How could one, in such circumstance, find that the testator knew the contents of the document and that they accorded with his instructions?

It is essential to the validity of a Will that the testator should know and approve of its contents - see: Hastilow v. Stobie (1865) 1 P & D 64 at 67 where Sir J.P. Wilde observed:

"The defendant has pleaded to a declaration on a will that the deceased did not 'know and approve of the contents thereof;' and the question is, whether this plea is bad, not in form, but in substance. The main ground taken against it was indicated by Sir Cresswell Cresswell in the two cases which have been cited, where he is reported to have said, as an abstract proposition, that a man might make a good will without knowing anything of its contents. But he never had occasion to expressly decide this point. This proposition is certainly rather a startling one, because it conflicts with the natural and popular idea of the nature of a will; and it is at variance, besides, with the universal practice of manking in such matters. For, however much men have been in the habit of yielding to the pressure and opinions of others in disposing of their property, I suppose no case ever yet to have occurred in which a man in possession of his full faculties handed over the making of his will to another, and was content to execute it without so much as the curiosity even to know what it contained. But still the question remains whether a will so made, if duly executed, would be good in law; and I am constrained to come to the conclusion that it would not."

See also Battan Singh v. Amirchand & Ors. (1948) AC 161. **Where a document is ex facie duly executed the court may pronounce for it on the maxim: Omnia Praesumuntur rite esse acta. See: Barry v. Butlin (supra) at p. 1091, In the Estate of Randle, Nelson & Anor. v.**

akofiranmi (1962) 1 ALL NLR 130; (1962) ANLR 132. **This maxim only applies with force where the document is entirely regular in form and no suspicion attaches to the Will; Nelson v. Akofiranmi (supra). But where suspicion attaches or the document cannot be said to be ex facie regular or where the testator suffers from some disability such as deafness, blindness or illiteracy the maxim does not apply with the same force.** See: In re Geale (1864) 3 S & T 431; 164 E.R. 1342 - where a testator who was deaf, dumb and illiterate, the Court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the Will, before making the grant; In Re Owston (1862) 3 S & T 461; 164 E.R. 1075; Fincham v. Edwards (1842), 3 Curt 63; 163 ER 656 - where it was held that to establish the Will of a party totally blind, or so nearly so as to be incapable of discerning writing, it must be proved that the will was read over to the deceased testator in the presence of witnesses or that he was otherwise acquainted with the contents. All these decisions and many more along the same line are in accord with common-sense.

It is known that the testator in this case was an illiterate. Ex. D1 contains a jurat to the effect that the contents were read and explained to the testator in Yoruba language but the jurat was unsigned and contains no name of an interpreter nor evidence of such interpretation. I would not think that in such circumstance the maxim applies.

Having regard to my observations above and the findings of fact and inferences drawn by the learned trial Judge from the evidence, the better view of the evidence is that the defendant as the propounder of Exhibit D1 failed to discharge the primary duty on her to establish prima facie that the testator had testamentary capacity to make Exhibit D1 and that he made the instrument. With this conclusion, I must allow this appeal which is hereby allowed. I set aside the judgment of the Court below and restore the judgment of Oladipo Williams, J to the effect that the Will, Exhibit D1 purportedly made by the testator, Theophilus Abiodun otemuyiwa on 24th February 1976 be not admitted to probate. The counterclaim of the defendant also stands dismissed.

Before I end this judgment I need to make an observation. This is in respect of the testator's earlier Will (Exhibit P1). The defendant did not challenge the authenticity of this Will. She, in fact, in paragraphs 18-20 of her statement of defence and counterclaim admitted that the testator made the said Will. The plaintiff, the propounder of it, proved by evidence its due execution. By this Will the testator gave the plaintiff whom he described in the Will as his cousin a half share in the property in dispute situate at 163 Igboere road Lagos. The devise in the Will reads:

"2. I give all my property of whatsoever kind and wheresoever situate including half share of my interest in the property situate and known as No. 163 Igboere Road, Lagos which I own jointly with my brother Adekunle Otemuyiwa to my cousin Olufunso Okelola of No. 28 Eleshin Street, Obalande, Lagos and appoint her sole executrix."

At the date of Exhibit P1, both the testator and his brother Adekunle owned the property jointly as family property. But Adekunle died childless in February 1976 leaving the testator as the sole owner of the property. At the date of the death of the testator on 26th June 1977, the property had ceased to be family property and belonged only to the testator.

Plaintiff had claimed, in the alternative, in her writ -

"(3) That the Court Will decree probate in solemn form of Law and Will of Gabriel Theophilus Otemuyiwa (deceased) dated the 28th day of December 1972."

The learned trial Judge dismissed this claim. He gave as reason for his decision -

"There was no argument about the fact that the property at 163 Igboere Road, Lagos devolved on the Testator and his brother Adekunle finally at the making of the Will Ex. P1. There was no evidence that that property was ever partitioned between the children of the original owner Theophilus Otemuyiwa (deceased). Thus it was clear on the evidence that the Testator and his brother Adekunle who were Yorubas held undivided shares in the property purported to have been devised in the Will Ex. P1 to the plaintiff. It is trite law that a devise purporting to bequeath an undivided share in property which share was derived by de-

scent under Yoruba customary Law is void. See E. J. Johnson & Ors. v. Macaulary & Anor. (1961) 1 ALL NLR (Pt. iv) 743 at 746. Ogunmefun v. Ogunmefun 10 NLR 82. Thus in accordance with these decisions, it is my considered view that the Testator had nothing to devise at the time that he made the Will Ex. P1 and that Will so far as it purported to bequeath an undivided share in the property at 163 Igboere Road, Lagos is void."

The plaintiff did not appeal against this decision and indeed at the hearing of the defendant's appeal in the Court below plaintiff's learned counsel conceded that the 1972 Will (Ex.P1) was void and plaintiff's claim thereon was properly dismissed. This notwithstanding, as it is a question of law I think the error made by the learned trial Judge should be corrected.

A Will speaks from the death of the testator. See: Sections 3(1) and 21 of the Wills Law, Cap 141 Laws of Lagos State 1973 applicable to this case which provided:

"3. (1) Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator."

"21. Every Will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as it if had been executed immediately before the death of the testator unless a contrary intention shall appear by the Will."

It follows that the validity or otherwise of any devise or bequest in a Will is dependent on whether the property so devised or bequeathed belonged to the testator at the time of his death and not at the time of the making of the Will. If at the time of the death of the testator in this case, the property in dispute was still family property the learned trial Judge would be right in his decision. But as it turned out that, as at that time, the said property belonged solely to the testator, the learned trial Judge was in error to void the 1972 Will for the reason he gave. Johnson & Ors. v.

Macaulay & Anor. and Ogunmefun v. Ogunmefun relied on by the learned trial Judge are just not apposite to the facts of this case as in those cases the properties in dispute were family property not only at the dates of the making of the Wills therein but also at the dates of the death of the testators and therefore, not disposable by them.

That is not all. Clause 2 of the 1972 Will (Ex. P1) gave to the plaintiff

"all my property of whatsoever kind and wheresoever situate....."

This clause would seem to embrace all the testator's real and personal estate. Even if the property in dispute, that is, 163 Igbosere road Lagos were family property at the death of the testator and its devise in his Will would be void, this could not affect the validity of Exhibit P1 which would remain valid in respect of the testator's other property "of whatsoever kind and wheresoever."

It follows from my observations above that the decision of the learned trial Judge invalidating Exhibit P1 (the 1972 Will) would appear to be erroneous in law. As that decision is, however, not on appeal before this Court I make no definitive pronouncement on it.

The plaintiff is entitled to the costs of the proceedings in the Court below and in this Court which I assess at N500.00 (five hundred Naira) and N10,000.00 (ten thousand Naira) respectively to be paid by the respondent

WALI JSC

I have read before now, the lead judgment of my learned brother Ogundare, JSC and I agree with the reasons given for allowing the appeal.

For these same reasons which I hereby adopt, I also allow this appeal and abide by the consequential orders in the lead judgment, that of costs inclusive.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with the reasoning and conclusions arrived at therein. The burden was really on the defendant who propounded the Will, to show that prima facie, the Will was validly made as rightly held by the trial High Court, and not on the plaintiff who merely challenged same, as erroneously stated by the Court of Appeal. It was only after the plaintiff had done that, that the burden shifted on the defendant, who attacked the Will, to substantiate by evidence the allegations she made against the Will. (See for example ADEBAJO v. ADEBAJO & ORS. (1973) ALL NLR 297 and JOHNSON & ORS V. MAJA & ORS. 13 WACA 290). I think the learned trial judge was right when he concluded thus:-

"I find that defendant has not discharged the onus placed on her by law in respect of the Will, Exhibit D.1 and I find that, that Will is not entitled to probate."

The appeal therefore succeeds and it is hereby allowed. The judgment of the Court of Appeal is set aside while that of the High Court is restored.

I endorse the orders for costs in the lead judgment.

OGWUEGBU JSC

I have had the privilege of a preview in draft of the lead judgment just delivered by my learned brother ogundare, J.S.C. I am in complete agreement with his arguments and conclusions.

The burden of proof of the genuineness and authenticity of a will lies on the party propounding it (the defendant/respondent in the present proceedings). The onus of proof shifts. In the first stage, where there is a dispute as to a Will, the person who propounds it must clearly show by evidence that prima facie everything is in order. Having done this, the burden is cast upon the party who attacks the Will (the plaintiff/appellant herein) to substantiate by evidence the allegation he had made.

The decision will ultimately depend upon the consideration of the value of the evidence given by both sides, the court having given due regard to the shifting burden of proof. The Court of Appeal wrongly

placed the burden of establishing a prima facie case on the plaintiff/appellant. See Barry v. Butlin 12 E.R. 1090 and Johnson & Or. v. Maja & Ors. 13 W.A.C.A 290.

In the final result, this appeal ought to be allowed and it is hereby
B allowed with costs as assessed in the lead judgment of my learned brother Ogundare, J.S.C.

ONU JSC

C Having had a preview of the judgment just delivered by my learned brother Ogundare, JSC, I am in entire agreement with him that this appeal must perforce succeed and it is accordingly allowed by me.

D My learned brother Ogundare, JSC has so ably set out the facts and meticulously considered the case in all its ramifications that the only task I am left with, in my opinion, is to expatiate briefly thereon as follows:-

E As I perceive it, the main as well as the subsidiary or ancillary issue emerging from the case as fought in the two courts below (in place of the five formulated at the instance of the appellant) can be succinctly summarised or stated thus:

1. Whether the onus of proof (in this case pertaining to a Will) is
F on plaintiff (appellant herein) who challenged it and not on the defendant (respondent herein) who propounded it, and

2. Whether there was due execution of the Will (Exhibit D1 dated 24th February, 1976) on the evidence.

G I will first deal with issue No. 1 regarding which learned counsel for the appellant, Mr. Jimoh-Lasisi elaborating on his brief, posed the question whether the onus of proof in this case (there was in fact a second Will of 1972 - Exhibit P1 which the learned trial Judge declared void and will be alluded to in passing latter in my consideration of this
H appeal) is on the appellant who challenged it and not on the respondent who propounded it. And if not, whether as contended by Mr. Kolawole, learned counsel for the respondent, that she (respondent) discharged the onus of proof laid down in the case of Johnson & Anor. v. Maja & others

13 WACA 290 - a case which was adopted and followed in this Court's decision of Irene A. Adebajo v. Luke Adepoju Adebajo & ORS. (1973) 1 ALL NLR 361 at 377; (1973) 3 ECSLR (Part 1) 544 at 555. In other words, whether or not there has been a misplacement of the burden of proof as asserted by the appellant whereas there would appear to be no misplacement, as the respondent sought to demonstrate. B

Now, as laid down in Johnson v. Maja (supra), the basic principle of law is that -

"Where there is a dispute as to a Will, those who propound it must clearly show by evidence that, prima facie, all is in order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me that the burden is then cast upon those who attack the Will, and that they are required to substantiate by evidence, the allegations they have made as to lack of capacity, undue influence, and so forth." C D

And in Adebajo v. Adebajo (supra), this court (per Elias, CJN) re-stated the above principle when it observed inter alia:- E

"The learned Chief Justice took great care to define quite clearly where the onus of proof lies in a probate action of this kind and apply the well known principle to the present case. He laid the onus squarely on the proponents of the Will and examined their evidence and their witnesses with jealous scrutiny in order to ensure that all allegations about suspicious circumstances are considered in attempt to clear the conscience of the court. It was only after satisfying himself that the defence has discharged this onus that the learned Chief Justice turned to examine the challenger's evidence" F G

When, therefore, in the case in hand, the learned trial Judge on 2nd July, 1986 held as follows:

"The law requires a person who propounds a Will to show that the Will really expresses the mind and intention of the testator - See Tyrell v. Painton page 151. I am of the view that a greater onus should be placed on the defendant in this case more so when her principal witness who has taken so much under the will could not explain satisfactorily the circum-

stances of the will with which he was so closely connected."

but the Court of Appeal in its own judgment delivered on 10th May 1989, allowing the appeal in part, stated inter alia that:-

"The onus was therefore on the plaintiff to prove that the testator
B lacked testamentary capacity. She alone testified in this regard and her evidence did not discharge the burden. True, the Defendant/Appellant chose to assume a similar burden by the second and their claims in the counterclaim, but the burden of proof did not thereby shift"

C the latter was, with utmost due respect, palpably wrong to have come to this conclusion to wit: that the onus was on the appellant as challenger of Exhibit D1 therefore and not on the respondent who set up the issue of testamentary capacity. That court, in my respectful view, was equally
D wrong to have considered first the evidence adduced by the appellant whereas it should first have considered the evidence adduced by the respondent as propounded on whom the burden lay. See Adebajo's case (supra) and Adesanya, Akinyemi & Anor. v. Olafunji, Sunbo & Anor. (1990) ALL NLR 551.

E As to what the respondent as the propounder of Exhibit D1 should have proved before the burden of proof could have shifted, it is the law that he -

"must show clearly by evidence *prima facie*, all is in order; that is
F to say, that there has been due execution and that the testator had the necessary mental capacity and was a free agent."

In other words, the Will must be completely free from any suspicion or suspicious circumstances whatsoever, since the existence of any suspicion or suspicious circumstances unless removed, debarred the court
G from pronouncing against it and so refuse probate for being per testes i.e. irregular. See also Tristram and Coote, Prob. Pr. 17th Edition. As the Court of Appeal (per Awogu, JCA concurred in by Apata and Babalakin, JJ.CA as they then were) wrongly placed the onus on the challenger
H (plaintiff in the trial court), rather than on the propounder of Exhibit D1 (the defendant/respondent), I will answer the first issue in the negative.

I will now consider the second issue which asks whether there was due execution of the Will. (Exhibit D1 dated 24th February, 1976)

on the evidence.

It is pertinent to remark from the onset that our courts have held consistently that "before a document can be admitted to probate, it has to be a testamentary document, complying with the requirements of the Wills Acts 1837 and 1852" (per Bellamy, J.) in Nelson v. Akofiranmi B (1959) LLR 143; (1962) 1 ALL NLR 130 at 131. Thus, in Onwudinjoh v. Onwudinjoh 2 ENLR 1 (per Ainley C.J.) the Will was refused probate for non-compliance with formalities of the Wills Acts, 1837 and 1852.

The respondent in her attempt to prove the state of health of the testator at the time the Will, Exhibit D1, was made called four witnesses. C D.W.1, a medical Records officer merely testified to the fact that the deceased was admitted at the Lagos University Teaching Hospital (LUTH for short) on the 23/1/76 and discharged on the 19/2/76. D.W.2, gave evidence, rather unreliably, that even though he was a Medical Practitioner at LUTH, he was not the one who treated the deceased as he was in the Department of Surgery while the testator was admitted in the Department of Medicine. Through him was received Exhibit D6 which showed that the deceased was alive in 1980 and said he saw the deceased in 1978 E when he came back from overseas, whereas in actual fact the deceased had died on the 26th of June, 1977. He however added that the deceased had stroke on the right side which could affect his brain. D.W.3 was the sole beneficiary of the Will, Exhibit D1. He gave evidence which did not F show categorically what the testator's state of health was between 19th February, 1976 when he was discharged from the hospital and 24th February, 1976 when he purportedly made Exhibit D1. He stated under cross-examination that he could not remember if he conversed with the G deceased between the above period nor see him and spoken to him during the five days as he could no longer remember. When re-examined, however, this witness said:

"I saw the deceased after 19th February, 1976 but I can't remember now. There was a serious change in his condition." H

The evidence of DW4 regarding the state of health of the testator at the relevant time was:

"I did not know whether or not he was ill."

The learned trial Judge after a very careful consideration of the evidence adduced by the respondent in proof of the state of health of the testator at the relevant time held inter alia:

"There was therefore no reliable evidence as to the state of health of the testator when he was discharged and went home on the 19th February, 1976."

Further down in his judgment the learned trial Judge observed thus:

"This evidence did not show categorically what the testator's state of health was between 19th February, 1976 and 24th February, 1976. From my perception of DW3 in the witness box I formed the opinion that he was trying to avoid saying that he had any contact with the testator between 19th and 24th February, 1976 so that it might not be said that he was instrumental in getting the testator to make the Will Exhibit D1. It is however important to know the state of health of the testator having regard to the contention of the plaintiff and the burden which the law placed on those who propound the Will. It must be pointed out that the only other witness for the defendant, Abudu Ogundipe (DW4) who was one of the two attesting witnesses to the Will Exhibit D1 said that he saw the testator in a sitting position when he affixed his thumb impression to the Will. He too did not talk about the condition of the testator but it must be noted that he said that the testator thanked him after he (DW4) has signed the Will. If all that was true, it might be presumed that all was in order; but other things happened at that ceremony with regard to the Will that must be considered further." (Underlining is mine for emphasis and comment)

Of such other things, it was common knowledge that the whole of the right side of the testator was paralysed. This much was admitted by DW1 and DW2 who also agree that the paralysis should affect his brain. The testator was also acknowledged to suffer from high blood pressure although there was no medical evidence of the combined effect of these two bodily conditions at the time of making Exhibit D1. It is, however, a known fact that paralysis affects the brain and causes loss of memory as borne out in the evidence of DW2.

The learned authors of Williams and Mortimer on Executors,

Administrators and Probate (1970 Edition) have this to say at page 138:

"No person is capable of making a Will who is not of sound mind, memory and understanding. The testator's mind must be sound to be capable of forming the testamentary intentions in the Will; his memory must be sound to recall the several persons who ought to be considered as his possible beneficiaries." (Underlining is mine for emphasis.) B

there could be no better evidence of the testator's loss of memory at the time of making Exhibit D1 than the naming of a non-existent person as his co-executor namely, Olu Okelola.

The learned trial Judge was therefore right, in my view, when he made the following findings in his judgment: C

"It is therefore not possible at all to conclude that the testator was made to understand the contents of the Will. Where the testator's understanding of the Will is doubtful, proof of mere execution is insufficient - D See Billinghurst v. Vickers 161 ER 956, Wood v. Wood 161 ER. 1010. In the absence of interpreters in the jurat in Exhibit D1 and the evidence of the said interpreter whomsoever he might be, I cannot accept the fact that the testator understood the contents of the Will notwithstanding the E evidence of DW4."

While the court below, because of the misconception it had that the onus of proof was on the appellant and not on the respondent who propounded Exhibit D1, it was patently wrong in reversing the learned trial Judge's F judgment by holding -

"The other attack on the validity of the Will was that no one interpreted it to the testator. This attack was not by the plaintiff, but by the learned Judge himself, simply because the name of the interpreter was not in Exhibit D1, and no one claimed to have duly interpreted it." G

Indeed, proof by the respondent that the testator understood and approved of the contents of Exhibit D1 becomes even more overriding if regard is had to the fact that the testator was an illiterate person. Thus, when a will is challenged as in the instant case, those propounding it H must not only prove it affirmatively to the satisfaction of the court that the testator had the necessary testamentary capacity but that he understood and approved of its contents. For as Williams and Mortimer on

Executor, Administrators and Probate (ibid) at page 147 put it:

"A party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator's knowledge and approval of the contents of the Will are part of the burden of proof assumed by everyone who propounds a testamentary document." (Underlining is mine for emphasis).

with the above proposition, I cannot agree more in the setting and consideration of the case in hand since the construction and interpretation of a will which lot fell on the High Court, in this case the trial court, was fully and creditably discharged. See Okoya v. Ojule (1968) ALL NLR 468 and Etim v. Affiong (1962) ALL NLR 1019.

It is trite law that when the findings of fact by the trial court are based on credibility of witnesses, as in the instant case, it is not the business of the appellate court to substitute its own views for the views of the trial court which had the advantage of seeing and watching the demeanour of the witnesses. See Balogun v. Agboola (1974) 1 ANLR (Part 2) 66 AT 73; Egri v. Uperi (1974) 1 NMLR 22 at 26; Emaphil v. Odili (1987) 4 NWLR (Part 67) 915 at 935 and Kponunglo v. Kodadja (1933) 2 WACA 24. In Asanya v. The State (1991) 3 NWLR (Part 180) 442 at 471 this court clearly re-stated the law as follows:-

"The Court of Appeal will not interfere where the credibility or not of the evidence is based on the demeanour of the witness. In the instant case the learned trial Judge did not believe Monday Obi, the witness of the appellant. The Court of Appeal has been criticized for being silent on the issue. I do not consider this criticism to be fair. As I have pointed out already, the rejection of evidence having been based on credibility, the Court of Appeal cannot interfere."

It is also trite law that the appellate court ought not to lightly interfere with the findings of fact made by the trial court unless those findings are perverse. See Awoyale v. Ogunbiyi (1986) 2 NWLR (Part 24) 626; Adimora v. Ajufo (1988) 3 NWLR (Part 80) 1; Adeyeye v. Ajiboye (1987) 3 NWLR (Part 61) 432; Adebanjo v. Brown (1990) 3 NWLR (Part 141) 661 and Ebba v. Ogodo (1984) 4 SC. 84. In Woluchem v. Gudi (1981) 1

SC. 291 this court stated that an appellate court ought not to interfere with the findings of the trial court if it merely entertains doubt as to the correctness of the findings, unless it is sure that the finding are wrong.

In the light of the above, it is my firm view that the court below was clearly wrong when it held inter alia:

"On the issue of testamentary capacity, it was the plaintiff who set this up also as a basis for the invalidity of Exhibit D1. The learned Judge no doubt overlooked the fact that the claim was to declare Exhibit D1 as invalid and, in the alternative, to declare the devise made to George in Exhibit D1 as invalid. The onus was therefore on the Plaintiff to prove that the testator lacked testamentary capacity. She alone testified in this regard and her evidence did not discharge the burden. True, the Defendant/Appellant chose to assume a similar burden by the second and third claims in the counterclaim, but the burden of proof did not thereby shift The counter-claim was only necessary because there were other claims besides the validity of the Will and secondly, because there were two Wills in question; (see Irene Adebajo v. Adebajo & ors. (1973) 3 ECSLR (Part 1). 544 at 553. Thus, it was in the examination of the defence and counter-claim that the learned judge found no satisfactory evidence of the state of the health of the testator when he made the Will, even though the plaintiff in his claim led no credible evidence to this effect. It was not enough that the testator was partially paralysed, bed-ridden and unable to feed himself. The uncontroverted evidence of DW4 was that he sat up to thumb-print the Will which he DW4 witnessed, and thereafter he (the testator) thanked them. DW4 said he did not know that he was ill, meaning that the testator did not to the layman's eyes, appear to be ill. In the context of the testamentary capacity of the testator these were the crucial moments. In the context also of the validity of the Will, it was the crucial hour" (Underlining is mine for emphasis).

Rather than the above, the conclusion arrived at by the learned trial Judge after spelling out in details the suspicious circumstances surrounding the making of Exhibit D1 when he asserted in conclusion that -

"As I have already stated, the Will Exhibit D1 as propounded by the defendant will not be admitted to probate."

which, of course, means that the appellant's claim succeeded while the respondent's counter-claim and the orders prayed for therein in respect of the Will Exhibit D1 stood dismissed, constituted an unimpeachable decision by the trial court which I have no hesitation in restoring.

B On the locus standi of the testator to make the Will, Exhibit D1. the learned trial Judge in my view, erred in law when he held inter alia:

"It must be remembered that the two brothers and sister of the testator died intestate and without any issue surviving them. The last of them died intestate and without issue on 9th February, 1966 apparently under the impression that the testator became the sole owner of the property at 163 Igboere road, Lagos as at that date. Inaccordance with the authorities it seems to me that the property remained family property and could not be devised by the testator" (Underlining is mine for emphasis).

This is because the Will dates from the date of the testator's death, in this case, from 24th February, 1976 since the last of the other surviving issues of the testator's parents died on 9th February, 1976 and the property in Exhibit D1 became vested in him alone on the 24th February, 1876 as sole survivor to the family property. However, the learned trial Judge was unequivocally right, in my opinion, to have held towards the concluding portion of his judgment when he essayed thus:

F "If I am wrong in this view I hold my earlier view that the will Exhibit D1 was void because the testator did not know what was written in it and that he therefore lacked testamentary capacity"

A fortiori, the deceased testator although he had the locus standi to make the will Exhibit D1, lacked the capacity to do so. See Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 669. Compare this decision with our recent case No. SC. 57/1990: Madam Asimowu Odusoga & Anor. v. L.L. Rickets decided on 4th July, 1997 (now reported in (1997) 7 SCNJ. 135 at 158) where I held inter alia:

H "On whether Exhibit 'G' was duly and validly executed by Mrs. Bucknor, in as much as the law clothed her with the authority to do so in her capacity as administratrix of the estate of Jemi-Alade, she rightly, in my view, exercised that power. It is of no consequence and detriment that

he was joined by others not similarly empowered to execute Exhibit 'G'." The law did not clothe the testator in the instant case with the testamentary capacity to make Exhibit D1 because of the hard facts put forward on the appellant's behalf and with which I agree in toto that:

"(1) *The Will was made in suspicious circumstances as the main beneficiary of the Will - Mr. A. Idowu who was a total stranger to the testator was the one that invited/briefed the legal practitioners who prepared the will and was the only beneficiary under the will.*

(2) *That the right thumb print depicted on the Will could not have been that of the testator as the whole of the testator's right side which included his right arm and hand was weak throughout his life time and had become completely paralysed as a result of his sickness before and until his death.*

(3) *That the testator could neither speak nor eat as at the time the Will was purported to be made and could not have given any useful or reasonable instruction to the legal practitioner who was said to have prepared the Will as he could hardly talk as at then. This accounted for a couple of anomalies found in the Will especially the inclusion in the Will of a non-existent person - Mr. Olu Okelola as a co-executor to the respondent herein in the Will." See Section 6 of the Wills Law, Cap. 141 Laws of Lagos State, 1973.*

I accordingly answer Issue 2 in the negative.

For these reasons and the fuller ones contained in the leading judgment of my learned brother Ogundare, JSC this appeal succeeds and it is allowed by me. I make similar consequential orders inclusive of those relating to costs as set out in the lead judgment.

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