

**SUPREME COURT OF NIGERIA**  
FRIDAY 13TH DECEMBER, 2013. SC. 170/2007  
**CORAM:- M. MOHAMMED, O. ARIWOOLA,**  
**M. D. MUHAMMAD, K. B. AKA'AHs,**  
**K. M. O. KEKERE-EKUN, JJSC**

1. CHIEF EYO EDEM NSEFIK (SINCE DEAD)
  2. EDEM ANTHONY NSEFIK ..... APPELLANTS
  3. MAKAMBA TERESA NSEFIK
  4. EFFIONWAN ELIZABETH NSEFIK
- AND
1. ROSEMARY MUNA
  2. JOHN EFFION ASUQUO
  3. WILLIAM ENE-EYO ASUQUO .... RESPONDENTS
  4. MORRIS ARCHIBONG
  5. SYLVIA ASUQUO
- 

APPEALS - Grounds - Validity - Appellants' ground one is competent - As it arose from the decision of CA - With regard to issue of which of the parties was to start calling evidence (H1)

ADMINISTRATION OF ESTATES - Will - Proof - Where there is dispute as to a will - The propounders of the will must prove by evidence - That prima facie all is in order in respect of the will (H2)

ADMINISTRATION OF ESTATES - Probate grant - Revocation - Appellants must first call evidence to invalidate the grant - Before facing their claim on validity of the will - Where respondents are expected to begin evidence (H3)

APPEALS - CA ruling - Interference - There is no justification to set aside the ruling - As CA comments did not prejudice the substantive case of appellants - Which is pending at trial court (H4)

***FACTS***

Plaintiffs/appellants brought this action against defendants/respondents at the High Court of Lagos State, seeking to have probate of a pretended will of the deceased (Mrs. Teresa E. Nsefik) revoked

and the said will propounded against and to have a grant of letters of administration of the estate of the deceased. In their amended statement of claim, appellants inter alia seek for the revocation of the grant of probate and a declaration that the deceased died intestate. Respondents filed their statement of defence and counter-claimed that the court should pronounce in solemn form for the true last will of the deceased. It of note that the parties are involved in dispute over the administration of the estate of the deceased who died on 12<sup>th</sup> March 1989 leaving behind her will dated 6<sup>th</sup> July 1988. Upon her death, 2<sup>nd</sup> and 3<sup>rd</sup> respondents applied for and were granted probate of the said will after duly satisfying the necessary conditions for the grant. The grant was made under the seal of the court and duly signed by the Probate Registrar. Nobody entered caveat before the grant of Probate on the will.

Pleadings were exchanged between the parties. However, before the commencement of hearing, the learned trial Judge died and the matter was transferred to another Judge of the same court for hearing. Thereafter, an issue arose as to which party shall call evidence first. After hearing submissions from the parties on the issue, the court ruled that appellants shall call evidence first. Appellants were dissatisfied with the ruling. Hence, they appealed to the Court of Appeal, Lagos Division. Appellants also stayed the proceedings for hearing their action at the trial court pending the determination of their appeal. In its judgment, the court dismissed the appeal and affirmed the ruling of the trial court. Aggrieved further, appellants filed appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“i. Whether or not the Court of Appeal was right in holding that the burden of proof in the circumstances is first cast on the Appellants; and that it is the Appellants that must first lead evidence.*

*ii. Whether or not the Court of Appeal had not by its pronouncements prejudged and pre-empted the substantive matter at the High Court.”*

**HELD** (Unanimously dismissing the appeal per  
**MOHAMMED JSC**)

*APPEALS - Grounds - Validity*

**1. It is the complaint of the learned Counsel to the Respondents that the above ground of appeal does not arise from the Ratio Decidendi of the Court below. A ground of appeal is expected to represent an Appellants complaint against a decision he is not satisfied with and which he has grouse against and wants an appellate Court to correct. Reading the ground of appeal being attacked as a whole, it is quite clear that the ground arose from the decision of the Court of Appeal being appealed against by the Appellants. It is far from being an obiter, because the burden of which of the parties was to start calling evidence to prove their case, was the main issue covered by the judgment of the Court of Appeal which dismissed the Appellants' appeal. Consequently I hold that the Appellants' ground one of the grounds of appeal is competent and so also is the Appellants' issue two in the Appellants' brief of argument arising from that ground of appeal. (p. 4356 B)**

*ADMINISTRATION OF ESTATES - Will - Proof*

**2. The law is trite that although in civil cases it is the party who asserts that must prove, the position of the law is the reverse in probate cases as argued by the learned Appellants senior Counsel. Even the Court below recognized this correct position of the law at page 110 of the record of appeal in the judgment of that Court. That is to say where there is a dispute as to a Will especially with respect to the testamentary capacity of the testator, those who propounded the Will must closely show by evidence that prima facie all is in order in respect of the Will. (p. 4358 B)**

*ADMINISTRATION OF ESTATES - Probate grant - Revocation*

**3. It is important to observe that the prevailing situation in the present case is not the same as in the above cases relied upon by the Appellants where the question of revocation of probate already granted to the propounders of the Will was not in issue. In the present case, although the 2nd and 3rd Respondents were the propounders of the Will of the deceased dated 6th July, 1988, the inaction on the part of the Appellants in**

**challenging the grant of probate on the Will before the grant was made, had brought a new dimension to the case of the Appellants now pending at the trial Court. This is because the Appellants in their action are not only challenging the genuineness and authenticity of the Will which they claimed was not even in existence but are also challenging the grant of probate which they are urging the trial Court in their statement of claim, to set aside and declare that the deceased died intestate. In other words, the Plaintiffs/Appellants in their action have to scale the hurdle of invalidating the grant of probate of the will made to the Defendants/Respondents before facing their main claim touching on the validity of the Will itself where the law expects the Defendants/Respondents as propounders of the Will to begin if the grant of probate were not challenged. Therefore, it is my view that as far as the claim for the revocation of grant of probate already made is concerned, the ball is in the court of the Plaintiffs/Appellants to begin to call evidence at the trial Court as found by the two Courts below. This issue is thus resolved against the Appellants.** (p. 4358 F)

*APPEALS - CA ruling - Interference*

**4. I have earlier in this judgment quoted the part of the judgment of the Court below being attacked by the Appellants in this issue. What the Appellants are quarrelling with is the statement by the Court below that-**

***“The nature of the Appellants claim places the burden of proof on the Appellants who failed to discharge the same.”***

**This statement says exactly what the Appellants failed to do at the trial Court when that Court, having regard to the nature of the case of the Appellants then on trial, asked the Appellants in its ruling to start their case by calling their witnesses but they refused and decided to appeal against the ruling to the Court of Appeal. That statement does not amount to the Court below delving into the main or substantive issues in the claims of the Appellants at all which were still waiting to be heard at the trial Court. The statement being complained of by the Appellants when closely examined in its context, it is**

**very clear even beyond argument that the Court below did not delve into the main claims of the Appellants which still remain intact waiting to be moved for hearing when the Appellants are ready to call evidence in support of the reliefs claimed by them that the trial court should revoke the grant of probate on the deceased last Will, pronounce against the force and validity of the Will, the existence of which the Appellants are contesting and the declaration that the deceased died intestate. The comments of the Court below therefore had not prejudged nor pre-empted the substantive case of the Appellants which is still pending at the trial Court, to justify the setting aside of the ruling of the Court below as claimed by the Appellants in this second issue which is hereby resolved against the Appellants.** (p. 4360 B)

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## NOTABLE POINTS OF INTEREST

### **ARIWOOLA JSC**

#### ***1. Probate - Meaning of***

There is no doubt, this is a probate action. “*Probate is the judicial procedure by which a testamentary document is established to be valid Will*”. In other words, it is the proving of a Will to the satisfaction of the Court. Therefore, unless it is set aside, the probate of a Will is conclusive upon the parties to the proceedings and other persons who had notice of them on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the Will. However, it should be noted that, probate does not preclude inquiry into the validity of the Will’s provisions or on their proper construction or legal effect.

Probate in common form is one granted in the registry of the court without any formal procedure in court. This is done on an ex parte application of the executor. But the decision is subject to being reopened by a party who has not been given notice. Whereas, probate in solemn form is one granted in open court, as a final decree, when all interested parties have been given notice. The judgment is final for all parties who have had notice of the proceeding, unless a later Will of the testator is discovered. (p. 4366 E)

## ***2. Counter claim - Distinctive nature***

A counter claim is a distinct cause of action and has all the tapestry of an action. It is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. It must, however, be directly related to the principal claim but not outside and independent of the subject matter of the claim. (p. 4369 D)

## **KEKERE-EKUN JSC**

### ***3. Propounder of will - Definition of***

Blacks Law Dictionary (8th edition) at page 1256 defines the “*propounder*” of a will as “*an executor or administrator who offers a will or other testamentary document for admission to probate.*” (p. 4372 E)

## **REPRESENTATION**

Kola Awodein SAN with Chima Okereke and Kenneth Gomwalk, for Appellants  
Babajide Olasite, for Respondents

## **CASES REFERRED TO**

- Ojeme v. Momodu 11 (1983) 1 SCNLR 188
- Abubakar v. B. O. & A. P. Ltd. (2007) 18 NWLR (pt. 1066) 319
- Johnson v. Maja (1951) 13 WACA 290
- Awoyoolu v. Aro (2006) 18 WRN 1
- Balogun v. Agboola (1974) 10 SC 111
- Lokoju v. Olojo (1980) 2 SCNLR 12
- Ibodo v. Enarofia (1980) 12 NSCC 196
- Akinsanya v. U.B.A. (1986) 4 NWLR (pt. 35) 273
- Adebajo v. Adebajo (1973) 1 All NLR 361
- Okelola v. Boyle (1998) 2 NWLR (pt. 539) 533
- Odutola v. Mabogunje (2013) 7 NWLR (pt. 1354) 522
- Clement v. Iwuanyanwu (1989) 3 NWLR (pt. 107) 39
- Ewete v. Gyang (2003) 6 NWLR (pt. 816) 345
- Awoyoolu v. Aro (2006) 18 WRN 1
- Oyegbola v. Esso West Africa (1966) 1 All NLR 170

**STATUTE & RULES REFERRED TO**

Evidence Act, ss. 136 and 137(1)

Lagos State High Court (Civil Procedure) Rules 1994, O. 58 r. 77(2)-(4)

**BOOKS REFERRED TO**

Halsbury's Laws of England 4th Ed. Vol. 17 p. 475 para. 903

Blacks Law Dictionary 8<sup>th</sup> Ed. p. 1256, 9<sup>th</sup> Ed. pp. 1321-1322

**LEAD JUDGMENT BY MOHAMMED JSC**

The dispute between the parties in this appeal concerns the Administration of the estate of the late Mrs. Teresa Ekpenyong Nsefik (Nee Ekpenyong Eyo) of No. 18, St. Gregory Road, Eko Eket Close, South West Ikoyi, Lagos, Lagos State who died on 12th March, 1989 leaving behind her Will dated 6th July, 1988. Upon the death of the deceased, the 2nd and 3rd Respondents in this appeal John Effion Asuquo and William Ene-Eyo Asuquo applied for and were granted probate of the Will of the deceased dated 6th July, 1988 after duly satisfying the necessary conditions for the grant. The grant was made under the High Court of Lagos State's seal and duly signed by the Probate Registrar. There was no caveat entered by any person before the grant of Probate on the Will.

However, the Plaintiffs now Appellants who did not take any steps against the application by the Defendants now Respondents for the grant of probate, brought their action at the trial High Court of Lagos State after the grant of probate by a Writ of Summons dated and filed on 15th November, 1989 and claimed thus -

*"The Plaintiffs claim is as the lawful husband and one of the persons entitled in the event of an intestacy to share in the estate of Mrs. Teresa Ekpenyong Nsefik (Nee Ekpenyong Eyo) late of 18, St. Gregory Road, Eko Akete Close, South West Ikoyi Lagos, Lagos State who died on 12th March, 1989 to have probate of a pretended Will of the deceased dated 6th July 1988 granted on 24th October, 1989 revoked and the said Will propounded against and to have a grant of letters of administration of the estate of the said deceased."*

In their amended statement of claim, the Appellants/Plaintiffs claimed the following reliefs namely -

*"(a) That the Court shall revoke the said grant of probate and*

*pronounce against the force and validity of the said alleged Will; and  
(b) Declaration that the said deceased died intestate.*”

The Defendants now Respondents in this appeal on being served with the processes of the trial Court, reacted by filing their statement of Defence and counter-claim dated 26th June, 2000. In the state-  
B ment of Defence at paragraph 18 thereof, the Defendants averred -

*“18. The Defendants will further contend at the hearing of this action that the Plaintiffs claim apart from being ill-motivated, is frivolous, misconceived, speculative and ill-advised and should be dis-  
C missed.”*

At the conclusion of their four paragraph counter-claim, the Defendants claimed -

*“(1) That the court shall pronounce in solemn form for the true last Will of the deceased dated 6th July, 1988 and propounded  
D by the 2nd and 3rd Defendants.*

*(2) For the alternative that the Court do pronounce in solemn form of law for one of the said prior Wills.”*

After the exchange of pleadings, the case eventually went to trial at the High Court of Lagos. However, before the hearing could  
E commence, the learned trial Judge died and the case was transferred to another Judge of the same Court for hearing. On the date the case came up for hearing, an issue arose as to which of the parties were to start calling evidence. The learned Counsel to the Plaintiffs/  
F Appellants who raised the issue, contended that the Defendants/Respondents were the party to start while the learned Counsel to the Defendants/Respondents asserted that the Plaintiffs/Appellants were the party to start. The learned trial Judge after hearing the learned Counsel to the parties on this issue, in the Ruling delivered by him on  
G 26th February, 2001, he came to the conclusion thus -

*“In the light of all that I have been saying, it is hereby ordered that the Plaintiffs shall lead evidence in proof of their case on dates to be fixed for trial. The Plaintiffs shall call evidence first.”*

The Plaintiffs/Appellants who were dissatisfied with the ruling  
H of the trial Court, appealed against it to the Court of Appeal, Lagos Division and at the instance of the Appellants, proceedings for the hearing of their action at the trial Court were stayed pending the hearing and determination of their appeal. The appeal by the Appellants was eventually heard by the Court of Appeal which in its judg-



ment given on 13th March, 2007, dismissed the appeal and affirmed the stand taken by the trial Court that the Appellants were the party to commence leading evidence at the trial Court. Still not satisfied with the decision of the Court of Appeal, the Appellants are now on a further final appeal against that decision.

The Notice of appeal filed on behalf of Appellants by their learned Counsel on 27th March, 2007 contains three grounds of appeal from which the learned Counsel distilled two issues for the determination of the appeal as follows in Appellants brief of argument.

- i. Whether or not the Court of Appeal was right in holding that the burden of proof in the circumstances is first cast on the Appellants; and that it is the Appellants that must first lead evidence.*
- ii. Whether or not the Court of Appeal had not by its pronouncements prejudged and pre-empted the substantive matter at the High Court.*

In the Respondents' brief of argument however, the learned Counsel to the Respondents in addition to the preliminary objection raised against ground one of the grounds of appeal filed on behalf of the Appellants and issue two in the Appellants' brief of argument, the learned Counsel to the Respondents saw only one issue for the determination of the appeal as follows -

*"Whether the Court of Appeal was right in affirming the decision of the Lagos High Court that the Appellants were the party to start leading evidence at the trial of these proceedings before the Lagos High Court."*

Starting with the preliminary objection by the Respondents to ground one of the Appellants' grounds of appeal, the ground being attacked reads -

*"Ground 1*

*The learned Justices of the Court of Appeal erred in law when they held as follows -*

*"...The nature of the Appellants' claim places the burden of proof on the Appellants who failed to discharge same."*

*(a) The onus is not on the Appellants who were not the ones propounding the Will in this suit.*

*(b) There was no issue before the Court about whether or not this burden of proof on any of the parties had been discharged or*

not.

(c) *The only issue before the Court of Appeal is as to who has the burden of proof and not whether the burden has been discharged or not.*

(d) *The finding of the Court, therefore that the Appellants failed to discharge their burden had already pre-empted the substantive matter which is still pending before the Court (sic) below."*

**It is the complaint of the learned Counsel to the Respondents that the above ground of appeal does not arise from the Ratio Decidendi of the Court below. A ground of appeal is expected to represent an Appellants complaint against a decision he is not satisfied with and which he has grouse against and wants an appellate Court to correct.** See *Ojeme v. Momodu* 11 (1983) 1 S.C.N.L.R. 188 and *Abubakar v. B. O. & A. P. Ltd.* (2007) 18 N.W.L.R. (Pt. 1066) 319. **Reading the ground of appeal being attacked as a whole, it is quite clear that the ground arose from the decision of the Court of Appeal being appealed against by the Appellants. It is far from being an obiter, because the burden of which of the parties was to start calling evidence to prove their case, was the main issue covered by the judgment of the Court of Appeal which dismissed the Appellants' appeal. Consequently I hold that the Appellants' ground one of the grounds of appeal is competent and so also is the Appellants' issue two in the Appellants' brief of argument arising from that ground of appeal.**

On the determination of the appeal on the merit, it appears to me that the Appellants' issue one and the Respondents' sole issue, are virtually the same for the purpose of effectively disposing this appeal, particularly on the part of the Appellants whose learned senior Counsel stressed that the Appellants action pending at the trial Court is probate action quite distinct from other civil actions under the rules of the trial High Court; that the law in probate actions is that where there is a dispute concerning the Will, the party to begin is that party that put forward the Will as the last true Will of the testator. Learned senior Counsel quoted from the lead judgment of the Court of Appeal at page 110 of the record where it was observed - "*It is trite in civil cases that the party who asserts must prove but the rule operates in probate cases in reverse...*" to support this argument, express-

ing surprise why the court below finally came to a different conclusion on the position of the law in its judgment. Relying on Halsbury's Laws of England 4th Edition Volume 17 page 475 paragraph 903, page 555 paragraph 1065 and the case of Johnson & Anor. v. Maja & Ors. 13 WACA 290 at 292, learned senior Counsel to the Appellants stressed that the Defendants/Respondents having agreed even in their statement of Defence that the last Will of the deceased was propounded by the 2nd and 3rd Respondents, the law in probate matters required that the Defendants/Respondents were the parties to start their case at the trial Court and not the plaintiffs/Appellants as held by the trial Court and affirmed by the Court below. Learned senior Counsel urged this Court to allow the appeal, set aside the decisions of the two Courts below and order the Defendants/Respondents to start their case at the trial Court.

For the Respondents however, it was argued by their learned Counsel that the two Courts below were right in their decisions that it was the Appellants that ought to have started their case by calling evidence first. Citing the case of Awoyoolu v. Aro (2006) 18 W.R.N. 1, learned Counsel urged this Court not to disturb the concurrent findings of the two Courts below which were neither perverse nor occasioned any miscarriage of justice. Learned Counsel emphasised that the Respondents having applied and obtained probate of the Will of the deceased at the trial Court without any caveat being entered by the Appellants against the grant, having regard to the situation on the ground, it was the Appellants that should start calling evidence to prove their case and in that respect the two Courts below were right in their decisions which should not be disturbed by this Court. On the reliance placed by the Appellants on Halsbury's Laws of England and the case of Johnson & Anor. v. Maja & Ors. (supra) on the position of the law, the learned Respondents Counsel pointed out that the matter in the present case being procedural, it was the Lagos State High Court (Civil Procedure) Rules, 1994 that applies where Order 58 Rule 77(2) - (4) provides the effect of failure to enter caveat to stop the grant of probate; that it is by these rules that in probate cases, as soon as probate was granted, the Will is valid by judicial act and the onus of proof shifts to the attackers of the Will. Finally, learned Counsel still relying on several cases some of which are, Balogun v. Agboola (1974) 10 SC 111; Lokoju v. Oloju (1980)

2 S.C.N.L.R. 12; and Ibodo v. Enarofia (1980) 12 N.S.C.C. 196 and Akinsanya v. U.B.A. (1986) 4 N.W.L.R. (Pt. 35) 273, urged this Court not to disturb the concurrent findings of the two Courts below which were not perverse nor occasioned any miscarriage of justice but to dismiss the appeal.

B ***The law is trite that although in civil cases it is the party who asserts that must prove, the position of the law is the reverse in probate cases as argued by the learned Appellants senior Counsel. Even the Court below recognized this correct position of the law at page 110 of the record of appeal in the judgment of that Court. That is to say where there is a dispute as to a Will especially with respect to the testamentary capacity of the testator, those who propounded the Will must closely show by evidence that prima facie all is in order***  
C ***in respect of the Will.*** See the cases of Johnson & Anor. v. Maja & Ors. (1951) 13 WACA 290 at 292; Adebajo v. Adebajo (1973) 1 All N.L.R. 361 and Okelola v. Boyle (1998) 2 N.W.L.R. (Pt. 539) 533 at 549 where Ogundare, JSC (of blessed memory) after very closely examining previous decisions on the subject said -  
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E *“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*  
F *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.”*

***It is important to observe that the prevailing situation in the present case is not the same as in the above cases relied upon by the Appellants where the question of revocation of probate already granted to the propounders of the Will was not in issue. In the present case, although the 2nd and 3rd Respondents were the propounders of the Will of the deceased***  
G ***dated 6th July, 1988, the inaction on the part of the Appellants in challenging the grant of probate on the Will before the grant was made, had brought a new dimension to the case of the Appellants now pending at the trial Court. This is because the Appellants in their action are not only challenging the genu-***  
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**ineness and authenticity of the Will which they claimed was not even in existence but are also challenging the grant of probate which they are urging the trial Court in their statement of claim, to set aside and declare that the deceased died intestate. In otherwords, the Plaintiffs/Appellants in their action have to scale the hurdle of invalidating the grant of probate of the will made to the Defendants/Respondents before facing their main claim touching on the validity of the Will itself where the law expects the Defendants/Respondents as propounders of the Will to begin if the grant of probate were not challenged. Therefore, it is my view that as far as the claim for the revocation of grant of probate already made is concerned, the ball is in the court of the Plaintiffs/Appellants to begin to call evidence at the trial Court as found by the two Courts below. This issue is thus resolved against the Appellants.**

The second issue in the Appellant's brief of argument is whether or not the Court of Appeal had not by its pronouncement prejudged and pre-empted the substantive matter at the High Court. The learned Appellants Counsel quoted from judgment of the Court of Appeal at pp 113-114 of the record of appeal where the Court observed -

*"The only issue framed in the Appellants' brief on behalf of the Appellants which reads as follows -*

*'Upon whom, as between the Plaintiffs and the Defendants is the burden of proof thrown by the nature of the material issues between them', is resolved against them. The nature of Appellants claim places the burden of proof on the Appellants who failed to discharge same.'* and argued that the Court below by holding that the Appellants had failed to discharge the burden of proof said to be placed upon them, that Court had inadvertently prejudged the main issue in the case at the trial Court yet to be heard. Learned Counsel therefore urged this Court to set aside the ruling of the Court below for delving into the main issue of the substantive case in the interlocutory ruling, a practice admonished by this Court in several decisions including *Shahu v. Afribank Nig. Plc. (2002) 17 NWLR (pt. 795) 230.*

The learned Counsel to the Defendants/Respondents' stand on the second issue for determination however is that the issue as framed is based on an obiter of the Court of Appeal which by law is

not appealable. All the same, the learned Counsel contended that the statement made by the Court of Appeal in its judgment being complained of in this issue, did not amount to the Court of Appeal delving into the main claims of the Plaintiffs/Appellants still pending at the trial Court and therefore urged this Court to resolve this issue against the Appellants.

***I have earlier in this judgment quoted the part of the judgment of the Court below being attacked by the Appellants in this issue. What the Appellants are quarrelling with is the statement by the Court below that-***

***“The nature of the Appellants claim places the burden of proof on the Appellants who failed to discharge the same.”***

***This statement says exactly what the Appellants failed to do at the trial Court when that Court, having regard to the nature of the case of the Appellants then on trial, asked the Appellants in its ruling to start their case by calling their witnesses but they refused and decided to appeal against the ruling to the Court of Appeal. That statement does not amount to the Court below delving into the main or substantive issues in the claims of the Appellants at all which were still waiting to be heard at the trial Court. The statement being complained of by the Appellants when closely examined in its context, it is very clear even beyond argument that the Court below did not delve into the main claims of the Appellants which still remain intact waiting to be moved for hearing when the Appellants are ready to call evidence in support of the reliefs claimed by them that the trial court should revoke the grant of probate on the deceased last Will, pronounce against the force and validity of the Will, the existence of which the Appellants are contesting and the declaration that the deceased died intestate. The comments of the Court below therefore had not prejudged nor pre-empted the substantive case of the Appellants which is still pending at the trial Court, to justify the setting aside of the ruling of the Court below as claimed by the Appellants in this second issue which is hereby resolved against the Appellants.***

The case of Odutola v. Mabogunje (2013) 7 NWLR (Pt. 1354) 522, made available to the Court by the learned Counsel to the

Appellants after the appeal had been reserved for judgment, is not directly relevant to the present case. This is because the case did not decide the main issue in the present case as to who between the Appellants and the Respondents should begin to call evidence at the hearing of the case at the trial Court. The issues raised in the Appellants brief of argument in that case of *Odutola v. Mabogunje* (supra) seen at pages 542 - 543 of the report and which issues were considered and resolved in the judgment of this Court are -

*“1. Whether the learned Justices of the Court of Appeal were right in view of the totality of the evidence adduced before the trial Court on the issue of testamentary capacity in re-evaluating the evidence and arriving at the conclusion that Chief Timothy Adeola Odutola has testamentary capacity at the time he purportedly made exhibits A and A1.*

*2. Whether the learned Justices of the Court of Appeal were right in re-evaluating the evidence adduced by both parties at the trial Court on the issue of signature and arriving at the conclusion that late Chief Timothy Adeola Odutola signed Exhibit A and A1 (Will and Codicil dated 23rd November, 1993 and 14th of March, 1994 Respectively).*

*3. Whether the learned Justices of the Court of Appeal were right in holding that the onus was on the Plaintiffs (Appellants) to prove that the sound disposing mind of the deceased that they acknowledged to have existed up to 8th of April, 1993, no longer existed as at the time the alleged Will and Codicil (exhibits A and A1) were signed.*

*4. Whether the learned Justices of the Court of Appeal were right in holding that by necessary implication from content of paragraph 4(1) of the statement of claim the Plaintiffs (Appellants’) case is that the signature of the deceased at the foot or end of exhibits A and A1 were forged which allegation had to be proved beyond reasonable doubt.”*

Although the first set of Respondents, 1st, 2nd and 3rd Respondents and the second set of Respondents, 4th and 5th Respondents in that case both formulated three issues each for the determination of the appeal in their respective Respondents briefs of argument, the issues were virtually the same in contents as those formulated in the Appellants’ brief of argument. In otherwords, all the is-

sues raised by the parties and resolved by this Court in that appeal in *Odutola v. Mabogunje* (supra), were complaining against the re-evaluation of the evidence adduced by the parties at the trial Court by the Court of Appeal before coming to the conclusion that the Will and the codicil Exhibits A and A1, were properly executed by the deceased. The decision of this Court in *Odutola v. Mabogunje* (supra) therefore, is not relevant to the present case. The opening remarks made by Rhodes Vivour JSC at the beginning of the lead judgment in that case, is merely a restatement of the law in the case of *Adebajo v. Adebajo* (1973) 8 N.S.C.C. 204 and can by no means be regarded as part of the ratio decidendi of this Court in that case to warrant our being bound by it in the present case. See *Clement v. Iwuanyanwu* (1989) 3 N.W.L.R. (Pt. 107) 39 at 53 - 54.

As for the case of *Ewete v. Gyang* (2003) 6 N.W.L.R. (Pt. 816) 345, also forward by the learned senior counsel to the Appellant as additional authority being a decision of full Court, I am afraid I cannot find a place for it in the present case in the absence of any application or call by any of the parties in the present case to depart from our previous decisions.

It is indeed very unfortunate that this simple probate matter which commenced since November, 1989 after the death of the deceased who died on 12th March, 1989, is still pending unheard at the trial Court after nearly 24 years while the estate left behind by the deceased remained not administered between the beneficiaries. For whatever reason that was responsible for this very sad situation, learned Counsel to the Appellants should largely share the blame. It is indeed very unfortunate.

In the result, this appeal must fail and the same is hereby dismissed. The decision of the trial Court of 26th February 2001 as affirmed by Court of Appeal in its judgment on 13th March, 2007 that Appellants were the parties to start their case by calling evidence first, is hereby further affirmed. I am not making any order on costs.

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### **ARIWOOLA JSC**

This appeal is against the interlocutory order of the Court below made on 13th March, 2007 dismissing the appellants' application with the conclusion that the plaintiffs rather than the Defendants



should be the party to lead evidence first in proof of their case when the trial of the action begins.

The facts of the case briefly are as follows-the plaintiff-Chief Eyo Edem Nsefik - now deceased had sued the defendants where he claimed as the lawful husband and one of those entitled in the event of intestacy to share in the estate of Mrs. Teresa Ekpenyong Nsefik, late, of Lagos who died on 12th March, 1989 and to have probate of a pretended Will of the said deceased, granted on 24th October, 1989, to the defendants, revoked and for declaration that the deceased died intestate.

The case of the plaintiffs now appellants as contained in the amended statement of claim was that the pretended Will was not duly executed in accordance with the provisions of the Will Act, 1837, and that at the time the said Will was executed she was suffering from kidney failure, diabetes mellitus and complicated high blood pressure and therefore neither gave any instruction nor was she capable of comprehending anything, as she was not of sound physical condition, mind, memory and understanding.

On the other hand, the defendants now respondents in their statement of defence contended that the will propounded by them was validly and legally made by the Testator and was duly executed in accordance with the Will Act, 1837. They also pleaded that the deceased, at the time she made the Will was of sound mind, memory and understanding and that she approved the contents of the Will.

Pleadings had been completed in the suit and trial had begun before Hon. Justice A. A. Aka (now of blessed memory). At the trial, the defendants led evidence first after they lodged their grant with the court registrar. However, before the plaintiffs now appellants could open their case, the trial Judge died and the case was transferred to Bode Rhodes-Vivour, J. (as he then was) now of the Supreme Court.

The trial was about to begin de novo but respondents then refused to open as they did earlier. Both counsel addressed the court and before the ruling could be delivered, plaintiff died and was substituted by an order of court with his children who are now Appellants.

In the ruling on which party was to begin and call evidence first, the trial court ruled on 26/2/2001 that the plaintiffs were to open by calling evidence first.

Upon being dissatisfied with the ruling, the appellants appealed to the court below which appeal was dismissed leading to the instant. The main issue as distilled for determination by both parties in this court is -

*“Whether or not the Court of Appeal was right in holding that the burden of proof in the circumstances is first cast on the Appellants and that it is the Appellants that must first lead evidence”.*

In arguing this issue, the appellants stated clearly and rightly too that there is no dispute whatsoever that their action is one on probate. It was contended that in probate action, the law is that where there is a dispute concerning the Will, the party to begin calling evidence is that party that put forward the Will as the last true Will of the Testator. They conceded that the Court below correctly stated the position of the law at paragraph 2 of page 110 of the record. They relied on the following - Halsbury’s Laws of England, 4th Edition Volume 17, page 475 paragraphs 903. *Johnson & Anor v. Maja & Ors.* 13 WACA 290 at 292.

The appellants further contended that there is no dispute that it is the Respondents that put forward the Will in question. It was submitted that the position taken by the Court below that it is the appellants that should call evidence first is erroneous for the following reasons -

(a) That it ignored the principle underscored by several high authorities that in a probate action where there is a dispute concerning the Will, the party to begin is the party putting forward the Will and asserting that it is the true last Will of the testator.

(b) It drew a distinction without any statutory or judicial authority or valid basis between a probate action taken before probate is granted and one taken after the grant or probate.

(c) It failed to appreciate that the Appellants action was a legitimate challenge to the validity of the Will and therefore raised a dispute concerning the Will.

(d) It misconceived the nature of the Appellants’ action which was not to revoke the Will (as erroneously held by the Appeal Court) but to revoke the grant and pronounce against the Will.

(e) It ignored the fact that the respondents themselves had counter-claimed for the court to pronounce the disputed Will in solemn.

It was contended that the appellants' action at the trial court sought to revoke the grant of Probate of the Will to the Respondents on the ground that the will was invalid in that;

(a) It was not duly executed in accordance with the provisions of the Wills Act, 1837 and that at the time the alleged will was executed the testator did not know and approve of the contents; B

(b) At the time the Will was purported to have been executed the testator was not of sound physical condition, mind, memory and understanding.

It was submitted that the action of the appellants thus raised a clear dispute as to the validity of the Will. C

Reference was made to paragraph 1 of the Respondents counter claim which was filed after the grant of probate to them. It was contended that both the Appellants action and the Respondents counter claim raised a dispute as to the validity of the Will. The appellants submitted that, the validity of the Will having been disputed, the onus is on the party who put forward the Will, in this case, the Respondents, to first satisfy the conscience of the court that the Will so put forward or propounded by them is the action of a free agent who knew and approved of the contents of the will at the time she executed it. E

It was further submitted by the appellants that in the face of the authorities, the court below was obliged to hold that, being a probate action which challenged the validity of the Will and thus raised a dispute about the Will, the Respondents were the party to begin in order to establish and prove affirmatively that the Will was the act of a testator who was a free agent. F

The appellants contended that the critical point that the court below overlooked or failed to appreciate, is that once there is a dispute about the validity of the Will, the onus is always on the party putting the Will forward as the true and last Will of the deceased, to begin. It was submitted that it does not matter that the plaintiffs' action raising the dispute was instituted before or after probate had been granted. They referred to Halsbury's Law of England, 4th Edition paragraph 1065 page 555. On this issue they urged the court to allow the appeal and grant the relief sought by the appellants. H

In responding to this issue, the respondents referred the court to the concurring findings of the two courts below which led to their

decision that the appellants are the party to commence leading evidence at the trial of this matter before the Lagos State High Court. It was submitted that this court will not ordinarily disturb the concurrent findings of facts unless they are wrong, perverse or where a miscarriage of justice has been occasioned, relying on *Awoyoolu v.*

B Aro (2006) 18 WRN 1.

Respondents further submitted that it is undisputed before this court that they had obtained the grant of probate of the Will of late Mrs. T. E. Nsefik without any caveat being entered against the grant.

C Reference was made to the stand of the court below on the position of the law who moves first at the trial in an action on probate.

It was contended that before any Will is admitted to probate it must first be proved before being admitted to probate, they referred to Williams on Executors and Administrators, 13th Edition at page D 75 article III. And Order 55, High Court of Lagos State (Civil Procedure) Rules, 2004 dealing with Probate and Administration. It was submitted that the stand of the trial court based on the materials before it, which was affirmed by the court below, that the appellants are to call evidence first as plaintiffs in the circumstances of their case, E supported by the Rules of Court on the matter. They urged the Court to dismiss the appeal.

There is no doubt, this is a probate action. *“Probate is the judicial procedure by which a testamentary document is established to be valid Will”*. In other words, it is the proving of a Will to the F satisfaction of the Court. Therefore, unless it is set aside, the probate of a Will is conclusive upon the parties to the proceedings and other persons who had notice of them on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the Will. However, it should be noted that, probate does not G preclude inquiry into the validity of the Will’s provisions or on their proper construction or legal effect. See Blacks Law Dictionary, Ninth Edition pages 1321 - 1322.

Probate in common form is one granted in the registry of the H court without any formal procedure in court. This is done on an ex parte application of the executor. But the decision is subject to being reopened by a party who has not been given notice. Whereas, probate in solemn form is one granted in open court, as a final decree, when all interested parties have been given notice. The judgment is

final for all parties who have had notice of the proceeding, unless a later Will of the testator is discovered. See Blacks Law Dictionary, Ninth Edition, (supra).

From the records, it is clear that upon the death of the testator of the testamentary document in question in this case, pursuant to the application of the 2nd and 3rd Respondents, probate was granted. B The respondents had contended that the probate was granted upon due consideration of all appropriate documents filed, estate fees paid and all inquiries by the court satisfactorily answered.

The appellants' action was instituted after the grant of probate to pray that the said probate should be revoked and the court should pronounce against the force and validity of the Will. Also sought is a declaration that the deceased died intestate. C

It is equally very clear in the findings of the court below on record that the respondents as defendants at the trial court were the propounders of the Will as set out in their counter claim. It was held that in that circumstance the burden of proof rest on the party propounding the Will. The Will is being propounded when an application is lodged by the executors, with the Probate Registrar. It was held that it is during the pendency of the application for grant of probate at the registry of the court, and there is a dispute as to the validity of the Will that the propounders of the Will have the burden to manifestly establish by credible evidence, prima facie that there has been due execution and that the testator had the necessary and required capacity as a free and capable testator. This is the time the propounders have the burden of proof and duty to commence by calling evidence first. D E F

In other words, there are two stages following the death of a person with a testamentary document to guide the administration of the deceased's estate. First is when a testamentary document is being propounded by the executors and secondly after probate has been granted to the executors upon their application. G

In the action following a dispute when a Will is being propounded, it is the duty of and the burden lies on the propounders of the Will to start the calling of witnesses to prove that all required legal conditions of making a valid testamentary document were met including the mental and physical capacities of the deceased. H

On the second stage, when there was no caveat entered after

receiving notice from the Probate Registrar, in the action by an aggrieved party subsequently challenging the grant of probate, the Will is no longer being propounded. It has passed the stage of proving. The attackers of the validity of the Will who are seeking an order revoking the probate have the burden on this second stage to prove, B inter-alia, that the testamentary document was not validly executed and therefore probate was granted in error. They are to start the hearing before the trial court but not the executors whom the law presume to be entitled to administer the estate referred to in the Will on probate. C

In *Okelola v. Boyle* (1998) 2 NWLR (pt 539) 533; (1998) 1-2 SC 60; (1998) LPELR - SC - 30/1993, this court opined as follows:

*“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... to refer only to the first stage... 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... 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 ...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.”* See *Adebayo V. Adebayo* (1973) 1 All NLR 361; (1973), ANLR 297; *Tyrell V. Painton* (1894) P. 151. D E F

I must state clearly that in the action instituted by the appellants as plaintiffs before the trial court when the respondents were defendants, the respondents herein cannot be said to be in court on the appellants’ claim to be there to propound the testamentary document in question. Upon probate, the law presumed that the Will had H been proved and the challengers have the burden to prove the Registrar wrong.

However, in paragraph 3.12 of the appellants’ brief of argument, they referred to the counter claim of the respondents where they “counter claimed that the court do pronounce in solemn form

*of law for the said Will dated 6th July, 1988 propounded by the 2nd and 3rd defendants as constituting the true last Wills of the deceased.”*

It is note worthy that the appellants contended that both the plaintiffs/appellants action and the respondents counter claim raise a dispute as to the validity of the Will. It was submitted that the validity of the Will having been disputed, the onus is on the party who put forward the Will in this case, the Respondents to first satisfy the conscience of the court that the Will so put forward or propounded by them is the action of a free agent who knew and approved of the contents of the Will at the time she executed it.

As I stated earlier, in the appellants’ action at the trial court, the respondents were not there propounding the Will. It was an action by the appellants attacking the probate. But in the respondents’ counter claim, they may, in defence of their probate be seeking the court’s pronouncement in solemn form of law.

A counter claim is a distinct cause of action and has all the tapestry of an action. It is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. It must, however, be directly related to the principal claim but not outside and independent of the subject matter of the claim. See *Oyegbola V. Esso West Africa* (1966) 1 All NLR 170.

On the established practice and procedure, in an action seeking an order of court against probate after a Will had been propounded and proved, it is the duty of the plaintiff to start off the hearing to substantiate his assertion against the Will and the probate. In the counter claim of the respondents, as the saying goes, “*when the court gets to the bridge, it will cross it.*” The counter claimants have the burden to establish their counter claim, failure of which the counter claim will be liable to dismissal. The Evidence act is clear on this that the burden of proof in a suit or proceedings lies on that party who would fail if no evidence at all were given on either side. See; Sections 136 and 137(1), Evidence Act. *Duru v. Nwosu* (1989) 4 NWLR (pt 113) 24; *Sanusi V. Ameyogun* (1992) 4 NWLR (pt 237) 527; *Adegoke V. Adibi* (1992) 5 NWLR (pt 242) 410; *Dangote V. Civil Service Commission Plateau State* (2001) 4 SC (pt 11) 43.

Accordingly, the court below was right in holding that the burden of proof in the circumstances of this case lies on the appellants and that they must first lead evidence before the trial court.

For the above reasons and the detailed reasoning of my learned brother, Mahmud Mohammed, JSC in his lead judgment just delivered with which I entirely agree, I hold that this rather unnecessary interlocutory appeal is lacking in merit and should be dismissed. I also dismiss same and abide by the consequential order contained in  
B the lead judgment.

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### **AKA'AH'S JSC**

I read in draft the lucid judgment of my learned brother, Mahmud Mohammed, JSC and I entirely agree that the appeal lacks merit. The challenge the appellants are making on the validity of the Will of late Mrs. Teresa Ekpenyong Nsefik dated 6th July, 1988 and insisting that the respondents should lead evidence is rather curious  
D since probate was granted before the action leading to this appeal was instituted. Before Probate is granted, the Registry usually publishes a Notice to enable any interested party to enter a caveat usually to contest the Will. It is at this stage that the propounder of the Will is required to prove that the Will is valid and that the testator had the  
E mental capacity to make the Will See: Okelola v. Boyle (1998) 2 NWLR (Pt.539) 533. Hence learned counsel for the respondents is right in submitting that the respondents having applied and obtained probate of the Will of the deceased in the High Court of Lagos without any caveat being entered by the appellants against the grant, the  
F onus lies on the appellants who woke up late to challenge the Will, to start calling evidence to prove their case. For a court to reverse itself on a completed action, it is the party alleging that the earlier decision of the court should be set aside to lead evidence to that effect. They  
G stand to lose if no evidence is called on either side.

This appeal is not only frivolous but time wasting. It is accordingly dismissed. The decisions of the two lower courts are hereby further affirmed.

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H

### **KEKERE-EKUN JSC**

I have had the advantage of reading in draft the lead judgment of my learned brother, Mahmud Mohammed, JSC just delivered. I agree entirely with the reasoning and conclusion that the ap-



peal lacks merit and should be dismissed.

The narrow issue for determination in this appeal is who, as between the appellants and respondents, should lead evidence first in proof of their case before the trial court. The appeal is against the concurrent decisions of the High Court of Lagos State delivered on 26/2/2001 and of the Court of Appeal (Lagos Division) made on 13/3/2007 ordering the plaintiffs to lead evidence first. B

The original plaintiff (Chief Eyo Edem Nsefik, now deceased) claimed as per his Amended Statement of Claim at the High Court of Lagos State as the lawful husband and one of those entitled in the event of intestacy to share in the estate of Mrs. Teresa Ekpenyong Nsefik who died on 12/3/89. He also sought to have the probate of the will of the deceased granted to the defendants on 24/10/89 revoked and for a declaration that the deceased died intestate. C

The plaintiffs contended that the Will was not duly executed in accordance with the Wills Act 1837 and that at the time the will was executed, the testator was suffering from various ailments that rendered her incapable of giving instructions or of comprehending anything. D

The defendants in their pleading contended that the Will propounded by them was duly executed in accordance with the Wills Act and that at the time of making the Will, the testator was of sound mind and that she understood and approved the contents of the will. They also set up a counterclaim in which they propounded two earlier Wills as an alternative claim. Trial initially commenced before Aka, J. with the defendants leading evidence first. Aka, J. died before the plaintiffs could open their case. The case was transferred to Bode Rhodes-Vivour, J. (as he then was). The issue then arose as to who was to start leading evidence. In a considered ruling delivered on 26/2/01, the court held that the plaintiff was to begin. The appellant was dissatisfied with the decision and appealed against it to the lower court, which dismissed the appeal on 13/3/07. Upon further appeal to this court, the appellant formulated two issues for determination to wit: E

(1) Whether Court of Appeal was right in holding that the burden of proof in the circumstances is first cast on the Appellants and that it is the appellants who must first lead evidence. F

(2) Whether or not the Court of Appeal had by its pronouncement prejudged and pre-empted the substantive matter at the High G

Court.

My comments in support of the lead judgment are in respect of issue 1.

It is the appellants' contention that the burden of proof in a probate action where there is a dispute concerning a will is different from the burden of proof in ordinary civil actions. While it is conceded that the burden of proof in civil cases rests on he who asserts, it is contended that in probate actions it is the person who propounds the will who must lead evidence first. In other words, where the validity of a will is challenged the onus of proving that it is valid is on those who hold it out to be so. The position of the respondents on the other hand is that while it is conceded that in a probate action the onus of proof ordinarily lies on those propounding the will, the circumstances of the instant case are different, as there has been an intervening event between the setting up of the will and the appellants' challenge of same, namely the grant of probate. They contend that since the challenge to the will came after Probate had been granted the onus was on the appellants to substantiate their claim that it is invalid.

Blacks Law Dictionary (8th edition) at page 1256 defines the "propounder" of a will as "an executor or administrator who offers a will or other testamentary document for admission to probate." Proceedings for the administration of estates in the instant case are governed by the High Court Law of Lagos State, 1994 and the rules of procedure made there under. There are two procedures for the grant of probate of a will. Probate may be granted either in common form or in solemn form. An application for the grant of probate in common form is usually made ex-parte. The procedure is carried out by the Registrar of the High court upon an application by the executor (s). It involves establishing that it was in fact the testator (the maker of the Will) who died; that the Will was properly signed and attested and that the executors have been appointed. The procedure is usually employed where it is not anticipated that there would be any challenge to the grant. Once those requirements have been fulfilled and there is no caveat entered against the grant, as in the instant case, the propounders of the will would have made out a prima facie case of entitlement to the grant. On the other hand, where the Will is being contested, it would involve a trial at the High Court. The ex-

ecutors must apply in solemn form which means a statement of claim is filed under the standard procedure for civil proceedings in the High Court. The party who is contesting the Will would be named as a defendant. He would then have the opportunity of filing a statement of defence and/or a counter claim if he so desires. In a situation where the executors are applying for the grant of probate in solemn form it is not in doubt that they are propounding the will and must begin by leading evidence to show, *prima facie*, that the testator had the necessary testamentary capacity to make the will and that there was due execution. See: Halsbury's Laws of England (4th edition) Vol. 17 page 475 paragraph 903. Thereafter the onus would shift to the challenger to disprove the assertion.

In the instant case, I agree with the two lower courts that having already been granted probate, the respondents are no longer propounding the will. It is the appellants who would fail if no evidence were led in the case. It is also relevant to observe that a counter claim is a distinct action in its own right even though made a part of the main claim. It would not fall for consideration until the main claim has been determined. A separate decision would be given in respect of the counter claim. *Jeric (Nig.) Ltd. v. U.B.N. Plc.* (2000) 12 SC (pt. II) 133; *Obmiami Brick & Stone Nig. Ltd. v. A.C.B. Ltd.* (1992) 3 NWLR (Pt. 229) 260. After all, at the conclusion of the main trial the counter claimant is at liberty to abandon his counter claim, if he so desires. I am of the considered view that the fact that the respondents have a counter claim wherein they are seeking a declaration in common form of the will in question does not relieve the appellants of beginning by leading evidence first in respect of the main claim.

In defence of the appellants' claim, the respondents would no doubt be required to prove that the grant of probate was validly made. This does not mean that they must begin by leading evidence first. If no evidence were led on either side, the grant of Probate already made by the High Court of Lagos State would subsist. The several authorities relied upon by learned counsel for the appellants, such as *Okelola V. Boyle* (1998) 2 NWLR (Pt. 539) 533 and *Johnson V. Maja* 13 WACA 290 do not deal with which of the parties to the suit should begin leading evidence. The purport of the decisions, which is not disputed, is that when a will is challenged, the propounder has the onus of proving that all the legal requirements were fulfilled and

that the testator had the necessary testamentary capacity to make the will. Thus once all the evidence has been led in the case, the learned trial Judge in evaluating the evidence would begin by considering the evidence of the propounders of the will to determine whether they have shown, prima facie, that the will was validly made. In the recent  
B decision of this Court in *Odutola V. Mabogunje* (2013) 7 NWLR (pt. 1354) 522, made available to the court by learned counsel for the appellants after the case had been reserved for judgment, the issue of which of the parties should begin to lead evidence did not arise for  
C determination. The observation of His Lordship, Rhodes-Vivour, JSC at page 541 of the report in the course of introducing the appeal prior to dealing with the merits, to wit: *“The learned trial Judge was right to commence proceedings with the evidence of the defendant”*, can only be regarded as obiter.

D Having regard to the facts and circumstances of this case, I agree with my learned brother, Mohammed, JSC in the lead judgment that the decision of the lower court has not been shown to be perverse and there is no reason to interfere with it.

Before concluding, it must be noted that it is most unfortunate  
E that the main trial in this matter, instituted in the year 2000, is yet to commence at the trial court on account of the appeals to the lower court and this court on such a narrow issue. Throughout the submissions in the appellants’ brief there is nowhere that it is shown that  
F leading evidence first would have occasioned a miscarriage of justice. What would the appellants have lost if they had led evidence first? The important issue at the end of the day is whether the court correctly evaluates the evidence before it to arrive at a just decision. So much judicial time and expense has been wasted to the detriment of  
G the ultimate beneficiaries of the estate of the deceased. Sadly the eventual decision on the merit may also travel all the way up to this court. The overall interest of the parties should be the main consideration in matters of this nature.

For these and the more detailed reasoning contained in the  
H lead judgment, I also find no merit in the appeal and dismiss it accordingly. I abide by the consequential orders contained in the lead judgment.