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BURDEN OF PROOF AND ORDER OF PROCEEDINGS IN PROBATE ACTIONS IN NIGERIA

BEING A PAPER PRESENTED BY OBINNA AKPUCHUKWU, ESQ AT THE MONTHLY MEETING OF THE NIGERIAN BAR ASSOCIATION, ONITSHA BRANCH HELD ON THE 30TH OF JUNE, 2017 AT THE SIR LOUIS MBANEFO BAR CENTER, ONITSHA, ANAMBRA STATE NIGERIA.*

INTRODUCTION:

The demise of a person comes with it some legal implications especially as it has to do with the inheritance of the deceased estate. The deceased may have died testate (where he made a Will that covered all his estate which he had the right to bequest to another), or intestate (where the deceased did not make a Will) or partial intestate (where he made a valid Will which did not cover some of his estate). The scope of this paper covers were the deceased died either testate or partial intestate and there is a challenge as to the validity of the supposed Will of the deceased.

Central in a suit challenging the validity of a Will or one seeking to validate a Will is the issue of who has the burden to prove any particular fact or set of facts. This may appear simple, but when one bends back and approaches the issue especially on the bedrock of the fact that probate suits are *sui generis* on questions of burden of proof, one would better appreciate the complexities that are associated with it. This paper therefore attempts a voyage into the intricacies of the apportionment of burden of proof, the

oscillation of the pendulum of evidential burden and consequently, the order of proceedings in probate disputes were the validity of a Will is being challenged.

It is hoped that at the end of this paper, judges, probate registrars, legal practitioners and indeed the litigants would better understand the law and procedure relating to the burden of proof and the order of calling evidence in probate disputes where the validity of a Will is being challenged.

BURDEN OF PROOF

MEANING OF BURDEN OF PROOF

The phrase burden of proof (onus probandi) has been greeted with various definitions both in judicial authorities and by learned authors. According to the Black's Law Dictionary 6th Edition,

"in the law of Evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties on a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the triers of fact or the court".

The learned authors of "Phipson on Evidence", 2005, 6th Ed (Sweet and Maxwell P. 125) stated thus:

"The phrase "burden of proof" is used to describe the duty which lies on one or other of the parties either to establish a case or to establish the facts upon a particular issue".

In **Elemo v. Omolade (1968) NMLR 359**, it was held that burden of proof has two distinct and frequently confusing meanings, it means:

i) The burden of proof as a matter of law and pleading i.e. the burden as it has been called of establishing a case whether by preponderance of evidence or beyond reasonable doubt, and

ii) the Burden of proof in the sense of introducing evidence.

Furthermore, in **INEC v. Ifeanyi (2010) 1 NWLR (Pt. 1174) 98** at 121-122, the Court of Appeal per Ariwoola, JCA (as he then was) said that:

"The phrase, "burden of proof" in civil cases has been held to have two distinct and frequently confused meaning. Firstly, it may mean the burden of proof as a matter of law and the pleadings, usually referred as the legal burden or the burden of establishing a case; secondly, the burden of proof in the sense of adducing evidence, often referred to as the evidential burden. While the burden of proof in the first sense is always stable and static, the burden of proof in the second sense may shift constantly as one scale of evidence or the other preponderates. See **MSC. Ezemba v. S.O Ibeneme & Anor. (2004) 40 WRN 1 at 25, (2004) 14 NWLR (Pt. 894) 617; Felix O. Osawaru v. Simon Ezeiruka (1978) 6 and 7 S.C. 135 at 145; Odukwe Vs. Ogunbiyi (1998) 8 NWLR (Pt. 561) 339 at 353**".

Similarly, in **Gbinijie Vs. Odji (2011) 4 NWLR (Pt.1236) 103 at 127**

Paras A-C Amina Augie, JCA (as he then was) explained it thus:

> *"It must also be remembered that the term "burden of proof" is used in two different senses. In the first sense, it means the burden on a party to persuade the court that his case is true and consequently, to have the case established and judgment given in his favour. This burden is always stable and remains on the same party.*
>
> *The other meaning of burden of proof is the obligation to adduce evidence on a particular fact or issue and unlike the burden on the pleadings or the legal burden, this burden is not fixed but shifts from one party to another. What this means is that when a party bearing evidential burden has discharged if by adducing the requisite evidence on the particular fact, then his opponent comes under another evidential burden either to disprove the fact or neutralize the evidence by proving other facts*. See **Nwadialo –Modern Nigerian Law of Evidence, 2nd Ed, Sokowo v. Kpongbo (2008) 2 NWLR (Pt.1086) 342 SC; Nwaru v. Okoye (2008) 18 NWLR (Pt.1118) 29 SC**

LEGAL BURDEN

Legal burden connotes the obligation imposed on a party by a rule of law to prove (or disprove) a fact in issue to the requisite standard of proof. A person who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question. This burden

rests upon a party whether Plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleading and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleading places it. It never shifts and it is always stable. See **Okoye v. Nwankwo (2014) 15 NWLR (pt.1429) 93 at 133-134 SC**.

The statutory imprimatur for the Legal burden of proof in Nigeria can be found in Section 131 of the Evidence Act, 2011 which provides thus:

Section 131

1) *Whoever desires any court to give judgment as to say legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.*

2) *when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

From the tenets of Section 131 (1) of the Evidence Act, the legal burden of proof is fixed. Thus, any party alleging any specific fact is under duty to prove that fact, and if he fails to prove it, the issue flowing from that fact may be resolved against him. See **Amadi – Contemporary Law of Evidence in Nigeria Vol. 11 (Pearls Publishers, 2012)**.

In civil cases, pleadings delineate the facts in issue. See **Ukaegbu v. Ugoji (1999) 6 NWLR (Pt.196) 127 at 150**. Unlike the general burden, the legal

burden rests on any party (whether the Plaintiff or the Defendant) who substantially asserts the affirmative of the issue. This category of burden is fixed at the beginning of the trial by the State of the pleadings; it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it. See **Imana v. Robinson (1979) 3-4 SC 1.**

The burden is normally on the Plaintiff, where the Defendant denies, to establish the allegation in the statement of claim with a view to proving the case as put by him. This is because the burden lies on the party that substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all the parties, the party who has this burden has not discharged it, the decision must be against him. See **Pickup v. Thames Insu W. Railway (1886) 12 App, Cas 41 at 45**. This Principle is an Ancient rule founded on consideration of good sense and it is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case. See **Joseph Constantine Steamship Line, Ltd v. Imperial Smelting Corporation (1942) A C 154 at 174 per Lord Maughan**.

Further, in deciding which party asserts the affirmative, regard must be had to the substance of the issue, where it forms an essential part of a party's case, the proof of which, whether affirmative or negative, must rest on he who makes the assertion – See **Soward v. Leggatt (1836) 7 P. 613, Abrath Vs. North Eastern Railway (1883) 11 QB 440 at 457, per Bowen L.J; Doe v. Johnson (1844) 7 M & Gr 1047, per Tindal, C J; Okoye Vs. Nwankwo** (supra).

It must however be noted that the above rule that the burden of proof on the pleadings is usually on the Plaintiff is not immutable. Like all general

rules, it is pregnant with its own exceptions, which may extend but not limited to the following:

i) The incidence of the burden placed on the Plaintiff can be modified by the pleadings, particularly where the defendant introduces a new issue which will require him to lead evidence in establishing that new issue. This does not necessarily have to do with a counter claim which is an independent claim of itself which necessitates evidence from the Defendant/Counter Claimant.

ii) When a rebuttable presumption of law exists in favour of a party, the onus is on the other side to rebut it.

iii) When any fact is especially within the knowledge of a defendant and upon which he would want rely, the burden of proving it is on him. See Okoye Vs. Nwankwo (supra) per I.T. Muhammad JSC at 135.

EVIDENTIAL BURDEN

Unlike the legal burden that is fixed, the evidential burden of proof swings like a pendulum, from one party to another until the question is resolved one way or another.

In civil suits, the statutory backing of evidential burden can be found in

Section 133 (2) of the Evidence Act which provides as follows:

> "*If the party referred to in subsection (1) of this Section adduces evidence which ought reasonably to satisfy the Court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with*".

Flowing from the above, in respect of particular facts, the burden rests on the person against whom judgment would be delivered if no evidence were produced in respect of those facts. See **Are vs. Adisa (1967) 1 NMLR 303 and Osawaru v. Ezeiruka (1978) 6-7 SC 135**.

We must however keep in mind that the rule that the burden of proof swings like a pendulum from one side to another is subject to the fact that it is proved on one side, and therefore shifts to the other side for rebuttal. If the burden is not discharged where it naturally rests, it cannot shift. If it shifts to the other side, and no evidence introduced to make it return, it remains. See **Ukpo Vs. Ngaji (2010) 1 NWLR (Pt.1174) 175 CA; Ayogu Vs. Nnamani (2006) 8 NWLR (Pt.981) 160 CA; Unipetrol (Nig.) Plc Vs. Adireje West Africa Ltd (2005) 14 NWLR (pt.946) 563 CA**.

Furthermore, as Amadi noted in his book "Cotemporary Law of Evidence in Nigeria vol. 11 Page 1431

> *"As part of the incidents of Section 133 (2) of the Evidence Act, where the burden of proof is discharged where originally stood by virtue of the parties' pleadings and the presumption that may be drawn, it shifts to the adverse party to adduce evidence to the contrary or rebut what his adversary has adduced.*

Where no evidence is adduced on the opposite side then judgment may be given against that side with respect to the particular issue in controversy".

Thus, in **Jinadu v. Esurombi –Aro (2005) 14 NWLR (Pt.944) 142 CA**, it was held that where the Claimant proved that he sent the disputed letter to the defendant, then the burden shifts to the defendant to lead credible evidence that he did not receive the letter.

BURDEN OF PROOF IN PROBATE MATTERS

MEANING OF A WILL

The word **"Will"** has two district meanings. The first and strict meaning is metaphysical, and denotes the sum of what the testator wishes or "wills" to happen on his death. The second and more common meaning is physical and denotes the document or documents in which the intention is expressed. See **Kwentoh v.**

Kwentoh (2010) 5 NWLR (Pt.1188) 543 at 562 para H per Ariwoola, JCA (as he then was).

A Will is a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his

personal representatives otherwise known as his executors, who administers his estate in accordance with the wishes manifested in the Will. See **Abayomi- Wills: Law and Practice (2004, Mbeji & Associates (Nig.) Ltd**.

According to the Black's Law Dictionary, 8th Edition, pages 1628 and 1629, a Will is the disposition of real and personal property to take effect after the death of the testator. When the Will operates upon personal property, it is sometimes called a testament, and when upon real estate, a devise but the more popular description of the instrument embracing equal real and personal estate is that of "Last Will and Testament".

WHO IS A PROPOUNDER OF A WILL?

The propounder of a Will is an executor or administrator who offers a Will or other testamentary document for admission to probate. See

Nsefik v. Muna (2014) 2 NWLR (Pt.1390) 151 SC. At 193 paras D-E. This is because it is usually the executors named in the Will that apply to the court to pronounce the Will in a solemn form of Law.

Where however the executors named in the Will predeceased the testator, a beneficiary in the said Will can apply to the court to pronounce the Will in solemn form of law and such a beneficiary can safely be described as a propounder of the Will. Therefore, on a general note, a propounder of a Will is a person who asserts that the document is the last Will and testament of the deceased and should be pronounced as such and given full legal force.

BURDEN OF PROOF ON PROPOUNDER OF A WILL

It is already a settled law that where there is a dispute as to the genuineness and authenticity of a testamentary Will, the onus of proving the genuineness and authenticity of the Will lies on the party propounding the Will. The propounder of the Will must clearly show by evidence that, prima facie, the Will had been executed in accordance with the provisions of the relevant law. See **Okafor v. Okafor (2015) 4 NWLR (Pt.1449) 335 at 356 paras F-H; Ize –Yamu v. Alonge (2007) 6 NWLR (Pt. 1029) page 84**;

In **Okelola Vs. Boyle (1998) 2 NWLR (Pt.539) 533 at 549**, the Supreme Court captured it as follows:

> *".....Propounder of (a Will) had the burden of showing*
>
> *prima facie that the deceased not only duly executed but also had the testamentary capacity to do so. It is only after 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".*

In all therefore, what crystallizes from the consistent position of the Supreme Court is that whenever there is a dispute as to a Will, the initial burden of proving the twin requirements of due execution and the subsistence of the testator's mental capacity must always be borne by those who propound it and not those who are contesting its validity. See **Amadi v. Amadi (2017) 7 NWLR (Pt.1563) 108 at 136 - 137 paras H-A; Okupe v.**

Ifemebi (1974) 3 SC 97; Atane v. Amu (1974) 10 SC 237. How then can the propounders of the Will discharge this initial burden?

DISCHARGING THE BURDEN OF PROOF ON A PROPOUNDER OF A WILL

It must be borne in mind that the burden and standard of proof on the propounder of a Will and Codicil is not conclusive proof nor is it proof beyond reasonable doubt. What the propounders need to adduce is *prima facie* evidence that the testator signed the Will and codicil and that he has requisite mental capacity when he signed it. And *prima facie* evidence is such evidence which if uncontradicted, is sufficient establishment of the facts or facts sought to be proved. See **Mabogunje v. Adewunmi (2006) 11 NWLR (Pt.991) 224**.

We shall hereinbelow attempt to show different ways through which the propounders of a Will can discharge the burden of proving the twin requirements of due execution and testamentary capacity.

DUE EXECUTION

The expression "due execution" as it relates to a Will is somewhat complex and not straight –jacketed. It involves the following:

a) That the Will was signed/thumb printed.

b) That the Will was signed by the purported maker or some other person upon his instruction in his presence and on his behalf.

c) That there were two or more witnesses who witnessed at the same time the signing of the Will by the deceased testator.

d) That the witnesses attested to the Will after the testator had signed the Will.

e) That the witnesses attested to the Will in the presence of the testator and by his direction.

f) That the witnesses were both present when each of them attested the will.

g) That the witnesses are both of full adult age and none of them was blind as at the time of witnessing the execution of the Will.

See Generally **Section 140 of the Administration and Succession (Estate of Deceased Persons) Law, Cap. 4 Laws of Anambra State of Nigeria 1991.**

Where the propounder of the Will fail to lead evidence to *prima facie* prove the above stated points, they would be held to have not discharged the *onus* of proof placed on them.

Thus, in **Fasakin v. Siwoku (2009) 16 NWLR (Pt.1167) 305** the P.W. 4 who was the Solicitor that prepared the said Will testified under cross-examination that he read the contents of the Will over to the testator before he signed it and that the two attesting witnesses were not present when the testator signed the Will. It was held that there was no evidence of due execution of the Will.

To lead *prima facie* evidence that the signature on the Will was that of the deceased testator documentary evidence may be led as to previous documents signed by the deceased testator prior to signing the Will in other to prove that they are the same and have the same master pattern. The Court would thereafter be invited to compare the signature on the Will with those on the documents tendered. It is trite law that the court has the inherent powers to compare two or more signatures to determine if they are one and the same. See **Ndoma –**

Egba Vs. A.C.B. (2005) 14 NWLR (Pt. 944) 79; (2005) 2 S.C. (Pt.111) 27; Wilcox Vs. Queen (1961) 2 SCNLR 296; **Section 101(1) Evidence Act, 2011**.

It is instructive to note that since the propounders have the burden to lead only prima facie evidence of due execution, there is no duty on them to call a handwriting expert to prove that the signature was that of the deceased testator. It is only the challengers of the Will who are alleging that the purported signature of the deceased testator is a simulation that may require the evidence of a handwriting expert to prove beyond reasonable doubt the allegation of forgery (simulation) which is a crime.

Where the attesting witnesses physically appear to be of adult age, then *viva voce* evidence that they are adults would be sufficient *prima facie* proof of that fact. However, where doubt may be casted as to their adulthood due to

their physical appearance, then documentary evidence or their birth certificate may be necessary to discharge that *prima facie* burden.

Once the Will *prima facie* appears to have been duly executed, it would enjoy the presumption of law as to its due execution often expressed in the Latin maxim *omnia praesumuntur rita esse acta.* See **In the Estate of Randle (Deceased) (1962) 1 ALL NLR 130**.

To dissuade all elements of doubt as to the due execution of their Will, some deceased testators made videos of their giving instructions in making the Will and also during the execution of the said Will. Such video evidence, once they scale the huddles of admissibility would be more than sufficient *prima facie* evidence of due execution of the Will.

TESTAMENTARY CAPACITY

To prove the genuineness of a Will, the propounders must lead evidence that the testator had the requisite testamentary capacity to make the Will.

In other to discharge this burden, the propounders may lead evidence to show that during the build up to both the giving of instruction to prepare the Will and the actual execution of the Will, the deceased testator was acting in such a manner consistent with that of a man with the requisite disposing mind.

In **Kwentoh v. Kwentoh (2010) 5 NWLR (Pt. 1188) 543**, to establish sound disposing mind, the propounders of the Will tendered documents

which included letters written by the deceased testator in long hands at a time proximate to the handing of instructions to make the Will and the actual execution of the Will. It was held that the propounders successfully discharged that burden of proof placed on them.

Once this is established, then the law presumes that the state of the deceased mental capacity would continue until and unless the contrary is proved, and the *onus* is clearly on the challenger to prove that the sound disposing mind of the deceased no longer existed at the time the Will and codicil were made. This is premised on the position of the law that the law presumes that a state of things shown to exist continues to exist unless the contrary is proved by virtue of Section 167 (b) of the Evidence Act, 2011. See also **Odutola v. Mabogunje (2013) 7 NWLR (Pt.1354) 522 SC**.

Physical infirmity does not necessarily translate to lack of metal capacity except there is evidence to show that the physical infirmity was such that it affected the testator's disposing mind. It is not uncommon to find people very ill but who nevertheless remain mentally alert and stable, capable of giving rational instructions and advice. See **Mabogunje v. Adewunmi (2006) 11 NWLR (Pt.991) 224 at 264 paras G-H; Adebajo Vs. Adebajo (1973) 1 ALL NLR 361**.

ORDER OF PROCEEDINGS IN PROBATE MATTERS

As has been stated at the beginning of this paper, our focus here is on where a person died testate and there is a challenge as to the validity of his Will. Generally, where a person dies testate and there is no likelihood that the Will would be challenged, an application may be made ex parte to the probate

Registrar for the grant of probate in common form. This usually does not pose a problem.

Where however there is likelihood that there would be a challenge as to the validity of the Will, an application shall be made for probate in solemn form. Once this is done, due notice would be given to persons who may likely be interested in the grant of the probate. At this point, any person who wishes to challenge the validity of the Will on any ground may enter a caveat with the Probate Registrar. This is after the Will must have been read but before probate is granted. The order of proceedings would depend largely on whether probate has been granted or not before the validity of the Will is challenged.

WHERE PROBATE HAD NOT BEEN GRANTED BEFORE THE CHALLENGERS COMMENCED THE SUIT AS PLAINTIFFS

Upon the entry of a caveat against the grant of probate, the executors of the Will are expected to commence a suit praying the Court to declare the Will in solemn form and grant probate. The challengers of the Will would be made the defendants to the action. The Probate Registrar may be joined as a nominal defendant. At this stage, the executors are the propounders of the Will and are expected to first call evidence. This also does not pose any hurdle since the propounders are the Plaintiffs and also has the initial burden of proof. So naturally they would first put in evidence.

It may however happen that after entering a caveat against the Will, the challengers did not wait for the propounders to commence the suit to proof the Will but rather chose to quickly initiate a suit challenging the validity of the Will and making the propounders defendants in the said suit. Often times

in this situation just like the earlier one, the defendants usually file a counterclaim in addition to their statement of defence. The question that arises is, where probate has not been granted and the challengers commence a suit challenging the validity of the said Will, making the propounders defendants in the suit, who between the Plaintiffs (challengers) and the defendants (propounders) should first put in evidence? This indeed is the gravamen of this paper, and we shall attempt an answer to the issue by reference to relevant judicial and statutory authorities.

In **Nsefik v. Muna (2014) 2 NWLR (Pt.1390) 151 at 182, the Supreme Court per Ariwoola, JSC** stated thus:

> *"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 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".*

In other words, in an action following a dispute when a Will is being propounded and probate has not been granted, 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.

In **Odutola v. Mabogunje** (supra) at page 541, the Supreme Court per Rhodes-Vivour, J.S.C. captured it thus;

"It is well settled that in probate action of this kind, the onus is on the propounder of the Will and in this case, the defendants. See Adebajo vs. Adebajo (1973) 8 NSCC P. 204.

The learned trial Judge was right to commence proceedings with evidence of the defendants."

Although the above *dictum* of Rhodes-Vivour, J.S.C. was made by of an *obita* since the question of the correct order of proceedings to follow was not in issue in the suit, it however has a huge persuasive effect.

Order 30 Rules 7 and 8 of the High Court of Anambra State (Civil Procedure) Rules 2006 gives a guide as to the order of proceedings in civil matters in the High Court as follow:

7 The Order of proceeding at the trial of a cause shall be as prescribed in the following rules.

8 (1) The party on whom the burden of proof lies by nature of the

issues or questions between the parties shall begin.

See also **Order 30 Rules 7 and 8 High Court of Abia State (Civil Procedure) Rules, 2014, Order 30 Rules 7 and 8 of the High Court of Imo State (Civil Procedure) Rules, 2017.**

It therefore follows that even the makers of our High Court Rules recognize the fact that it is not in all cases that the plaintiff must begin to call evidence, if not, the draftman would have expressly stated that the plaintiff shall first call evidence.

Flowing from the above provisions of the High Court Rules, since the burden of proof first lies on the propounders of the Will (whether as Plaintiffs or defendants) to prove that the Will exists and is valid in law, they should first call evidence. With the assertion by the propounders of the Will that the deceased died testate, the primary *onus* of proving the existence and / or validity of a Will is on the propounders which *onus* if they successfully discharge it, the secondary burden of proof of the allegation that the Will is not properly executed or that it is tainted with fraud or forgery, would shift to the challenging party. See **section 133(1) of the Evidence Act LFN 2011; Okelola vs. Boyle (supra), Okupe vs. Ifemebi (1974) 3 SC 97; Atane vs. Anu (1974) 10 SC 237; Adamu & Anor vs. Ikharo & Anor (1988) 4 NWLR (PT. 89) 474; Elias vs. Diju (1962) 1**

ALL NLR 214, (1962) 1 SCNLR 361; Amadi vs. Amadi (supra).

We concede that the norm in civil cases is that the plaintiff starts the process of testimony first and his witnesses if any, thereafter the defendant proffers his evidence in defence. But in civil cases too, proof is based on balance of probabilities and it rests on the party who asserts the affirmative, in this case the propounders and if they fail to discharge the first burden on them, the Will would not be pronounced in solemn form. See **Amadi v. Amadi** (supra), **Fasakin v. Siwoku** (supra).

The point however has to be made that it is not in all instances where the usual or the norm must play out. This is because certain peculiar features might present which will change the course of events like who takes the first

shot at the evidence. Example of such peculiar features is in probate actions where the validity of the Will is being challenged. In the matter of who testifies first at the bottom of it is the pleadings of the parties; and in probate actions, the state of the pleadings is usually such that the propounders of the Will (whether as plaintiffs or defendants) should take the first shot at giving evidence.

Interestingly, in **Okoye v. Nwankwo (2014) 15 NWLR (PT. 1429) 93**, a case not dealing on probate issues but rather on declaration of title to land, the Supreme Court held that based on the state of the pleadings of the parties, the defendants are to begin to call evidence. The court considered the provisions of Order 27 rule 17 of the Old High Court of Anambra (Civil Procedure) Rules 1988 which is *impari materia* with Order 30 rules 7 and 8(1) of the extant High Court of Anambra State (Civil Procedure) Rules 2006 quoted above *in extenso* and also sections 135 – 137 of the Evidence Act. The apex court per Peter-Odili, J.S.C. at page 131 of the report stated thus;

> *"It might seem strange or even radical and revolutionary for a trial court to call on a defendant to take the witness stand by himself or his witnesses before the Plaintiff would be heard. But in truth, there is nothing novel or out of the ordinary and so the two courts below were well guided by the applicable rules of court of the High Court of Anamnbra State, Order 27 rule 17 sections 135 – 137 of the Evidence Act to decide that the appellant take the first start of testimony before the Respondent as plaintiff."*

It is however important to point out that the above rule may not apply where the challengers commenced the suit as plaintiffs but in addition to the cause

of action of challenging the validity of the Will, they included other cause or causes of action in the suit. Where this is the case, the above rule may no longer apply because the initial burden of proving those other additional causes of action would rest on the plaintiffs who incidentally are the challengers of the Will.

WHERE PROBATE HAD BEEN GRANTED BEFORE THE CHALLENGERS COMMENCED THE SUIT AS PLAINTIFFS

Usually, after the expiration of the notice to all interested parties to register their interest in respect of a Will and no caveat is entered, the Will shall be pronounced in solemn form and probate granted to the executors.

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, *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 presumes to be entitled to administer the estate referred to in the Will or probate. See **Nsefik vs. Muna (2014) 2 NWLR (PT. 1390) 151 at 182 – 183 paras G – a per Ariwoola, J.S.C**. This is because, upon the grant of probate, the law presumed that the Will had been proved and the challengers have the burden to prove the Registrar wrong.

Section 168(1) of the Evidence Act, 2011 provides as follows:

> *"When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."*

Thus, once Probate has been granted, it is presumed that the propounders of the Will have successfully discharged their burden of proving the twin elements of due execution and testamentary capacity. Therefore, where the challengers of the Will commence an action as plaintiffs to challenge the validity of the Will, they have the primary burden to prove that the Probate was granted in error and urge the court to set it aside. It is only after the Plaintiffs (challengers) of the Will have successfully discharged that primary burden of proving that the Probate was granted in error that the burden would shift to the propounders of the Will to prove due execution and testamentary capacity.

In that wise, the challengers of the Will as plaintiffs would begin to call evidence because on the state of the pleadings of the parties and the nature of the issues joined by the parties, the initial burden of proof lies on the Plaintiffs/challengers. See **Nsefik v. Muna** (supra).

CONCLUSION:

We have discussed above the question of burden of proof in Probate actions; and this is not out of place. It needs to be said that when there has been a misapprehension as to the *onus* of proof and a misdirection casting such *onus* on the wrong party, there is a likelihood of a miscarriage of justice. Also, such misdirection can also affect the credibility of witnesses. See

Onobruchere v. Esegime (1986) 1 NWLR (PT. 19) 799; Okoye v. Nwankwo (supra).

A legal Practitioner retained by a challenger of a Will must take immediate steps to enter a Caveat before Probate is granted in order to escape the rather bounden duty of convincing the court to invalidate the probate already granted to the propounders of the Will.

A Will is a sacrosanct document, and where found to be valid, the testator's wishes as expressed in the Will must be respected by all. See **Asika v. Atuanya (2008) 17 NWLR (PT. 1117) 484 at 516.**

Judges and legal Practitioners alike must ensure that not only is the appropriate burden of proof apportioned to each party, but that the proper order of proceedings is followed so as to attain justice

Thank you.

CONTRIBUTORS

OBINNA AKPUCHUKWU

Managing Partner

+234(0)8069155321; +234(0)9052461965.

o.akpuchukwu@allenandporter.com

CONTACT US

Address: Last Floor, Teachers Place, No 44 Francis Street by Venn Road North, Onitsha, Anambra State, South East Nigeria.

Telephone: +2348069155321; +2349052461965; +2347089379319

Email: info@allenandporter.com

Website: www.allenandporter.com