

SUPREME COURT OF NIGERIA
16TH JULY, 1993. SC.103/1990
CORAM:- M. L. UWAIS, S. M. A. BELGORE, A. B. WALI, U.
OMO, M. E. OGUNDARE, JJSC

EZEBILO ABISI & 4 OTHERS APPELLANTS
AND
VINCENT EKWEALOR & ANOR RESPONDENTS

- APPEALS - Grounds of appeal - where not properly drafted - whether appeal ought to have been dismissed in limine - when an onminbus ground of appeal was treated*
- APPEALS - Powers of the Court of Appeal-under s.16 of the Court of Appeal Act-to evaluate evidence-whether properly exercised-whether evidence was properly adverted to*
- EVIDENCE - Documentary evidence of judgment - where parties in the judgment are different - whether the document is properly admitted.*
- EVIDENCE - Land dispute-documentary evidence-whether tendered exhibits are of any value-to have settled land boundaries*
- ESTOPPEL - By conduct - where not specifically pleaded - whether the Court of Appeal can raise it suo motu*
- LAND LAW - Claim of ownership of land - based on act of possession over a long period of time - and the identity of the land - whether validly established*

FACTS

The Plaintiffs/Respondents and the Defendants/Appellants are descendants of a common ancestor, Ikenga Nando, original owner of the land in dispute and other lands. There has been protracted boundary dispute the past 80 (eighty) years amongst the descendants of the said Ikenga which has been subject of various litigations and settlement panels. Before the High Court, Onitsha, Plaintiffs claimed the land in dispute as portion

of their inheritance whilst the Defendants denied the claim. The trial Judge found that the Plaintiffs have neither proved acts of possession nor the identity of the land in dispute, and then dismissed their claim.

The Plaintiffs appeal to the Court of Appeal was wrongfully upheld as that Court suo motu raked up the doctrine of estoppel by conduct in favour of the Defendants and held that the trial court did not properly evaluate the evidence. Being dissatisfied, Plaintiffs have now appealed to the Supreme Court. Their counsel submitted that the Defendants' appeal to the Court of Appeal should have been dismissed in limine as it was not based on any proper brief. The Supreme Court had to determine amongst other issues whether the Court of Appeal was right in invoking a Privy Council judgment (Exhibit K) when the Plaintiffs were not parties to that case, and whether the Plaintiffs had proved their claim to the land in dispute.

HELD (unanimously allowing the appeal)

1. A careful scrutiny of the eight grounds of appeal to the Court of Appeal show that grounds 1 - 7 were so inelegantly drafted that any of them could hardly be said to be a proper ground of appeal. Whilst some of the grounds were mere commentaries or arguments others christened misdirections could hardly be so described. (p. 115 L 5)

2. The Appellants' brief filed in the Court of Appeal failed to meet the standard of a good brief as laid down in the various decisions. (p. 119 L 24)

3. As imperfect as the Appellants' brief before the lower court might be, it would not be correct to say that ground 8 (the omnibus ground that the judgment is against the weight of evidence) was not treated therein. Counsel's submission that the appeal ought to have been dismissed in limine is therefore, not accepted. (p. 121 L 9)

4. As the Privy Council judgment (Exhibit K) is not between the parties nor their privies, it is irrelevant as between them and should never have been admitted, but having been wrongly admitted it should have been expunged from the record. The court below is clearly in error to have made use of that exhibit in coming to its decision. (p. 127 L 37)

5. Since it is settled law that any party relying on estoppel must specifically

plead it, the Court of Appeal was wrong in invoking suo motu the doctrine of estoppel by conduct against the Defendants when the Plaintiffs did not set up such case nor was it even backed by the evidence. (p.129 L 19)

6. The Court of Appeal in holding that there was no proper evaluation of the evidence adduced at the trial proceeded to do so. That Court is not an *avante garde* with power to suo motu rake up mistakes contained in the trial court's judgment. (p. 136 L 11)

7. The Court of Appeal's jurisdiction by virtue of s. 16 of the Court of Appeal Act is limited only to issues raised before it by way of grounds of appeal or to issues raised suo motu by it. But in the latter case, it cannot base its decision on such issues without giving the parties an opportunity of addressing it on them. (p. 136 L 15)

8. In the Appellants' brief before the lower court, reliance was not placed on Exhibits F, Fl and K in support of Plaintiffs' case. That court took those issues suo motu. (p. 136 L 22)

9. From the sketch map attached to exhibit Fl, it cannot be said that the boundaries of land inherited by each of the three sons of Ikenga Nando had been settled. The previous adjudication shown in exhibits F & Fl relate to a small portion of Ikenga Nando's land so that the value, if any, of exhibits F & Fl to the present case must be minimal. (p. 13/5 L 27)

10. Following admissions made by some of the Plaintiffs' witnesses, the weakness of their case is so evident that one can hardly find that the Plaintiffs have shown such act of possession over a long period to lead to the inference that they were ever in exclusive ownership of the land in dispute. (p.139 L4)

11. The Court of Appeal did not advert its mind properly to the evidence, thereby going far beyond what is required of an appellate court when considering the ground of appeal that judgment is against the weight of evidence. (p.141 L28)

12. In view of the evidence of the 1st Plaintiff. PW 1 and PW 3 believed by the learned trial Judge, his finding is adequately supported by the evidence before him. (p.142 L 4)

13. The learned trial Judge's finding that the identity of the land in dispute was not established by the Plaintiffs is correct since the eastern boundary cannot be said to have been established. (p.142 L 23)

14. The Plaintiffs having failed on the two fronts on which they based their
5 claim (ie acts of possession and identity of the land in dispute), their case was rightly dismissed by the learned trial Judge and the Court of Appeal was wrong in disturbing that verdict. (p. 142 L 27)

PER OGUNDARE JSC "Briefs are meant to assist in the administration of
10 justice by making the work of both Counsel and Court simpler once the matter has got to the oral hearing stage. It is to promote justice. Sometimes in the course of writing a brief the learned counsel involved in the case sees the futility of his course. The courts gain immense assistance from excellent briefs when it gets to the stage of the court undertaking research into the
15 matter before it." (p.118 L 17)

(Lifted from his statement in Ehot v. the State (1993) 5 KLR 58; (1993) 4 NWLR 644)

20 **REPRESENTATION**

Chief Bayo Kehinde, SAN, Jean Chiazor (Miss), O. A. Fapohunda
O.N. Awoniyi, E. B. Ebong, F. E. Obunse, F. Olaosebikan (Mrs.), for the
Appellants

Chief G.C.M. Onyiuoke, SAN, E.O. Ekpo (Mrs.), E.N.E. Peter Okoye (Mrs.),
25 for the Respondents

CASES REFERRED TO

1. Chidiak v. Laguda (1964) 1 All NLR 160
2. Bray v. Ford (1896) A.C 44
- 30 3. Solomon Ehot v. The State (1993) 4 NWLR 644 [(1993) 5 KLR 58]
4. Ohiaha Akpapuna v. Oha Nzeka 11 SC. 85/82
5. Chief Imam Y.P.O. Sodeinde v. The Registered, Trustees of the Ahmadiya Movement in Isian SC 64
6. Bronik Motors Ltd. v. Wema Bank Ltd SC. 115
- 35 7. Paul Unongo v. Aper Aku SC. 95/83
8. Oloyo v. Alegbe SC. 94/1982
9. Transbridge Co. Ltd. v. Survey International Ltd. SC 17/85
10. A.M.O Akinsanya v. U.B.A. Ltd SC.95/1985
11. A. G. Bendel State v. U.B.A. Ltd SC 66/1985

12. Ezekiel Emenimaya & ors v. Okorji SC. 235/84
13. Ibiyemi Oduye v. Nigeria Airways Ltd SC. 135/85
14. Olowo Sage v. Adebajo (1988) 4 NWLR 275
15. Okpala v. Ibeme (1989) 2 NWLR 208
16. Jonah Onyebuchi Ezech v. Federal Republic of Nigeria (1987). (pt 51)

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LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in the Onitsha Judicial Division of the High Court of Anambra State of Nigeria, the plaintiffs (who are now respondents before us) for themselves and on behalf of the people of Umuakwo Ikenga Nando, sued the defendants (now appellants) for themselves and on behalf of Abube Ikenga Nando claiming as subsequently amended:

1. A declaration that the plaintiffs are the persons entitled to ask for customary rights of occupancy to the piece or parcel of land verged violet on Plan No. MEC/168/61 minus the area verged blue lying within it. 15
2. N1,000.00 general damages for trespass.
3. An injunction to restrain the defendants, their servants and agents from further building on the land or farming thereon or utilising economic trees thereon without the consent of the plaintiffs or in any way doing anything on the land inconsistent with the plaintiffs' ownership and possession of the said land. 20

Pleadings having been ordered, were filed and exchanged by the parties. The plaintiffs, with the leave of the trial court, amended their statement of claim. The action subsequently proceeded to trial on the plaintiffs' amended statement of claim and the defendants' statement of defence. By paragraph 26 of the amended statement of claim the plaintiffs' final claims read as follows: 25

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- "(a) *A declaration that the plaintiffs are the people entitled under the Land Use Decree, 1978 to apply for customary right and certificate of Occupancy in respect of the land verged violet or purple minus the area verged blue on Plan No. MEC/168/61 now reproduced in Plan No. ECAS 170/78.* 35
- (b) *N1,000.00 damages for trespass.*
- (c) *An injunction to restrain the defendants, their servants and agents*

from further building on the land or farming thereon or utilizing economic trees thereon or going on the land without the consent of the plaintiffs or in any way doing anything on the land inconsistent with the plaintiffs' customary right of occupancy under the Land Use Decree or ownership and possession."

5 At the trial, the learned trial Judge, Awogu, J. (as he then was) had ruled, following submissions of leading counsel for the parties, that

10 *"The decision of the Supreme Court in 0/115/61 (S.C. No. 304/65), is reported in 1978 1 S.C. at P.9. One of the issues raised and dealt with in that judgment appears to be similar to the averments in paragraphs 8, 9, 10 and 11 of the amended statement of claim in the present case, and is the gravamen of the issue estoppel*
 15 *which leading counsel for the plaintiffs now wants resolved as to the quantum of proof. It is my view however, that paragraph 4 of the statement of defence properly joins issues with the plaintiffs on the material questions which I now have to try. Besides, having regard to the chequered history of this case, including a Privy Council judgment in the three-cornered fight and two Supreme Court judgments involving the present parties, a determination on issues which*
 20 *may well still loom large, will not at this stage be in the interest of justice. It is my view therefore that the trial should take the normal course. The case of the plaintiffs may now proceed."*

25 The 1st plaintiff and three other witnesses testified in support of plaintiffs' case. Three witnesses testified in support of the defence. After addresses by leading counsel for the parties the learned trial Judge, in a reserved judgment, found against the plaintiffs and dismissed their case in its entirety.

30 Being dissatisfied with this judgment, the plaintiffs appealed to the Court of Appeal of Enugu Division upon eight grounds of appeal. In accordance with the rules of that court written briefs of arguments were filed and exchanged by the parties and after oral arguments by learned leading counsel, the Court of Appeal (Kutigi J.C.A.) (as he then was) Katsina-
 35 Alu and Uwaifo, JJ.C.A) allowed the appeal, set aside the judgment of the trial High Court and entered judgment in favour of the plaintiffs in terms of their claim. More will be said in the course of this judgment on the grounds of appeal to the Court of Appeal and the briefs filed before that court.

The defendants have now appealed to this court upon five original and one additional, grounds of appeal. These grounds read:

"(1) The Court of Appeal erred in law in deciding the appeal on an issue which is not related to a ground of appeal (page 12 line 16 et seq of the judgment)

PARTICULARS OF ERRORS

- (a) Order 3 rule 2 (1) and (3) stipulates the filing of a Notice of Appeal "which shall set forth the grounds of appeal" on which the appellant intends to rely. 5
- (b) Order 3 rule 2 (5) stipulates that the appellant shall not be heard in support of any ground not mentioned in the notice of appeal except with leave and on amendment of the grounds of appeal. 10
- (c) Order 6 rule (2c) stipulates the filing of a brief by the appellant being a succinct statement of his argument in appeal.
- (d) It is submitted that the said argument in appeal is argument on or for the grounds of appeal. 15
- (e) Order 6 rule 3 stipulates, inter alia, that the brief shall contain the issues arising in the appeal.
- (f) It is submitted that without a ground or grounds of appeal, there can be no brief or issue. 20
- g) It is further submitted that the Court of Appeal was wrong in deciding the appeal on the basis of an issue for determination raised in the brief of the appellants in the Court of Appeal instead of basing the decision on a ground of appeal to which could be tied the issue arising in the appeal. 25

(2) The Court of Appeal erred in law in not dismissing the appeal or at least those relevant grounds of appeal after it found (last paragraph of page 4 of the judgment) that "Most of the grounds appear... difficult to understand and appreciate."

PARTICULARS OF ERROR

- (a) Order 3 rule (4) stipulates that no ground of appeal which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted. 30
- (b) On page 4 from line 31 to page 5, the judgment reads: The appellants filed eight grounds of appeal. 35
Most of the grounds appear to me difficult to understand and appreciate. Grounds 1, 2 and 3 SEEM IN EFFECT to complain Grounds 5 and 6 APPEAR TO COMPLAIN Ground 7 COMPLAINS, I THINK Ground 4, as rightly pointed out by

Chief Kehinde for Abube, is not a ground of appeal but simply what can be regarded as a mere comment. (Capitals and italics are mine)

(c) Clearly, the Court of Appeal, in using the phrases italicized in respect of Grounds 1, 2, 3, 5, 6 and 7 find undoubtedly that the
5 grounds of appeal are either vague or general in terms or disclose no reasonable ground of appeal and ought to have been struck out.

(d) Ground 8 which is the omnibus ground has no particulars and therefore vague.

10 (e) The Court of Appeal rightly found that Ground 4 is not a ground of appeal but mere comment.

(3) The Court of Appeal erred in law when it quoted extensively from the Privy Council judgment from page 26 line 13 to page 27 of the judgment, to conclude as it did in lines, 18 and 19 of the said page 26 that -

15 *"There can, however, be no dispute that District Officers made the said settlement."*

PARTICULARS OF ERROR

20 (a) The respondents herein, the Umuawo Nando did not appeal to the Privy Council from the Supreme Court judgment in Suit No.259/1960 which started as 0/32/57 in the Onitsha High Court with the respondents as plaintiffs, but which they (plaintiffs) lost to the present appellants as respondents in the Supreme Court.

25 (b) The Privy Council judgment Exhibit K in these present (c) proceedings categorically so stated on its first page.

(c) Since there was no appeal from the Supreme Court to the Privy Council in High Court Suit No. 0/32/57 which went to the Supreme Court as FSC.295/1960, the decision of the Supreme Court binds the parties and anything stated by the Privy Council is
30 only in respect of the other consolidated suit where there were appeals 0/19/57 and 0/31/57 which were between Agbudu and Adube and Agbudu Communities respectively and not between the parties tot his appeal.

(4) The Court of Appeal erred in law in making out a case of
35 toppels by conduct for the respondents which they neither made for themselves nor pleaded:

PARTICULARS OF ERROR

(a) At page 34 lines 9 to 15, the Court of Appeal in its judgment states-

It is hardly realised by them reading through exhibits P and P1 and the Privy Council's view that decisions reached in those exhibits had been acted on for over 40 years by the parties, the parties were at least stopped by conduct from claiming contrary to what had been established and accepted.

(b) It is trite law that estoppel must be specifically pleaded, even by the plaintiff as shown by the Supreme Court in *Odjevwedje v. Echanokpe* (1987) 1 NWLR (Pt.52) 633. 5

(c) Neither in the last amended statement of claim nor in the Grounds of Appeal nor in the issues arising did the respondents herein, as plaintiffs, raise the issue of estoppels by conduct. 10

(5) The Court of Appeal erred in law in making finding of fact contrary to the finding of the Supreme Court on the same matter.

PARTICULARS OF ERROR

"(a) At page 38 lines 35-38 of the Court of Appeal judgment, the following passage appears 15

It is clear therefore that the area of land known as Odo Ubiri which the appellants lost to the respondents in suit No.0/115/61 was definite and was accepted to be so.

(b) Contrary to that Court of Appeal findings, the Supreme Court, in its judgment in Suit No. FSC/295/1960 delivered on 30/06/61, which was an appeal on High Court Suit No. 0/32/57 which was not appealed to the Privy Council, stated at page 2 lines 25 to 31 of Exhibit O in these proceedings, that the trial Judge erred in granting a declaration of title to Umuawo in respect of an unde fined area of land. 25

(c) The claim in High Court Suit No. 0/32/57 was by Umuawo as plaintiffs against Abube for, inter alia: a declaration that the plaintiff is the owner of land known and called Odo Ubiri (Orokpobiri) situate at Nando and bounded as in plan to be hereafter filed. This is recorded at page 18 of the Privy Council Record Exhibit D in these proceedings. 30

(d) The judgment of the Federal Supreme Court in the said appeal No. FSC/295/1960 from the High Court Suit No.0/32/57, was an order of non-suit on the ground that they failed to prove their western boundary (p. 120 Exhibit D), as recorded from the last line of page 2 to lines 1 to 27 page 3 of Exhibit O in these proceedings. 35

(e) The respondents herein, as plaintiffs, again sued the appellants herein as defendants in Suit No. 0/115/61 claiming declaration for the same Odo Ubiri (or Okpobiri) land and lost in the High Court Onitsha. See page 3 lines 28 to end of Exhibit O.

(f) On page 8 lines 22 to 27 of Exhibit O, another passage shows that the trial Judge erred in granting declaration to the plaintiffs (Umuawo - the respondents herein) in respect of an undefined area of land."

Pursuant to the rules of this court the parties, through their respective leading counsel, filed and exchanged their written briefs of arguments. In the appellants' brief the following issues are set out as arising in this appeal, to wit:

- (1) Can an appeal court decide an appeal on an issue not related to or based on a ground of appeal?
- (2) Whether the Court of Appeal ought not to have dismissed the appeal after it found that most of the grounds appear..... difficult to understand and appreciate.
- (3) Where two or more suits are consolidated and some of the losers in one or more of the consolidated suits appeal to an appeal court whilst other losers do not appeal, can the appeal court judgment on the suit or suits appealed be made to affect the parties in the suit or suits not appealed?
- (4) Whether the Court of Appeal could make out a case of estoppel by conduct for the respondents which they neither made for themselves nor pleaded.
- (5) When an appeal court has made a finding of or a pronouncement on a fact; can a lower court make a contrary finding or pronouncement?
- (6) Can the Court of Appeal grant declaration to a large area of land claimed by the respondents when there is NO evidence of the boundary of or defining or delineating the area to be minussed from the large area claimed?"

The plaintiffs, for their part, set out the following five issues in the respondents brief:

- (i) *Whether the Court of Appeal was right and justified in setting aside the decision of the trial court and in granting the claims of the respondents on the evidence before the court.*
- (ii) *Can, (and if so, to what extent) the Privy Council judgment, Exhibit K, be applied to affect the parties in the present suit 0/61/75 having regard to the fact that Suit 0/32/57 to which they were*

parties in the consolidated suits, 0/19/57, 0/31/57 and 0/32/57 was not appealed to the Privy Council.

(iii) Whether the question of ESTOPPEL by conduct referred to by the Court of Appeal in its judgment and the use, if any, made of it by the Court of Appeal amounts to a miscarriage of justice. 5

(iv) Did the findings or pronouncements made by the Court of Appeal in its judgment in the present case contradict the findings by the Supreme Court in the earlier suits.

(v) Was the area excised by the respondents in their claim for declaration of title to land sufficiently delineated and demarcated." 10

There appears not to be much difference in the two sets of questions posed in the briefs but for the purpose of determining this appeal I shall adopt the set of questions set out in the appellants' brief.

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At the oral hearing of the appeal both learned leading counsel for the parties proffered oral arguments in further elucidation of the arguments contained in their respective written briefs.

Perhaps this is a convenient stage to set out the facts, howbeit 20 briefly. Both the plaintiffs and defendants descend from a common ancestor, Ikenga Nando; he was the original owner of the land in dispute and other lands. Ikenga Nando begat three sons, namely Agbudu Umuawo and Abube. The plaintiffs are descendants of Umuawo while the defendants 25 are descendants of Abube. On the death of Ikenga Nando, his extensive land was divided among his three sons, each son taking a part and the descendants of each son inheriting their respective ancestor's share. The boundaries of the respective lands of the three sons have been the cause of disputes among their descendants for about 80 years now. The protracted 30 disputes among them have been adjudicated upon by administrative officers and various courts, including this court and the Privy Council from about 1914 to the present day. In the present proceedings, plaintiffs claim that the land in dispute was the portion shared out to their ancestor, Umuawo. The defendants claim to the contrary.

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ISSUES (1) & (2)

In determining this appeal I shall take Issues (1) and (2) together; these issues are covered by the complaints raised in grounds 1 & 2 of the ground of appeal. These grounds have earlier in this judgment been set out;

I need not repeat them here. The complaint is based on the following passage in the lead judgment of Uwaifo, J.C.A. (with which the other Justices of the Court that sat on the appeal agreed), to wit:

- 5 *"The appellants filed eight grounds of appeal. Most of the grounds appear to me difficult to understand and appreciate. Grounds 1, 2 and 3 seem in effect to complain of the failure of the trial Judge to accept Reynolds, J.'s finding as it affected suit No. 0/32/57 (which, as will be recalled, ended on appeal in a non-suit at the Federal Supreme Court as having created an issue estoppel, namely, that the larger area verged violet in the survey plan No.MEC/258/57 used in that case over which Amuawo allegedly asserted ownership (although they sought no declaration in respect of it but only in respect of the area verged grey shown within it) belonged to them. Grounds 5 and 6 appear to complain of the trial Judge's failure to accept that the total land owned by Ikenga Nando which was shared by his three children was as described by Amuawo. Ground 7 complains, I think, about the acceptance by the trial Judge of the act of ownership possession by Abube through the alleged presence of 50 tenants of theirs on the land in dispute when their location was not shown in the survey plan No. MEC/58/79, exhibit M, pleaded and relied on by Abube. Ground 8 is the omnibus ground which complains that the judgment is against the weight of evidence.*
- 20 *Ground 4, as rightly pointed out by Chief Kehinde for Abube, is not a ground of appeal but simply what can be regarded as a mere comment. It reads:*
- 25 *The learned trial Judge having held that the non-suit of the present plaintiffs/appellants was in respect of Grey (ODOUBILI) and not in respect of VIOLET OR PURPLE (the larger area) the question for determination was whether although the present plaintiffs/ap*
- 30 *pellants claimed the smaller area (Grey) as the subject matter of the relief claimed the larger area became an issue for determination as a common issue arising in the consolidated suits between the 3 parties in the consolidated suits.'*
- 35 *It does not state whether it is based on error in law or a misdirection and there are no particulars supplied as should have been done in a proper ground complaining of error in law: See Osawaru v. Ezeiruka (1978)6 8 S.C. 135 at 137. The said ground is struck*

out. Whatever argument was proffered in respect thereof will be discountenanced as being incompetent: See Okpala v. Ibeme (1989) 2 NWLR (Pt.102) 208 at 221."

(Italics in paragraph I above are mine)

What are these grounds of appeal on which the learned Justice 5 passed the above comments? They read:

*"(1) The learned trial Judge misdirected himself in law and on the facts in the following passage of his judgment, to wit:
...Firstly, it must be pointed out that the assertion in paragraph 19 10 of the amended statement of claim, to the effect that the Federal Supreme Court uphold the findings of fact on the summon issues raised at the trial (see Exhibit J) was incorrect. Taylor F.J. (as he then was) said in his judgment (See Exhibit J.10) "In my judgment the trial Judge erred in granting the declaration of title to the people 15 of Umuawo in regard to an undefined area of land. To that extent the judgment must be set aside....."*

He, however, proceeded to order a non-suit because as he put it:-
'In view of the trial Judge's finding that the larger area edged VIO 20 LET though not claimed in the action, was owned by Umuawo and the area to which they failed to get title for failure to prove their western boundary is within it. (See Exhibit J.U.) Taylor F.J. (as he then was) did not thereby agree that in the three cornered fight the larger area verged VIOLET belonged to Umuawo for, had 25 this been so, there would have been no difficulty in granting a declaration of title to the smaller area within the VIOLET. Thus the ownership of VIOLET by Umuawo was not settled in the three- 30 cornered fight and no issue estoppel could arise therefrom....."

PARTICULARS OF MISDIRECTIONS.

(a) The reason for making an ORDER of non-suit in the case un 30 der consideration was clearly based on the adoption of the finding by the learned trial Judge that the larger area verged VIOLET belonged to the present plaintiffs/appellants and that a non-suit was to be entered because the smaller area of land which was the 35 subject matter of the said plaintiffs/appellants fell within a larger area belonging to them.

(b) The learned trial Judge in the instant case was saying in effect that it was wrong for the Federal Supreme Court having found that the larger area of land belonged to the present plaintiffs/ap

pellants to have proceeded to enter an order of non-suit in the circumstances but that he could not believe the Federal Supreme Court was wrong in law. Error in law by the Supreme Court can not negative the finding of fact on which the order of non-suit was based.

5 (c) The reason for a judgment or decision is binding on the parties to that case.

(2) The learned trial Judge failed to appreciate that the finding by the learned trial Judge in Exhibit J related to a common issue which arose in the consolidated suits involving the 3 parties in the
10 three cornered fight which issue was the basis of and justification for the consolidation of the suits in the first instance and a finding on that issue was binding on the 3 parties.

(3) The learned trial Judge misdirected himself in law in the following passage of his judgment, to wit:-

15 *'It must be observed that the plea of estoppel in this matter was raised by the plaintiffs (see paragraphs 16-21 of the amended statement of claim). As I understand it, estoppel, by its nature, is a shield rather than a sword and so should be raised by way of defence, which is not the case here....'*

20 *Thus, in both issue estoppel, and cause of action estoppel the matter ought to be raised on by way of defence or in the plaintiffs' reply to the statement of defence, I would have had to decide whether or not these paragraphs should have been struck out....'*

PARTICULARS OF ERROR

25 (a) On the authorities, estoppel can be raised not only as a defence but also in support of a cause of action.

(b) The question is whether estoppel applied in the case and not whether it can be raised in the statement of claim or in the reply to a statement of defence as long as it is pleaded.

30 (4) The learned trial Judge having held that the non-suit of the present plaintiffs/appellants was in respect of Grey (ODOVBILI) and not in respect of VIOLET or PURPLE (the larger area) the question for determination was whether although the present plaintiffs/appellants claimed the smaller area (Grey) as the subject matter
35 of the relief claimed the larger area became an issue for determination as a common issue arising in the consolidated suits between the parties in the consolidated suits.

(5) The learned trial Judge misdirected himself in the following passage of his judgment, to wit:-

'If the plaintiffs must succeed in their claim, the burden is on them to show exactly the extent and boundary of Odoubili. Unless this is so, an injunction relating to the land in dispute, minus, Odoubili, can hardly be enforced, it is clear that for nearly three decades, Odoubili, constituted a problem child to the plaintiffs....' 5

PARTICULARS OF MISDIRECTION

- (a) The claim before the court was for a declaration of title to land verged violet on Plan MEC/168/61 minus the Blue verged within it, N1,000.00 general damages for trespass and injunction. The claim for title was amended in view of the Land Use Decree (Act), to a declaration that the plaintiffs are the persons entitled to ask for customary right of occupancy to the piece of land verged VIOLET on Plan MEC/168/61 minus the area verged blue lying within it. 10
- (b) The boundaries of the land verged VIOLET were properly delineated on the plan and proved by evidence and there was no uncertainty about the boundaries thereof. Having regard of the fact that ODOVBILI is not co-terminous with the area verged blue, the learned trial Judge was wrong to make the boundaries of ODOUBILI a condition for awarding title to the area verged VIOLET. 20
- (c) The defendant/respondents having failed to plead or prove the extent of ODOVBILI the learned trial Judge should have accepted the area of ODOUBILI as delineated by the plaintiffs/appellants on their plan. 25
- (d) The area of Odoubili excepted by the plaintiffs/appellants was clearly delineated on their plan and a surveyor can easily demarcate the area on the ground.
- (6) The plaintiffs/appellants having pleaded and the totality of Ikenga land which was admittedly shared out between the 3 sons of Ikenga and the defendants/respondents having completely failed to show the totality of such land the learned trial Judge should have held and found that the totality of Ikenga land was as shown by the plaintiffs/appellants on their plan. 30
- (7) The learned trial judge misdirected himself in the following passage of his judgment, to wit:- 35
'Furthermore, there is the presence of D.W.3 and 49 other Nteje farmers on the land in dispute which the plaintiffs have not succeeded in explaining away.

PARTICULARS OF MISDIRECTION

(a) The plaintiffs/appellants having closed their case before D.W.3 testified and the site of the area occupied by the alleged D.W.3 and his 49 other tenants was not shown on the defendants' plan the learned trial Judge was wrong to hold that the plaintiffs/appellants failed to explain away the presence of the alleged 49 tenants on the land.

(8) Judgment is against the weight of evidence.

In his submissions, learned counsel for the defendants made the following points:

(i) that Order 3 rule 2(4) of the Court of Appeal Rules stipulates that no ground of appeal which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted;

(ii) that the court below, having realised that grounds 1, 2, 3, 5, 6 & 7 of the grounds of appeal offended the said rule of Court, ought to have struck them out

(iii) that ground 8 which is the general ground not having been argued in the appellants' brief ought to have been struck out;

(iv) that consequently, there being no grounds of appeal to sustain the appeal, the appeal should have been dismissed.

Regrettably, learned leading counsel for the plaintiffs did not proffer any answer to the submissions on the competence of the grounds of appeal before the Court of Appeal but rather in the introductory part of respondents' written brief in this court, he sought to justify the format of appellants' brief before the court below. The whole of paragraph 3 of the respondents' brief under the caption "INTRODUCTION" is devoted to this exercise. I shall not prolong the length of this judgment unduly by setting out, in full, paragraph 3 but shall only quote the concluding part of it which reads:

"SUBMISSION: It is submitted that the contention of the present appellants that there was no ground of appeal to support the appeal in the Court of Appeal and therefore the whole appeal should be dismissed is manifestly untenable."

What can be deduced from paragraph 3 is that learned Senior Advocate does not contest the submission that grounds 1,2,3,5,6 and 7 of the grounds of appeal to the Court of Appeal are incompetent but maintains that the appeal to that court was sustainable on ground 8 the general or omnibus

ground. He submitted, in oral argument before us, that the court below decided the appeal before it on the general ground that 'E2'80'9c the decision is against the weight of evidence."

Let me now examine the complaints against the grounds of appeal before the court below. After a careful scrutiny of the eight grounds, 5 grounds 1-7 were so in elegantly drafted that any of them could hardly be said to be a proper ground of appeal. While some of them (such as grounds 2, 4 and 6) were mere commentaries or arguments, others (such as grounds 1, 3, 5 and 7) that were christened "misdirections" could hardly be so described. A misdirection occurs when a Judge misconceives the issues, or 10 summaries the evidence inadequately or incorrectly for one side or the other, or makes mistakes in the law applicable to the issues in the case. As this court per Taylor, J.S.C put it in Chidiak v. Laguda (1964) 1 All NLR 160, 162-163.

"Time and again do cases come up on appeal in which matters 15 are treated in the grounds of appeal as misdirection which are no more than findings of fact by the trial Judge. Perhaps it is time to make it clear again what is regarded as a direction. In the case of Bray v. Ford (1896) A.C. 44 at 49 Lord Watson said that:-
'Every party to a trial by jury has a legal and constitu 20 tional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.'"

This is done by the trial Judge directing the jury, who are the Judges of fact, as to the issues of fact, and what is the law applicable to 25 those issues. A misdirection therefore occurs when the issues of fact, the case for the plaintiff or for the defence, or the law applicable to the issues raised are not fairly submitted for the consideration of the Jury. Where, however, the Judge sits without a Jury, he misdirects himself if he misconceives the issues, or summaries 30 the evidence inadequately or incorrectly or makes a mistake of law, but provided there is some evidence to justify a finding it cannot properly be described as a misdirection. It is of course d e - sirable, and we consider that it should be the practice that the particular findings to which objection is to be taken at the hearing 35 of an appeal should be specified in the grounds of appeal alleging that the judgment was against the weight of evidence."

In my respectful view, grounds 1, 3, 5 and 7 can hardly be described as grounds of misdirections. No doubt, Uwaifo, J.C.A., in his lead judgment was mindful of the defects contained in the grounds of appeal before him
5 and rightly struck out ground 4. He ought also to have struck out grounds 1, 2, 3, 5, 6 and 7 as being incompetent. Those grounds being incompetent, no issues for determination could be formulated on them.

Ground 8 is, however, a competent ground. This is not disputed by learned leading counsel for the defendants. His argument is that no arguments were proffered in the brief of the plaintiffs/appellants on that ground
10 which, therefore must be considered abandoned. This takes us to the format of the appellants' brief in the Court of Appeal. With profound respect to learned leading counsel for the plaintiffs in that court, it is the way Appellant's brief was drafted that has led to the submission that no issue
15 encompassing ground 8 was argued in the brief.

Order 6 rule 2 of the Court of Appeal Rules requires an appellant within the stipulated time to file a written brief, being a succinct statement of his argument in the appeal. Rule 3 of the said Order 6 sets out the forms and contents of the brief. It provides:

20 *"3-(a) The brief, which may be settled by counsel, shall contain an address or addresses for service and shall contain what are, in the appellant's view, the issues arising in the appeal as well as any points taken in the court below which the appellant wishes to abandon and any point not taken in the court which he intends to seek
25 leave of the court to argue at the hearing of the appeal.*

*(b) Where possible or necessary, the reasons in brief shall also be supported by particulars of the titles, dates and pages of cases reported in the Law Reports or else where including the summary of the decisions in such cases, which the parties propose to
30 rely upon. Where it is necessary, reference shall also be made to relevant statutory instruments, law books, and other legal journals.*

*(c) The parties shall assume that briefs will be read and considered in conjunction with the documents admitted in evidence
35 as exhibits during the proceedings in the court below, and where ever necessary, reference shall also be made to all relevant documents or exhibits on which they propose to rely in argument.*

(d) All briefs shall be concluded with a numbered summary of the points to be raised and the reasons upon which the argu

ments is founded.

(e) Except to such extent as may be necessary to the development of the argument, briefs need not set out or summarize judgments of the lower courts, nor set out statutory provisions, nor contain an account of the proceedings below or of the facts of the case."

5

The provisions of Order 6 rules 2 and 3, Court of Appeal Rules (which are in pari materia to Order 6 rule 5(1)(a) & (b) of the Supreme Court Rules 1985) have been subject of numerous decisions of this Court and of the Court of Appeal and of a book on Brief Writing written by a former Justice of the Court of Appeal and of this Court (Hon. Justice Nnaemeka-Agu). All these lay down the format of a good brief as required by the Rules. In Solomon Ehot v. The State (1993) 4 NWLR (Pt.290) 644, 644-667, I had cause to restate the position in these words:

"The Appellant's Brief has raised, once again, the issue of what constitutes a proper format of an appellant's brief. In his judgment in Engineering Enterprises of Niger Contractor Co. of Nigeria v. Attorney-General of Kaduna State (1987) 2 NWLR 3 (Pt.57) 381, 396-397, Eso, J.S.C. set it out thus:

'Brief writing is now ten years old, and learned counsel who seek audience in the Supreme Court or even in the Court of Appeal should by now be fully versed in the art. An excellent book on the subject has been produced by a learned Justice of the Court of Appeal Nnaemeka Agu, J.C.A. titled, Brief Writing, For The Court of Appeal and The Supreme Court, and anyone who has read that book should be knowledgeable enough to write a good Brief for this court. But even then, and apart from this, many learned counsel have produced in this court such excellent Briefs, in so many celebrated cases that all a counsel has to do is to read one or the other of those very many excellent productions. Without being exhaustive, I shall refer to a few, very few indeed for the guidance of counsel

1. Otuaaha Akpakpuna v. Obi Nzeka II SC. 85/82;
2. Chief Iman Y.P.O. Shodeinde v. The Registered Trustees of the Ahmadiya Movement in Islam S.C. 64/82;
3. Bronik Motors Ltd. v. Wema Bank Ltd. sc. 110/82, (1983) 1 SCNLR 296;
4. Paul Unongo v. Aper Aku SC.95/83, (1983) 2 SCNLR 332;
5. Oloyo v. Alegbe SC.94/1982, (1983) 2 SCNLR 332;

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6. Transbridge Co. Ltd. v. Survey International Ltd. SC.17/85;
7. A.M.O. Akinsanya v. Survey International Ltd. SC.95/1985, (1986) 4 NWLR (Pt.35) 273;
8. Attorney-General of Bendel State v. U.B.A. Ltd. SC.66/1985, (1986) 4 NWLR (Pt.37) 547;
- 5 9. Ezekiel Emenimaya & Ors. v. Okorji SC.235/84, (1987) 3 NWLR (Pt.59) 6;
10. Ibiyemi Oduye v. Nigeria Airways Ltd. SC.135/85, (1987) 2 NWLR (Pt.55) 126

There is nothing in Brief writing that anyone intends to learn that could not be found in these cases and many more. Learned counsel in the briefs state-

- (a) Introduction (which sets out the background);
- (b) Issues in the Court of Appeal;
- (c) Issues for determination in this Court;
- 15 (d) Arguments and references to in-depth authorities pro and con on the issues.
- (e) Conclusion specifying the reasons why this court should find for the appellant or for the respondent as the case may be;
- (f) Authorities to be relied upon in course of arguments.

20 Briefs are meant to assist in the administration of justice by making the work of both counsel and court simpler once the matter has got to the oral hearing stage. It is to promote justice. Sometimes, in the course of writing a brief, the learned counsel involved in the case sees the futility of his course. The courts gain immense assistance from excellent briefs when
25 it gets to the stage of the court undertaking research into the matter before it.

And in *Olowosago v. Adebajo* (1988) 4 NWLR (Pt.88) 275, 283 Karibi-Whyte, J.S.C. observed thus:

'It is necessary to emphasise the purpose of formulating issues for determination in briefs. Like pleadings to a litigation between the parties, the issues formulated are intended to accentuate the real issues for determination before the court. The grounds of appeal allege the complaints of errors of law, fact or mixed law and fact against the judgment appealed against. The issues for determination accentuate the issues in the grounds of appeal
35 relevant to the determination of the appeal in the light of the grounds of errors alleged.

Hence the issues for determination cannot and should not be at large, but must fall within the purview of the grounds of appeal filed.'

I like to refer to yet another dictum of another Justice of this Court.

In Okpala v. Ibeme (1989) 2 NWLR (Pt.102) 208, 219-220, Nnaemeka-Agu J.S.C had this to say:

"Before I deal with the main issues canvassed in this appeal, I would like to make certain observations on the "issues for determination" framed for this appeal. The learned counsel for the appellants, Senator Anah, formulated two issues which he described as the main issue and a subsidiary issue. These two issues were worded thus:

"4.1 The main issue for determination in this appeal is whether the plaintiffs/appellants failed in toto in the High Court to prove their case. If they did, the proper order should be a dismissal but if not, a non-suit should have been retained by the Court of Appeal.

4.2 The subsidiary issue is whether the non-compliance with Order XL VIII R.I of the High Court Rules of Eastern Nigeria by the trial Judge by not inviting the counsel to address him on the appropriate order to be made vitiates the proper order of non-suit which he made."

With greatest respect, these issues could have been more elegantly worded. Also, the learned counsel for the appellants later framed another "issue" in his 'Supplementary Brief' dated the 6th of March 1987. This runs thus:

"2.1 Whether the applicants can show that there is an arguable appeal."

Quite apart from the fact that there does not appear to be any authority for filing any supplementary brief on 9th March, 1987, when the last date authorised by the rules for filing the appellants' brief was 5th February, 1987, there is no provisions in the rules for filing a supplementary brief without leave of court. What is provided for is a reply brief, where necessary (see Order 6 rule 5(3) of the Supreme Court Rules, 1985). Even so, where it is necessary, it should be limited to answering any new points arising from the respondents' brief. No fresh issue for determination need be included.

The "issues for determination" as framed in respondents' brief was not free from faults either. Three "issues" were set out, namely:

"4.1 Whether the appellants established ownership to the land in dispute referred to by them in ANI NWEKE on the evidence brought by them to entitle them to a declaration of title to the said land. 4.2 Whether the Order of non-suit entered by Umezinwa, J. without inviting counsel to the parties to address him on the propriety of the relief

which was not asked for by any of the parties was a proper exercise of judicial discretion.

4.3 *Whether the Court of Appeal was right in dismissing the appellants' case in the light of the evidence led and findings of fact made by the learned trial Judge."*

5 It can be seen that the first issue did not relate to the grounds of appeal filed while the second wrongly relates to the judgment of the High Court, rather than that of the Court of Appeal appealed from. I should repeat what my learned brother, Obaseki, J.S.C
10 said in respect of the respondent's brief in *Jonah Onyebuchi Eze v. Federal Republic of Nigeria* (1987) 1 NWLR (Pt.51) 506, at p.521,522:

15 *"The respondent is not the appellant and has filed no cross-appeal. It must therefore formulate issues for determination in the appeal, with reference to the grounds filed."*

20 This Court has said a number of times that the "issues for determination" is a very serious part of a brief and ought to be carefully got up. It should not be framed in the abstract but in concrete terms, arising from and related to the grounds of appeal filed which represent the questions in controversy in the particular appeal. See *Western Steel Works Ltd. & Anor v. Iron & Steel Workers Union of Nigeria & Anor.* (1987) 1 NWLR (Pt.49) 284, at p.304."

25 These are weighty pronouncements on the issue of brief writing.
With profound respect to learned leading counsel for the plaintiffs, the appellants' brief filed in the Court of Appeal failed to meet the standard of a good brief as laid down in the various decisions. The brief devoted the first 23 pages of its 25 pages to raising specific issues and making submissions on them. On page 24, after the last submission, the Brief set out the "Matters for determination in this Appeal" under which three questions were posed and without relating any of the previous submissions to any of these three questions nor proffering arguments on them, proceeded to CONCLUSION.

35 The three questions posed in the brief were:

"(i) In view of the preponderance of evidence adduced by the appellants, both oral and documentary, in support of the claim for declaration, damages for trespass and injunction whether the reasons adduced by the learned trial Judge for dismissing all claims

by the appellants are justified. (sic)

(ii) Can the judgment of the learned trial Judge be sustained in view of his failure to make definite findings of fact on material issues raised by the pleadings.

(iii) Does any ISSUE ESTOPPEL arise out of the 3 consolidated suits binding on the appellants and respondents in spite of the order of NON-SUIT in 0/32/57" 5

Questions (i) & (ii) would appear to cover the omnibus ground. As imperfect as the appellants' brief in the Court below might be said to be, it would not be correct, in my respectful view, to say that ground 8 was not treated therein. In view of this conclusion, therefore, I do not accept the submission of learned leading counsel for the defendants that the appeal to the court below ought to have been dismissed in limine. That appeal could properly be considered on the omnibus ground and Chief Onyiuke, S.A.N, for the plaintiffs conceded before us that it was on that ground that the appeal was considered and determined by the court below. 15

ISSUE (3):

This is Issue (ii) in respondents' brief and it is covered by ground 3 of the Grounds of appeal. In arguing this Issue learned leading counsel for the defendants, Chief Kehinde SAN. observed that suits 0/19/57, 0/31/57 and 0/32/57 between Agbudu and Abube communities, Abube and Agbudu communities and Amuawo and Abube communities respectively, were consolidated for trial in the High Court, Onitsha. The three suits went on appeal to the Federal Supreme Court as Appeal No. FSC/295/1960. After judgment by the Federal Supreme Court, further appeals were lodged to the Privy Council in two of the three suits, that is, Suits Nos. 0/19/57 and 0/31/57 between Agbudu and Abube communities. Learned Senior Advocate further observed that Suit No. 0/32/57 between the parties to the present proceedings, that is Umuawo and Abube Communities terminated in the Federal Supreme Court in Appeal No. FSC/259/1960 as there was no further appeal by either party to the Privy Council. Amuawo community lost to the Abube Community in the said appeal. Learned Senior Advocate submitted that since there was no appeal from the Federal Supreme Court to the Privy Council in respect of Suit 0/32/57, nothing decided in the Privy Council could affect the judgment of the Federal Supreme Court in Appeal No. FSC.259/1960 as it affected that suit, notwithstanding that the three suits were consolidated for trial in the High Court, Onitsha. He further submitted that where two or more suits are consolidated and some of the losers in one or more of the consolidated suits appeal whilst other losers do not appeal, the appeal court's judgment in the suits appealed cannot in any 20 25 30 35

way affect the parties in the suit or suits not appealed. Chief Kehinde submitted, in effect, that the court below was in serious error in the use it made of the Privy Council judgment and exhibits considered therein which did not bind the parties to the present proceedings. He urged us to allow the
5 appeal on this ground.

Chief Onyiuke, for the plaintiffs, conceded that the Court of Appeal referred to exhibits and judgment of the Privy Council in the appeal to
10 that body between Abube community (that is present appellants) and the Agbudu people but submitted that what the court below did was to analyse those exhibits for what was actually demarcated and agreed upon by the parties. He further submitted that the comments by the Privy Council dealt with the legal effect of the exhibits and oral transaction which comments
15 were basically matters of law. Learned Senior Advocate submitted that there was no basis on which this court would be justified in setting aside the decision of the lower court for referring to the views of the Privy Council which merely confirmed the view of the Court below as to the effect of the documents tendered in evidence. Chief Onyiuke observed that the docu-
20 ments constituting the exhibits were pleaded by the plaintiff in the present proceedings. He finally submitted that if there was anyone to complain about the use made of the Privy Council judgment it would be the present plaintiffs who were not parties to the Privy Council judgment.

25 In their amended statement of claim the plaintiffs pleaded inter alia, as follows:

30 "13. Prior to 1957 and dating as far back as 1914 there had been disputes between the said three sons or involving any two of them but to the knowledge of all of them as to the correct boundaries of the shares which the three sons inherited. These transactions took place before various administrative officers over a long period of time. These transactions and the memoranda embodying them made before the said administrative officers were reviewed and
35 assessed in the consolidated suits 0/19/57, 0/31/57 and 0/32/57 and in the appeal, judgment on these consolidated suits, appeal, to wit, F.S.C., 295/1960, details of which shall hereinafter be referred to in this statement of claim. The plaintiffs will rely on these transactions and memoranda contained in the said judgment.

14. In 1957 the conflicting claims of the descendants of the said three sons of IKENGA -NANDO resulted in the institution of three suits. In Suit 0/19/57 the people of AGBUDU IKENGA NANDO sued the people of ABUBE IKENGA NANDO instituted a cross action against the people of AGBUDU IKENGA NANDO in Suit 0/32/57 the people of UMUAWO IKENGA NANDO sued the people of ABUBE IKENGA NANDO. All these suits related to IKENGA NANDO lands. 5

15. These three suits were consolidated and tried together before Mr. Justice J. Reynolds in the High Court of the Onitsha Judicial Division. 10

16. Of the various issues raised in the three suits the common issue raised, canvassed extensively in evidence and addresses of counsel and involving the three parties was the extent of the share of IKENGA LAND inherited by each of the 3 (three) sons, namely, Agbudu, Umuawo & Abube. 15

17. This common issue was directly dealt with by the trial Judge who made definite findings of fact, to wit, that the land of IKENGA was divided between AGBUDU, UMUA WO AND ABUBE and that they took their land in that order; that the PLAN-EXHIBIT "A" accurately represents the area owned by each of the three parties to these suits. 20

18. The Plaintiffs assert that EXHIBIT "A" referred to in the said Judgment mentioned in paragraph (17) of this amended statement of claim is Plan No. MEC/258/57.

19. These findings of fact on this common issue were upheld on appeal in F.S.C 295/1960. - 25

20. The findings of fact on the said common issue as adumbrated in the judgment in the consolidated suits and on the said appeal will be founded upon.

21. The defendants are estopped by issue estoppel from relitigating the issue."9d

The defendants pleaded, in reply, thus:

"6. Save and except that the people of Agbudu and the plaintiffs have made series of unsuccessful efforts to snatch portions of the defendants land on various occasions in the law courts, including suits Numbers 0/19/57, 0/31/57 and 0/32/57 as also appeals numbers FSC 295/1960 and Sc. 304/65 the defendants made no further admissions with respect to paragraphs 13, 14, 15, 16, 17, 18, 19 and 20 of the statement of claim and will put the plaintiffs to 35

strict proof of the allegations therein contained.

7. The defendants deny paragraph 21 of the statement of claim
and in further reply thereto the defendants maintain that they are
5 not estopped or at all and will rely on the judgment in appeal
NO.SC.304/65.

At the trial, documents and plans were tendered and admitted in evidence
showing the previous disputes over the Ikenga Nando land shared among
10 and inherited by his three children and their respective descendants. The
first of these documents are Exhibits F, F1 and F2 (which are Exhibits C, D
& E respectively in the proceedings before the Privy Council in Privy Council
Appeal No. 49 of 1962.) Exhibit F is the boundary settlement by P.J.
Gardner, District Officer in April 1917 between Agbudu and Umuawo com-
15 munities at the Native Court of Achalla. Abube Community were not parties
to the suit but their representative gave evidence for both parties. It was
made clear that Abube community were not claiming any part of the land
then in dispute. Igbariam community also joined in the dispute. The boundaries
between the three communities of Agbudu, Umuawo and Igbariam
20 were fixed and demarcated on sketch plan attached to the memorandum
signed by the three communities. Subsequently, Abube Enuyi people came
into the picture as their village was found to be on part of the land. This
necessitated a revision of the April 1917 settlement by J.G. Lawton, Ag.
District Officer in November 1917. Exhibit F1 shows the Gardner decision
25 of April 1917 of the boundary dispute between Agbudu and Abube Enuyi
Communities and the subsequent revision by J.G. Lawton in July 1918.
Exhibit F2 is the memorandum of the boundary resolution between Agbudu
and Amagata of Okpopiri village of Ezi Quarter; this was in April 1917 by
P.J. Gardner.

30

Exhibit G is the record of appeal to the Privy Council in Privy
Council Appeal No. 49 of 1962. It contains the proceedings and judgment
of the trial High Court in the consolidated suits Nos. 0/19/57, 0/31/57 -
35 both cross actions by Agbudu and Abube communities against each other
and 0/32/57 between Umuawo and Abube communities (parties to the
present proceedings) and (iii) the proceedings and judgment of the Federal
Supreme Court in Appeal No. FSC. 295/1960. Exhibit K is the judgment of
the Privy Council in Privy Council Appeal No. 49/1962 from the judgment

of the Federal Supreme Court in FSC 295/1960 but in respect of suits 0/19/57 and 0/31/57 only. The Umuawo community who were plaintiffs in suits 0/32/57 against the Abube community and whose case was non-suited by the Federal Supreme Court did not appeal further to the Privy Council.

5

Following the non-suit of their suit No. 0/32/57, the present plaintiffs sued the defendants again in Suit No. 0/115/61 claiming the same land as in 0/32/57. Their claim was dismissed by Kaine J. and on appeal to this Court (Sir Alexander C.J.N, Sowemimo and Bello JJ.S.C. (as they were then) dismissed the appeal and held:

10

"On the state of law, therefore, since judgment of Reynolds J. was set aside on appeal and an order of non-suit substituted, any findings in that judgment cannot give rise to a plea of issue estoppels in the latter action before Kaine J. This disposes of the arguments and submissions of learned counsel for appellants that there was some issue estoppel pleadable on the judgment of Reynolds J. On the contention as regards Exhibit B (a copy of a plan made for the Agbudu against the Abube) there is nothing on the face of the plan to show that that plan was the same as the one referred to in the Judgment of Reynolds J."

15

20

Following the dismissal of their claim, the plaintiffs have now instituted the present action leading to this appeal claiming a larger area less the area they lost in suit 0/115/61.

25

The question that arises then is: Is the judgment of the Privy Council-Exhibit K admissible in the present proceedings bearing in mind that the plaintiffs in the present proceedings were not parties to the appeal to the Privy Council, even though the present defendants were? Following on this question is the further question whether the findings of the Board in that appeal can be used against the defendants in the present proceedings as seem to have been done by the court below. I have referred to the pleadings of both parties in respect of the plea of issue estoppel raised by the plaintiffs. It is to be observed that the Privy Council judgment was not pleaded in support of the plea of issue estoppel. The learned trial Judge rejected the plea in these words:

30

35

"...it is clear that issue estoppel can only apply in circumstances in which cause of action estoppel also applies. True, suits 0/19/57, 0/

31/57 and 0/32/57 were consolidated for the purposes of trial but the judgment must relate specifically to each cause. In 01/19/57, Agbudu sued Abube; Abube cross-claimed in 0/31/57. Then,
 5 Umuawo sued Abube in 0/32/57 and this was the suit that was non-suited on appeal. No issue estoppel can therefore enure to the benefit of the present plaintiffs when their suit was non-suited."

The court below also rejected the plea of issue estoppel. Uwaifo, J.C.A observed:

10 "In the Supreme Court case of Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228, Idigbe J.S.C. had this to say inter alia:
'Now there are two kinds of estoppel by record inter parties or per rem judicatam, as it is generally known The first is usually referred to as "cause of action estoppel" and it occurs where the cause of
 15 *action is merged in the judgment. Therefore, on this principle of law (or rule of evidence) once it appears that the same cause of action was held to lie (or not to lie) in a final judgment between the same parties or their 'privies, who are litigating in the same capacity (and on the same subject matter), there is an end of the matter. They are precluded from relitigating the same cause of*
 20 *action. There is, however, a second kind of etoppel inter parties and this usually occurs where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceed*
 25 *ings between the same parties (or their privies); in these circumstances, 'issue estoppel' arises. This is based on the principle of law that a party is not allowed to (i.e. he is precluded from) contending the contrary or opposite of any specific point which, having been once distinctly put in issue, has with certainty and solemnity*
 30 *been determined against him. (Idigbe J.S.C.'s emphasis)*
See also Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 27 S.C.; Udo v. Qbot (1989) 1 NWLR(Pt.95) 72 S.C. Here again it must be noted as stated in the above passage that for issue estoppel to
 arise it is one of the conditions that a specific point should have
 35 *been 'distinctly put in issue' and has 'with certainty and solemnity been determined'. The land outside the area verged purple in the plan of Amuawo or within the area verged violet in Exhibit A in suit No. 0/32/57 was never distinctly put in issue to be decided upon and so issue estoppels could not arise from any pronounce*

ment on it.

For Chief Onyiauke on behalf of the appellants to have relentlessly pressed issue estoppel all along, and before this court to submit in the appellants' brief that: The appellants contend with the greatest respect that the lead judgment by Sowemimo J.S.C 5 (as he then was) was made per incuriam and did not really deal with the question of ISSUE ESTOPPEL generated by the 3 consolidated suits but on the contrary dealt with the suit between the appellants and respondents' is, with due respect, a complete misconception and extreme labour in vain. I cannot accept that the said issue estoppel should have been considered in connection 10 with the three consolidated suits rather than the suit No. 0/32/57 between the appellants and the respondents. It is elementary principle that estoppel per rem judicatam, whether cause of action estoppels or issue estoppel, can only arise between the same parties in its full meaning to a particular suit. That is why it is inter partes i.e., as between the same parties to the same suit: See 15 Ikpong & Ors v. Chief Sam Edoho & Anor. (1978) 6-7 S.C. 221."

Coming now to the issue of Exhibit K - the Privy Council judgment, it is undoubtedly res inter alia, the plaintiffs not being parties to the Privy Council appeal. Now sections 52 & 55 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 provide:

"52. Judgments, orders or decrees, other than those mentioned in sections 49,50 and 51 of this Act, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of this or any other Act. 25
55(1) If a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant fact, when ever any matter, which was, or might have been, decided in the action in which it was given, is in issue, or is deemed to be relevant 30 to the issue, in any subsequent proceeding.
(2) Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel. (Italics mine) 35

I must note here that the Privy Council judgment does not come within sections 49-51 of the Act. As Exhibit K is not between the parties (and their privies) to the present proceedings it is irrelevant as between them in these

proceedings and should never have been admitted and having been wrongly admitted, it should have been expunged from the records. The court below is clearly in error to have made use of the findings or observations of the Board in coming to its own decision. It indeed relied heavily on Exhibit K in coming to its finding of estoppel by conduct made against the defendants. Uwaifo, J.C.A. concluded thus:

'Unfortunately, the trial Judge clearly failed to realise the effect of those exhibits. He completely neglected to make use of them or consider them. He did not even make reference to them.'

10 (Italics mine)

As between the trial court and the court below, I think - and I say this with profound respect - that it is the latter court that went wrong by making use of irrelevant evidence before it.

ISSUE (4)

15 This is the same as respondents' Issue (iii). Chief Kehinde's main submission on this issue is that it is wrong of the Court of Appeal to have imported, suo motu, into plaintiff's case estoppel by conduct which the plaintiffs never raised in their case.

Chief Onyiuke, on the other hand, submitted that the issue was without any basis and unsound and could not be a ground for setting aside the decision of the court below.

Uwaifo, J.C.A. in his lead judgment at page 259 of the record observed:

25 *"The appellants have carried out a survey to establish that boundary as fixed by Mr. Lawton which separates Agbudu from Umuawo to the exclusion of Abube except the small portion earlier awarded them. On the contrary the respondents seem to want to spread over whatever land would be due to the appellants although without a counterclaim but by mere assertion. It is hardly realised by them that reading through exhibits F and F1 and the Privy Council's view that decisions reached in those exhibits had been acted on for over forty years by the parties, the parties were at least estopped by conduct from claiming contrary to what had then been established and accepted. In particular, Abube (i.e.,*
30 *respondents) cannot be heard to assert any right over land far more than they claimed at a stage and even when they attempted to claim extra, the decisions of Mr. Gardner and Mr. Lawton had given them very limited award or area of ownership. Also as a matter of law, the said decisions estop the respondents. In any*

case the totality or the cumulative effect of exhibits F and F1 together with the views of the Privy Council in exhibit K is that the respondents have no doubt engaged in false assertion over land that has never been their own through systematic or opportunistic encroachment."

5

The law is that any party relying on estoppel must specifically plead it - See *Odadhe v. Okujeni* (1973) 11 sc. 343, 353 where Ibekwe J.S.C (as he then was) delivering the judgment of this court observed:

"It is relevant to observe that the plaintiff did not plead estoppel. It was, therefore, not open to him to raise it, either in the Court below or before us. Moreover, this point was never taken before the learned trial Judge. This court has said over and over again that, where the plaintiff did not set up estoppel in the court below as part of his case, it would, in our opinion, be wrong for this court to allow such an issue to be raised as one of the issues in the case for the first time in this court."

15

Estoppel by conduct was never pleaded by the plaintiffs. Indeed, it did not form part of their case at the trial court or even at the Court of Appeal. It was the latter court that suo motu took the point and based its decision thereon by holding that the defendants were estopped "from claiming contrary to what had been established and accepted." I must, with respect, say that the court below was clearly in error to invoke, as it did, the doctrine of estoppel by conduct against the defendants which case the plaintiffs did not set up nor was it even backed by the evidence.

20

25

I therefore, answer Question 4 in the negative.

ISSUE (5) & (6)

These are similar to questions (iv) & (v) raised in the respondents' brief. I propose to take them together as they dovetail into one another. I shall also consider I along the question (i) posed in the Respondents' Brief.

30

Chief Kehinde for the defendants referred to the finding of the court below to the effect that the area of land known as ado Ubili which the plaintiffs lost in Suit 0/15/61 was definite and submitted that this finding was in conflict with the Supreme Court finding in that case, especially so that there was no evidence adduced by the plaintiffs in the present proceedings to improve on the evidence given in the earlier suit where this court made the finding that the land was uncertain. He reviewed the evidence led

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for the plaintiffs and submitted that the boundaries of Odo Ubili were not well defined nor ascertained and, therefore, those of the larger area could not be said to be equally defined.

5 Chief Onyiuke, for the plaintiffs argued that the plaintiffs were not claiming in the present action Odo Ubili and that, therefore, the live issue in the case was not what is ado Ubili but what area did plaintiffs lose in Suit 0/115/61. After A quoting passages from the lead judgment of the court below, learned Senior Advocate urged this court to dismiss the appeal and
10 to hold that that Court was right and justified in granting plaintiffs' claims on the evidence before the trial court.

There is no doubt that the court below adverted its mind to the correct attitude of an appellate court to a judgment of the trial court at-
15 tacked on the ground that it is against the weight of evidence. Uwaifo, J.C.A. in his lead judgment at pages 275 and 276 of the record said, and I agree with him, that-

20 "The Supreme Court has time and again directed as to what the role of the appellate court is in considering the way a trial court evaluated or failed to evaluate evidence before reaching a decision and to what extent and in what circumstances it can interfere with such evaluation or intervene to do its own evaluation. The direc-
25 tion prescribes caution on the part of the appellate court when the trial court has satisfactorily performed its primary function of evaluating evidence and ascribing probative value to it. This is in order not to exceed its role and proceed to substitute its own findings for those of the trial court: see *Etowa Enang & Ors v. Fidelis Ikor Adu* (1981) 11-12 S.C. 25 at 38 and 40 per Nnamani, J.S.C.; *Obodo & Anor v. Ogba & Ors.* (1987) 2 NWLR (Pt.54) 1; (1987) 3 SC.459
30 at 479 and 482 per Oputa, J.S.C. An appellate court in its primary role in considering a judgment on appeal in a civil case in which the finding or non finding of facts is questioned will seek to know (1) the evidence before the trial court; (2) whether it ac-
35 cepted or rejected any evidence upon the correct perception; (3) whether it correctly approached the assessment of the evidence before it and placed the right probative value on it; (4) whether it used the imaginary scale of justice to weigh the evidence on either side; (5) whether he appreciated upon the preponderance of evi-
dence to which side the scale is weighted having regard to the

burden of proof: See *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt.70) 325 at 339 per Nnaemeka-Agu, J.S.C; *Misir (Nig.) Ltd. v. Mallam Y. Ibrahim* (1975) 5 S.C. 55 at 62 per Coker, J.S.C; *Edward Egonu & Ors v. Eziamaka Egonu & Ors.* (1978) 11 & 12 SC. 111 at 129 per Obaseki, J.S.C. When, as a general rule, the question of the evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non evaluation or improper evaluation of the evidence tendered before the trial court, an appellate court is in as good a position as the trial court to do its own evaluation: See *Narumal & Sons Nigeria Limited v. Niger Benue Transport Company Limited* (1989) 2 NWLR (pt.106) 730 at 742 per Nnamani, J.S.C. It follows that where these various inadequacies on the part of the trial court result in judgment that is per verse, an appellate court has a duty to examine the conclusions and inferences drawn by the court below and to undertake the process of re-evaluating the evidence to come to its own judgment: See *Atolagbe v. Shorun* (1985) 1 NWLR (Pt.2) 360; (1985) 4 S.C. 250 (Pt.1) at 285 per Oputa, J.S.C.

I will add to the authorities cited by him the following cases: *Eki v. Giwa* (1977) 2 SC. 131,133; *Lion Buildings Ltd. v. Shodipe* (1976) 12 S.C. 135, 153; *Ogboda v. Adulugba* (1971) 1 All NLR 68, 71. In the often quoted case of *Mogaji v. Odofin* (1978) 4 S.C. 91, 93-95 Fatayi- Williams J.S.C (as he then was) put the issue more squarely in these words:

"When an appellant complains that a judgment is against the weight of evidence, all he means is that when the evidence adduced by him is balanced against that adduced by the respondent the judgment given in favour of the respondent is against the weight which should have been given to the totality of the evidence before him. In other words, the totality of the evidence should be considered in order to determine which has weight and which no weight at all. Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all the facts, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it; if that law supports it bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiff's claim will be dismissed. In

certain circumstances, however, the claim is either struck out or the plaintiff is non-suited. Incidentally, in deciding which evidence has more weight than the other, a trial Judge sometimes seeks the aid of admissions made by one party to add more to the weight of the evidence adduced by the other party. This is precisely why the totality of the evidence must be considered and why a trial Judge must weigh the conflicting evidence adduced by both parties and then draw his own conclusions. Of course, the procedure set out above will be unnecessary if the plaintiff's case is so patently bad that no reasonable tribunal could possibly act upon it. In such a case, the trial Judge will dismiss the plaintiff's claim without calling upon the defence.

In short, before a Judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore, in determining which is heavier, the judge will naturally have regard to the following:-

- (a) Whether the evidence is admissible;
- (b) Whether it is relevant;
- (c) Whether it is credible;
- (d) Whether it is conclusive; and
- (e) Whether it is more probable than that given by the other party.

Finally, after invoking the law, if any, that is applicable to the case, the trial Judge will then come to his final conclusion based on the evidence which he has accepted.

Plaintiffs' case on their amended statement of claim was based on two pillars, to wit (a) issue estoppel which is covered by paragraphs 13-21 and (b) acts of ownership and possession covered by paragraphs 5-12 and

22-25. In paragraphs 22-25 they pleaded thus:

- "22. The plaintiffs assert that they are the owners under native law and custom of the area verged violet or purple on the Plans Nos. MEC/168/61 minus the area verged Blue on Plan No. MEC/168/ 5 61 this latter area is being excluded by virtue of the judgments in O/ 115/61 and S.C. 304/1965 EMEKA OSONDU & ANOTHER representing UMUAWO IKENGA NANDO versus AJAMA ADUAKA and the named defendants/respondents in that case.
23. As owners in possession the plaintiffs have exercised maximum 10 acts of ownership and possession over the said area since the division of IKENGA lands on the death of their common ancestor IKENGA NANDO. They have their whole village homestead on this land and inter alia have been using the land for erecting their houses, fanning and enjoying economic trees thereon as owners in 15 possession. They have also their jujus on the land as shown on their plan.
24. The named defendants and others have disturbed the plaintiffs' ownership and possession of the said land by lawless acts such as 20 uprooting their crops, cutting economic trees, erecting houses in discriminately on the land. The structures wrongfully erected on the land by the named defendants and other of Abube Nando are shown on the plaintiff's plan as well as the plaintiffs' farm destroyed by the defendants.
25. Unless restrained by injunction the defendants threaten to 25 con tinue these wrongful and lawless acts."

The learned trial Judge after a review of the evidence led on both sides and addresses of learned counsel for the parties, approached the case before him in this manner; he said: 30

"In a case of this nature which in the last 25 years, has reached the Supreme Court twice, and the Privy Council as well, it behoves a trial court to consider carefully the issues previously settled. Only in this way can the trial court avoid making findings which are either unnecessary or erroneous 'unnecessary' because they had 35 been made previously; 'erroneous' because they may well fly in the face of earlier findings. Therefore, to be able to decide the issues before me, I must of necessity take a leap over the grounds already covered by the previous litigations between the parties. From

the pleadings, the plaintiffs sought to prove their case by a combination of two approaches. Firstly they sought to show that certain issues were settled inter parties, by the previous litigation, thereby giving rise to issue estoppel, and secondly, that in addition they were the owners in possession of the land in dispute and have

5 *been disturbed in their exclusive possession by the present defendants. This classification is only useful as a working formula, as all that the plaintiffs have set out to do is to prove their right to occupancy of the land in dispute. I shall now examine both aspects of the methodology."*

He considered the first pillar - issue estoppel - and rejected it. The court
10 below affirmed this part of his judgment. I have no reason to disagree with the rejection of that plea. In any case there is no appeal by the plaintiffs against this part of the lower court's judgment.

The learned trial Judge next considered the second pillar, that of traditional ownership and possession. He considered the evidence led on
15 both sides on the issue. He thereafter observed:

"If the plaintiffs must succeed in their claim, the burden is on them to show exactly the extent and boundary of Odoubili. Unless this is so, an injunction relating to the land in dispute, minus
20 Oboubili, can hardly be enforced. It is clear that for nearly three decades, Odoubili constituted a problem child to the plaintiffs. In 0/32/57 they were to show it in BROWN on a plan to be made. Agbudu had earlier showed it in GREY on their plan Exhibit A. When the present plaintiffs adopted Exhibit A, they did not amend BROWN to read GREY. On appeal, the claim for title to Odoubili
25 was non-suited. Also, the Odoubili shown in GREY in Exhibit A was the shape of a heart, with no boundary features, but when the 1st plaintiff testified, he was reminded of his evidence at the trial of 0/32/57. He agreed that he had said at the trial on 21/1/60-

'In the centre of where we gave Abube to live there are Ubili
30 trees but the Ubili trees were no longer there on the land.'
He also said on 21/1/60 -

'In ancient times the line through which Ubili ran was the boundary, but now the boundary that could be seen is the extent of their houses. They exceeded the boundary.'

35 This was in -1960 and it was no wonder that Odoubili was shown in GREY in Exhibit A with the shape of a heart and no boundary features.

The plaintiffs made a second try for title to Odoubili. This was in 0/115/61. Exhibit B was made for this purpose. In fact

Exhibit B was a reproduction of Exhibit A save that the heart shaped Oboubili became an oblong, verged BLUE, with boundary features shown mainly as 'Udala' tree, Iroko tree, 'Akpa' tree, 'Ugili tree, 'Inyi' tree, 'Ukwu' tree, etc., in the West. Suffice it to say that the claim to Odoubili was dismissed as per Exhibit O. The plain tiffs now claimed PURPLE or VIOLET, minus BLUE in Exhibit B, hence it is their burden to show the extent of BLUE. If the evi dence of the 1st plaintiff on 21/1/60 is anything to go by, the Odoubili in BLUE cannot be the land he described as marked only by Ubili trees which have been cut down with the result that the only boundary that could be seen was the extent of the houses. It must be added that when the present defendants made Exhibit C, for 0/31/57, they did not show Odo Ubili. Where Odoubili was shown on Exhibit A, they showed Abube Nandotown and did not show Odoubili by name. In effect, there is no agreement between the parties as to what constitutes the extent of Odoubili. The plain tiffs say it is as in BLUE verge but I am not satisfied from the dence before me that this is so. This is because I fail to under stand the shifting nature of the land in so short a time. Also, the plaintiffs did not call any witness who were their tenants on the land in dispute. The defendants called D.W.3 who stated that fifty of them were tenants of the defendants at Aguoyi land and that each of them paid N10.00 per year as rents. Aguoyi land is shown in identical position in Exhibits C and M. D.W.3 impressed me as a witness of truth. If his father before him, himself and 49 others have been at Aguoyi without challenge it is clear evidence of act of possession on the part of the defendants. The evidence of PW.2 that Ubasioye was in boundary with the plaintiffs and not with the defendants is neither here nor there for that boundary is a natural one, namely the Agbanabo Stream which separated the two towns. The witness knew the people on the other side of the stream to be Umuawo but knew nothing more of the land. Similarly, the evi dence about shrines on the land is inconclusive. If I may return once more to the question of issue estoppel it is in respect of the eastern boundary that the present plaintiffs may lay claim to issue estoppel since in the three cornered battle, both Agbudu and Umuawo asserted this as their boundary. Even so, the eastern boundary is only one of the three boundaries encircling the land in dispute, and so cannot establish the identity of the Ani Umuawo now claimed by the plaintiffs. Furthermore, there is the presence

of D. W.3 and 49 other Nteje farmers on the land in dispute which the plaintiffs have not succeeded in explaining away. In short, the plaintiffs have not succeeded in showing that they are in exclusive possession of the land in dispute and the declaration sought therefore fails and is hereby dismissed."

5 In disturbing the verdict above, the court below, per Uwaifo, J.C.A. considered in great detail the adjudications by administrative officers in 1917 - 1918, Exhibits F & F1 and the judgment of the Privy Council Exhibit K. It also held that there was no proper evaluation of the evidence adduced at the trial and proceeded to do so. It must be remembered that a court of
10 appeal is not an *avant garde* with power to rake up *suo motu* mistakes contained in the judgment of the court of trial. The powers conferred on the court below by section 16 of the Court of Appeal Act do not give it a blank cheque. Its jurisdiction is limited only to issues raised before it by way of grounds of appeal or to issues raised *suo motu* by it but cannot base its
15 decision on such issues without giving the parties an opportunity of addressing it on them.

EXHIBITS F, F1 & K

It is interesting to observe that in the appellants' brief before the
20 court below, reliance was not placed on Exhibits F, F1 and K in support of plaintiffs' case. The court below took those issues itself. I have already considered the use made of exhibit K; I need not go over that again.

From the sketch map attached to-exhibit F1 it cannot be said that
25 Messrs Gamer and Lawton adjudicated and settled boundaries of the lands inherited by each of the three sons of Ikenga Nando. The adjudication must have related to a small portion of the land of Ikenga Nando. This conclusion is reached when one compares the sketch map and the plans used in the various litigations since 1957. With this conclusion, the value if any of
30 Exhibits F & F1 to the case on hand must be very minimal. Those documents show there have been since the early part of this century boundary disputes among neighbouring communities in the area. No evidence was led to relate the boundaries adjudicated upon in 1917-1918 with the land now in dispute.

AREA IN DISPUTE

The court below considered the evidence of P.W.1 and P.W.2 and concluded that the "boundary descriptions given by them are clearly sup-

ported by the appellants plans exhibits A, B, E and L which they pleaded in paragraphs 3, 8, 9 and 26(a).¹ With profound respect to the Justices of the court below, they do not appear to have adverted their minds properly to the evidence of P.W.1, Joseph Asike. The witness testified thus:

"I know the Oyi River. It touches part of Ikenga land. On this side, Ikenga land has boundary with Nteje and Awkuzu. I know the Gbugburu River. It is within Ikenga land and marks the boundary between Agbudu and Abube. I know the Ezuku Stream. It is also on the boundary between Agbudu and Abube. It also marks our boundary with Igbariam. I know the Anyafuanwu stream which flows into lyiojiagu stream and there to Ezuku stream. The Anyafuanwu stream also marks the boundary between Agbudu and Abube as well as with Okpobili. I know the Iku stream. It forms the boundary between Abube and Igbariam. I know the Ubasioye village which is boundary with lands of Ikenga-Nando. Agbudu and Umuowo have a boundary. Beginning from Oyi River near the bridge to Nteje, there are cement pillar, Ukwa tree, cement pillar from which leads to Achalla Nteje, then a 4th cement pillar, ukwu tree, Okpokolo tree, then a 5th cement pillar, Omelebude stream, then Udala tree, Araba tree, Iroko tree, then a 6th cement pillar, Echichi tree, Ukwa tree, Echichi tree, a 7th cement pillar, Elili tree near Isingene stream. Echichi tree near Ajagujuju, a 9th cement pillar Ogilisi tree, Ebenebe Olisioku tree, then the last cement pillar, mango tree, Inyi tree and mango tree on the road to Nkwo Nando market. The District Officers called Gardner and Lawton planted the beacons on the boundary as a result of a dispute between Agbudu and Umuawo. Abube was present on the occasion. At this time, there was also a dispute between Agbudu and Abube, settled by the same District Officers. The settlement was in writing, signed by Agbudu, Abube and Umuawo. Echundu and Achua - signed for Agbudu; Chief Nwakamma and Egneti signed for Umuawo; Akpe and Anekwe signed for Abube."

The evidence of this witness differs in some respects from the plans Exhibits A, B, E, L. For instance, Awkuzu are not shown on any of them as boundary men. The witness talked of 9 cement pillars but Exhibits F & R talk of 3 cement pillars planted by the administrative officers in 1917. To questions under cross-examination the witness admitted:

5 *"Other people live where Ibeche Abasi live. Those who live there are people of Abube. Among them is one Ezebile Abasi. I do not know the number. I know the father of the Abasi. He is now dead. Their father did not live where the children now live. He lived on the other side of Ubeiyi stream. It is located close to the stream and now a Church. The Church is St. Jude. Standing at the confluence of Ubeiyi and Oyi River, there are no houses in the direction of the land in dispute. I know the Nwanne Bridge at which the road crosses Ubeiyi River. There are many houses on both sides at the road belonging to Abube people. I know the St. Jude's near this road. I do not know Arobinagu Juju along this road. Our people of Agbudu have no jujus from the Nwanne Bridge down to Oyi River. We have no houses on either side of the road, but we have the lands on both sides of the road. I reject the suggestion that we have no lands on both sides of the road.*
 15 *I know the Omanto shrine. It belongs to Umuawo, not Abube. I know the Achutu pond. No-one lives near it. I know Nwasa Akwuba and Okagbu Ogue, but I do not know where they live. Both are of Abube. I know the Iyimbeku Pond. It is on our land. It is bush and no-one lives there. I reject the suggestion that Iyimbeku is not on our land. Iyimbekll is near the portion of land with which we paid for the Abube man that we killed.*
 20 *Exhibits F-F2 deal with disputes between Agbudu, Umuawo and Abube, not between Agbudu and Abube. I know the Umuawo village. There is only one Umuawo village in Nando. Umuawo village is within the land now in dispute. I know Abube village in Nando. There are parts of Abube people living on the land ill dispute."*
 25

(Italics mine)

As regards PW.2, if the learned Justices of the court below had
 30 carefully considered his evidence, they would not have placed much value on it. The witness denied knowledge of the existence of Odo Ubili nor of Ubeiyi stream. Indeed, he has never entered the land in dispute! According to the witness Obu ama Abube is in Abube village but 1st plaintiff contradicted this in his evidence when he said Obu-ama Abube is in Odo-Ubiri
 35 and not in Abube. Both PW.1 and 1st plaintiff contradicted themselves on

the position of St. Jude's. PW.1, by his description of the location of St.

Jude's put it on Umuawo land but 1st plaintiff denied that the Church is on Umuawo land. By his own description of the location of this Church it would be on Agbudu land. The weakness of the case for the plaintiff is so evident in the testimony of 1st plaintiff and PW.1 and PW.2. Following admissions made by them one can hardly find that the plaintiffs have shown such acts of possession over a long period as to lead to the inference that they were ever in exclusive ownership of the land in dispute. 5

As the learned trial Judge found, and rightly in my view, the extent of Odo-Ubiri is the plaintiffs' achilles heel. The shape of it in Exhibit A is different to the shape shown in Exhibits E & L. No accurate description of the area has ever been given by the plaintiffs' not even in the present proceedings. The learned Justices of the court below, per Uwaifo, J.C.A. held the view and I do not share their view that the learned trial Judge in the present case

"..... failed to approach the evidence available in a proper and satisfactory manner. All the possible evidence that the appellants could adduce was before him. He did not evaluate it but rather concerned himself with irrelevancies. If he had evaluated the evidence in relation to the pleadings he would have found that the appellants proved (1) the totality of the land owned by Ikenga Nando; (2) the fact that the appellants, the respondents and Agbudu (the last mentioned being the descendants of the eldest son of Ikenga) derived interest in the said land from their common ancestors for Ikenga Nando; (3) that the interest of each is within the said land and not outside it as the respondents half-heartedly attempted to show by their survey plan; (4) the land to which the respondents since 1914-18 were properly entitled; (5) that the appellants and Agbudu share a common boundary; (6) that the area now claimed by the appellants is less than they would have been entitled to through losing a previous litigation relating to a small piece of land, referred to as Odo Ubiri." 15 20 25 30

On the contrary, it is they who, in an attempt to rake up, suo motu, purported mistakes in the judgment of the learned trial Judge, embarked on a voyage of discovery by either dwelling on irrelevancies such as Exhibit K or making up a case which the plaintiffs did not set up such as the issue of estoppel by conduct. In the enthusiasm to find for the plaintiffs they even

speculated on the thoughts of the plaintiffs. Uwaifo, J.C.A said:

Finally, the trial Judge cannot re-open the fact that the Odo Ubiri claimed in 0/32/57 was different in shape from that later claimed in 0/115/61 (or the present case) because (a) the plan used in that earlier case is evidence which at best could have been used in cross-examination in the later case of 0/115/61 and possibly this very case; (b) the purpose of the non-suit in 0/32/57 was to enable the appellants to try again to ascertain the boundaries of Odo Ubiri satisfactorily: this they could do either by making out a different shape of the land or indicating boundary marks of the former shape. They decided to establish a different shape with boundary features as the facts and circumstances dictated. If they were bound to maintain the former shape in any event, then it would have been no use to them to have been given a second opportunity to go to court over Odo Ubiri; (c) it should not be forgotten that from the point of view of the appellants, Odo Ubiri is an incursion and was in a sense growing through further incursion by the respondents, hence the 1st plaintiff said in evidence:

'We have sued the defendants because, following the decision over ODO-UBIRI, they entered our land now in dispute. They began to uproot our crops and to plant their own, as well as building on the land and cutting down economic trees' as recorded by the Judge.

This act of the respondents could well account for the difference in shape of the ado Ubiri in the 1957 action and that in the 1961 action. In any case, as already said, it was in the 1961 action that the area of ado Ubiri was recognised to arrive at a decision,"

They misdirected themselves when they, per Uwaifo, J.C.A, said:

'Thirdly, it was completely wrong of the trial Judge to refer to the evidence allegedly given by the 1st plaintiff on 21/01/60 (in what suit no one knows) when he was at no time confronted with it and cross-examined on it which is the only use that could be made of such previous evidence (if it existed): See Alade v. Aborishade (1960) SCNLR 398: (1960) 5 F.S.C. 167; Marade v. Isikhenmen (1978) 2 S.C. 87.'

This shows glaringly that it was the court below, rather than the trial court that did not advert its mind properly to the evidence. For 1st plaintiff testified thus:

'In the 1957 case, I testified on 21/1/60 before Reynolds J, I said in my evidence that- Abube people were our tenants. 'I also said that -in the centre of where we gave Abube to live there are Ubili trees. ' I also said that the grant to Abube was made by us, The Ubili trees are no longer on the land, When I testified on 21/1/60, I knew the boundaries of Odo-Ubiri, I gave the boundary to the West in my

evidence. I said in my evidence In ancient times, the line through which Ubili trees ran was the boundary, but now, the boundary that could be seen is the extent of their houses, They exceeded the boundary. The size of Odo-Ubiri since I knew it has always remained the same up till today. No new boundary trees have been inserted after my evidence in 1960. Abube people are increasing in numbers due to migration from their homestead to Odo-Ubiri and the land in dispute, "

In conclusion, the court below, in my respectful view, went far beyond what is required of an appellate court when considering the ground of appeal that the judgment is against the weight of evidence.

It only remains for me to examine the judgment of the learned trial Judge to see whether there is any justification for interfering with the verdict reached by him, As earlier observed in this judgment, the plaintiffs based their claims on (a) issue estoppel and (b) acts of possession, The two lower courts found against them on the question of issue estoppel. There has been no appeal against that finding. On the question of acts of possession, the learned trial Judge specifically found as follows:

"Furthermore, there is the presence of D.W.3 and 49 other Nteje fanners on the land in dispute which the plaintiffs have not succeeded in explaining away. In short, the plaintiffs have not succeeded in showing that they are in exclusive possession of the land in dispute."

In view of the evidence of the 1st plaintiff that-

- (1) A road leads from Agbudu into the land in dispute. As one enters the land in dispute, there are zinc houses on both sides of the road. I do not know if the following are among the owners of the houses: Osita Modilim, Nzensi Aronu, Aronu Onwuoku, Nnake Ohan and Amali Uzoeghe. Of these 5, 1 only know Osita Modilim, but he lives at Odo Ubiri.
- (2) The only storey building within the land in dispute (excluding B Odo-Ubiri) belongs to 1st defendant. I know Ebeene Abasi. He is the elder brother of the 1st defendant. He too has a house on the land in dispute.
- (3) I know Ejimofor Madubuko and Ufuegbuna Umerah, but not Odiel Maduka. The 2 that I know lived on the land in dispute in 1957 (i.e. in Odo-Ubiri). As of now, both have left Odo-Ubiri and lived on the land now in dispute."

The evidence of P.W.1, Joseph Asika that -

(1) I know Ibeche Abisi Abube. He does not live on this road. He lives on the road to the right and on land of Umuawo.'

(2) Other people live where Ibeche Abasi live. Those who live there are people of Abube. Among them is one Ezebili Abasi. I do not
5 know the number.'

(3) There are parts of Abube people living on the land in dispute" and the evidence of D.W.3 whose evidence the learned trial Judge believed, it is my humble view that that finding of the learned trial Judge is adequately supported by the evidence before him.

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The learned trial Judge considered the issue of the identity of the land in dispute and held it was not established. He was of the view that the western boundary was not established. Having regard however to the evidence of P.W.2, Ogugua Ibesi it is difficult to accept the finding that the
15 western boundary was not established. He also expressed the view that issue estoppel might apply to establish the eastern boundary. This view would appear also to be erroneous as issue estoppel would not apply as between the present parties (Omuawo/Abube) to a finding in a case between Agbudu and Omuawo. It can, therefore, not be said that the eastern boundary
20 was established. In effect, the learned trial Judge's finding that the identity of the land in dispute was not established by the plaintiffs is correct.

The plaintiffs, having failed on the two fronts on which they based
25 their claims, their case was rightly dismissed by the learned trial Judge. The Court of Appeal was in error to disturb that verdict.

On the whole, for the reasons I have given, this appeal succeeds and it is allowed by me. I set aside the judgment of the Court of Appeal
30 given in this matter on 11th January, 1990 and in its stead I restore the judgment of the trial High Court given on 27th May 1985 dismissing plaintiffs claims and awarding N1,000.00 costs in favour of the defendants. The defendants are also entitled to the costs of the appeals in the Court of Appeal and in this court which I fix at N750.00 and N1,000.00 respectively.
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UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I entirely agree with the judgment. The appeal has merit. Accordingly, it succeeds. I set aside the judgment of the Court of Appeal and I restore the judgment of the trial court as modified by the judgment of my learned brother Ogundare, J.S.C. I abide by the order as to costs in the said judgment. 5

BELGORE JSC

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I had the privilege of seeing and reading in draft the judgment of my learned brother Ogundare, J.S.C., with which I am in full agreement. The trial Court in a meticulous judgment apparently returned the correct decision. However, for some invalid reasons, the Court of Appeal opened a new vista to the case. Court of Appeal, just as trial court, should always confine its decisions to issues in contention by the parties and nothing more. Once the facts on which the trial court relied upon for its decision are clear and the decision flows directly from those facts pleaded. Court of Appeal ought not embark on new facts unpleaded and even not in evidence. I agree, for the fuller reasons advanced in the judgment of Ogundare, J.S.C., that the appeal ought to be allowed. I also allow the appeal and make the same consequential orders as contained in the said judgment. 15 20

WALI JSC

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I have read in advance a draft copy of the lead judgment of my learned brother, Ogundare, J.S.C. I agree with his reasoning and conclusion that the appeal has merit, and should be allowed.

And for those same reasons stated in the lead judgment, I too hereby allow this appeal, set aside the judgment of the Court of Appeal, Enugu Division delivered on 11th January, 1990, and restore the judgment of the trial court given on 27th May, 1985 dismissing the plaintiffs' claim. I abide by the order of costs made in the lead judgment. 30

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OMO JSC

The plaintiff/respondents in 1978 filed an action in the Anambra State High Court (Onitsha Judicial Division) against the defendants/appellants claiming a declaration of entitlement to customary rights of occupancy in respect of a piece of land 'verged violet in Plot No. MEC/168/8 I
 5 minus the area verged blue lying within it'; N1000.00 general damages for trespass; and an injunction to restrain the defendant/appellants, their servants, agents etc, from further trespass on the said land.

Pleadings were duly filed and in the course of hearing many exhib-
 10 its, comprising survey plans, record of proceedings and judgments were tendered by the parties. After hearing witnesses and counsel on behalf of the parties, Awogu, J (as he then was), in a reserved judgment, dismissed the claim of the plaintiffs/respondents in its entirety. The plaintiffs/respon-
 dents being dissatisfied with this decision appealed against same to the
 15 Court of Appeal.

In the Court of Appeal parties duly filed their briefs of argument, and counsel were heard in oral argument on their behalf. In its judgment the court below allowed the appeal of the plaintiffs/respondents, set aside
 20 the judgment of the High Court, and entered judgment for the plaintiffs/respondents (to be called respondents simpliciter hereafter) as claimed by them. It is against this decision that the defendants/appellants (hereinafter referred to as the appellants only) have appealed to this court.

25 In this court, parties again filed their respective briefs of argument and preferred oral arguments before us.

In the High Court the respondents based their case on issue estoppel and proof (acts) of possession/ownership. The findings which were re-
 30 lied upon as constituting issue estoppel are those made (a) in the judgment of Reynolds, J in the consolidated actions involving the present parties and their kinsmen of Agbudu Ikenga (Suits Nos 0/19/57, 0/31/57 and 0/31/57 consolidated), and (b) in the Privy Council judgment on Suit. Nos. 0/19157 and 0/31/57 (between Agbudu Ikenga and the appellants of Abube Ikenga)
 35 With regards to (a), the trial court held that since the Federal Supreme Court had non-suited the respondents in their claim No. 0/32/57 when the matter went on appeal from the decision of Reynolds J, his findings at
 the trial went to no issue and could no longer be relied upon by the respon-

dents. On (b) those findings could not be relied upon by the respondents because the Privy Council proceedings were only between the appellants and Agbudu Ikenga; and the respondents were not parties thereto. It is noteworthy that these very submissions had been made when the action between the present parties in an Earlier suit No.0/115/61 went on appeal to the Federal Supreme Court (No.SC.304/1965), where the Supreme Court also made it clear that issue estoppel did not arise from the findings of Reynolds J. On the claim for ownership of the land in dispute, the learned trial Judge held that it's boundaries had not been satisfactorily established, and that evidence led had not shown that the respondents were in exclusive possession of the land in dispute. He therefore dismissed the respondents' claim.

In the Court of Appeal, the respondents (as appellants in that court) filed and relied on eight grounds of appeal, most of which were described by Uwaifo, J.C.A in his lead judgment as 'difficult to understand and appreciate'. He thereafter appeared to understand the grounds filed because he dealt with all of them, only striking out ground 4 which he agreed was mere comment and not a ground of appeal. These grounds of appeal have been set out in full in the judgment of my learned brother Ogundare, J.S.C., and I do not deem it necessary to further reproduce them in this judgment. My learned brother has fully considered the nature/competence of the grounds of appeal. I agree with him that they were inelegantly drafted. Whether all the other grounds except Ground 8 should have been struck out is no longer in my view of any importance because respondents' counsel has conceded that the court below based its decision on a consideration of ground 8 the omnibus ground. In response to the appellants' ground of appeal complaining about the brief of the respondents (as appellants) in the Court of Appeal being deficient, contravening the provisions of Order 6 rules 2 and 3 of the Court of Appeal Rules, Ogundare, J.S.C. in his judgment x-rayed at some length the brief of the appellants prepared by their counsel. Again it is enough for me to agree with his conclusion that the aforementioned appellant's brief failed to meet the standard of a good brief, as laid down by the law and various decisions. In its judgment the Court of Appeal confirmed that the plea of issue estoppel raised by the respondents had not been established. In rejecting that plea, it also observed as follows:

"For Chief Onyiuke on behalf of the appellants to have relentlessly

pressed issue estoppel all along, and before this court to submit in the appellants' brief that: The appellants contend with the greatest respect that the lead judgment by Sowemimo J.S.C (as he then was) was made per incuriam and did not really deal with the question of ISSUE ESTOPPEL generated by the 3 consolidated suits but on the contrary dealt with the suit between the appellants and respondents' is, with due respect, a complete misconception and extreme labour in vain. I cannot accept that the said issue estoppel should have been considered in connection with the three consolidated suits rather than the suit No. 0/32/57 between the appellants and the respondents. It is elementary principle that estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, can only arise between the same parties in its full meaning to a particular suit. That is why it is inter partes i.e., as between the same parties to the same suit: See Ikang & Ors v. Chief Sam Edoho & Anor. (1978) 6 1977 S.C. 221."

But it proceeded to hold by reference to documents tendered in the consolidated suits between the three kinsmen of Agbudu, Umuawo and Abube referred to earlier, that estoppel by conduct had been established in favour of the respondents, and against the appellants. On the evidence of acts of ownership/possession and boundaries, the court took the view that this had not been properly evaluated by the trial High Court. It then evaluated same, and found that the respondents had discharged the onus of proof of them in respect of their claim, and allowed their appeal.

Five grounds of appeal were filed and relied on by the appellants in support of their appeal. Again, these are set out in full in the lead judgment of my learned brother Ogundare, J.S.C., and I will not repeat them here. From these grounds, the appellants distilled the following issues for determination:-

- (1) Can an appeal court decide an appeal on an issue not related to or based on a ground of appeal?
- (2) Whether the Court of Appeal ought not to have dismissed the appeal after it found that "Most of the grounds appear difficult to understand and appreciate".
- (3) Where two or more suits are consolidated and some of the losers in one or more of the consolidated suits appeal to an appeal court whilst other losers do not appeal, can the appeal court judgment on the suit or suits appealed be made to affect the parties in the suit or suits not ap

pealed?

(4) Whether the Court of Appeal could make out a case of estoppel by conduct for the respondents which they neither made for themselves nor pleaded.

(5) When an appeal court has made a finding of or a pronouncement on a fact, can a lower court make a contrary finding or pronouncement? 5

(6) Can the Court of Appeal grant declaration to a large area of land claimed by the respondents when there is NO evidence of the boundary of or defining or delineating the area to be minussed from the large area claimed?' 10

The respondents, in their brief, raised the following issues as arising for determination:-

- (i) Whether the Court of Appeal was right and justified in setting aside the decision of the trial court and in granting the claims of the respondents on the evidence before the Court. 15
- (ii) Can, (and if so, in what extent) the Privy Council judgment Exhibit K, be applied to affect the parties in the present suit 0/61/75 having regard to the fact that Suit 0/32/57 to which they were parties in the consolidated suits, 0/19/57, 0/31/57 and 0/32/57 was not appealed to the Privy Council. 20
- (iii) Whether the question of ESTOPPEL by conduct referred to by the Court of Appeal in its judgment and the use, if any, made of it by the Court of Appeal amounts to a miscarriage of justice. 25
- (iv) Did the findings or pronouncements made by the Court of Appeal in its judgment in the present case contradict the findings by the Supreme Court in the earlier suits. 30
- (v) Was the area excised by the respondents in their claim for declaration of title to land sufficiently delineated and demarcated.'

The first two issues set out by the appellants having already been disposed of by earlier agreement with the conclusions of my learned brother Ogundare, J.S.C. in his judgment, the third issue will now be briefly considered. The documents relevant for a proper consideration of this issue are Exhibits F, F1 and F2, which are boundary settlements and memoranda 35

relating thereto made by District Officers Gardner and Lawton in 1917/18 in disputes between Agbudu, Abube Umuawo, Igbariam and Amagata (Okpopiri) communities. The appellants of Abube were parties only to Exhibit F1, although they testified for the parties in Exhibits F and F2. Exhibits G and K are the record of appeal and judgment respectively in the consolidated cases between the three kinsmen of Ikenga Nando - Agbudu, Umuawo and Abube - referred to earlier (Suit Nos. 0/19/59, 0/31/57 and 0/32/57). Exhibit G contains all the proceedings from the High Court and at the Supreme Court which constituted the record before the Privy Council in Appeal No. 49 of 1962. Whereas all the three went on appeal from the decision of the High Court (Reynolds J.) in Onitsha to the Federal Supreme Court in Lagos, only two of them - Agbudu and Abube - were involved in the further appeals to the Privy Council in respect of their suits 0/19/57 and 0/31/57. The third suit - 0/32/57 between the present parties in this appeal - Umuawo and Abube - was not appealed to the Privy Council. No doubt because the Federal Supreme Court non-suited their claim to Odo Ubili land, the Umuawo (present respondents), decided to re-litigate same in Onitsha. Suit No. 0/32/57 was therefore effectively deconsolidated from the other two suits which went to London i.e. 0/19/57 and 0/31/57. The complaint in the issue raised is that the judgment of the Privy Council Exhibit K was very liberally referred to and relied upon by the court below in its judgment, when the present respondent of Umuawo was not a party to that appeal. Strictly speaking findings/comments by the Privy Council when the appeal of the suits between Agbadu and Abube came before it, are not relevant to the present action which is between Abube and Umuawo. They may therefore be normally described as *res inter alias acta*. But a close look at the quotations which the court below made from Exhibit K will however show firstly that they are only three in number and reference to them cannot therefore be correctly described as liberal. Secondly, that they were referred to as interpretations by the Privy Council of Exhibits F to F2 which are pleaded and relevant in the present case. Thirdly, that references to them have had very marginal effect on the decision of the Court of Appeal, because the court below relied more on its references to Exhibits F to F2. Whilst the answer to Issue 3 as framed is obviously in the negative, it cannot be said that references to the judgment of the Privy Council has adversely affected the appellants here. I will comment later on the failure of the learned trial Judge to consider Exhibits F to F2 which were before him.

There is some substance in Issue 4. There is no doubt that the re-

spondents could have made out a case of estoppel by conduct if they had pleaded it. They however did not do so and it was wrong of the court below to have taken it suo motu. Be it noted however that the decisions which the court below regarded as giving rise to estoppel by conduct were also stated by it as estopping the present appellants 'as a matter of law'. They also constitute relevant facts. The courts reliance on estoppel by conduct cannot therefore by itself alone have in my view justified setting aside the judgment of the court below. 5

The issue for determination in issue 5 is 'whether the Court of Appeal can make a finding of fact contrary to the finding of the Supreme Court on the same matter'. The finding of the court below complained of is stated thus: 10

'It is clear therefore that the area of land known as Udo Ubiri which the appellants lost to the respondents in Suit No. 0/115/61 was definite and was accepted to be so' 15

It is contended by the appellants that this finding is contrary to the decision of the Federal Supreme Court firstly in FSC/295/1960 where Reynold's judgment in Suit E No. 0/32:/57 granting Udo Ubiri to the present respondents in the Onitsha High Court was set aside by the Federal Supreme Court on the ground that the declaration was 'in respect of an undefined area of land' and secondly, in SC.304/1965, the subsequent action taken by the present respondents Suit No. 0/115/61 relitigating the ownership of Udo Ubiri. There is no doubt that in the first action the Supreme Court found the area Udo Ubiri undefined and so non-suited the present respondents. But the contention would appear to be incorrect in respect of the second action. In the High Court the area of land called by the respondents (as plaintiffs) as Udo Ubiri was clearly delineated on a plan. Kaine J. did not in the judgment dismiss the plaintiffs' claim on the ground that the boundaries of the land had not been properly defined or proved but because he was not satisfied with the averment of the plaintiffs (Umuawo) that the defendants (Abube) were their tenants on the land in dispute. It is therefore in my view safe to say that the land which the plaintiffs of Umuawo describe and know as Udo Ubiri was defined and definite in that case. Issue estoppel can therefore arise on this ground, and the finding of the learned Justice of Appeal complained of is correct. Again therefore, whilst the answer to the issue as framed is in the negative, the problem raised does not arise in this 20 25 30 35

case.

The sixth issue for determination, is set out by the appellants at page 11 of their brief as

5 "Whether the Court of Appeal was right in law in allowing the
 appeal and granting the declaration sought by the plaintiffs when
 no evidence of the boundaries of or defining or delineating the
 area called (by the plaintiffs) Odo Ubiri which is minused from
 their claim is before the trial court"
 10 (note: *Italics mine*)

This issue as posed is not entirely correct. There was evidence by the 1st
 plaintiff in the High Court as to the boundaries of the whole land Ani
 Umuawo claimed, verged purple on plaintiffs plan, of which Odo Ubili is
 15 only a part, vide pages 63/64 where he correctly stated the features on the
 whole of the eastern boundary of Odo Ubiri. He did not however testify as
 to the eastern boundary, which I would have regarded as the more impor-
 tant, no doubt because counsel did not direct his mind thereto since all the
 features thereon are also clearly set out in the plan relied upon. However
 20 the whole of issue 6 as framed is regarded as an important issue by the
 appellant because of the erroneous contention, which I have already set to
 rest under issue 5, that Odo Ubiri as claimed by the respondents remained
 as at the present trial before Awogu, J. (as he then was) undefined. Further-
 more, whilst it would have been beneficial to give oral evidence as to the
 25 western boundary of Odo Ubiri, it must be emphasized that the western
 boundary more relevant for the purpose of the claim before the trial Judge
 is that of Ani Umuawo (the subject matter of the claim before him) and not
 Odo Ubiri. Oral evidence as to the western boundary of Odo Ubiri is not
 therefore strictly relevant, particularly as the land which the respondents
 30 call Odo Ubiri has already been adjudicated upon and defined.

I now proceed to consider some of the pertinent issues raised by
 the Court of Appeal in its 'evaluation' of the evidence before the trial court.
 Before proceeding on this re-evaluation the court below in its judgment
 35 appreciated the fact that the evaluation of evidence before it is primarily
 that of the trial Judge, and that it is only where and when he fails to
 evaluate such evidence at all or properly that a Court of Appeal can inter-
 vene and itself evaluate (re-evaluate) such evidence. Vide *Atologbe v. Shorun*

(1985) 1 NWLR (Pt.2) 360, (1985) 4 S.C. 250. Otherwise, where the court of trial has satisfactorily performed its primary function of evaluating evidence and correctly ascribing probative value to it, the Court of Appeal has no business interfering with its finding on such evidence vide *Obodo & Ors v. Ogba and Ors* (1987) 2 NWLR (pt.54) 1; (1987) 3 S.C. (479'97482).
 The court below found that the learned trial Judge failed to approach the evidence available in a proper and satisfactory manner. In the process he failed completely to consider some pieces of evidence before him, wrongly evaluated some of it by ascribing wrong probative values to same and made wrong findings on others. The court below dealt with this aspect of its judgment in as many as twenty six pages of its forty-seven pages judgment. In view of the conclusion which I will arrive at, I have no Intention of considering this aspect of this appeal at such great length.

It is indeed true that the trial of this case would have benefitted from an approach by the trial Judge which involved a consideration of (a) evidence led as to the totality of the land owned by Ikenga Nando as given by the respondents (b) which area of this land the parties before it can lay claim to and (c) the settlements of the disputes between the parties over Ikenga Nando land around 1914-18, as it affects the present case. Such an approach would have led the trial Judge to give a more favourable consideration to the case of the respondents that Ani Umuawo edged violet (purple) is their own share of their ancestor's land, just as the area edged green is appellants'. A careful analysis of Exhibits F to F2 would have probably laid to rest the issue whether or not the appellants have any land south of the area verged pink marked 'ceded to Abube Nando by Agbudu Nando for certain wrongful acts', confirmed that Agbudu and Umuawo have a common boundary and whether that boundary is as testified to by PW.1 and the 1st plaintiff. Instead of this wide approach, the learned trial Judge restricted himself to a very narrow approach. In his judgment, after dealing at some length with the plea of issue estoppel persisted upon by the respondents' counsel, he proceeded to consider traditional proof of ownership and possession. There he considered the evidence led on that aspect, made some findings of fact and concluded that

'In short, the plaintiffs have not succeeded in showing that they

are in exclusive possession of the land in dispute and the declaration sought therefore fails and is hereby dismissed. The claims for damages for trespass and injunction is hereby also dismissed'

Evidence of acts of ownership/possession considered and relied upon by the trial Judge were on (a) placing of tenants on the
5 land and (b) ownership/user of shrines thereon. The only other sub-issue dealt with and strongly relied on is as to proof of boundaries of the land in dispute. With regard to the boundaries, although most pieces/parcels of land in contention normally have
10 four boundaries which can be described by reference to the cardinal parts of the compass north, east, south and west the land in dispute is sort of pear shaped and really can be said to have 2 boundaries the one running north - east - south and the other running south west-north. I will refer to them hereafter as the west-
15 ern and eastern boundaries respectively. Before dealing with the specific boundaries of the land, the learned trial Judge said he was not satisfied that the land claimed by the respondents and verged blue is Udo Ubili, the boundaries of which, in his finding (stated earlier), must be proved before the respondents can succeed in
20 their claim. In so finding the learned trial Judge misdirected himself because what was at issue here is ANI UMUAWO edged purple (violet) and not ODO UBILI edged blue. It is obviously not absolutely necessary to prove all the boundaries of ODO UBILI before
25 succeeding to prove the boundaries of ANI UMUAWO. The only part of Odo Ubili which must be proved before the respondent's can succeed in their claim to ANI UMUAWO is the eastern boundary of Odo Ubali. Be that as it may, the main reason given by the trial Judge for holding Udo Ubiri not proved is that its shape has
30 changed from a heart shape in 1957 to an oblong shape from 1961 to 1978. This is clearly untenable, as correctly held by the court below. In 1960, the boundaries were found to be undefined by the Supreme Court. It was then heart-shaped, and the respondents were non-suited. In 1961 when they relitigated they took the
35 trouble to define it properly with boundary marks. It ended up being oblong shaped. It remained so in 1978. This should not be a cause for surprise or disbelief because the 1960 shape went with

the non-suit. Relitigation thereafter and the need to achieve clear definition may necessitate a change in shape. It is wrong for the trial court not to have appreciated this. As to the minor point about Ubili trees giving way to houses, it is nothing but straining at a gnat for the trial Judge not to have realised that this is one of the usual processes of development; and to hold it against the respondent. Whilst concerning himself with shapes, trees/houses the learned trial Judge completely failed to consider the evidence of the boundaries of the land in dispute given by P.W.1, P.W.2 and the 1st plaintiff. In these circumstances it is now the duty of the Court of Appeal to evaluate such evidence. Their testimonies as set out on the record and in the judgment of the court below shows a correct recital of the boundary features on the western and eastern boundaries of the land in dispute. The western boundary comprises almost wholly of three streams Okpodufua, Agbenabo and Oyi. The owners of the land across the boundary of the first two streams, which cover about two-thirds of that boundary, are the Ubasiaye people. This is indicated in the plan of both parties. Only the plaintiffs were able to call an Ubasiaye native P.W.2 who testified that the people awning the land across the rivers are the respondents (Umuawa). Yet the trial Judge dismissed his evidence, which was not shaken under cross-examination, as 'neither here nor there because the boundary is a natural one, namely the Agbanebo stream which separates the two towns'. This finding is obviously wrong. Since the trial Judge did not say he disbelieved the evidence of P.W.2 and the appellants did not call any one from Ubasiaye, the correct value to ascribe to the evidence of the respondents as to the western boundary is to hold that it is sufficient proof thereon. Again, on the eastern boundary, the 1st plaintiff at the trial court gave a detailed and correct evidence of the features on that boundary from the south to the north. The learned trial Judge completely overlooked this evidence, which was also in proof of the western boundary of Uda Ubili. Here again the evidence given, and also that of P.W.1 stating that boundary to be that between his village of Agbudu and the respondents (Umuawa), was very cogent and not shaken under cross-examination. I agree with the finding of the court below that the only conclusion possible is that the eastern

boundary of the land claimed has been proved. The position therefore is that the respondents successfully proved the boundaries of the land in dispute. On the sub-issue of user and acts of possession simpliciter, the learned trial Judge held, the evidence of ownership and user of shrines and the land to be inconclusive. But he then faulted the respondents, who had stated
 5 that they put tenants on the land for not calling any such tenant to testify. As against this, the appellants called D.W.3 a native of Nteje who. Testified that he and 49 others from Nteje farmed appellants' Agwu-Oyi land for which they pay N10 per person annually. He had been collecting the rent and paying same to a named appellant for two years. His father, he further
 10 testified, collected these rents before him. This witness impressed the trial Judge 'as a witness of truth', and he further went on to state that

'If his father before him, himself and 49 others have been at Aguoyi without challenge, it is clear evidence of act of possession on the part of the defendants'

15 The court below has sought to fault this evidence by observing that the farms of these 50 persons were no where indicated on appellants' plan, nor were their existence put to the respondents' witnesses under cross-examination. True as these observations may be they cannot be said to debunk the testimony or render same 'neither here nor there because the respondents,
 20 on whom the onus of proof lies, and who pleaded that they had tenants on the land failed to call any of them; nor did they also indicate the presence and/or name of such tenants on the land in dispute. The least interpretation that can be given to this finding by the trial Judge therefore is that it showed that the only act of possession on the land testified to and proved by the
 25 parties is that of the appellants.

This brings me to the penultimate sub- issue of the anus of proof. It is trite that in a claim for a declaration of title the onus is on the plaintiff to prove his case by a preponderance of evidence, and not to rely on the weakness of the defendant's case vide *Kodilinye v. Odu* (1935) 2 W.A.C.A.
 30 336. The plaintiffs in the case on appeal i.e. the respondents, relied in proof of their claim on the twin prongs of a plea of issue estoppel and acts of ownership/possession. They failed woefully on the first prong. In respect of the second, the only act proved before the trial court is that of the defendants (appellants) i.e. per evidence of D.W.3. It is true that the appel-
 35 lants have been shown to have been involved in several errors of omission or commission which I have catalogued earlier. These go to show that the case of the defendants (appellants) is abysmally weak. It does not however detract from the onus on the respondents (as plaintiffs) to discharge the burden of proof on them. This regrettably I must find they have been un-

able to do. Accordingly, this appeal must succeed. The judgment of the court below in its entirety is hereby set aside, and in its place, the judgment of the learned Judge dismissing the claim of the respondents (as plaintiffs) is hereby restored. The appellants are entitled to costs both of the hearing in the court below and in this court which I assess at N750 and N1,000 respectively. Appeal allowed.

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