

SUPREME COURT OF NIGERIA
16TH JULY, 1993. SC.210/1988
CORAM:- M. L. UWAI, A. B. WALI, O. OLATAWURA,
U. OMO, M. E. OGUNDARE, JJSC

1. AZUETONMA IKE
2. HYACINTH ANOZIE
3. HEZEKIAH IKE APPELLANTS
4. IKEOHA AHIA AMAZU

(For themselves and on behalf of
UMUONUEGBE UMU-UMEOHA
UMUOKPULUKPU QUARTER OF
UMUOMAKU)

AND

1. ILOABUEKE UGBOAJA
2. CHRISTOPHER UGBOAJA
3. GODFREY MBAH
4. EBENEZER ONWUDIWE RESPONDENTS
5. BENSON MBAH
6. NATHANIEL ONWUDIWE

(For themselves and on behalf
of MEMBERS OF UMUOHIAGU
FAMILY OF UMUOMAKU)

APPEALS - Findings of trial court - when supported by evidence - whether appellate court will interfere

COURTS - Alleged raising of issue suo motu by the court - Counsel not invited to address on the issue - where no miscarriage of justice occurred - whether the decision will be set aside

COURTS - Irrelevant issue - that did not affect the judge's mind in arriving at a decision - whether miscarriage of justice is occasioned

EVIDENCE - Res judicata-different parties names - no evidence showing the two names to be one - whether res judicata is proved

LAND LAW - Claim to title - based on res judicata and traditional

history - where un-explained different family names emerged in the two Suits - whether the Plaintiff will succeed

PRACTICE PROCEDURE - Plaintiff to rely on the strength of his own case - not on weakness of the defence

RES JUDICATA - Reliance on resjudicata - what the party must prove - where the parties are not the same - whether res judicata can arise

FACTS

The Plaintiffs/Appellants before the Anambra State High Court claimed from the Defendants/Respondents a declaration that they are entitled to the customary rights of occupancy in respect of the land in dispute, damages for trespass, forfeiture and perpetual injunction. The Appellants alleged that title to the disputed land had earlier been awarded to them by the customary court and defendants appeal against that award was dismissed in 1964. Appellant's case was mainly based on res judicata and traditional history. The Defendants denied the claim. Although the Appellants' star witness (1st Plaintiff) was also Plaintiff in the 1964 customary court case, two separate family names emerged in the previous and present action without any evidence proving the family to be one family.

The trial court after a review of the evidence dismissed the Plaintiffs case. Their appeal to the Court of Appeal was also dismissed. Plaintiffs being dissatisfied have further appealed to the Supreme Court, which had to determine inter alia, whether the Appellants can succeed on the plea of res judicata.

HELD (unanimously dismissing the appeal)

1. A party who claimed to have sued in earlier suits on behalf of Uhuohia family cannot be said without further evidence to be suing on behalf of the same family called Umuonuegbe family (a different name) (p.77 L 20)

2. To succeed on a plea of res judicata, the party relying on it must prove, that the parties, the issues and the subject matter in the previ-

ous action were the same in the action in which the plea is raised. (p.78 L 8)

3. A successful plea of the doctrine of *res judicata* is a bar to any cause of action based on the same subject matter between the parties and their privies. (p.78 L 12)

4. It is perverse to say that UHUOFIA family is the same family called UMUONUEGBE without any evidence from the Plaintiffs to explain that the two families are one and the same family. (p.79 L 1)

5. An appellate court will not ordinarily interfere with the findings of the trial court which is supported by evidence but where the trial court fails to make any finding on an established fact, the appellate court will make the necessary finding. (p.79 L 12)

6. In a claim for declaration of title or a declaration that a Plaintiff is entitled to a certificate of occupancy such as in this case, the Plaintiff in law is bound to succeed on the strength of his case and not on the weakness of the defendant's case. (p. 79 L 18)

7. An issue raised *suo motu* and in respect of which Counsel on both sides should be invited to address the court must be an issue on which the trial court relied to come to its decision and which has tilted the scale of justice. Even if that was a mistake on the part of the judge, it is neither substantial nor can it lead to a miscarriage of justice. (p.80 L 26)

8. An irrelevant issue which has not affected the mind of the judge in arriving at a decision cannot lead to a miscarriage of justice. (p.80 L 32)

9. An issue which will affect the merit of a case must be an issue relevant to the matters pleaded. (p.80 L 39)

10. The submission that the trial court did not take into account the principle of law in *Mogaji v. Odofin* (1978) 4 S.C. 91 overlooks the

meticulous review of the evidence led, the reasons and conclusion reached by the learned trial judge (p.81 L 8)

OMO JSC *“But it is the duty of Counsel where a plea of res judicata is being relied upon to ensure that evidence is led to show that any differing family names used in documents relied upon to support the plea in fact refer to the same family”*.(p. 86 L 25)

PER OGUNDARE JSC *“Before I conclude my decision on this issue, I need point out that the plea of res judicata is not available to a Plaintiff as a basis of his claim except by way of a reply to a defence raised by the defendant in a statement of defence. A successful plea of res judicata ousts the jurisdiction of the court before which it is raised. A Plaintiff cannot be seen to be raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that Court. As it is generally stated, the plea is a shield rather than a sword”*. (p.93 L 6)

REPRESENTATION

B. O. Anyaduba, O.A.A. Olajolo, for the Appellants

C. Atu, for the Respondents

CASES REFERRED TO

1. Nwobodo Ezeudu & ors v. Isaac Obiagu (1986) 3 S.C. 1
2. Mogaji v. Odofin (1978) 4 S.C 91
3. Alashe & ors v. Ilu & ors (1965) NN.M.L.R. 66
4. Fadiora v. Gbadebo (1978) 3 S.C. 219
5. Chief Oje & ors v. Chief Babalola & ors (1991) 5 SCNJ
6. Ogiamen v. Ogiamen (1967) N.M.L.R. 245
7. Mrs. Vic. Okotie-Eboh v. Adolo Okotie-Eboh (1986) 1 S.C. 479
8. Iyayi v. Eyigebe (1987) 3 N.M.L.R. 523
9. Ijale v. A.G. Leventis (1965) 1 All NLR 176
10. Nkanu v. Onun. (1977) 5 S.C. 13

LEAD JUDGMENT BY OLATAWURA JSC

This appeal raises two issues of significant importance about pleadings and evidence. It will be seen in the course of the judgment that a party who asserts must prove the assertion if he wants the

Court to find in his favour.

The appellants who were plaintiffs instituted an action in the High Court of Amawbia/Awka Judicial Division in the then old Anambra State of Nigeria, but which as a result of creation of new States, still falls within a new State called Anambra State and claimed
5 from the respondents, then defendants, as follows:

"(a) A declaration that the plaintiffs are entitled to the Customary rights of occupancy of all that piece and parcel of land situated at Umuomaku as contained in Plan No.ECAS/57/80.

10 *(b) N600.00 damages for trespass.*

(c) Forfeiture of the Area granted the defendants by the plaintiff's ancestors as contained in the area verged green in Plan No.E/GA298/64 in Suit No.54/64 and recovery of possession of same.

15 *(d) Perpetual Injunction restraining the defendants by themselves, their Agents, Servants or Assigns from committing further acts of trespass."*

Pleadings were filed and exchanged. In the course of the trial there were amendments to the Statement of Defence. The pleadings in respect of which evidence was led are as follows:

20 *"STATEMENT OF CLAIM*

*(1) The plaintiffs who are in possession of the piece and parcel of land, lying, being and situated at Umuomaku which land is more clearly delineated in Plans Nos.ECAS/57/80 and also NO.E/GA298/64 bring this action for themselves and on behalf of their
25 members of Umuonuegbe Umu-Umeoha of Umuokpulukpu quarter of Umuomaku.*

(2) The land in dispute which situated at Uhu Ohia in Umuokpulukpu in Umuomaku is known as and called 'Ana Aguegbebi' and has been the ancestral home-steads of the plaintiffs' ancestors as far back as legal memory could go. The plaintiffs are in possession of the said land to this day.

(3) TRADITIONAL HISTORY: The plaintiffs and defendants are descendants from a common ancestor known as Okpulukpu. The said Okpulukpu had 2 sons by the names of Dim and Eze. Okpulukpu divided his land between his sons in his life-time. Eze the ancestor of the plaintiffs got this land of 'Ana Aguegbebi' whilst Dim the ancestor of the defendants got the land known as and called 'Ani Ngodo' which is separate and distinct and remote from the disputed

land.

The said Eze begat Umeoha who begat Aguegbebi who begat the plaintiffs, in the meantime Dim left with his children for Ani Ngodo and later for Ezira. And some of Dim's descendants were later being maltreated at Ezira and so the plaintiffs' ancestor Umeoha brought some of them back and serried them on part of the land in dispute 5
verged Green on Plan No. E/GA298/64 i.e. Ani Aguegbebi and upon terms. In return for the said grant the defendants paid tributes of 8 yams, 4 pepper, 8 kola nuts and palm wine annually to the plaintiffs, and continued to do so until 1964.

(4) *Thereafter the parties have lived in peace until 1964.* 10

(5) *In that year, the defendants conceived the idea of asserting ownership of the said land of 'Ani Aguegbebi'.*

(6) *In consequence, the plaintiffs took out declaratory action against the defendants in the Mbamisi Customary Court in Suit 54/ 15*
64.

(7) *On the 19th August, 1964 the Court awarded title to the said land on the plaintiffs and upon appeal by the defendants the appeal was also dismissed in Suit No.30/64 of 28/9/64. The said judgments together with the Survey Plan No.E/GA298/64 will be founded 20*
upon at the trial.

(8) *The plaintiffs plead Estoppel per rem judicatem (sic) against the defendants.*

(9) *On or about 1976, the defendants again started to lay 25*
frivolous claims on the said land by trying to encroach on areas outside their confinement. They even tried to prevent some of the plaintiffs' people from building on the land. They felled palm-tress and did other acts of trespass on the land. And in fact one Gabriel Igwilo of the defendants' family is trying to build on the land. Wherefore the 30
plaintiffs claim against the defendants as follows:

(a) *A declaration that the plaintiffs are entitled to the Customary rights of occupancy of all that piece and parcel of land situated at 'Umuomaku as contained in Plan.No.ECAS/57/80.*

(b) *N600.00 damages for trespass.* 35

(c) *Forfeiture of the Area, granted the defendants by the plaintiffs' ancestors as contained in the area verged green in Plan No.E/GA298/64 in Suit No.54/64 and recovery of possession of same.*

(d) *Perpetual Injunction restraining the defendants by them-*

selves, their agents, servants or assigns from committing further acts of trespass."

The defendants in their Amended Statement of Defence averred thus:

"STATEMENT OF DEFENCE

5 1. *Save and except as is hereinafter expressly admitted the defendants deny every allegation of fact contained in the Statement of Claim as if the same were same out seriatim and specifically traversed.*

10 2. *The defendants vehemently deny paragraph 1 of the Statement of Claim and put the plaintiffs to the strictest proof thereof at the trial.*

15 *The defendants in further answer to paragraph 1 of the Statement of Claim aver that the land in dispute is more correctly represented in Plan No.P.O./E189/80 filed with this statement of defence, and forms only a portion of the whole land of the defendants called 'Mbubo Ohiagu' and verged violet in plan No.P.O/E189/80 filed with this statement of defence.*

20 3. *The defendants deny paragraph 2 of the statement of claim and will put the Plaintiffs to the strictest proof thereof at the trial. In further answer to paragraph 2 of the statement of claim the defendants aver that the land in dispute is more correctly called 'Mbubo Ohiagu' and situates at Umudim Umuokpulukpu. Uhuohia is the family of the descendants of Ezekwom, one of the children of Okpulukpu*
25 *members of Uhuohia family lived on Uhuohia land which adjoins the land in dispute. The plaintiffs are not from Uhuohia family and do not live on Uhuohia land.*

30 4. *Save that the plaintiffs and the defendants are descendants of Okpulukpu, the defendants deny every other allegation of fact contained in paragraph 3 of the statement of claim.*

In further answer to paragraph 3 of the statement of claim the defendants state as follows:

35 (i) *The man called Okpulukpu had 3 sons Dim (defendants' lineage) Ezeolu (plaintiffs' lineage) and Ezekwom. Dim begat Anyaa who begat Onyesinuba who begat Ohiagu who begat the defendants. On the death of Okpulukpu, Dim his first son inherited his father's lands in accordance with the native law and custom of Umuomaku people and later allocated Mbubo Ezeolu and*

*Ikpaezeukwu lands to Ezeolu and Uzonwubo land to Ezekwom. Dim retained for himself the rest of the lands of Okpulukpu including the land in dispute. Dim had 2 wives - Nsochi and Anugwo. Anugwo had only one son for Dim, called Anyaa who begat Onyesinuba who begat Ohiagu the ancestor of the defendants. Nsochi had 3 sons for Dim namely, Abanihe, Ezeugo and Ogbete. On the death of Dim,*⁵
Nsochi with her 3 sons went back to her father's family Okwu in Ngodo Okpulukpu. The descendants of the said 3 sons of Nsochi still live at Ngodo Okpulukpu to this day. The members of Umuohiagu never lived at Ngodo.

(ii) *In still further answer to paragraph 3 for the Statement of Claim the defendants aver that some descendants of Ezeolu (plaintiffs' lineage) including Umumeoha the plaintiffs' family settled on Ikpaezeukwu land which was one of the pieces of land allocated by Dim to Ezeolu. The land became unsuitable for habitation hence*¹⁰
*many of the descendants of Ezeolu including members of the plaintiffs' family migrated away from the land and hence they now live scattered (sic) in Umuokpulukpu village. A remnant of the descendants of Ezeolu including members of the plaintiff's family still live to*¹⁵
*this day at Ikpaezeukwu land.*²⁰

(iii) *During the said migration from Ikpaezeukwu, land, Umeoha appealed to Ohiagu to be 'shown' land for living purposes. Ohiagu granted a portion of land in dispute to Umeoha on the payment of annual tribute of 4 yams, 1 gallon of wine, 1 pepper and 4 Kola nuts.*²⁵
Ikeohahia Umeoha the son of Umeoha settled on the said land. Hezekiah Ikeohahia, the 3rd plaintiff and the son of Ikeohahia Umeoha now lives on the portion of land granted by Ohiagu to Umeoha.

5. *In still further answer to paragraph 3 of the statement of claim the defendant still further aver that defendants and their ancestors before them have been in possession of the 'Mbubo Ohiagu' from time immemorial and have exercised diverse acts of possession. The defendants will rely on the following acts of possession at the*³⁰
*trial:*³⁵

(a) *In or about 1919, the plaintiffs' great ancestor Ohiagu granted a portion of Mbudo Ohiagu land that is the portion verged yellow in Plan No. P.O/E189/80 filed with this statement of defence to the C.M.S., who founded Central School Umuomaku thereon.*

(b) *In or about 1921, Chukwuedo Ikeabuasi a member of Umuohiagu family granted a portion of the land in dispute to Alaebo Okparanyaka, of the plaintiffs' family for living purposes only on payment of annual tribute of 4 yams, 1 gallon of wine, 4 kolanuts and 1 pepper. Alaebo Okparanyaka continued paying the tribute to*
 5 *Chukwuedo and after the death of Chukwuedo in 1938 to his descendants.*

Daniel Alaebo the son of Alaebo Okparanyaka now lives on that portion of land granted to his father, and verged brown in plan
 10 *No.P.O./E189/80 and therein marked "compound of Hezekiah Ike allowed by defendants."*

(c) From time immemorial members of the defendants' family and their ancestors lived on the land in dispute. The members of the defendants' family who now live on the land in dispute are as follows:

15 (i) Godfrey Mbakogu now lives in Ohi Ohiagu the original living place of the defendants' great ancestor Ohiagu.

(ii) Reuben Onwudiwe now lives in the Compound of his father Onwudiwe a direct son of defendants' great ancestor Ohiagu.

(iii) In or about 1920 Okoli Onwudiwe of the defendants'
 20 family built a house in his 'ala-obi' on a portion of the land in dispute. He still lives there to this day.

(iv) In or about 1921, Ugboaja Ikeabuasi of Umuohiagu family built a house in his 'ala-obi' on a portion of the land in dispute. On
 25 the death of Ugboaja Ikeabuasi, his first son Iloabueke Ugboaja inherited the said 'ala-obi' and lives there to this day.

(v) In or about 1921, Okorie Ikeabuasi of Umuohiagu family built a house in his 'ala-obi' a portion of the land in dispute. On the death of Okorie Ikeabuasi the house fell into ruins.

30 (d) In or about 1961 Okoli Onwudiwe of Umuohiagu family granted a portion of the land in dispute to Gilbert Igwilo a maternal relation of the Umuohiagu family, for living purposes only on payment of annual tribute to 4 yams, 1 gallon of wine, 1 pepper and 4 kola nuts.

35 (e) In or about 1959, Reuben Onwudiwe granted a portion of the land in dispute to Onyesonga Igbo, a descendant of Ezeolu, on payment of annual tribute of 4 yams, 1 gallon of wine, 1 pepper and 4 kola nuts. He dutifully pays the tribute to this day. Onyeasonga Igbo installed an oil pressing machine on the else.

(f) The defendants from time immemorial own and worship various shrines on the land in dispute namely, Ngwu Igidiobi, Ohido Ekwessuama Ndichie, Isigwu Igidiobi, Izugbu Igidiobi, Nwaogwugwu Igidiobi, Udo Igidiobi, Agwu Igidiobi, Igidiobi and Igidiobi.

The present priests of the said shrines are Iloabueke Ugboaja and Okoli Onwudiwe, members of Umuohiagu family. 5

(g) The defendants from time immemorial have been farming and planting and reaping various economic crops on the land in dispute namely, iroko, palm-trees, Ora, Kola nuts, Ukwa and others without hinderance from the plaintiffs or anyone else. 10

6. The defendants deny paragraphs 4 and 5 of the statement of claim and put the plaintiffs to the strictest proof thereof at the trial. The land in dispute is Mbubo Ohiagu and it has been in the ownership and possession of the defendants from time immemorial. 10

6A. The defendants vehemently deny paragraphs 6 and 7 of the statement of claim. In further answer the defendants deny any knowledge of the said suits Nos. 54/64 together with plan No.E/GA298/64 and further aver that in any event any such proceedings are totally irrelevant to the present proceedings on the ground that they are res inter alios acta. 20

7. In answer to paragraph 8 of the statement of claim the defendants aver that the Plea of Estoppel per rem judicatem does not apply.

8. In answer to paragraph 9 of the statement of claim defendants admit that they exercised acts of possession on the land and repeatedly stopped plaintiffs from committing acts of trespass on the land. 25

In further answer the defendants aver that in or about 13th September, 1979, the plaintiffs trespassed on the land in dispute and built foundation for a house. The defendants drove them out of the land and stopped the plaintiffs from continuing with the erection of the house. 30

9. The defendants in still further answer to paragraph 9 of the Statement of claim state that the plaintiffs are not entitled as claimed or at all and will at the trial urge the Court to dismiss the claim as being frivolous, and vexatious. 35

10. The defendants will at the trial rely on all legal and equitable defence open to them.

The case itself has a chequered history in that trial started before Edozie, J. on 4th July 1983 but the case was heard de novo before Uyanna. J. on 19th November 1984.

The parties had instituted cross-actions numbered AA/13/80 and AA/30/80. Attempt was made to consolidate the two actions but
 5 there was no ruling notwithstanding that Onyia, J. on 17/5/82 adjourned for ruling on the application for consolidation to 7/7/82. It would appear at least that there is nothing in the record of appeal to show that that ruling was delivered. The case then started de novo
 10 before Edozie, J. on 4/7/83. It was, as already stated, Uyanna, J. that finally heard the case. The appellants and the respondents will be referred to as plaintiff and defendants respectively.

The plaintiffs called the Principal Registrar of the High Court to tender the Exhibits already tendered before Edozie, J. as Exhibits B,
 15 C, D and E, the 2nd witness for the plaintiff was one Sunday Kanayo-Chukwu Nwajagu a clerk attached to the Mbamisi Customary Court. Aguata to identify Exhibits C, D and E. The plaintiffs 3rd witness - a Licensed Surveyor was abandoned as a result of his loss of memory and the counsel on both sides tendered plans F and G by consent.

20 The only witness who gave evidence of tradition was the 1st plaintiff - Azietonma Ike. At the end of his evidence, the plaintiffs closed their case.

The defendants called three witnesses. Counsel on both sides
 25 addressed the Court and the learned trial judge, after a review of the evidence, consideration of the submissions of counsel, dismissed the plaintiffs' case.

The plaintiffs appealed to the Court of Appeal Enugu Division on a number of grounds, the appeal was dismissed, hence the ap-
 30 peal to this Court.

The grounds of appeal relied upon by plaintiffs are as follows:
 "(1) *ERROR IN LAW*

35 *The learned justice (sic) of the Court of Appeal erred in law in upholding the decision of the trial court that the plea of res judicata must fail in that the appellants did not establish any nexus between the names Uhuohia Family in Exhibit C and the Umuonaegbe Family used in the present proceedings.*

PARTICULARS

(a) *It is not disputed by the parties that the 1st appellant on*

record in this suit was the same Azietonma Ike who was the sole plaintiff on record in Exhibit C.

(b) The 3rd and 6th respondents on record in this action were also the 1st and 2nd defendants in Exhibit

(c) In trials before the native courts, the law looks at the substance rather than form and the question of the names the parties described themselves are irrelevant in so far as the physical parties present before the court are the same.

(d) In any event a change in name is not synonymous with a change in person and could not have affected the minds of the Court of Appeal on recording on wrong conclusion.

GROUND 2

The Court of Appeal Justices erred in law by failing to consider Ground 3 of the Appellants' Ground of Appeal in the court below.

PARTICULARS

(a) Ikwechegh, J.C.A., who delivered the lead judgment, considered grounds 1, 2 and 3 together.

(b) Ground 3 was argued separately by the appellants in the court below.

(c) In reply to appellants' briefs, respondents' counsel conceded in his briefs that ground 3 most affected Mr. Justice Uyanna's mind in awarding judgment against the appellants (See issue No.3 of respondents' brief).

(d) The learned trial Justices were not entitled to evaluate grounds 1, 2 and 3 together but separately by the appellants.

(e) That the learned Justices in so doing glossed over the main kemal (sic) in the appeal which has thus occasioned miscarriage of justice.

(f) Ground 3 of the Grounds of Appeal in the court below complained about the fact that the trial court after the F parties had closed their case addressed and adjourned for judgment, the learned trial judge in his judgment stated that whilst writing his judgment he discovered that the words "suit No.22/64" has filtered into Exhibit F which was plaintiffs' plan in the appeal.

(g) It was therefore the complaint by the appellants that having made such a discovery, the learned trial judge should in law have invited counsel of both parties to come forward and explain how the said words "Suit No.22/64" appeared in Exhibit F.

(h) That it was this fact which more than anything else, as conceded, in issue 3 formulated for determinations by respondents' counsel, which affected the mind of the learned trial judge in dismissing the plaintiffs' claim.

3. The judgment is against the weight of evidence."

5 Briefs were filed by the parties. The issues for determination formulated by the plaintiffs are:

"ISSUE NO.1

10 Was the Court of Appeal right in upholding the decision of the trial Court that the plea of Res Judicata must fail on the basis that the parties in this case and those in Exhibit 'C' are not the same, when in fact, the Octogenarian, Mr Azietonma Ike who testified in Customary Court (Exhibit 'C') was the same person who testified in this case?

ISSUE NO.2

15 Were the minds of the Justices of the Court of Appeal as well as the Judge of the Court of first instance affected by (to borrow Justice Uyanna's language at p.74 of the records) the "startling factor" that suit No.22/64 "filtered" into appellants' 2 Plans and, did it affect the fortunes of the plaintiffs plea of Res Judicata?

20 ISSUE NO.3

Did the Court of Appeal adopt the correct approach when it failed to consider GROUND 3 of the Grounds of Appeal which complained that the trial Judge suo motu raised the issue, that he found the number suit 22/64 on the Appellants Plan but failed to invite appellants' counsel to explain?

ISSUE NO.4

30 Did the Court of Appeal resolve whether Mr. Azietonma Ike who testified in the Customary Court (Exhibit 'C') for the plaintiffs was the one and same Azietonma Ike who testified in Customary Court of Appeal (Exhibit 'D') and still the same Azietonma Ike who testified in the present case for the appellants, and how the appellants' case failed to satisfy the test of parties, for purposes of a plea of Res Judicata?

35 ISSUE NO.5

Were the High Court and the Court of Appeal Justices justified in interfering with concurring findings of fact reached by the Customary Court Judges in Exhibits 'C' and 'D' respectively when there was no evidence that the said judgments were tainted with some miscar-

riage of justice or that there was a violation of some principle of law or procedure which would otherwise justify such interference within the principle laid down by the Supreme Court of Nigeria in *Nwobodo Ezendu & others v. Isaac Obiagu* (1986) 2 NWLR (Pt.21) 208; (1986) 3 S.C. page 1 at p, 21-23.

ISSUE NO.6

5

Did the Court of Appeal, as indeed the High Court Awka adopt the correct approach when they neither considered the appellants' case, and worse still failed to weigh the case of the disputants on the imaginary scale in accordance with the principle enunciated by the Supreme Court of Nigeria in *Mogaji v. Odofoin* (1978) 4 S.C. p.91?"

The defendants on the other hand formulated 3 issues;

"ISSUE NO.1

Did the Justices of the Court of Appeal err in law in upholding the decision of the Awka High Court that the Appellants failed to prove their plea of *res judicata*. This can be narrowed down to the specific issue of whether the Court of Appeal was right in upholding the decision of the Awka High Court that the appellants herein failed to prove by preponderance of evidence that the plaintiffs in the Customary Court case are the same as the plaintiffs in the present suit? (Ground 1 of the Appeal)

ISSUE NO.2

Did the Court of Appeal fail to consider Ground 3 of the appellants ground of appeal in the court below. If it did, did that lead to a miscarriage of justice? (Ground 2 of the appeal).

ISSUE NO.3

Did the Court of Appeal fail as the Awka High Court did, to consider the case of the appellants and still more the case of the parties in this case in accordance with the principle enunciated by the Supreme Court of Nigeria in the case of *Mogaji v Odofoin*? (Ground 3 of the appeal)

I will also at this stage mention that the plaintiffs filed a reply brief. In my view the 3 issues formulated by the defendants are comprehensive enough to cover the six issues raised by the plaintiffs. However where necessary I may refer to any issue raised by the plaintiffs in view of further arguments in the reply brief filed by the plaintiffs.

I need to remind myself again that the plaintiffs' case was on

the plea of Res Judicata and traditional history. It is helpful to resolve the issues raised by the proceedings in the Customary Court as evidenced by Exhibits C and D. The learned trial judge made some crucial findings. These are:

5 *"1 That the proceedings in Exhibit C were in a representative capacity.*

2. That in accordance with the defence set up by the defendants that the two suits (i.e. the proceedings in the Customary Courts) "do not concern the same parties".

10 3. That no evidence was led to show the nexus between "Uhuofia" in the earlier proceedings in the Customary Courts and "Umuonuegbe" in the present proceedings.

15 4. That the plaintiffs have not shown by preponderance of evidence that the parties in the previous suits are the same in the present suit before him."

20 5. In his oral submissions before us. Mr. Anyaduba, the learned counsel for the plaintiffs referred to Exhibits C and D i.e the proceedings in Mbamisi Customary Court and Judgment of Mbamisi Customary Court of Appeal respectively. Learned counsel also agreed that P.W.4 i.e the 1st plaintiff - Azietonma Ike was the star witness for the plaintiffs. In his evidence in chief he said:

"I am from Umuomaku in Aguata Local Government. I am from Umuokpulukpu family in Umuomaku."

25 Under cross-examination he said

"I said that in 1964 I had an action in connection with this land with the defendants. I was the plaintiff in that case. In that earlier suit I explained that the land in dispute then was that of Umuonuegbe. I claimed in that suit that the disputed land belonged to UMUMEHOA FAMILY". (capitals supplied).

30 One would have expected that when this witness was re-examined by Mr. Anyaduba that the witness ought to have been asked whether Umuonuegbe and Umumeoha are one and the same family. The re-examination is as follows:

35 *"Iloabueke Ugboaja, Nathaniel Onwudiwe Albert Igwilo - I said they do not live within the area our ancestors granted them. I also said they live on the disputed land but on the portion we granted to them. I know Iloabueke - he is the first dependant."*

It is therefore a misconception on part of the appellants' coun-

sel to submit that since the learned trial judge found that the two actions in Exhibits C and D were brought in a representative capacity" that should have been the end of the matter and judgment decreed in favour of the appellants" when the star-witness claimed on behalf of two different families: UHUOFIA in the earlier two cases and UMUONUEGBE in this case on appeal. The plaintiffs through paragraphs 6A of the Amended Statement of defence had denied knowledge of the two suits in the Customary Courts. The defendants had given the plaintiffs due notice that proof of these two suits will be required as they averred in paragraph 6A thus:

"6A. The defendants vehemently deny paragraphs 6 and 7 of the statement of claim. In further answer the defendants deny any knowledge of the said Suits Nos. 54/64 and 30/64 together with Plan No. E/GA298/64 and further aver that in any event any such proceedings are totally irrelevant to the present proceedings on the ground that they are res inter alios acta," -

A party who claimed to have sued in earlier suits on behalf of Uhuohia family cannot be said without further evidence to be suing on behalf of the same family called Umuonuegbe family. As a result of the pleadings, issues had been joined. I therefore agree with the submission of the defendants in paragraph 5.09 of their brief that:

"The plaintiffs neither pleaded nor gave evidence that Uhuohia family is the same as Umuonuegbe family nor indeed gave any evidence of the relationship between Uhuohia family and Umuonuegbe family."

I have looked at Exhibit C i.e the Customary Court's proceedings in Suit No.541/64 where 4 P.W (i.e. the 1st plaintiff in this case) was the plaintiff in 1964. In his evidence in the Customary Court Suit 54/64 he said:

"The land in dispute is known and called "Aguegbuebi". I am from UHOFIA FAMILY and the defendants are from the family of Ngodo." (Capitals mine).

Even the title of the plan Exhibit E described Mr. Azietonma Ike as suing "for on behalf of Umumeona Uhuohia (plaintiffs)" Plan No. ECAS/57/80 tendered as Exhibit F at the Court of trial described, in the Southern part of the plan, the land" given to C.M.S. Mission"

as "LAND OF UMUMEOHA FAMILY". With this contradiction in the name of the family that sued in both the Customary Court and the trial court. The Court of Appeal was right in its conclusion when the Court per Abai Ikwechegh, J.C.A. said:

5 "In that regard the Judge showed that nothing showed that
"Uhuofja" family is the same "Umuonogbe" family".

To succeed on a plea of RES JUDICATA the party relying on it must prove that parties, the issues and the subject-matter in the previous action were the same in the action in which the plea is raised:
10 Alashe & ors. v. Ilu & Ors. (1965) NMLR 66, Fadiora v. Gbadebo (1978) 3 S.C. 219. A successful plea of the doctrine is a bar to any cause of action based on the same subject-matter between the parties and their privies.

It appears that Mr. Anyaduba, the appellants' learned counsel
15 concentrated a greater part of his argument on the person of 1st plaintiff (4th P.W.) - AZIETONMA IKE as a person without seeing the crux of the issue that he gave evidence as suing on behalf of two different families in respect of the same piece of land. He has not been consistent and this goes to the root of the doctrine that the
20 parties must be the same, this will include their privies. Learned counsel has not been able to reconcile the difficulties he created by calling, if that was the appellants' case, the same family by two different names. What learned counsel expected the learned trial judge and the Jus-
25 tices of the Court of Appeal to do would have taken them from the judgment seats should they follow the anomalous suggestion that will make them witnesses. A departure from the evidence given or, in the case of an appellate court, the printed record of evidence, will lead to a miscarriage of justice. I will, under this issue No.1 in the respon-
30 dents' brief, now deal with concurrent findings of fact raised as issue No.5 in the Appellants' brief. Reliance was placed by the appellants on Exhibits C and D in the Customary Court and Customary Court of Appeal proceedings. Once the plea of res judicata fails for reasons already stated in the judgments of the learned trial judge and the
35 judgment of the Court of Appeal and which reasons are valid in law i.e. that the families represented by 4 P.W i.e the 1st plaintiff are not the same, the issue of concurrent findings based on wrong conclusion will not avail the appellant in this Court.

It is perverse to say that UHUOFIA family is the same family called UMUONUEGBE without any evidence from the plaintiffs to explain that the two families are one and the same family. It is true that Azietonma Ike was the plaintiff in Exhibit C and also the same person in Exhibit D, but the learned counsel, despite the fact that we drew his attention to the absence of evidence to link the two names of the families, persisted that the parties are the same. A man who issues a writ on behalf of two different families cannot be said to have taken the action on behalf of one family. If Azietonma Ike has issued the writ or summons without stating the representative capacity then there will be substance in learned counsel's submission. It is now an accepted principle of law that the Appellate Court will not interfere with the findings of the trial court which is supported by evidence. If however the trial court failed to make any finding on an established fact, the appellate Court will make the necessary finding: Balogun v. Agboola (1974) 10 S.C. 111.

In a claim for declaration of title or a declaration that a plaintiff is entitled to a certificate of occupancy such as in this case the plaintiff is in law bound to succeed on the strength of his case and not on the weakness of the defendant's case:

Kodilinye v. Odu (1935) 2 W.A.C.A 336; Okpala v. Ibeme (1989) 2 NWLR (Pt. 102) 208 and other cases which I need not mention again. My conclusions have now taken care of issues 4 and 5 in the Appellants' brief.

I now come to the issue whether the Court of Appeal has failed to consider Ground 3 of the Appellants' Ground of Appeal in the Court below. This ground of appeal as filed in the court below reads:

"3. ERROR IN LAW:

The learned trial judge erred in law and misdirected himself by raising the issue of Suit No.22/64 appearing on Exhibit 'F' when the defendants did not join issue on this point.

The same insertion of Suit No.A/13/80 can be found in defendants' plan which was meant for 2 cases namely Suit No. A/13/80 and Suit No. A/30/80.

The learned trial judge failed to take into account that one plan could serve dual or more purposes and in more than one or more cases."

It is misleading on the part of the learned counsel to say that

the learned trial judge suo motu raised the issue that he found the number 22/64 on the Appellants' plan. It is on record that the appellant relied on two Suits 54/64 i.e. the case in Mbamis Customary Court and Suit No.30/64 which was the appeal in respect of the earlier suit. In support of these suits the Appellants tendered the plan
5 Exhibit "F". Counsel has failed to explain whether the Suit No.22/64 is not on Exh. F. It is legitimate in the course of the judgment to refer to the Suit number 22/64. Learned counsel has not, before us, denied that Suit number 22/64 is not on Exhibit F. He had invited us to
10 invoke the powers of this Court in section 22 of the Supreme Court Act 1960. In his brief of argument, the learned counsel has this to say on an issue which he thought is of great importance.

*"It is submitted with respect that on the facts of this case and given the circumstances which existed at all times to the trial, it would
15 be safe to submit that Suit No.22/64 did not filter into Appellants' Plans. It was thereon the day it was tendered in evidence. The plans were tendered by Counsel and no question asked."*

I regret this is not an argument which can assist this Court on the question of an issue raised suo motu. Again learned counsel has
20 failed to connect Suit No.22/64. I understand the judge to have said he couldn't understand the connection of Suit No.22/64 with the cases relied upon. Neither has the learned counsel made any attempt to connect the Suit in No.22/64 with the two cases in the Customary
25 Court. An issue raised suo motu and in respect of which counsel on both sides should be invited to address the Court must be an issue on which the trial court relied to come to a decision and which has tilted the scale of justice. Even if that was a mistake on the part of the
30 judge, it is neither substantial nor can it lead to a miscarriage of justice: Chief Oje & Ors. v. Chief Babalola & Ors. (1991) 4 NWLR (Pt.185) 267; (1991) 5 S.C.N.J 110/123. An irrelevant issue which has not affected the mind of the judge in arriving at a decision cannot lead to a miscarriage of justice. The cases relied upon by the appellant: Ogiamen v. Ogiamen (1967) NMLR 245 at 248: Mrs. Victoria
35 Okotie-Eboh v. Adola Okotie-Eboh (1986) 1 S.C. 479 would have been relevant if the judge had relied on it. In fact looking at the Exhibit F, and if one should rely on the number 22/64 the appellants' case becomes more complex. An issue which will affect the merit of a case must be an issue relevant to the matters pleaded. Neither side

pleaded Suit No.22/64 as being the main plank of its case. What was the main issue was the identity of the parties. As rightly pointed out by Mr. Anyaduba in his reply brief, it is legal conclusion that is relevant.

I now come to the last issue, that is whether the trial court follows the principle of law enunciated in *Mogaji v. Odofoin* (1978) 4 S.C. 91. The submission that the trial court did not take into account the principle of law in *MOGAJI'S Case* (supra) overlooks the meticulous review of the evidence led, the reasons and conclusions reached by the learned trial judge.

"The plaintiffs have not shown preponderantly by the evidence they tendered that the parties in the previous as in the present suit are the same."

Earlier on the learned judge said:

"From the pleadings and the evidence on the traditional history it is not clear which story to accept as to who owns the land. As it is, the reliefs sought by the plaintiffs cannot be decreed on the basis of traditional history as it is CONTRADICTIONARY AND INCONCLUSIVE". (Capitals supplied).

In its consideration of the appeal on the issues raised mostly or *Res Judicata* and traditional history, the Court of Appeal per Abai Ikwechegh in the lead judgment said:

"It seems to me that the judgment dismissing the appellants' claims dealt adequately with the issues which the evidence before that court raised, and the matters were within a very narrow circumference, to wit, whether the traditional history of the appellants was satisfactory to establish their claims, and/or whether the plea of Res Judicata was made out as against the respondents. In my view, within this narrow pale, the trial judge validly, and adequately dealt with the case before him and came to the right conclusion that the plaintiffs' claims failed."

I agree entirely with the conclusions of both the trial Court and the Court below. There is no merit in this appeal. It is dismissed. Costs of N1,000.00 are awarded in favour of the respondents.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Olatawura, J.S.C. For the reasons and conclusions which he has reached therein, with which I am in full agreement, I too will dismiss the appeal.

5 Accordingly, it is hereby dismissed with N1,000.00 costs to the respondents.

WALI JSC

10 I have read before now the judgment of my learned brother, Olatawura, J.S.C. and I agree with his reasoning and conclusion. For those same reasons, I also dismiss the appeal as lacking in merit.

15

OMO JSC

The plaintiffs (appellants herein) filed an action in the High Court of Anambra State (Amawbia/Awka Judicial Division) against the defendants (respondents herein) claiming a declaration of entitlement to customary right of occupancy in respect of "Ala Aguegbebi" land situate in Umuomaku; N600 damages for trespass by defendants in 1979 on the said land; forfeiture of the area of land verged green in Plan No.E/GA/298/64 in Suit No.54/64, which said
20 land was granted to defendants by plaintiffs' ancestors, and recovery
25 of possession of the said land; an order of perpetual injunction restraining defendants, their agents etc, from further trespass on the said land.

In support of their claim the plaintiffs relied on their traditional
30 history; acts of ownership, prominent among which is the averment that part of the land in dispute was granted to defendants ancestors, in acknowledgment of which tribute was given and received; and "estoppel per rem judicatam", in that on 19/8/64 the Mbamisi District (Customary) Court awarded title to the said land to the plaintiffs which
35 was confirmed on appeal (Suit Nos. 54/64 and 30/64). The defendants who also relied on their traditional history, set out in their pleadings, several acts of ownership and rejected plaintiffs plea of estoppel per rem judicatam. They admitted that there had been a dispute over the land, which they call "Mbubo, Ohiagu", in the Customary

Courts, but averred that those courts granted possession of the land to them.

Both parties trace their origin to a common ancestor Okpulukpu. Whilst the plaintiffs descend from Eze (Ezeolu), the defendants descend from Dim, both Eze and Dim being sons of Okpulukpu. The divergence/conflict begins thereafter. According to the plaintiffs, who claim that their ancestor Eze is the first son of Okpulukpu, their common ancestor divided his lands, inter vivos between his two sons, the plaintiffs' share being the land in dispute, whilst the defendants got "Ani Ngodo" land. The defendants, on the other hand, state that Dim was the first son of Okpulukpu, his second and third sons being Ezeolu and Ezekwem respectively. On the demise of Okpulukpu his first son Dim succeeded him and inherited all his father's lands. He retained, inter alia, the land in dispute for his own use and allocated the plaintiffs "Ikpaezeukwu" and other lands.

The two parties led evidence in proof of their claims and tendered exhibits. In it's judgment, after hearing for the parties, the trial High Court dismissed the plaintiffs claim. It held the traditional evidence to be contradictory and inconclusive. It also rejected the plea of estoppel per rem judicaram taking the view that the cases relied on by the plaintiffs are res inter alios acta since the parties in those cases have not been shown to be the same as those in the present action. On appeal, the Court of Appeal affirmed the judgment of the High Court holding that the plaintiffs had failed to establish their case both on the plea or res judicata and the traditional evidence it led.

On further appeal to this Court both parties filed their briefs of argument and elaborated on them by making oral submissions.

The plaintiffs (appellants here) set out six issues for determination in their brief, which read thus-

"1. Was the Court of Appeal right in 'upholding the decision of the trial Court that the plea of Res Judicata must fail on the basis that the parties in, this case and those in Exhibit 'c' are not the same, when in fact, the Octogenerian, Mr. Azietonma Ike who testified in Customary Court (Exhibit 'C') was the same person who testified in this case?"

2. Were the minds of the Justices of the Court of Appeal as well as the Judge of the Court of first instance affected by (to borrow Justices Uyanna's language at p.74 of the records) the "Starling fac-

tor" that Suit No.22/64 "filtered" into appellants 2 Plans and, did it affect the fortunes of the plaintiffs plea of Res Judicata?

3. Did the Court of Appeal adopt that correct approach when it failed to consider GROUND 3 of the Grounds of Appeal which complained that the trial Judge Suo Motu raised the issue, that he
5 found the number Suit 22/64 on the appellants Plan but failed to invite appellant's Counsel to explain?

4. Did the Court of Appeal resolve whether Mr. Azietonma Ike who testified in the Customary Court (Exhibit 'C') for the plaintiffs
10 was the one and same Azietonma Ike who testified in Customary Court of Appeal (Exhibit 'D') and still the same Azietonma Ike who testified in the present case for the Appellants, and how the appellant's case failed to satisfy the test of parties, for purposes of a plea of Res Judicata?

5. Were the High Court and the Court of Appeal Justices justified in interfering with concurrent findings of fact reached by the Customary Court Judges in Exhibit 'C' and 'D' respectively when there was no evidence that the said judgments were tainted with some mis-
15 carriage of justice or that there was a violation of some principles of law or procedure which would otherwise justify such interference within the principle laid down by the Supreme Court of Nigeria in Nwobodo
20 Ezendu & Others v. Isaac Obiagu (1986) 3 S.C. PAGE 1 at p. 21 - 23.

6. Did the Court of Appeal, as indeed the High Court Awka adopt the correct approach when they neither considered the appel-
25 lants case, and worse still failed to weigh the case of the disputants on the imaginary scale in accordance with the principle enunciated by the Supreme Court of Nigeria of Mogaji v. Odofin (1978) 4 S.C.
30 p.91."

The respondents set out the issues for determination in their brief differently as follows:-

1. Did the Justices of the Court of Appeal err in Law in up-
holding the decision of the Awka High Court that the appellants failed
35 to prove their plea of res judicata. This can be narrowed down to the specific issue of whether the Court of Appeal was right in upholding the decision of the Awka High Court that the appellants herein failed to prove by preponderance of evidence that the plaintiffs in the Customary Court case are the same as the plaintiffs in the present Suit.

(Ground 1 of the Appeal)

2. Did the Court of Appeal fail to consider Ground 3 of the appellants' ground of Appeal in the Court below. If it did, did that lead to a miscarriage of Justice. (Ground 2 of the Appeal)

3. Did the Court of Appeal fail as the Awka High Court did, to consider the case of the appellants and still more the case of the parties in this case in accordance with the principle enunciated by the Supreme Court of Nigeria in the case *Mogaji v. Odofin*. (Ground 3 of the Appeal)" 5

The first two issues for determination as set out by the appellants and indeed the third relate to the treatment of and decision on the appellants plea of *res judicata*. What the appellants contended in the trial court is that the land presently in dispute had been decided in Mbamisi Customary Court and Customary Appeal Court in Suit Nos 30/64 and 56/64 as belonging to the appellants. The respondents on the other denied this averment contending that there had been no previous litigation between the parties and more specifically that the action relied on were not between the parties in this case. In his address, counsel to the respondents narrowed his denial to the question of difference in the capacity in which those actions were taken and the present action. Whilst the present action has been brought in a representative capacity, the previous actions were brought in a personal capacity. The latter action cannot therefore be relied upon, he finally submitted, to ground a plea of *estoppel per rem judicatem*: The learned trial judge however upheld the submission of appellant's counsel that on a close look at the cases, and relying on their substance (they being Customary Court cases), the action were brought in a representative capacity. The respondents both in their pleadings and in their address before the trial court did not rely on another objection to the plea of *res judicata*. It was the learned trial Judge who in his judgment took up the sub-issue that whilst the plaintiff in the 1964 cases - one *Azietonma Ike* - then used as representing the *Uhuofia* family (Exhibit C refers), the same person led others as 1st plaintiff in the present action to sue as representing the *Umnonuegbe Umu Umeoha Umuokpulukpu Quarter of Umuomaku*. He further observed that the plan relied on and tendered by the plaintiff in 1964 showed him as suing for *Umumeoha Uhofia*. On the ground that there was no evidence to show that the different fami- 10 15 20 25 30 35

lies/quarter averred are the same the learned trial Judge held that the capacities in which the 1964 and present action were instituted have not been proved to be the same Appellant's counsel has argued that this is a mere technicality and that the two family names are the same. Can this be decided suo motu by the trial court or indeed this Court
5 without evidence before it to say so? The submission of the respondents that-

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"The plaintiffs neither pleaded nor gave evidence that Uhuofia family is the same as Umuonuegbe family, nor indeed gave any evidence of the relationship between Uuhofia family and Umuonuegbe family" seem to determine this sub-issue. It is often the case that family names are loosely used. The plaintiff's as per the writ of summons are from Umuonugbe Umu-Umeoha (Umuemeoha) of Umuonuegbe quarters of Umuomaku town. Anyone testifying for the plaintiffs can
20 say that he or they belong to a family bearing any of the first three names underlined, and not be faulted in their circle. It is only Umuomaku that is the name of the town of both parties. Similarly, it is not uncommon that persons are called by reference to the land/town from which they originate. Uhuofia is incidentally the name of the
25 land on which both parties live. But it is the duty of counsel, where a plea of res judicata is being relied upon, to ensure that evidence is led to show that any differing family names used in documents relied upon to support the plea in fact refer to the same family. This counsel
30 has failed to do here. A plea of estoppel per rem judicatam deprives the court of jurisdiction to proceed from further determining an issue to which it relates, if it succeeds. All the ingredients thereof must therefore be proved. No part of them can be presumed. The appellants having failed to prove Uhuofia and Umuemeoha are the same, cannot
35 successfully rely on the 1964 cases to found estoppel per rem judicatam.

The second ground on which the plea of res judicata appears to have foundered is the "filtering" of the words "Suit No.22/64 into appellants' two plans in the Customary Court, when the numbers of

the relevant suits are 30/64. In the view of the trial Judge this raises some doubt on the authenticity of the plan, and its use to support the appellants' plea of *res judicata*. Here again the learned trial Judge made this observation himself. Counsel for the respondents did not raise it. If the wrong suit number on the plan had any significance, he certainly would have done so. I do not think this error on the plan, which was in fact used in the 1964 cases, as the witness who produced them from proper custody testified to, without being controverted, affects the case of the appellants. The learned trial judge certainly tried to make a mountain out of a mole hill by describing his "discovery" as a "startling factor". It cannot be so described. The Justices of the Court of Appeal should have found for the appellants on this ground. I so do, and add that the wrong finding of the trial judge has not in my view occasioned a miscarriage of justice.

Having arrived at the conclusion that the plea of *res judicata* does not avail the appellants, the learned trial judge considered the evidence led. He found appellants' traditional evidence not satisfactorily established, coming to the conclusion on this sub-issue that on declaration can be granted to the appellants on the basis of "contradiction and inconclusive" traditional history from which he is unable to decide the ownership of the land in dispute. The Court of Appeal affirmed these findings which are therefore both concurrent and not perverse. For these reasons, which have been more fully considered in the lead judgment of my learned brother Olatawura, J.S.C., I also uphold the decision of the court below affirming the judgment of the trial court dismissing the appellants' claim, with N1000 costs to the respondents.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Olatawura, J.S.C. just delivered. I agree with him that this appeal is lacking in merit and ought to be dismissed. I only wish to add a few words of my own.

The facts, have been fully set out in the judgment of my learned brother; I need not go over them again. Suffice it to say that plaintiffs (who are now appellants) based their claims for declaration of entitlement to customary rights of occupancy, damages for trespass,

forfeiture and injunction on two pillars, that is to say, traditional history and *res judicata* pleaded in paragraphs 3 and 8 respectively of their statement of claim. These paragraphs read:

"3. **TRADITIONAL HISTORY:** *The plaintiffs defendants are descendants from a common ancestor known as Okpulukpu. The said*
 5 *Okpulukpu had 2 sons by the names of Dim and Eze. Okpulukpu divided his land between his sons in his life-time. Eze the ancestor of the plaintiffs got this land of 'Ana Aguegbebi' Whilst Dim the ancestor of the defendants got the land known as and called 'Ani Ngodo' which*
 10 *is separate and distinct and remote from the disputed land.*

The said Eze begat Umeoha who begat Aguegbebi who begat the plaintiffs, in the meantime Dim left with his children for Ani Ngodo and later for Ezira. And some of Dim's descendants were later being maltreated at Ezira and so the plaintiffs ancestor Umeoha brought
 15 *some of them back and settled them on part of the land in dispute verged Green on Plan No. E/GA298/64 i.e Ani Aguegbebi and upon terms. In return for the said grant the defendants paid tribute of 8 yams, 4 pepper, 8 kola nuts and Palm wine annually to the plaintiffs, and continued to do so until 1964.*

20 *8. The plaintiffs plead Estoppel Per Rem Judicatem against the defendants."*

The defendants (who are now respondents) in reply, pleaded in paragraphs 4 and 5 of their amended statement of defence their
 25 own version of the traditional history and, in paragraph 7, averred that *res judicata* did not apply.

The learned trial judge at the conclusion of trial and after addresses by learned counsel for the parties found against the plaintiffs and dismissed their claims.

30 Being dissatisfied with the dismissal of their claims, the plaintiffs appealed unsuccessfully to the Court of Appeal. It is against the decision of the Court of Appeal dismissing their appeal that the plaintiffs have now further appealed to this Court upon three grounds of appeal, which without their particulars read:

35 **"1. ERROR IN LAW**

*The learned Justices of the Court of Appeal erred in law in upholding the decision of the trial court that the plea of *res judicatem* (sic) must fail in that the appellants did not establish any nexus between the names Uhuohia Family in Exhibit C and the Umuonuegbe Family*

used in the present proceedings.

2. *The Court of Appeal Justices erred in law by failing to consider Ground 3 of the Appellants' grounds of appeal in the Court below.*

3. *The judgment is against the weight of evidence."*

Learned counsel for the parties set out in their respective written briefs of arguments what they consider the issues arising for determination in this appeal. Plaintiffs' counsel set out 6 issues while defendants' counsel set out 3 issues. Having regard to the judgment appealed against and the grounds of appeal, the issues as set out in the defendants' brief are to be preferred. They are more in line with the issues arising, in my respectful view, in this appeal and are fully encompassed by the grounds of appeal. These three issues read:

"ISSUE No.1

Did the Justices of the Court of Appeal err in law in upholding the decision of the Awka High Court that the appellants failed to prove their plea of res judicata. This can be narrowed down to the specific issue of whether the Court of Appeal was right in upholding the decision of the Awka High Court that the appellants herein failed to prove by preponderance of evidence that the plaintiffs in the Customary Court case the same as the plaintiffs in the present Suit. (Ground 1 of the Appeal)

ISSUE NO. 2

Did the Court of Appeal fail to consider Ground 3 of the appellant's ground of appeal in the court below. If it did, did that lead to a miscarriage of justice (Ground of Appeal)

ISSUE No.3

Did the Court of Appeal fail as the Awka High Court did, not consider the case of the appellants and still more the case of the parties in this case in accordance with the principle enunciated by the Supreme Court of Nigeria in the case of Mogaji v. Odofin. (Ground 3 of the Appeal)"

I shall now proceed to consider the three issues, particularly Issue 1.

ISSUE 1.

This issue relates to the plea of res judicata raised by the plaintiffs in paragraph 8 of their statement of claim and based on the Customary Court proceedings pleaded in paragraphs 6 and 7. These

paragraphs read:

"6. In consequence, the plaintiffs took out declaratory action against the defendants in the Mbamisi Customary Court in Suit 54/64.

7. On the 19th August, 1964 the court awarded title to the said land on the plaintiffs and upon appeal by the defendants the appeal was also dismissed in Suit No.30/64 of 28/9164. The said judgments together with the Survey Plan No.E/GA298/64 will be founded upon at the trial."

The defendants in paragraph 6A of their amended statement of defence pleaded, in reply thus:

6A. The defendants vehemently deny paragraphs 6 and 7 of the Statement of Claim. In further answer the defendants deny any knowledge of the said Suits No. 54/64 and 30/64 together with Plan NO. E/GA298/64 and further aver that in any event any such proceedings are totally irrelevant to the present proceedings on the ground that they are res inter alios acta."

The proceedings of Mbamisi District Court in Suit No. 54/64 and the judgment of the Akwa County Court in Suit No.30/64, on appeal from Suit 54/64 were tendered in evidence at the trial as exhibits C & D respectively. The parties in Suit 54/64 which went on appeal as Suit 30/64 in the County Court were Azietonma Ike as plaintiff AND Godfrey Mba, Nathaniel Onwudiwe, Nnadielkwe Onwudiwe and Clement Mba as defendants. The proceedings would appear however to show that the plaintiff sued on behalf of his UHUOFIA FAMILY while the defendants equally defended as representing their Family too. Indeed, the learned trial Judge as found, and quite rightly too, that the parties in that case sued and defended in representative capacities.

In the present proceedings, the plaintiffs sued "for themselves and on behalf of UMUONUEGBE UMU-UMEOHAUMUOKPULUKPU QUARTER OF UMUOMAKU". The defendants were sued as representing themselves and members of "UMUOHIAGU FAMILY OF UMUOMAKU". No scintilla of evidence was led in the present proceedings to show that UHUOFIA FAMILY on whose behalf the action 54/64 was instituted was one and the same as UMUONUEGBE UMU-UMEOHA UMUOKPULUKPU QUARTERS OF UMUOMAKU on whose behalf the present action

was instituted. Nor that the latter family was a privy of the former family. Indeed, the 1st plaintiff in the present action, AZUETONMA IKE (and the only plaintiff to testify at the trial) was the plaintiff in Suit 54/64. In the present action he testified thus:

"I am from Umuokpulukpu family in Umuomaku" (Italic is mine) 5

Cross-examined, he deposed thus:

"I said that in 1964 I had and action in connection with this land with the defendants. I was the plaintiff in the case. In that earlier suit I explained that the land in dispute then was that of Umuonuegbe. I claimed in that suit that the disputed land belonged to Umumeoha family." 10

In Suit 54/64 this same witness had testified in the District Court as follows:

"The land in dispute is known and called 'Aguegbuebi'. I am 15 from UHUOFIA FAMILY and the defendants are from the family of Ngodo."

The learned trial Judge observed:

"I think I should before reviewing further evidence in this proceedings consider the issue of res judicata to which both counsel have 20 addressed me extenso. I take the main ingredients of the plea of res judicata. A lot has been said on this by the parties, Are the parties the same? After reading through the proceedings in Exhibit C I have no difficulty that the suit was taken out in a representative capacity. From 25 the evidence and defence of the defendants the impression is readily drawn that the defendants were speaking for themselves and their people. But this inference has not disposed of the question whether the parties are the same."

In his evidence in Exhibit C, the plaintiff in that court (1st plaintiff 30 in this Court and P.W.4) said, 'I am from Uhuofia family.' In Exhibit E the plan used in Exhibit C, it is stated that the 1st plaintiff in this case, then sale plaintiff in Exhibit C sued for and on behalf of Umumeoha - Uhuofia. Is Umumeoha Uhuofia the same as Umu-Onuegbe? In 35 the course of his evidence, (1st plaintiff) in this case, the name Onuegbe was a constant refrain but he made no mention of Uhuofia as one of his ancestors. What is the relationship between 'Uhuofia' and 'Onuegbe'? How has it come that this plan Exhibit E on which reliance is placed by the plaintiffs and on which res judicata is based

was made for the plaintiffs' family of 'Uhuofia' and the plan in the present case Exhibit F, it is made for plaintiffs of 'Umuonuegbe family'. While it is accepted that the strictness attached to proceedings in the Customary Courts should be relaxed in matters of procedure and form in this proceeding the name of the plaintiffs in the Customary Court is more than a mere matter affirm in view of the defence of the defendants that the two suits do not concern the same parties. It has not been expressed in the evidence the nexus between 'Uhuofia' in the earlier proceedings in the Customary Courts and 'Umuonuegbe' in the present proceedings."

Having regard to the different capacities in which AZIETONMA IKE sued in Suit 54/64 and joined 3 others in suing in the present proceedings, and in the absence of evidence to show that the two capacities are one and the same, that is the two families on whose behalf he sued in the two actions, are one and the same, I fail to see how the learned trial judge could be faulted in his finding that:

"The plaintiffs have not shown preponderantly by the evidence they tendered that the parties in the previous as in the present suit are the same."

The Justices of the Court below were clearly right in affirming that finding. A long line of cases has laid it down that before a plea of res judicata can succeed, it must be shown that the parties, issue and subject-matter are the same in the previous action as those in the action in which the plea is raised - see, for example: *Iyayi v. Eyigehe* (1987) 3 NWLR (Pt.61) 523, 533; *Ijale v. A.G. Leventis* (1961) 1 All NLR 762; *Alashe & Ors. v. Olori Ilu & Ors.* 1 (1964) All NLR 390, (1965) NMLR 66; *Fadiora v. Gbadebo* (1978) 3 SC 219; *Nkanu v. Onun* (1977) 5 SC 13; *Oyagbola v. Aremu* (1992) 8 NWLR (Pt.259) 326. See also *Sepencer Bower and Turner on RES JUDICATA* (2nd edition) paragraphs 210-215 at pages 179-186. Where the parties in the previous action are not the same as those in the subsequent action, a previous judgment cannot operate as estoppel per rem Judicata - see *Okorie v. Akurunwa* (1972) 8-9 Sc. 210. In view of the findings of the learned trial Judge and affirmed by the Court below I can, with respect, find on merit in the submissions both in his brief and in oral arguments, of learned counsel for the plaintiffs, Mr. Anyaduba, on this Issue.

5

Before I conclude my decision on this Issue, I need point out that the plea of *res judicata* is not available to a plaintiff as a basis of his claim except by way of a reply to a defence raised by the defendant in a statement of defence. A successful plea of *res judicata* ousts the jurisdiction of the court before which it is raised. A plaintiff cannot be seen to be raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that court. As it is generally stated, the plea is a shield rather than a sword. See: *Salawu Yoye v. Lawani Olubode & Ors.* (1974) 10 SC 209, 220-222 where 10 15 *Ibekwe J.S.C.* (as he then was) delivering the judgment of this Court, observed:

"...It is also relevant to stress that, once the plea of res judicata has been established, the jurisdiction of the court would be ousted. It therefore, sounds anomalous that the same plaintiffs/respondents who had invoked the jurisdiction of the court ab initio, were also the party that thought if fit to attack the court's jurisdiction. 20

For, that is exactly what the plea of res judicata would in the particular circumstances of this case, amount to. It is well-known that, before the doctrine of res judicata can operate, it must be shown that the parties, issues, and subject-matter were the same in the previous case as those in the action in which the plea of res judicata is raised. It is also well-settled that, once the plea is made out by the party seeking to rely upon it, the claim filed by the other party would be dismissed on the ground that the court lacks jurisdiction to allow parties to re-litigate the same issues again. 25 30

The plea of res judicata therefore, robs the court of its jurisdiction; and that explains why, in practice, the plea has always been used only as a defence. It is a formidable weapon which may be pleaded in the Statement of defence or in the plaintiff's Reply to the statement of defence, should the need arise, But, by its very nature res judicata should have no place in the Statement of Claim. It is unreasonable for the plaintiff to embody in his own claim the plea of 35

res judicata. In our view, such a course of action would lead to an absurdity. Indeed, it is unthinkable that the very plaintiff who invokes the jurisdiction of the court should afterwards turn round to plead that the same court has no jurisdiction to hear his claim. We would liken such plaintiff to a man who, while praying fervently for long life,
 5 *yet carries in his pocket, a time-bomb which, on explosion, would end his life."*

This is not to say however, that a plaintiff cannot raise a plea of issue estoppel or any other form of estoppel other than estoppel per
 10 *rem judicatam*. Even on this ground, therefore, the second pillar on which plaintiffs' case rests must collapse.

ISSUE 2

Plaintiffs' ground 3 before the Court of appeal reads:

"3. ERROR IN LAW:

15 *The learned trial Judge erred in law and misdirected himself by raising the issue of Suit No.22/64 appearing on Exhibit 'F' when the defendants did not join issue on this point.*

The same insertion of Suit No. A/13/80 can be found in defendants plan which was meant for 2 cases namely SuitNo.A/13/80 and
 20 *Suit No.A/30/80.*

The learned trial Judge failed to take into account that one plan could serve dual or more purposes and in more than one or more cases."

25 It is plaintiffs' contention before us that this ground was never considered by the Court below. This complaint would appear to be will taken as no reference was made in the judgment of the Court below to this complaint. But that effect has this failure on the judgment of the Court below? None, whatsoever.

30 Exhibit F was admitted at the trial by consent of both learned counsel as plaintiff's plan: Consequent on the evidence of P.W.3, Ejike Chidoluc, a licensed surveyor, to the effect that

"I have never heard the names of the plaintiffs in this case. I do not know the people of Umuonuegbe - Umuomaku"

35 The learned trial Judge made the following note in the record:

"NOTE: In view of the condition of the Surveyor who looks extremely unwell the court suggested to the counsel for the defendants if the plan could not be shown to the witness to identify as he appears not to remember any names, apparently because of his con-

dition which must have affected his memory. Mr. Nri Ezedi quite understandingly acceded and said he would not mind if the plans are admitted by consent. Mr. Okonkwo Abutu for Anyaduba hesitated but when he was left with no other option welcomed the gesture from Mr. Nri Ezedi that the plans could be admitted by consent.

BY COURT: Plans admitted by consent. Plaintiff's plan No.: 5 ECAS/57/80 is admitted, tendered and marked Exhibit F. Defendants' plan No. PO/E189/80 is admitted, tendered and marked Exhibit G. Evidence proceeds Mr. Okonkwo Abutu shows Exhibit 'F' to the witness.

BY COURT: Mr. Abutu says he no longer wishes to ask further question.

CROSS-EXAMINATION BY NRI EZEDI:

Note: Mr Nri Ezedi says he would have asked questions but for the condition of the Surveyor."

There are some notes on the plan one of which reads: "Buildings erected by the defendants without consent of the plaintiffs Cause of Action in Suit No.22/64 & 54/64". Commenting on this note, the learned trial Judge, in his judgment. observed:

"Another startling factor which emerged in the course of my careful reading of the plaintiffs' two plans are in my view bound to affect the fortunes of the plaintiffs in their plea of res judicata. In the plan Exhibit Fit was headed - 'Plan showing land in dispute in suit No. 22/64. How has this suit number filtered into this plan?"

Neither the plaintiffs' counsel nor the defendants' drew my attention to this. All along the suit number in the District Court was 54/64. There was no evidence by the plaintiffs that there had been any previous suit over this land apart from suit No. 54/64. To emphasize the confusion in the plaintiffs' case and in a way seem strengthen the defence of pleas against estoppel per rem judicatam. I have looked on plan Exhibit F in this proceeding. To the South- West of the land in dispute there is indicated on the plaintiffs 7 plan. House of Gilbert Igwilo cause of action in Suit No. 22/62. Again there is another indication to the South within the plan Exhibit F the following: 'Iloabueke defendant cause of action in Suit No.22/64. If one could concede that a mistake might have been made on Exhibit F by inserting Suit No.22/64 how could reference to the suit in Exhibit F be explained? Were they two suits: 22/64 and 30/64? But there was no evidence of

this kind.

A party must rest his case on his pleadings. The plaintiffs have rested their case mainly on res judicata based on the judgment in Suit No. 30/64. It has now turned out that the Suit No. was 22/64. A party must succeed or fail on the strength of his pleadings; Emegakwue v. Okadigbo (1973) 3 Sc. 129, Chief Victor Woluchem v. Chief Simon Gudi. (1981) 5 S.C. 291 at 320."

It is this observation that was the basis of the complaint in ground 3 before the Court of Appeal which was not touched upon by that Court. Exhibit C - the proceedings in the District Court case pleaded and relied on by the plaintiffs bears the number 30/64. The number 22/64 in the note in Exhibit F either must have probably been inserted in error by the surveyor or there was such an action not pleaded nor relied on in the present action. In my respectful view, the observation of the learned Judge in the passage quoted above is just much ado about nothing. It does not affect the point on which the issue of res judicata was decided, and that is, that the parties in the earlier and present suits are not the same.

I do not, however, agree that by making the observation in the passage the learned trial Judge was taking suo motu a point not canvassed by the parties. Exhibit F was admitted in evidence by consent. The learned Judge was entitled, in my respectful view, to comment on the Exhibit in so far as it affected the case of either party, particularly the party that tendered and relied on it.

I must therefore answer the second question posed in issue 2 in the negative.

ISSUE 3

The learned trial Judge after a painstaking evaluation of the evidence before him found that the traditional history relied upon by the plaintiffs was not satisfactorily established. The learned Judge found as follows:

"Plaintiffs pleaded their traditional history in paragraph 3 of the Statement of Claim. The defendants traversed this pleading fully in paragraphs 4 and 5 of their Statement of Defence. I have considered the evidence of the parties and their pleadings on traditional history of the land. Experience in land matters of pleading and evidence on traditional evidence is that for the most part it is sheer fantasy on both sides. This is not to say that in every case the parties

have set out on a deliberate course to mis-state the facts. The main reason is that the source of this kind of pleading and evidence is vague and uncertain. The facts are headed down from generation to generation by oral tradition and in the process the primary facts are diluted and distorted, sometimes deliberately, by one side or the other to suit its case. This present case is not free from this inherent defect. 5

On one fact the parties are in complete unanimity. They agree in their evidence and pleadings that they had a common ancestor called Okpulukpu. They begin to part ways on how many issues Okpulukpu had. While the plaintiffs maintain that he begat two male issues, namely: Dim and Ezeor Ezeolu, the defendants on the other hand say that Okpulukpu had 3 males as follows: Dim, Ezeolu and Ezegwom. Of course they agree on their primary lineage from Okpulukpu. The lineage of the plaintiffs is Eze and that of the defendants, Dim. They did not agree on how many sons and the order of seniority of the descendants from the two direct sons, namely: Dim and Eze. The 1st plaintiff on record (PW.4) testified as follows: Eze begat (Umeoha, who begat Onuegbe, who begat Aguegbebi). Aguegbebi begat (Ike, who begat Azietonma - the fourth plaintiff). At another time he would say that Umeoha begat Aguegbebi who begat Onuegbe who begat him the (4th Plaintiff). Plaintiffs' case is that one of the sons of Umeoha called Onuegbe as their great great grand father of his own lineage owned this land in dispute belonging to one of the sons of Umeoha called Aguegbebi. Umeoha had granted to the great grand father of the defendants, Ohiagu who plaintiffs referred to as the grandson of Umeoha the portion verged green in plan NO. ECAS/57/80 to live. 25

Later in the course of history the descendants exceeded this area verged green and encroached on the area verged pink. Plaintiffs case is that because of this expansion beyond the area verged green the plaintiffs took out an action which is the basis of the estoppel pleaded in paragraph 7 of the Statement of Claim. This plea of estoppel and the defence thereto will be referred to later. 30

On this question of traditional history the defendants just as the plaintiffs mis-stated some links in their own chain of historical evidence. One of the defence witnesses (to be precise D.W.3) said that Ohiagu was the father of Dim. Both parties are agreed that Dim was a direct son of Okpulukpu. From the account of D.W.3 Ohiagu 35

their great grand father would be about two generations removed from Okpulukpu. The defendants also plead and gave in evidence that it was Ohiagu who owned the portion of land in dispute originally but following a request by the plaintiffs' ancestor, Umeoha, Ohiagu granted him the portion now in dispute for which Umeoha
 5 was paying tribute to Ohiagu - which payment continued down the line.

From the pleadings and the evidence on the traditional history, it is not clear which story to accept as to who owns the land. As it is, the reliefs sought by the plaintiffs cannot be decreed on the basis of traditional history as it is contradictory and inconclusive.
 10

The Court of Appeal, per Ikwechegh J.C.A., agreed with the learned trial Judge when it observed:

*"It seems, to me that the judgment dismissing the appellants' claims dealt adequately with the issues which the evidence before that court raised, and the matters are within a very narrow circumference, to wit, whether the traditional history of the appellants was satisfactory to establish their claims, and/or whether the plea of res judicata was made out as against the respondents. In my view, with
 15 this narrow pale the trial judge validly and adequately dealt with the case before him, and came to the right conclusion that the plaintiffs' claims failed."*
 20

These are concurrent findings of fact of the two courts below. This Court will not disturb such findings unless a substantial error apparent on the face of the record of proceeding is shown or such findings are perverse
 25 see Sobakin v. The State (1981) 5 SC 75; Enang v. Adu (1981) 11-12 S.C. 25; Ibodo v. Enarofia (1980) 5 - 7 S.C. 42; Chiwendu v. Mbamali (1980) 3-4 S.C. 31, Njoku v. Eme (1973) 5 S.C. 293; Ige v. Olunloyo (1984) 1 SCNLR. 158. I am not satisfied that the findings of the two courts below
 30 under attack are perverse nor that any substantial error is shown on the face of the record. I am satisfied that the findings are adequately supported by the evidence before the trial court. I therefore have no reason to disturb these findings of fact made by the learned trial Judge and affirmed by the Court below.

In conclusion, for the reasons given above by me and the other reasons given in the judgment of my learned brother Olatawura J.S.C., I too dismiss this appeal and affirm the judgment of the Court below. I award N1,000.00 costs of this appeal to the defendants.

Appeal Dismissed.