

SUPREME COURT OF NIGERIA
15TH JANUARY, 1993. SC.190/1988
CORAM:- M. L. UWAIS, O. OLATAWURU, U. OMO,
M. E. OGUNDARE, S. U. MOHAMMED, JJSC

ALHAJI RAIMI OLORIEGBE APPELLANT

AND

J. A. OMOTESHO RESPONDENT

APPEALS - Application to Supreme Court to vary Judgment of lower court - proper procedure - cross - appeal.

RES JUDICATA - Where part of present claim doesn't exist at the time of previous suit - where original cause continues unabated and the injury and damage has not been abated - doctrine of res judicata will not apply.

FACTS

The Plaintiff/Appellant (hereinafter simply referred to as the Plaintiff) instituted an action in 1976 in the Ilorin Area. Court

claiming from the Defendant/Respondent (hereinafter referred to as Defendant) ownership of a parcel of land. During the pendency of the action the Defendant built a house on the land. The trial court found in favour of the Plaintiff and declared him the rightful owner of the land and ordered the Defendant to demolish the house. The Defendant then appealed to the Ilorin Upper Area Court which dismissed the appeal but at the same time quashed the order for demolition as being “outside” the Plaintiff’s action. There was no further appeal by either party.

The Plaintiff filed another action in the same Ilorin Upper - Area Court which was transferred to the Lokoja Upper Area Court praying the Court to order the Defendant to “remove” the building from his land. The Court found in favour of the Plaintiff and accordingly ordered the Defendant to remove his building. The

Defendant appealed against this decision to the High Court of Kwara State sitting in its appellate jurisdiction. The Court was comprised of two Judges of the High court and the kadi of the Sharia court. The Court allowed the appeal of the Defendant. The Plaintiff sought leave of the High court to appeal to the court of appeal, leave was refused. He appealed against the refusal to grant leave but lost.

The Plaintiff again in 1983, instituted an action in the High Court of Kwara State claiming inter alia an order of possession, and an order for account to be taken and sum due to the Plaintiff paid to him. The Defendant raised a plea of res judicata and a motion for dismissal which the court over-ruled. The Defendant appealed to the Court of Appeal (Kaduna Division) which allowed his appeal and upheld the plea of res judicata and also found that the defendant was a trespasser. The Plaintiff/Applicant appealed to the Supreme Court against the decision of the Court of Appeal, whilst the Defendant/Respondent cross-appealed solely against the finding that he is a trespasser.

HELD (unanimously allowing the appeal)

1. Before the Doctrine of res judicata can operate, the parties, the issues and the subject matter must be the same in the previous action as those in the action in which the plea of res judicata is raised. (p. 47 L. 22)
2. In the instant case though the parties and the subject matter were the same, the second part of the claim was new and was absent at the time the previous actions were undertaken. (pp. 47 L. 27/ 50 L.19)
3. Once it has been established that part of the present cause of action did not arise before the previous action relied upon to raise res judicata, the plea of res judicata cannot succeed.(p. 51 L. 13)
4. A claim for an account is based on a continuing receipt of rent from tenants, which cannot be held to have ended until the respondent ceases to collect same. (p. 51 L.16)

5. A finding that res judicata applies cannot possibly be grounded on any uncertainty, no matter how slight. To succeed on this plea all the evidence required must be unequivocal and certain.

(p. 52 L.3)

6. A respondent who seeks the reversal of an adverse finding by the lower court can only do so by way of notice of appeal/cross-appeal and not by a mere respondent's notice to defend the appeal.

(p. 53 L.5)

PER OGUNDARE JSC *“Only judgments of a competent court can be pleaded as constituting estoppel per rem judicatam and if it appears that the judgment relied on to sustain the plea was not given by a competent court, the plea must fail”.* (p.70 L. 12)

REPRESENTATION

J. O. Ijaodola For the Appellant

Chief E.A. Oshe For the Respondent

CASES REFERRED TO

1. Henderson v. Henderson. (1843) 3 Hare 114, 67 E.R. 313
2. Canadian Sugar Refining Co. v. R. (1898) AC 7. 4
3. Attorney General v. Brown (1920) 1 KB 773
4. Ibiyemi & 3 Ors. v. Olusoji & anor (1957) WNLR 25.
5. Okunsanya & ors v. Akanwo & ors (1941) 7 WACA 1
6. Nwaneri & ors v. Oriuwa & ors (1959) 4 FSC. 132
7. Njoku & ors v. Eme & ors (1975) 5 SC 293
8. Okpuruwa v. Okpokam (1988) 4 NWLR (Pt 90) 554
9. Ngwo v. Monye (1970) 1 ALL NLR 91
10. Savage v. Uwechie (1972) 3 SC 214
11. Standard Bank v. Ikomi (1972) 2 SC 164
12. Ozungwe v. Gbishe & ors (1985) 2 NWLR (pt 8) 528
13. Okuma v. Tsutsu 10 WACA 89
14. Madukolu & ors v. Nkemdilim (1962) 1 ALL NLR 587
15. Umenwuwaku v. Ezeana (1972) 5 SC 543
16. Ogunlade v. Adeleye (1992) 8 NWLR (pt 260) 409

17. Lagos City Council v. Ajayi (1970) 1 ALL NLR 291
18. Ellochin (Nig) Ltd. v. Mbadiwe (1986) 1 NWLR 47
19. Adekeye v. Akin-Olugbade (1987) 3 NWLR 291
20. Olawoyin v. C.O.P (1961) ALL NLR 213, (1961) NSCC 90
21. Western Steel Workers & Ors. v. Iron Steel Workers & ors. (1974) 1 NWLR (Pt 49) 284.
22. K. Chellaram & Sons v. G.B. Olivand Ltd. 10 WACA 77.

STATUTES & RULES REFERRED TO

1. Evidence Act SS. 53, 54 and 55
2. Constitution of the Federal Republic of Nigeria 1979 SS. 238, 274.
3. Constitution of Northern Nigeria 1963. S. 51(3).
4. High Court Law Cap 49. Laws of Northern Nigeria 1963 S. 63 (1).
5. Supreme Court Rules 1985, Order 8 Rule 3.

LEAD JUDGMENT BY OMO JSC

This is an appeal by the plaintiff/appellant against the decision of the Court of Appeal (Kaduna Division) which allowed the defendant/respondent's appeal against the ruling of the Kwara High Court in the plaintiff/appellant's favour.

The plaintiff/appellant instituted an action (KWS/70/1983) in which it claimed against the defendant/respondent.

"(i) an order of possession wherein the defendant is to vacate the plaintiff's adjudged land and to remove his structure thereon, and

(ii) (for) an order of account to be taken and payment of the sum due in respect of the structure on the plaintiff's adjudged land".

After pleadings had been filed and exchanged, the defendant/respondent filed an application in the trial High Court for an order to dismiss the plaintiff/appellant's action on the grounds: (a)

that it is caught by the doctrine of *res judicata*, to wit; that the issue(s) sought to be decided had been canvassed and decided upon in a previous action between the parties; and (b) that the action is an abuse of the process of the court. The High Court dismissed this application holding that, although the claim for title and possession
5 had been previously litigated, the court was not barred by the doctrine of *res judicata* from hearing the present claim because "the question of rendering an account is a completely new issue which has not been judicially decided upon". It relied on the decisions in *Okusanya*
10 and *Ors v. Akanwo and Ors* (1941) W.A.C.A.1 and *Bakare Ibiyemi & 3 Ors v. Lawani Olusoji and anor* 1957 W.N.L.R. 25. Defendant/respondent's second contention that the action is an abuse of process was not considered. The decision was however reversed by the Court of Appeal which held that the plaintiff/appellant's action is caught by
15 the plea of *res judicata* and the High Court therefore lacked jurisdiction to entertain the matter. In the process of coming to this decision, the Court of Appeal found that the defendant/respondent is a trespasser on the land in dispute. Dissatisfied with this ruling both parties have appealed against same to this court: the appellant against the
20 decision of *res judicata* and the respondent solely against the finding that he is a trespasser.

The dispute between the parties over the piece of land situate at No. 1, Amilegbe Close, Ilorin, has had a chequered history
25 dating back to the year 1976 when the plaintiff/appellant took his first action (case No. IAC/2/1/CU.672176) in the Ilorin Area Court Grade II No. 1, against the defendant/respondent. It is necessary to revisit the tortured career of this dispute in order to be able to understand clearly the reason/basis for the application to dismiss the present
30 action in the High Court filed by the defendant/respondent, and to be able to arrive at a correct decision in this appeal.

The aforementioned application to dismiss is supported by an affidavit to which is annexed six court proceedings (Annexure A
35 to F). Together they cover pages 15 to 101A of Volume 1 of the record or proceedings. Only the salient and relevant facts set out in these 87 pages will be summarised and adverted to herein. The plaintiff/appellant (who for the purpose of this summary will be referred to hereafter as plaintiff only) filed the original (first) action in

1976 against the defendant/respondent (called defendant only hereinafter in this summary) claiming "my land sold to me on which the defendant is building his house on the land now". Both claimed to have purchased from Balogun Fulani and received "written document with their measurements" (my note: of the pieces of land sold to them) from the same person - one Abdulkadir Ishola - who said he used to distribute lands sold to its owners on behalf of the Balogun Fulani. The court after hearing his evidence-in-chief, proceeded to the land in dispute which it inspected in the presence of the parties, all their witness, and a surveyor. At the locus in quo, measurements were made: after which the witness Ishola (who testified as P.W.1) was asked whether from his observation on the land he could say that the portion of land all which the defendant was building belonged to him. He answered that it belonged to the plaintiff. In its judgment the court stated. inter alia thus:

"Having heard the evidence of plaintiff and all their witnesses, The Court sees that the plaintiff and all his witnesses proved their case beyond reasonable doubt to convince this court that the land belongs to the plaintiff, the court therefore declares the land in dispute to the plaintiff because of the following reasons....."

It proceeded thereafter to set out eight (a-h) reasons for so deciding. The record shows that it ended its judgment thus:-

"Judgment:-The land in dispute declear (sic) to the plaintiff as the rightful owner.

Court Order:- The Court hereby order the defendant to demolish his building and to remove all his properties on the land within 30 days.

Right of Appeal:- Any aggrieved party may appeal to Upper Area Court within 30 days (vide pages 49 to 52 of the record of proceedings - (Vol. 1).

The defendant exercised his right of appeal to the Upper Area Court, Ilorin, Which affirmed the declaration of title in favour of the plaintiff but quashed the order for demolition of all the properties

of the defendant on the land because that order is, "outside" the plaintiffs action. (vide page 63 of record of proceedings - Volume 1).

The plaintiff then proceeded to file another action against the defendant in the same Ilorin Upper Area Court seeking an order of that court that the defendant "should remove his house from my land". That court, because of its "familiarity with a previous appeal case between the parties", decided to transfer the case to Lokoja Upper
5 Area Court, where it was heard and determined in favour of the plaintiff. The court ordered thus:-

*"The possession of the piece of land on which the defendant's
10 house in dispute stands is awarded to the plaintiff. The defendant is ordered to remove his house from the plaintiff's land not later than 26/6/81."*

The defendant again appealed successfully against this judg-
15 ment to the High Court Ilorin which quashed the Lokoja Upper Area Court judgment on the ground that it was incompetent to give a judgment which had the effect of setting aside the previous judgment of a court of concurrent jurisdiction - the Ilorin Upper Area Court. The plaintiff appealed against this decision to the Federal Court of
20 Appeal (as it was then called) in June 1981 (Annexure D at pages 84/5 of the record, of proceedings. Vol.1 refers). In his brief in this court, the plaintiff has stated that he "appealed unsuccessfully against the appellate decision of the High Court to the Federal Court of Appeal".
25 The defendant, on the other hand, stated in his brief that this appeal of the plaintiff "has never been heard or determined" (para. 2.14 of respondent's brief at page 4 thereof refers). A close study of Annexures D, E & F attached to defendant's affidavit in support of the dismissal motion in the present appeal shows that the defendant's submission,
30 to wit, that the appeal against the judgment of the Ilorin High Court has not been heard or determined is correct. What the plaintiff did as shown by Annexures E and F is to seek extension of time to appeal against the first judgment of the Ilorin Upper Area Court in 1977, which was refused both by the High Court and Court of Appeal. It is
35 difficult to understand why the plaintiff embarked on such a fruitless exercise instead of pursuing the substantive appeal against the High Court judgment which he had filed.

Four months after his appeal to the Court of Appeal had been dismissed, the plaintiff filed the present action now on appeal, particulars of which have been set out earlier. The Court of Appeal having allowed the appeal of the defendant/respondent (herein after referred to as the respondent only), the plaintiff/appellant referred to as appellant simpliciter hereafter), has appealed to this court on one 5 ground of appeal only, set out as follows:-

"The learned Justices of the Court of Appeal erred in law in holding that the new suit was caught by the doctrine of res judicata. Particulars of Error-in-law 10

(i) The doctrine can only apply where the new relief arose at the time the original suit was filed in the court of first instance.

(ii) The doctrine can only apply where the injury or damage continued and has not abated." 15

The respondent filed a notice dated 20/7/88 of his intention to contend that the decision of the court below be varied (Order 8 Rule 3 of the 1985 Rules of the Supreme Court refers), seeking an order of this court *"quashing that part of the judgment which held that the respondent herein is a trespasser and that he committed contempt of court by flouting the court's orders"*. Ten grounds were given for seeking this variation, prominent among which are the following:- 25

"7. The two decisions (i.e. that of the Area Court Grade II No. I Ilorin and that of the Lokoja Upper Area Court) which gave the appellant herein possession of the land have been quashed.

8. There is therefore no valid court decision awarding the possession of the land to the plaintiff. The finding of the Court of Appeal. Kaduna that the defendant flouted all courts' orders declaring him a trespasser is not supported by the facts of the case. The defendant never flouted any court's order.

9. The Defendant is not a trespasser because the disputed land is not in the plaintiffs possession. It is because the land is not in his possession that he instituted the suit in the Lokoja Upper Area Court and in the Ilorin High Court (which is the subject of this appeal) 35

claiming possession from the defendant.
Trespass is not founded on ownership which was awarded to the plaintiff but on possession which was never validly awarded to him.

10. The question of whether or not the defendant is a trespasser was not an issue before the Court of Appeal Kaduna, neither
5 were counsel given an opportunity to address the court on the issue before the court made its erroneous decision that the defendant is a trespasser."

10 Two issues for determination were set out in his brief by the appellant thus:-

- "1. Does the doctrine of res judicata apply where the new claim does not exist at the time the original suit was filed?*
- 15 2. Does the doctrine of res judicata apply where the original cause of action continues unabated and the injury/damage continues and has not abated."*

20 The respondent in his brief also set out two issues for determination which read thus:-

"3.1 Was the plaintiff right in circumventing the rule of res judicata by relitigating the issue of possession already decided in previous judgments by adding a new relief i.e. damages for a house
25 which was erected when the previous cases were tried.

3.2 Was the Court of Appeal right in holding that the defendant is a trespasser whereas all the court's decisions that he should
30 vacate the land and deliver possession to the plaintiff have been quashed?
I propose to determine this appeal primarily on the basis of the appellant's formulation of issues, but will deal with so much of the respondent's as is relevant."

35 The foundation of our law of estoppel per judicatum is set out in sections 53 and 54 of the Evidence Act as follows:-

"53. Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved. 5

54(1) If a judgment is not pleaded by way of estoppel it is between parties and privies deemed to be a relevant fact, whenever 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 to the issue, in any subsequent proceeding. 10

(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." 15

It is trite that before this doctrine can operate, the parties, issues, and subject matter, must be the same in the previous case as those in the action in which the plea of res judicata is raised vide Ihenacho Nwaneri & Ors v. N. Oriuwa & Ors (1959) 4 F.S.C. 132, (1959) SCNLR 316; Kalu Njoku and Ors v. Ukwu Eme & Ors (1973) 20 5 S.C. 293 (304, 305); Okpuruwa v. Okpokam (1988) 4 NWLR (Pt.90) 554. In the instant case it is agreed by all that the parties are the same and so also is the subject matter - No. 1, Amilegbe Close, Ilorin. But are the issues the same? The issues before the Ilorin High Court for plaintiff's determination, as set out in plaintiff's writ of summons are:- 25

(i) an order for possession of land in dispute and removal of defendant's structure thereon.

(ii) an account to be taken, and sum due to plaintiff paid to him. 30

Although appellant's counsel had in the High Court submitted that he is claiming "two remedies which are different and distinct from the ones previously litigated upon". the High Court did find that the various courts which had dealt with this dispute had dealt with issues of title and possession. It then proceeded to consider the second issue of "rendering an account" which it held was a completely new issue, because of which the plea of res judicata must fail. 35

On appeal to this Court the ground of appeal filed by the appellant

and the issues for determination raised by him, do not deal with the first issue of possession. It was also not canvassed in his brief. I will therefore confine my consideration on identity of issues to the second issue (head of claim) raised on the writ of summons. The Court of Appeal came to the decision that the doctrine of *res judicata* is applicable to this second issue because firstly, it is a claim for mesne (intermediate) profits, being rents collected on land adjudged to belong to the appellant. This it held cannot be claimed by the appellant as "an ancillary remedy to the order of possession already granted" because there is no relationship of landlord and tenant between the appellant and the respondent. Secondly, that the proper remedy the appellant should have sought is damages for trespass "as an additional remedy against the defendant, in the court of first instance, that is, at the Area Court Grade II Ilorin". Thirdly, that the appellant through his "inadvertence or negligence" has failed to put forward every subject of his case particularly damages for trespass."

In his brief, the appellant submitted that *res judicata* does not apply to this second issue (claim), on which this fresh suit is based, because the cause of action did not arise when the original suit was filed. At that time (in 1976), the only cause of action which existed, and which was canvassed in the Area Court Grade II Ilorin was for "declaration of title", The house to which the present claim refers had not been completed when the suit began, let alone its being occupied by tenants (to be able to attract rents). The doctrine of *res judicata* he also submitted cannot apply to a continuing trespass, this cannot shut out a subsequent and similar action where the trespass has not abated. "It is both good law and good sense" he further submitted, that a land-owner (the appellant) should be able to bring a fresh suit to seek redress for all collections from the trespasser's tenants which have arisen after the original suit. No legal authority was cited in support of this "*good law*".

The respondent, in his brief, considered at some length the first issue of possession and sought to show that it had been finally decided in favour of the respondent and against the appellant. In view of my earlier remarks, I will neither set out nor consider his

submissions on the issue of possession. It is enough to observe that the decision of the Ilorin Upper Area Court on the question of demolishing of the offending structure on the land in dispute was not on the merits. The order to demolish was quashed on the rather "technical" ground that it was not claimed by the plaintiff. The effect of the subsequent decision of the Ilorin High Court can be best determined against that background. I will say no more on this since there would appear to be an appeal against it, filed in the Court of Appeal since 1981, which respondent's counsel has stated to be still pending. On the second and relevant issue, respondent agreed with the decision of the Court of Appeal that the appellant could not ask for rent/mesne profits from the defendant, because there is no relationship of landlord and tenant between them. The only remedy open to the appellant he submitted is for damages for trespass when he took his first action in 1976 and having failed to do so, he is shut out from so doing, because it is an issue that he has failed to litigate or canvass either through "negligence or calculation" and cannot therefore re-open in a subsequent litigation vide *Ngwo v. Monye* (1970) 1 All NLR 91 (97/8); *Savage v. Uwechie* (1972) 3 S.C. 214 (222/3). He also cannot be permitted to split his causes of action and litigate them one by one vide *Standard Bank of Nigeria Ltd v. Chief F.M. Ikomi* (1972) 2 S.C. 164 (178).

In coming to the conclusion that the second issue (claim) cannot be canvassed or indeed put forward because there is no relationship of landlord and tenant between the parties, the Court of Appeal was adjudicating on the merits of the issue (claim). This

is not what it is called upon to do in deciding whether it is a fresh issue which has not already been finally determined in the previous decisions relied upon in support of a plea of *res judicata*, or an old issue firmly laid to rest the relitigation of which is excluded by that doctrine. The appellant's submissions that the claim on which the present suit is based did not arise in 1976 appears to be well-taken. Whatever may be the exact nature of his claim (I will comment on that later), it is (as set out) (i) asking for an account (ii) payment of

sum due, presumably after taking the account (iii) in respect of defendant's building on plaintiff's land (iv) which building has been let to tenants (v) without permission or consent of the plaintiff. As at the time the 1st action was taken by the plaintiff in 1976, it is true as appellant has submitted, that there were no tenants on the land, because the building in which they were subsequently let in was not yet completed. This submission is fully supported by the evidence led in the 1976 case reproduced at pages 23 to 52 of volume 1 of the record of proceedings (see particularly pages 23, 28 & 30). Apart from challenging this statement as false, respondent's counsel has not sought to disprove same. This issue therefore cannot ex facie be said to have been canvassed in 1976 or thereafter. It can only be caught by the doctrine of res judicata on the ground that it is a claim which should have been put forward when the claims for declaration of title and possession were filed.

Failure to do so can therefore be held to arise out of "inadvertence or negligence", or even accident; and the present action therefore be adjudged caught by the plea of res Judicata vide *Dzungwe v. Gbishe & or.* (1985) 2 NWLR (Pt.8) 528 (537(8), where the observation of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 114 reported in 67 E.R. 313 at p.319 is cited and relied upon. It reads thus:

"I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation on, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only on the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

(Note: underlining mine)

Is the present action for an account one "which might have been brought forward in the previous action(s) but was not brought forward only because" the appellant has out of "negligence, inadvertence, or even accident, omitted part of his case?" The answer must be in the negative once it has been established that the cause of action did not arise before the previous action(s) relied on to constitute *res judicata*. What is more, a claim for an account is based on a continuing receipt of rent from tenants, which cannot be held to have ended until the respondent ceases to collect same. 5 10

It is therefore difficult to see how it can be the subject-matter of a plea of *res judicata*, unless the period for which the account is sought is limited to the exact period when the earlier actions were filed in court. The conclusion to which I have therefore arrived is that the second issue (claim) is an entirely new issue (claim) which has not been previously canvassed. It cannot therefore be caught by respondent's plea of *res judicata*, which must therefore fail. The answer to appellant's issues for determination must therefore be in the negative. The judgment of the Court of Appeal to the contrary is therefore hereby set aside. 15 20

Before I proceed to consider the complaint of the respondent that he has been wrongly found to be a trespasser, I must comment briefly on another reason why it must be premature to hold that the doctrine of *res judicata* applies, and that the jurisdiction of the court to hear the action on its merits had been ousted. This relates to the exact nature of this second claim. Is it purely a claim for an account of rents collected from tenants by the respondent or is it in effect seeking damages for the building on the land (regarded as an act of trespass by the appellant) to be assessed in the basis on the account taken? This in my view needs to be clarified. A finding that *res judicata* applies cannot possibly be grounded on any uncertainty, no matter how slight. To succeed on this plea all the evidence required must be unequivocal and certain. 25 30 35

To the respondent's complaint, the appellant has raised an objection

albeit rather tentative, to wit, that it should have been by way of a cross-appeal and not merely by way of notice to vary under Order 8 Rule 3 of the Supreme Court Rules 1985. The finding which the respondent is complaining of was made in the lead judgment (Ogundere, J.C.A.) of the Court below and arrived at thus:-

5 *"With the greatest respect to all the courts which have had anything to do with this case, the decision of the original Area Court of trial is commendable, clear and unambiguous. The defendant was in effect declared a trespasser, and as an act of grace he was ordered to demolish his building and to remove all his property from the plaintiff's land, otherwise the maxim*

10 *quic quid plantatur solo solo cedit would have applied so that the plaintiff would recover possession of his land together with the building planted on it, as his own. It was contempt of court of the highest order that the defendant, now appellant, by ruses and subterfuge, flouted with unabashed effrontery and impunity the Courts order".*

(Note: underlining mine)

20 In answer to the appellant's objection, the respondent has replied that he did not cross-appeal because the finding complained of is not "fundamental and crucial to the respondent's case". Furthermore, that the pronouncement is "besides the issue" and what is required is to ask the court to vary same. Although the finding may not be perceived by respondent as "fundamental and/or crucial" to his case, it is a weighty finding which must be seen by the respondent as portraying him in a bad light, hence he wants it "set aside". For this court to be able to do so, there must be a cross-appeal filed against it because the decision of the court below is being attacked. A variation can only be made on the basis that all the findings are correct but the judgment can and should be varied without detracting from any of those findings, sometimes in order to properly bring out some aspect of the court's decision which have been overlooked. A respondent who seeks a reversal of an adverse finding can only do so by way of a notice of appeal/cross appeal and not by a respondent's notice vide Western Steel Workers & or Iron and Steel Workers & or. (1987) 1 NWLR (Pt.49) 284. No such cross-appeal having been filed, I agree

with appellant's counsel that the complaint cannot be entertained. In the alternative and on the merits, it is not entirely correct that the issue was not before the court. The appellant (then respondent) raised it in paragraph 4.1.3 and, sub-paragraph (iii) of his conclusions/summary at pages 170 and 171 of the record of proceedings volume II. Whether the finding was necessary for arriving at the final decision in the appeal before the court below is however another matter. The ambivalent attitude of the respondent to his complaint is another reason why the order sought must be refused. According to him the variation sought is only "for the purpose of convenience". It is therefore not a serious complaint and should not be entertained.

Far from criticising the learned appellate Justice. I entirely agree with his perception of the legal position between the parties. It is to be hoped that at the end of the hearing in the Ilorin High Court or before then, the respondent will take necessary steps to comply with the implications of the declaration of title in the land in dispute, which the appellant obtained in 1976.

To summarise, the appeal is allowed. The judgment of the court below is set aside. In its place, I hereby order that the case be sent back to the High Court Ilorin for prompt hearing and a decision on the merits of the claim before it.

The appellant is entitled the costs of the hearing in the court below and in this Court which I assess at N300 and N1, 000 respectively.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Uche Omo, J.S.C. I agree that the appeal has merit and that it should be allowed. I only wish to add that this court suo motu raised the question whether the High Court that set-aside the decision of the Upper Area Court, Lokoja was properly constituted in view of the provisions of section 238 of the 1979 Constitution. The question became pertinent because the issue of res judicata which was raised in the Court of Appeal and before us will fall or stand on the important question whether the judgment of the High Court as constituted by Kawu, CJ, Salami J and Abdullahi, Kadi

(as they all were then) on the appeal from the Upper Area Court, Lokoja, was a valid judgment. Both learned counsel for the parties have submitted, even though with much reluctance on the part of Mr. Oshe, that the High Court was improperly constituted due to the presence of a Kadi of the Sharia Court of Appeal who was not a
 5 Judge of the High Court. I do not wish to say more on the point other than to adopt the judgment of my learned brother Ogundare, J.S.C. in that respect.

10 Accordingly, I allow the appeal and set aside the judgment of the Court of Appeal. I abide by the orders contained in the judgment of my learned brother Uche Omo J.S.C.

15 **OLATAWURA JSC**

I had a preview of the judgment of my learned brother Uche Orno. J.S.C. I will also allow the appeal and send the case back to the High Court of Kwara State to be heard on its merits. I wish to add
 20 some points.

It is important to bear in mind that the case which is on appeal to this court originated from an Area Court which by its composition is similar to a Native Court. It is for this reason that both the
 25 Area Court and the Native Court now popularly called Customary Court that one looks into the substance and not the form: MATE NONO PER TETTER OKUMA V. TSUTSU: 10 WACA. 89. In the Area Court Grade II Ilorin the appellant before us stated categorically
 30 the claim to wit:

"I wish to claim my land sold to me of which the defendant is building his house on the land

After listening to the evidence by both parties and a visit to the
 35 locus in quo by the Area Court; the Court adjudged as follows:

"The land in dispute declare (sic) lathe plaintiff as the rightful owner (sic). The court hereby order (sic) the defendant to demolish his, building and to remove all his properties on the land within 30days
 "

It is the order of the Court i.e. demolition of the building and removal of his properties by the defendant that has led to appeals and another action. The judgment of the Area Court II Ilorin except the demolition order was confirmed by the Upper Area Court. A bewildered and frustrated plaintiff who was stunned by the refusal of the defendant to obey the court's order filed another action in the Upper Area Court Lokoja seeking an order "to force the defendant to remove his building on the plaintiff's land" on the ground that the court (Area Court II Ilorin) has awarded him title in respect of the land. The court i.e. Upper Area Court Lokoja found for the plaintiff in these words:

"we give judgment for the plaintiff and in our judgment we order that the defendant should vacate the land by removing his house therefrom for use by the plaintiff not later than 26/6/81."

ORDER: The possession of the land on which the defendant's house in dispute stands is awarded to the plaintiff. The defendant is ordered to remove his house from the plaintiff's land not later than 26/6/81."

The defendant then appealed to the High Court of Justice, Kwara State sitting in Ilorin. High Court of Justice Ilorin allowed the appeal against the order of demolition made by the Upper Area Court Lokoja in these words:

"The Appeal is therefore allowed and the decision of the Lokoja Upper Area Court ordering the demolition of the appellant's building is set aside."

There was an appeal to the Court of Appeal Kaduna Division. Another action filed by the plaintiff came before Ibiwoye J (as he then was). It was in respect of the same matter i.e. the land and the building on the land. In that Court another claim was added to the claims. The claims before him were for:

- (a) an order for possession
- (b) an account stated for rent collected by the plaintiff on the land adjudged to be the plaintiff's land.

A preliminary objection raised by the defendant on a plea of res judicata was dismissed. The defendant sought and obtained leave of the High Court of appeal to the Court of Appeal against that ruling. The appeal was allowed and the plea was sustained. In its unanimous decision the Court of Appeal coram: Aikawa, Ogundere and
5 Achike, J.C.A. allowed the appeal. Ogundere, J.C.A. in his lead judgment said:

"The plea of res judicata succeeds so does the appeal. The High Court of Kwara State in its appellate jurisdiction lacked jurisdiction to entertain the matter ... The appeal is accordingly allowed."
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The appellant has now appealed to this Court on one ground of appeal which without the particular reads:

15 *"The learned Justices of the Court of Appeal erred in law in holding that the new suit was caught by the doctrine of res judicata."*

20 The respondent has filed a Notice under Order 8 rule 3 of the Rules of the Supreme Court of notice of contention that the judgment should be varied on other grounds. This rule though in existence at the time the appeal was filed has now been deleted by Government Notice 111/1991 with effect from 1st October, 1991. I will
25 come to this later.

Nothing much was urged in the oral submission by both counsel except to emphasise that title which was challenged by the respondent was refused in all the courts. It is now the issue of res
30 judicata that is now the bone of contention in this appeal.

Since the jurisdiction of the High Court with regard to the composition of members of that court was raised by us, we called on both counsel to address us. Under section 238 of the 1979 Constitution of the Federal Republic of Nigeria a High Court of a State shall
35 be duly constituted if it consists of at least one Judge of that court. Mr. Ijaodola readily submitted that since the panel that heard the appeal from the judgment of Lokoja Upper Area Court was not properly constituted the decision of the High Court was a nullity. The Judges

that heard the appeal were Saidu Kawu C.J. (as he then was) I.A. Salami, J. (as he then was) and Kadi Alhaji U. I. Abdullahi: Kadi Sharia Court. It was not without some hesitation that Chief Oshe agreed that the judgment Exhibit C is a nullity and that the proper order is a retrial by the High Court; this is in so far as Exhibit C is concerned: That court was incompetent because it was improperly constituted, Kadi Alhaji Abdullahi was not qualified to sit: *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, (1962) 2 SCNLR 341. A judgment given without jurisdiction is a nullity *Umenwuwaku v. Ezeana* (1972) 5 S.C. 543.

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It is the ruling of Ibiwoye J. that went on appeal to the Court of Appeal Kaduna and which ruling was set aside on the ground that the action before the High Court was caught by a plea of *res judicata* raised by the present respondent. The Court of Appeal rightly traced the history of the case before the various courts. The lower Court per Ogunidere, J. C.A. said:

"With the greatest respect to all the courts which have had anything to do with this case, the decision of the original Area Court of trial is commendable, dear and unambiguous. The defendant was in effect declared a trespasser, and as an act of grace he was ordered to demolish his building and to remove all his property from the plaintiff's land, otherwise the maxim quicquid plantatur solo-solo cedit would have applied so that the plaintiff would recover possession of his land together with the building planted on it, as his own ... The appellant is therefore a trespasser and he should cease to be one."

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The lower Court was then of the view that the ancillary relief of rent or statement of account was wrongly decided. I do not wish to go into the merits of the conclusion reached in view of the passage quoted above and the relief sought by the appellant that the case be remitted to the High Court to be heard on its merits. Ibiwoye I rightly came to this conclusion in his ruling when he said:

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"The question of rendering an account is a completely new issue which has not been judicially decided upon and therefore the doctrine of res judicata is inapplicable in this case."

If one looks at the claims before the two Area Court they are in substance for title to the land in dispute and possession of the land. If the lower Court has come to the conclusion that the maxim *quicquid plantatur solo-so/a cedit* applies, I cannot see how the issue of account which was raised for the first time could be said to have been caught by the plea of *res judicata*.

The respondent has filed a respondent's notice to vary the judgment of the lower court. The reasons given are good grounds for across-appeal. The difference between a respondent's notice (where it applies) and across-appeal was succinctly stated by this Court in *Ogunlade v. Adeleye* (1992) 8 NWLR (Pt.260) 409.

On the whole I will allow the appeal, set aside the judgment of the Court of Appeal dated 21st April, 1988, the case is remitted back to the High Court of Justice Kwara State to be heard on its merits. I will abide by the order for costs in the lead judgment.

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OGUNDARE JSC

The two questions that arise in this appeal are as set out in the appellant's brief, that is to say:-

(i) *does the doctrine of res judicata apply where the new claim does not exist at the time the original suit was filed; and*

(ii) *does the doctrine of res judicata apply where the original cause of action continues unabated and the injury/damage continues and has not abated.*

In the course of the hearing of the appeal. however, another issue arose which called into question the validity of the judgment of the High Court of Kwara State quashing the decision of the Upper Area Court Lokoja which High Court judgment is vital to a successful plea of *res judicata*.

The chequered history of the series of litigations between the parties commenced in 1976 when the plaintiff (who is now appellant

before us) instituted, in the Ilorin Area Court Grade 2, suit No.UAC/2/2/CV672/76 claiming from the defendant (now respondent) ownership of a piece or parcel of land situate at No. 1 Amilegbe Close, Ilorin. During the pendency of the action, the defendant built a house in the land. At the conclusion of trial, the trial Area Court Grade 2 found for the plaintiff and declared him to be the rightful owner of the land. It further ordered as follows:

"The Court hereby orders the defendant to demolish his building and to remove all his property on the land within 30 days."

The defendant, being dissatisfied with that judgment, appealed to the Upper Area Court Ilorin in Appeal No. UACI/CVA.72/76. The appellate court adjudged as follows:

"We therefore dismiss the appellant's appeal subject to a variation that it was the land in dispute only that is declared for the respondent. The order for the demolition of the appellant's building and the removal of all his properties on the land within 30 days is quashed because it is outside the respondent's action"

There was no further appeal by either party.

Following the setting aside by the Upper Area Court of the trial Area Court Grade 2's order that defendant should remove his building and properties from plaintiff's land as that order was not sought in the original action, the plaintiff, instituted case No. UCAL/CVF/30/78 in the Upper Area Court Lokoja claiming:-

"An order to force the defendant to remove his building on the plaintiffs land."

After taking evidence from the parties, the trial Upper Area Court, in a reserved judgment given on 26/3/81 adjudged as follows:

'In the circumstances of this case, we reject the defendant's defence and we find for the plaintiff that he should recover the possession of the land from the defendant. As we are satisfied that the defendant has failed to dislodge the onus of proof which lay on him to prove his right to possession against the plaintiff the owner of the land, we award the possession of the land on which the defendant's house stands to the plaintiff. In effect, we give judgment for the plaintiff and in our judgment we order that the defendant should vacate the land by removing his house therefore for use by the plaintiff not

later than 26/6/81."

It further proceeded to give the following order:

"ORDER: The possession of the piece of land on which the defendant's house in dispute stands is awarded to the plaintiff. The defendant is ordered to remove his house from the plaintiff's land
5 *not later than 26/6/81."*

The defendant again was dissatisfied with the judgment of the Upper Area Court, Lokoja and appealed to the High Court of Kwara State. That Court (coram: S. Kawu, C.J. (as he then was),
10 Alhaji U. Y. Abdullahi, Kadi Shari a Court and LA. Salami, J. (as he then was) allowed the defendant's appeal and held as hereunder:-

"We are in no doubt that Mr. Oshe's submission is well taken. In our view the position now is that the decision of the trial court
15 *awarding title to the respondent still stands and so also does the decision of the Ilorin Upper Area Court regarding the setting aside of the order of demolition. We say this because this {sic} has not been any appeal against those decision (sic). In the circumstances we are of the view that Mr. Oshe's point is valid and consequently the appeal*
20 *must succeed. The appeal is therefore allowed and the decision of the Lokoja Upper Area Court ordering the demolition (sic) of the appellants building is hereby set aside."*

The plaintiff, being aggrieved with the decision, sought leave of the High Court to appeal to the Court of Appeal. Leave was, however,
25 refused. He appealed to the Court of Appeal against the order of refusal, by the High Court, of leave to appeal but lost.

In 1983, the plaintiff once again instituted, this time in the High
30 Court of Kwara State, an action leading to this appeal claiming as per paragraph 12 of his statement of claim:

"12. Wherefore the plaintiff claims from the defendant as per his writ of summons
(i) an order of possession and
35 *(ii) an account stated for rent collected (sic) by the defendant on the plaintiff's adjudged land as mosne (sic) profit."*

The defendant, in his statement of defence, raised a plea of res judicata. He pleaded thus:

"The defendant pleads that the Area Court Grade II No. 1 Ilorin which gave judgment on the title to the land and gave an order of demolition of the defendant's house as well as the Upper Area Court Ilorin which quashed the order of demolition are competent court with jurisdiction over the issues before them. The defendant pleads that the claim now before this Honourable Court is res judicata by reason that it has been heard and tried by the Area Court Grade II No.1 Ilorin and Upper Area Court, Ilorin. The defendant in answer to all the claims of the plaintiff will therefore at or before: the hearing of this suit raise by way of preliminary objection on a point of law the issue that the present case is res judicata.

The claim for possession and removal (or demolition) of defendant's house now before this Honourable Court was adjudicated upon by the Upper Area Court, Lokoja, the High Court (Appellate Division) Ilorin and now pending in the Federal Court of Appeal Kaduna.

The defendant pleads that it is an abuse of judicial process for the plaintiff to be seeking the same relief in this Honourable Court and also in the Federal Court of Appeal, Kaduna.

Wherefore the defendant pleads that the present action be dismissed with costs on the grounds that it is res judicata., scandalous, vexatious and an abuse of the process of this Court,"

This was followed by a motion for dismissal of the suit. At the hearing of the motion certified copies of all previous proceedings between the parties on the land in dispute were annexed to the affidavits relied on. In his ruling, the learned trial Judge, (Ibiwoye, J.) overruled the plea of res judicata set up by the defendant and ordered that the case be heard on its merit. In coming to his conclusion, the learned Judge observed:

"It will be recalled that the two issues dealt with by the various courts previously are title to and possession of a piece of land situate at No. 1 Amilegbe Close, Ilorin. In the present suit the writ of summons reads:

The plaintiff's claim against the defendant is for (i) an order of possession wherein the defendant is to vacate the plaintiff's land and remove his structure thereon and (ii) for an account to be taken and payment of the sum due in respect of the structure on the plaintiff's

adjudged land which the defendant let to some tenants without the permission and/or consent of the plaintiff."

The writ of summons in this case as stated above shows that the plaintiff/respondent is claiming an additional subject matter which is an account stated as in (ii) above. The additional subject-matter
5 has distinguished this present suit from the previous ones where the subject-matter were only title and possession, notwithstanding the fact that the parties are the same. The question of rendering an account is a completely new issue which has not been judicially decided
10 upon and therefore the doctrine of *res judicata* is inapplicable in this case. This is the principle enunciated in the cases of *Okusanya & Anor. v. Akanwo & Anor.* (1941) 7 WACA 1 and *Bakare Ibiyemi & 3 ors. v. Lawani Olusoji & Anor.* (1957) WNLR 25. In this case therefore, the plea of *res judicata* must fail since the plaintiff/respondent
15 has added a new claim as shown in paragraph 12 of his statement of claim different from the previous proceedings and which has not been previously adjudicated upon."

The defendant appealed to the Court of Appeal (Kaduna Division) against the trial Judge's ruling. That Court (coram: Aikawa, Ogundere and Achike, J.C.A.) allowed the appeal and upheld the defendant's plea of res judicata. In his lead judgment with which the other Justices of Appeal agreed, Ogundare, J.C.A. observed:

"Be that as it may, from the exposition of the law above, could
25 rent or mean (sic) profits on the appellant's house wrongfully erected on respondent's land be deemed an ancillary remedy to the order of possession earlier granted? Clearly not, as there was no relationship of landlord and tenant between the parties. It is another way of asking for damages for trespass. The dictum of Wigram, Vice Chancellor
30 in Henderson's case covers adequately the question herein; the plaintiff should have claimed damages for trespass as an additional remedy against the defendant in the court of first instance, that is the Area Court Grade II, Ilorin. He is therefore estopped from relitigating the
35 matter even though through his inadvertence or negligence he failed to put forward every subject of his case particularly damages for trespass. The plea of *res judicata* succeeds, so does the appeal. The High Court of Kwara State in its appellate jurisdiction lacked jurisdiction to

The plaintiff was displeased with this judgment and appealed to this Court upon one ground of appeal which reads:
"I. The learned Justices of the Court of Appeal erred in law in holding 5
that the new suit was caught by the doctrine of res judicata.

Particulars of errors in law

- i. The doctrine can only apply where the new relief arose at the time the original suit was filed in the Court of first instance.* 10
- ii. The doctrine can not apply where the injury or damage continues and has not abated."*

The defendant, on 20/7/88, filed, pursuant to Order 8. Rule 3 of the Rules of this Court then in force, a respondent's notice of intention to contend that the decision of the Court below be varied. 15
The notice reads in part:

"TAKE NOTICE that upon the hearing of the above appeal the respondent herein intends to contend that the decision of the court below dated that 21st day of April, 1988 shall be varied as 20
follows: By quashing that part of the judgment which held that the respondent herein is a trespasser and that he committed contempt of court by flouting the court's orders."

The penultimate paragraphs of the grounds relied on are 7-10 25
which read:

"7. The two decisions (i.e. that of the Area Court Grade II No. 1, Ilorin and that of the Lokoja Upper Area Court) which gave the appellant herein possession of the land have been quashed. 30

8. There is therefore no valid court decision awarding the possession of the land to the plaintiff. The finding of the Court of Appeal, Kaduna that the defendant flouted all courts' orders declaring him a trespasser is not supported by the facts of the case. The defendant 35
never flouted any court's order.

9. The defendant is not a trespasser because the disputed land is not in the plaintiff's possession. It is because the land is not in his possession that he instituted the suit in Lokoja Upper Area Court and

in the Ilorin High Court (which is the subject of this appeal) claiming possession from the defendant. Trespass is not founded on ownership which was awarded to the plaintiff but on possession which was never validly awarded to him.

10. *The question of whether or not the defendant is a trespasser was not an issue before the Court of Appeal, Kaduna, neither were counsel given an opportunity to address the court on the issue before the court made its erroneous decision that the defendant is a trespasser."*

10 In the appellant's brief filed by Ijaodola, Esq. learned counsel for the plaintiff, he contends that the complaint of defendant/respondent ought to have come by way of a cross-appeal and not by way of a contention to vary the Court of Appeal decision.

15 In reply to learned counsel's objection to the procedure adopted by the defendant in complaining against a part of the decision of the court below, Chief Oshe, counsel for the defendant, in respondent's brief argues as follows:-

20 *"4. 39 The appellant herein submitted in clause 3.1 of his brief of argument that the complaint of the respondent herein that he was wrongly called a trespasser should have been made a cross-appeal instead of a notice of a contention to vary the said decision.*

25 *4. 40 It is our humble submission that a respondent would need to file a cross-appeal if the decision of the lower court complained against is fundamental and crucial to the respondent's case.*

4. 41 The respondent's case in the trial High Court of Ibiwoye, J. and in the Court of Appeal is that the suit was res judicata.

30 *4. 42 After holding that the suit is res judicata and that the trial High Court had no jurisdiction to hear it, the pronouncement that the defendant is a trespasser is besides the issue and the proper procedure is to pray this Honourable Court to vary that decision.*

4. 45 It is therefore for the purpose of convenience

35 *that we are praying this Honourable Court to vary that part of the judgment of the Court of Appeal."*

With profound respect to learned counsel for the respondent. I can find no merit in his argument justifying the procedure adopted

by him. The purpose of a respondent's notice to vary the decision of the court below has been restated in a number of cases such as Lagos City Council v. Ajayi (1970) 1 All NLR. 291 at 296: Eliochin Nig. Ltd. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47): Adeleye v. Akin-Olugbade (1987) 3 NWLR (Pt.60)214, and Ogunlade v Adeleye (1992) 8 NWLR (Pt.2601-10). The defendant's case does not fall within any of the principles enunciated in these cases. Since he is dissatisfied with a part of the judgment of the court below on the ground that, that part is not supported by the facts of the case, the defendant could not have wanted to retain that part but to have it set aside. He therefore, ought to have appealed against the part he is complaining about as being erroneous. In the circumstance, the respondent's notice is incompetent and it is hereby struck out by me.

I now come to the main appeal. I have set out at the beginning of this judgment the issue for determination as set out in the appellant's brief. I have carefully considered the submissions of learned counsel in their respective written briefs of argument. One fact stands clear and that is that in all actions previous to the action leading to this appeal, the plaintiff was adjudged the owner of the land in dispute between the parties. What has led to the protracted litigations between them is the quashing by the Upper Area Court, Ilorin of the order of the Ilorin Area Court Grade 2 to the effect that the defendant quit the land. The reason given by the Upper Area Court was that the order was not asked for by the plaintiff. I will not concern myself in this judgment with the correctness of that decision as that judgment is not on appeal before us.

To remedy the situation, the plaintiff brought an action before the Upper Area Court, Lokoja specifically asking that the defendant quit his land by removing his building therefrom. The plaintiff succeeded and an order to the effect was made. Defendant's appeal to the High Court of Kwara State presided over by Kawu, CJ. (as he then was) succeeded and the order of the Upper Area Court. Lokoja was quashed. In the course of the oral bearing of this appeal the question arose whether the proceedings of the latter court were not a

nullity for the reason that the court was not properly constituted. Learned counsel for both parties addressed us on it. It is necessary to determine this issue at this stage for, unless the decision of the High Court of Kwara State given on 9/6/81 was valid, all talk about res

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 Mr. Ijaodola submitted that the High Court of Kwara State was not properly constituted when it decided the defendant's appeal before it on 9/6/81. It is learned counsel's submission that by the Kadi of the Sharia Court sitting with two of the Judges of the High Court when determining the appeal, the composition of the court offended against section 238 of the 1979 Constitution.

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 Mr. Oshe at first contended that in as much as a Judge of the High Court sat, the court was properly constituted and that it was immaterial that one who was not a Judge of that court sat along. Learned counsel later conceded that the High Court proceedings were a nullity. He asked for an order of retrial of the defendant's appeal to that court.

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 It is not in dispute that the 1979 Constitution was already in force when the defendant appealed to the High Court of Kwara State against the judgment of the Upper Area Court, Lokoja. Section 238 of the Constitution provides for the Constitution of the High Court of a State. The section reads:-

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"238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law. A High Court of a State shall be duly constituted if it consists of at least one Judge of that court."

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 The record of the High Court reveals that in determining the defendant's appeal to it, one Alhaji U.Y. Abdullahi, who is not a Judge of that court but a Kadi of the Sharia Court sat along with the Chief Judge and another Judge of the Court. That composition clearly offended against section 238 of the Constitution. What is the effect of this contravention? It was laid down by this Court in *Madukolu & Ors v. Nkemdilim* (1962) 1 All NLR 581, (1962) 2 SCNLR 341, that any defect in the competence of a court renders the proceedings before it

a nullity, a defect of competence being extrinsic to the adjudication. The competence of a court is well described in that often quoted dictum of Bairamian, F.J. where at pages 589-590 and 348 of the Reports, the learned Judge observed:

"... a court is competent when -

(1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction: and

(3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are not a nullity however well conducted and decided: the defect is extrinsic to the adjudication."

It is clear from the record before us that the High Court of Kwara State was not properly constituted having regard to section 238 of the Constitution and its proceedings in the hearing and determination of the defendant's appeal to it are, therefore a nullity.

I am not unaware of section 63(1) of the High Court Law, Cap.49 Laws of Northern Nigeria, 1963 (applicable in Kwara State) which provides that:

"63(1) In the exercise of its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal."

and that the High Court Law is an existing law within the meaning assigned to that expression in section 274 of the Constitution. But as section 63(1) is not in conformity with section 238 of the Constitution. It is of no avail in saving the proceedings of the High Court of Kwara State here concerned. It is invalid as it stands - See *Olawoyin v. Commissioner of Police* (1961) NSCC 90 at 96-97, (1961) All NLR 213 at 222-223, (1961) 1 SCNLR 210 at 217-218, where Brett. FJ delivering the opinion of this Court said:

"The argument against the validity of section 59(c) of the Northern Region High Court Law (which is on the same terms as section 63(1) of the High Court Law under consideration), as expressed by Chief Rotimi Williams, is as follows: Chapter IV of the

5 Constitution of Northern Nigeria does not enable anyone but a qualified High Court Judge to sit as a member of the High Court; therefore any Law which makes such provision is inconsistent with the Constitution and is, to the extent of that inconsistency, void under

10 5.5 of the Constitution of the Federation; section 3 of the Nigeria (Constitution) Order in Council, 1960, only saves an existing Law if it is in conformity with the Constitution, and section 4 only saves existing courts so far as is consistent with the provisions of the Order.

In my opinion this argument must be accepted. The derailed provisions which the Constitution contains for the qualifications and independence of the Judges of the High Court could be defeated if it were within the power of a Regional legislature to enable other persons to take part in the exercise of the jurisdiction of the Court. The

20 point at issue is not whether the section in question is a reasonable one in the conditions of Northern Nigeria, but whether the Constitution leaves it open to the regional legislature to enact such a section without express authority. I do not consider that it does. The Constitution establishes a number of special authorities for the exercise of

25 particular functions, and it seems clear on principle that any law which provides for the sharing of those functions with other persons must, unless the Constitution expressly permits it, be regarded as inconsistent with the Constitution. It is significant that section 48 of the Constitution of Northern Nigeria expressly authorises the Director of Public

30 Prosecutions of the region to exercise his powers through members of his staff or to delegate them to the Director of Public Prosecutions of the Federation; similarly, section 64 authorises the Public Service Commission of the Region to delegate its powers. For these reasons I think the answer to the first question referred to the court must be

35 that section 59(c) of the Northern Region High Court Law has been invalidated to the extent referred to in the question." (brackets are supplied by me)

Section 63(1) however derived its validity prior to 1st October, 1979 when the 1979 Constitution came into force, from section 51(3) of the Constitution of Northern Nigeria, 1963 which was enacted after the decision of this court in *Olawayin v. Commissioner of Police* (supra). It provides:

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"When the High Court is exercising jurisdiction on appeals from a decision of a native court a member of the Sharia Court of Appeal may sit as an additional member of the High Court in such manner and under such conditions as may be prescribed by any law enacted by the Legislature of the Region."

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There is no provision in the 1979 Constitution similar to section 51(3) of the Constitution of Northern Nigeria, 1963.

Having declared the proceedings of the High Court of Kwara State in Appeal No. KWS/10A/81 a nullity, it only remains for me to say that the judgment of the Upper Area Court Lokoja given on 26/3/81 ordering the defendant to vacate the land in dispute *"by removing his house therefrom for use by the plaintiff not later than 26/6/81"* and granting possession of the land to the plaintiff subsists.

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Chief Oshe has invited us to order a retrial of the defendant's appeal to the Kwara State High Court. We cannot do this as the judgment of that court is not on appeal before us. It has become necessary to determine the validity of the judgment of that court since only judgments of competent courts can be pleaded as constituting estoppel per rem judicatam. And if it appears that the judgment relied on to sustain the plea was not given by a competent court, the plea must fail. This is the course taken by this court in *Madukolu & Ors v. Nkemdilim* (supra). I have refrained from pronouncing on the correctness of the decision of the High Court as this does not arise for consideration in this appeal. See also section 53 of the Evidence Act.

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Ogundare JCA in his lead judgment held that *"the High Court of Kwara State in its appellate jurisdiction lacked jurisdiction to entertain the matter."* He gave no reasons for coming to this conclusion and I can find none. With profound respect to the learned Justices of

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the court below, I can find no justification for their so holding. That court had (and presumably still has) jurisdiction to entertain appeals from the Upper Area Court. What went wrong was its constitution in the hearing of the particular appeal we are concerned with in this case which robbed it of its competence. The question of its jurisdiction or lack of it was not even an issue before the court below.

I now come to the issue of res judicata pleaded by the defendant and sustained by the Court of Appeal. The rule of estoppel per rem judicatam requires that where a final decision is given by a court of competent jurisdiction the parties thereto cannot be heard to contradict that decision in any subsequent litigation between them respecting the same subject matter. As a plea, the decision operates as a bar to subsequent litigation and as evidence, it is conclusive between the parties to it: sections 54 and 55, Evidence Act. I do not consider it necessary, for the purpose of this appeal to dwell in depth with the principles governing the plea of estoppel per rem judicatam or res judicata, as it is properly referred to. On the facts of this case, I fail to see how the defendant against whom there are subsisting judgments of courts of competent jurisdiction in respect of the land in dispute can now defeat plaintiff's claims by a plea of res judicata. The plaintiff was adjudged the owner of the land in dispute by all the courts. By a subsisting judgment, the Upper Area Court Lokoja ordered him to vacate the land. He refused to obey the law. What estoppel can he now raise to bar plaintiff's claims for possession and mesne profits? I cannot fathom.

Ogundere, J.C.A, in his lead judgment observed: *"Be that as it may, from the exposition of the law above, could rent or mean (sic) profits on the appellant's house wrongfully erected on respondent's land be deemed an ancillary remedy to the order of possession earlier granted.*

Clearly not, as there was no relationship of landlord and tenant between the parties. It is another way of asking for damages for trespass. The dictum of Wigram, Vice Chancellor in Henderson's case covers adequately the question herein; the plaintiff should have claimed damages for trespass as an additional remedy against the defendant in the court of first instance that is at the Area Court Grade

Il Ilorin. He is therefore estopped from relitigating the matter even though through his inadvertence or negligence he failed to put forward every subject of his case particularly damages for trespass. The plea of res judicata succeeds, so does the appeal. The High Court of Kwara State in its appellate jurisdiction lacked jurisdiction to entertain the matter." 5

With respect to the learned Justices of the court below, what is to be determined at the stage the case reached when the trial Judge gave his ruling on defendant's motion to dismiss the suit was not whether the plaintiff could succeed in any or all of his claims but whether there were previous decisions of courts of competent jurisdiction in respect of the subject matter now in dispute which would bar the plaintiff from raising his present claims. Even if the defendant could not be described as a trespasser prior to the judgment of the Upper Area Court Lokoja and on this I reserve my opinion - he has clearly become one since the judgment of that court which granted plaintiff possession of the land in dispute and ordered the defendant to vacate it. By holding out since 1981, the defendant has been in continuous trespass. The plaintiff is entitled to sue for any trespass arising after the last proceedings between the parties. See K. Chellaram & Sons v. G.B. Ollivant Ltd. 10 WACA 77. He was obviously misled by the void decision of the High Court of Kwara State into suing again for possession. As the learned trial Judge observed, and quite rightly in my view, plaintiff's claim (ii) has never been of any contention between the parties in the previous litigations and could not and did not arise out of the claim for title brought in 1975. 10 15 20 25

From all I have been saying above, it is my respectful view that the court below was in error to hold that defendant's plea of res judicata succeeded. I therefore, allow this appeal, set aside the judgment of the court below and remit the case to the High Court of Kwara State for it to be determined on its merit. Having regard to the time these proceedings have taken, I order that the hearing be conducted with utmost despatch. 30 35

It is for the above reasons that I agree with the conclusion reached by my learned brother Omo, J.S.C. in his judgment. I abide

by the order for costs made in the said judgment.

MOHAMMED JSC

I have had the advantage of reading in draft, the judgment
5 of my learned brother, Omo, J.S.C., with which I am in total agree-
ment. I have also read, in draft the judgment of my learned brother,
Ogundare, J.S.C., with which I also agree.

10 In allowing the appeal and remitting the case to the High
Court of Kwara State to be determined on its merit, there is the issue
which this court raised Suo motu in the course of hearing the appeal
as to whether the High Court. Kwara State was properly constituted
when it heard and set aside the appeal from the decision of the Lokoja
15 Upper Area Court. In other words, having regard to the provision of
section 238 of the 1979 Constitution, and in view of the fact that the
coram of the High Court that heard the appeal from the Lokoja
Upper Area Court included a person other than a Judge of that High
Court, was that court properly constituted? If it was not, would its
20 judgment not be a nullity?

The Court of Appeal had had to decide the same issue in
Mallam Ado & Anor v. Hajia Dije (1984) NCLR Vol. 5, 260, where
Karibi-Whyte, J.C.A. (as he then was) said on page 277 as follows:-

25 *"It is important in the construction of S.238 to bear in mind
the use of the word 'that', in referring to the Court. The Court so
referred to is the High Court, and not any other or in association with
any other court. The provision of S.238 of the Constitution is to be
found in Part IIA, and should be construed by reference to the other
30 sections associated with it. To construe section 238 to include other
Judges outside that part suggests and can only assume a reference
to section C of Part II with respect to Judges of the Customary Court
of Appeal, who referred to in S. 245(1)(b) as 'Judges'. This is because
S.240(2)(b) which refers to Kadis of the Sharia Court of Appeal can-
35 not be so construed. It will therefore be absurd to construe S.238 to
include a Kadi, and Judges other than those of the High Court. In
my view, although S.238 enables more than one Judge of the High
Court to sit and hear appeals in the High Court; it does not enable*

any Judge of any other court, or any other person to sit as a member of the High Court. This, in my view, is consistent with the scheme of the Constitution in relation to the spheres of operation and exercise of jurisdiction of the courts, and accords with the ordinary meaning of the section, in relation to other sections of the Constitution - See Canadian Sugar Refining Co. v. R. (1898) AC 741; Attorney-General v. Brown (1920) 1 KB 773 at page 791."

and His Lordship went on page 281 of the report thus:

"I have held earlier in this judgment that the scheme of the Constitution and the express provision of S.238 thereof, do not contemplate any other, than a Judge of the High Court sitting in that court. Hence, the High Court constituted as it was, in this appeal, by two High Court Judges, and a Khadi of the Sharia Court of Appeal, was incompetent to hear the appeal, and therefore heard the appeal without jurisdiction."

Clearly the judgment of the High Court, Kwara State, is in the circumstance, a nullity, having been given without jurisdiction.

For the fuller reasons in the two judgments, I allow the appeal and abide by all the orders made therein including the orders for costs.

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