

SUPREME COURT OF NIGERIA
26TH FEBRUARY, 1993 SC.91/1988

**CORAM:- A. G. KARIBI-WHYTE, S. KAWU, S. M. A.
BELGORE, P. NNAEMEKA-AGU, U. OMO, JJSC**

1. INNOCENT IBERO
2. LAZARUS OKEKE APPELLANTS
(OF UMUAWIRI FAMILY)

AND
OBIOHA UME-OHANA RESPONDENT

APPEALS - Land dispute - Failure to file any ground
against trial court's finding of fact -
Implications thereof

CIVIL PROCEDURE - Dealing with proceedings of native
tribunals - Principle of regarding substance
rather than form - Whether to be stretched
to give strained meanings to words used
in judicial proceedings

EVIDENCE - Res judicata raised by respondent - Vital
admissions by his witness - Whether are -
Inforcement of appellants' case - That
parties are not the same

ESTOPEL - Plea of res Judicata - Elements thereof -
What the defendant must prove

ESTOPEL - Res judicata - When the ingredients are not
established - Implications thereof - What the
Plaintiff is entitled to show

WORDS & PHRASES - "OF" - Its proper meaning - whether same
as "for"

FACTS

The plaintiffs/appellants claimed declaration of title to a parcel of land, damages for trespass and order of injunction against the defendant/respondent before the High Court of the former East Central State holding at Orlu. They supported their case with traditional history connecting the land in dispute with various acts of possession and ownership.

The Defendant relying on the past decision of a Native Court in two consolidated suits raised the plea of *res judicata*. The trial court found in favour of the Plaintiffs, holding that the Defendant failed to establish his plea of *res judicata*. On appeal by the Defendant, the court of Appeal allowed the appeal, holding that the parties in the previous suits were the same in the instant case. Court of Appeal concluded that having found the parties were the same in the previous and present suits, it was unnecessary to consider whether the issues and the subject matter in the two cases were the same because *“res judicata is, as a plea, a bar; as evidence, it is conclusive.”*

The Plaintiffs appealed to the Supreme Court.

The Defendant did not file any ground nor raise any issue against the trial court's finding of fact.

HELD (unanimously allowing the Appeal)

1. The Defendant who raises a plea of *res judicata* during trial must show that the instant suit seeks to raise a question already finally and validly decided by a court of competent jurisdiction. (P. 75 L.7)
2. A decision being relied upon in raising the plea of *res judicata* must be shown to have been between the same parties or their privies, on the same subject matter and issues. And once the question in litigation is found to be caught by estoppel per rem judicatam, there ends the matter. (p. 75 L. 12)

68 IBERO V. UME-OHANA (1993) 2 KLR 66; (1993) 2 NWLR

3. Estoppel per rem judicatam is so conclusive and important that the party affected by it is not allowed to plead against it or to call evidence towards its contradiction/he can only show that the parties, subject matter or issues were not the same or show lack of jurisdiction or invalidity of the decision reached by the tribunal whose judgment is relied upon in raising the plea. (p. 75 L. 12)

4. A decision against a person in his personal capacity cannot be res judicata against another who is not his privy and has not been held to be an interested person standing - by. Likewise, a judgment against a person in his personal capacity cannot be res judicata against him in a representative capacity. (p.76 L. 10)

5. The trite principle of regarding the substance rather than the form in dealing with proceedings of native tribunals should not be extended unto giving strained meanings to words which have received judicial interpretations. (p.78 L. 31)

6. The word “of” means residing in, living at, belonging to or dwelling in a particular place. It follows that “of Akokwa” “and of Osina” in each of the two consolidated suits simply mean that the name parties live in Akokwa or Osina. “For Akokwa” and “for Osina” would have imported representation if so intended by the parties. Learned Court of Appeal Justice was therefore in error to have held that representation was implied or expressed. (p. 78 L. 37)

7. Whilst the previous suit relied upon as res judicata was prosecuted and defended in personal capacities the present suit was also filed in the personal capacities of the plaintiffs and the Defendant. (p. 79 L. 23)

8. Save where a question of standing by arises (which is not so in the present case) an action between two different individuals in their personal capacities cannot constitute res judicata in another suit by a different set of individuals suing or being sued in their personal capacities. (p.79 L. 27)

9. Vital admissions by Respondent's witness not only reinforce Appellants' case as to lack of connection between the present parties and those in the previous cases, the said admissions also confirm that in Osina as in Akokwa, the unit of land ownership is the family.

(p. 80 L. 26)

10. The decision given in the previous suits will not bind the parties in this suit so as to either ban the Plaintiffs from bringing the action at all or deprive the court of jurisdiction to adjudicate upon the action.

(p.81 L. 2)

11. The onus of establishing or substantiating respondent's plea of res judicata squarely falls on him and where he fails to establish any of the necessary ingredients, he is bound to fail on the issue. Trial Judge's failure to consider the necessary questions of issues and subject matter cannot place on the Appellant the burden of cross - appealing, as urged by the Respondent's Counsel. (p. 87 L. 15)

12. Trial Court's finding of fact that the Appellants have proved their case for declaration of title to the land in dispute not having been attacked by any of the respondent's grounds of appeal must stand and the judgment of the trial court (in favour of the Appellant) is restored. (p.89 L. 7)

REPRESENTATION

Chief FRA Williams, SAN., A. Williams (Mrs) For the Appellants

P. O. Balonwu, S. A. N., G. M. Nwagbogu Esq. For the Respondents

CASES REFERRED TO

1. Ikpany & ors v. Edoho & ors (1978) 2 LRN 29

2. Thoday v. Thoday (1964) P. 181

3. Egbeyemi Ogundiran v. Egungemi Balogun (1952) WRNLR 51

4. Mrs. G.A.R. Sosan & ors v. Dr. M.B. Ade Muiyiwa (1986) 3 NWLR 241

5. Chapman v. CFAO & anor. (1943) 9 WACA 181
6. Day v. Deacock (1865) 18 C.B.N. 702
- ⁵ 7. Shonekan v. Smith (1964) 1 All NLR 168
8. Iyaji v. Eyigbebe (1985) 3 NWLR (Pt 61) 523
- ¹⁰ 9. Fabumi v. Agbe (1985) 1 NWLR (Pt. 2) 299
10. Okafor v. Idigo (1984) SCNLR 481
11. Akibi v. Opaleye & anor (1988) 1 All NLR 344
- ¹⁵ 12. Ogbechie v. Onochie (1988) 1 NWLR (Pt. 70) 370
13. Dr. Okonjo v. Dr. Odje (1981) 10 S.C. 267
- ²⁰ 14. Nofiu Surakatu v. N.H.D.S. (1981) 4 S.C. 20
15. Yoye v. Olubode & ors (1974) 10 S.C. 209
- ²⁵ 16. Mogo Chukwendu v. Mbamali (1980) 3 - 4 S.C. 31
17. Ayoola v. Adebayo (1988) 1 NWLR 159
18. Agbonife v. Aiwereobi (1988) 1 NWLR 325
- ³⁰ 19. Nwaneri & ors v. Orinwa & ors (1958) 4 F.S.C. 132
20. Fadiora v. Gbadebo & anor (1978) 3 S.C. 219
- ³⁵ 21. Osaweru v. Ezeinuea (1978) 6 - 7 S.C. 135

LEAD JUDGMENT BY NNAEMEKA-AGU JSC

The two appellants as plaintiffs in the High Court of the former East Central State holden at Orlu brought an action against one Obioha Ume-Ohana claiming a declaration of title to land called Ala Elugwu, said to be situate at Osina, N2,000.00 damages for trespass to the said land, and an order of injunction restraining the defendant, his servants, agents or any person claiming through him from further trespass on the said land. The defendant was later substituted for the original defendant when the latter died.

Plaintiffs' case before the trial court was that they were owners of the land in dispute as delineated in Plan No. SE/EC/13/75 (Exh. A). They supported their case with the traditional history connecting the land in dispute and with various acts of possession and ownership. The defendant, they maintained, was from Akokwa. According to them, the traditional boundary between Osina and Akokwa was an Ekpe ditch, an ancient trench dug several centuries ago by the Osina people as a rampart to protect themselves from their war-like neighbours, the Akokwa people and which both communities had respected ever since. They pointed out that even in their plan, Exh. G., (Plan No. MEC/266/75) the defendant's people recognized this ditch but claimed that it was inside Akokwa land as a line of defence. No Akokwa man had land across the Ekpe ditch, they maintained. In exercise of their right over the land on the Osina side of the ditch, the Osina people in the Mbanasa Native Court Suit No. 115/49 sued Umuezeahunanya people of Akokwa for trespass over "Ala Ihonwoma" land on Ezi - the side of Osina and succeeded against them up to the Supreme Court. When in 1974, they stated, the defendant crossed over to Osina side of the "Ekpe" ditch, destroyed economic trees and crops and built a house, the plaintiffs brought this action.

The defendant's case is that he hails from Ikpa kindred of Umukekwa village, Akokwa and that the land in dispute is a portion of their land known as "Uhu-Ehihioke" more clearly delineated in Plan No. MEC/266/75 (Exh. G.). The Ekpe ditch, he claimed was only a line of defence dug inside Akokwa land whereas the boundary between Akokwa and Osina was a line of life trees. They pleaded res judicata based on two consolidated Mbanasa Native Court Suits -

Nos. 153/47 and 2/48. Through a series of appeals before the District Officer (Exh. K.) the Resident (Exhs. L & M), the Deputy Governor, Eastern Nigeria (Exh. O) the defendants were successful. They also tendered a superimposed plan, Exh. H which shows the lands litigated upon in those suits.

5 After hearing and addresses by counsel on both sides, the learned trial Judge, Ugoagwu J., found for the plaintiffs and entered judgment on their behalf. He found that while the traditional evidence and acts of possession relied upon by the plaintiffs and accepted by him amply supported their case, the defendant failed to establish the plea of *res judicata* which they relied upon. On appeal, the Court of Appeal found that the parties in the previous suits were the same with the instant case and reversed the decision.

15 The learned Justices of the Court of Appeal having found that the parties in the previous suit (Exh. K) were the same with the instant case came to the conclusion that it was not necessary to consider whether the issues and the subject matter in the two cases were the same because "*res Judicata* is, as a plea, a bar; as evidence, it is conclusive - see *Yoye v. Olubode* (1974) 10 S.C. 209, at 220 and the fact that the other grounds (3 and 4 based as they are on the other defences) automatically abate." The appeal was consequently allowed, the decision of the High Court set aside.

25 The plaintiffs have, therefore, appealed to this Court, with the leave of the Court of Appeal. They filed three grounds of appeal which read as follows:

30 GROUND OF APPEAL:

1. *The learned Justices of the Court of Appeal erred in law and in fact in holding that the plea of res Judicata availed the defendant.*

35 Particulars of Error

(a) Contrary to the findings of the Court of Appeal, exhibits 'J', 'K', 'L', 'M', 'N', and 'O' did not show that the parties were the same as, or, privies to, the parties in the action herein.

(b) *Having regard to the state of the law, it was incumbent on the defendant to produce in evidence the whole proceedings in the said exhibits aforementioned before a court of law could possibly come to the conclusion that the parties were the same or privies.*

(c) *In the absence of such evidence the Court of Appeal ought not to have inferred that the parties were the same or that they were privies.*

(d) *The Court of Appeal was wrong in relying on evidence extrinsic to the aforementioned exhibits in coming to the conclusion that the plea of res judicata was sustained.*

2. *The learned Justices of the Court of Appeal erred in law in relying on exhibit '8' as helping to sustain the plea of res judicata against the plaintiffs when exhibit 'B' was a judgment in which the findings made therein were in favour of the plaintiffs' case.*

3. *The learned Justices of the Court of Appeal erred in law in failing to consider the other factors relevant to establishing a plea of res judicata, namely; whether the subject matter of the claim, and, the issues, are the same before allowing the appeal.*

Particulars of Error

(a) *The Court of Appeal only considered the issue as to whether the parties were the same or were privies.*

(b) *In the High Court this was the only issue considered and the Court found for the plaintiffs.*

Relying on those grounds Chief Williams learned Senior Advocate on behalf of the plaintiffs, formulated the following issues, namely:-

(i) *Whether Exhibits 'J', 'K', 'L', 'M', 'N', and 'O' show that the parties to this action were the same as, or, privies to, the parties in the said Exhibits?*

(ii) *Whether Exhibit 'B' supports the contention that the appellants are estopped from laying claim to the land in dispute?*

(iii) Whether in deciding whether the plea of res judicata has been made out, it is permissible to rely on evidence extrinsic to the previous proceedings alleged to constitute res judicata in order to determine the parties in those previous proceedings? and

5 *(iv) If this Honourable Court holds that the parties are the same as, or, privies to, the parties in Exhibits 'K' to 'O', whether the Court of Appeal ought not to have sent the case back to the High Court for a retrial?*

10 Mr. Balonwu, learned Senior Advocate for the respondent also formulated the issues thus:

(i) Whether the Court of Appeal properly applied in this case the principles so well enunciated by the Supreme Court in the case of
15 Ikpong & Ors. v. Edoha & Ors (1978) 2 L.R.N. 29 - to wit 'that in respect of claims before Native Courts of old, it is necessary to look at the substance rather than the form of the writ, in determining the identity of the parties, issues and subject matter in connection with res judicata'?

20 (ii) Whether the Court of Appeal was right in holding that Exhibits 'K' to 'O' viewed closely would reveal that the appellants herein are privies to the plaintiffs/appellants in those suits?

25 (iii) Whether it is appropriate in determining the issue of res judicata, as the court below did in the instant case to look at the surrounding background of the case by considering Exhibits 'B' and 'E' and holding that they buttressed the view that the appellants are privies of the plaintiffs/appellants in Exhibit 'K'?

30 (iv) Whether in the circumstances of the case and in view of the legal authorities, it could be said that the Court of Appeal imported evidence extrinsic in the nature of Exhibits 'B' & 'E' and the testimonies of PW.2, PW.3, PWA and D.W.5 in determining the issue of parties as it relates to the defence of res judicata?

35 (v) Whether the learned Justices of the Court of Appeal erred in law by not considering the other requirements of res judicata, namely whether the issues and subject matter were the same, when such were not issues for determination in the appeal before them?

I believe it is necessary to begin with a consideration of the issue raised as the 3rd on behalf of the appellants and as the 1st, 3rd and 4th on behalf of the respondent. Put simply these issues pose the question as to how far, if at all. On decided cases, a defendant who raises an issue of *res judicata* can rely on all evidence or findings not on record to sustain the plea. 5

Now the principle upon which is based a successful plea of *res judicata*, whether raised in limine or after a trial is clear. It is that the defendant who raises such a plea must show that the instant suit seeks to raise anew a question or questions already finally and validly decided (or implicit in such a decision) by a court of competent jurisdiction, Such a decision must have been between the same parties or their privies (or conclusive in rem), on the same subject matter, and on the same issues: all these conditions must be shown to co-exist. 10
Once it is found that the question in litigation is caught by estoppel per rem judicatam, there the matter lies. It is a rule of public policy based on the maxim: interest rei publicae ut sit finis litium - it is in the public interest that a litigation shall come to an end: see Thoday v. Thoday (1964) P181, p.197-198; Egbeyemi Ogundiran & Anor v. Egunyemi Balogun (1952) WRNLR. 51. p.52. So conclusive and important is *estoppel per rem judicatam* that the party affected by it is not allowed to plead against it or to call evidence to contradict it: he can only show that the decision was not validly or competently reached, or that the tribunal whose decision is relied upon as *res judicata* had no jurisdiction or that the parties, subject matter or issues were not the same. 15 20 25

In this case, what the respondent as defendant pleaded and relied upon as *res judicata* were the Mbanasa Native Court Suit No. 153/47 and 2/48 (consolidated) and the judgments of the District Officer dated 11th July, 1953, of the Senior Resident dated 8th September, 1954, of the Resident dated 8th September, 1954, and of the Deputy Governor dated 27th October, 1954. See paragraphs 5, 6, 7, and 21 of the Amended Statement of Defence dated the 12th day of November, 1984. Reference was also made to the criminal proceeding in the Native Court Suit No. 97/54. These were tendered and admitted as Exhs. 'J', 'K', 'L', 'M', 'N', and 'O'. I must observe that 30 35

the full proceedings in the Native Court are not in evidence. This has led to a considerable difficulty in this case. And in the statement of parties, named parties were referred to as "of Osina", "of Akokwa" or "Akaokwa". As rightly observed by the learned Senior Advocate for the appellants in their brief it is not clear from the title of the parties in the suit alone to determine whether or not the suits were fought or defended in representative or personal capacities. It was probably to make up for the deficiency that the respondent had to plead facts in this case and give evidence thereon in order to establish a nexus between the parties who were involved in these cases and the person who is defending this case. I believe it to be settled principles of law that a decision against a person in his personal capacity cannot be res judicata against another person who is not his privy and has not been held to be a person interested who is standing-by. Similarly a judgment against a person in his personal capacity cannot be res judicata against that person in a representative capacity: see *Mrs. G.A.R. Sosan & 2 Ors. v. Dr. M.B. Ademuyiwa* (1986) 3 NWLR (Pt.27) 241 at 251. As it is so, the capacity in which a previous suit sought to be relied upon as res judicata was fought or defended is usually a matter of paramount importance.

I may pause here to observe that as Exhs. 'J' to 'O' were Native Court proceedings in which there were no pleadings, the courts over the years have developed an attitude of liberalism in the ascertainment of who the parties and what the issues and subject matter were. Even though the court generally guards against regarding evidence given in a previous suit as evidence in the instant when, however, the previous case was decided in a Native Court or in an appeal therefrom it is the substance and not the form that is material. So, the whole proceedings must be regarded, The management and the evidence can be looked into to find out who the parties were and in what capacities they fought or defended the case as well as what the subject matter and issues were: see on this - *Chapman v. C.F.A.O. & Anor.* (1943) 9 W.A.C.A. 181, *Ikpang & Ors. v. Edoha & Anor.* (1978) 2 L.R.N. 29. It is only by this approach that substantial justice, which is the sole purpose of all decisions of native tribunals can be achieved. If that were what we are called upon to do in this case, no problem would have arisen. But clearly it is not.

As I see it, respondent's argument in this aspect of the appeal has two prongs. First, learned Senior Advocate on his behalf submits that it is clear from the proceeding before the District Officer, Mr. Bex, in the consolidated suits that the cases were fought and defended in representative capacities. This is the question raised by appellants' issue No. 1 and respondent's issue numbered (ii) in this appeal. Secondly, he submits that it is clear from the pleadings and evidence in this case which he could freely refer to that the parties in this suit are the same with the parties in those suits. This is the question raised by appellants' issue numbered (iii) H and respondent's issues numbered (iii) and (iv).

Now, the portion of the proceedings to which the first of the above propositions relates is where it was recorded before the Divisional Officer, Mr. Bex, in Exh. 'K' thus:

"The Akokwa claimant appears for Umukegwu Akokwa. The Osina claimants appear for Eluama Osina."

Learned Senior Advocate for the respondent submitted that the above record shows unequivocally that the suit was fought in representative capacities and are binding upon the parties in the present suit. I must however note that the parties to the suit were on its commencement stated as -

*"Ben Igwilo and Sylvester Igwilo all of Osina" Plaintiffs
Versus*

- 1. Obioha Umeohana*
- 2. Ihekusiobi*
- 3. Ogbunakwo Uchewuba*
- All of Akokwa*
- 4. Uchewuba Ogbunekwo..... Defendants"*

Now the fons et origo of the conflicting views between the High Court and the Court of Appeal as to parties appears to be essentially from their differing views as to the import of the expressions "Osina" "all of Akokwa" in Suit No. 153/47 and "of Akokwa" and "of Osina" in Suit No. 2/48. The learned trial Judge Ugoagwu, J., held as follows:- *"It is manifest from the foregoing that the parties were not shown to have sued or defended in a representative capacity in any of the two suits 153/47 and 2/48. The fact that Ben Igwilo is stated to be 'of Osina' and 'Obioha Umeohana' and 'Obioha Nwosu' to be 'of Akokwa' is not assertion that they represented the people of their*

various towns. This view is buttressed by the defendant's paragraphs 13, 14 and 15 of the amended statement of defence quoted earlier on in which he pleaded that Osina has four villages one of which is Ehiama or Eluama, that Eluama has three kindreds, one is Umu Ume Agbagosi to which Ben Igwilo belongs and another is Ezihe to which the plaintiffs belong, and that plaintiffs belong to Umuawiri family in Ezihe kindred. This pleading supports plaintiffs' paragraph 1 of their amended statement of claim quoted above i.e. that plaintiffs are members of Umuawiri family in Ezihe Osina. In respect of Obioha Nwosu or Obioha Umeohana I am supported in my view that he did not represent Akokwa people in the said suits having regard to paragraphs 2, 8, 9, 10 and 12 of the amended statements of defence in which defendant pleaded that Umukekwa or Umukekwa village in Akokwa has five kindreds one of which is Ikpa; that there are four families in Ikpa kindred, that Okegwu had shared his land among his five sons i.e. the five kindreds in Umukekwa; that each of the five sons shared his own portion amongst his own sons; that is, Ikpa shared his land among his four sons who make up the four families pleaded in paragraph 9 (supra). The defendant did not plead the family in Ikpa kindred to which he belongs,"

On the other hand, Onu, J.C.A., in the Court of Appeal held:

"It seems to me clear that appellant had proved on the balance of probabilities that the heading of the claim in Suits 2/48 and 153/47 (Exhibit 'K') consolidated, are the parties or privies to the case on appeal herein and further, that it is clear on the headings that the suits constituted representative actions. It is immaterial, in my view, that the word 'of' was used instead of 'for' in describing the parties in the concluding sentence of Exhibit 'K'."

His Lordship proceeded to hold that as that was a Native Court proceeding the substance rather than the form ought to be regarded.

To begin with, the principle that while dealing with proceedings of native tribunals either at first instance or on appeal, the substance rather than the form ought to be regarded is trite. But I believe we should not extend that principle to giving strained meanings to words used in judicial proceedings, particularly where such words are terms of art or have received judicial interpretations. It is from this point of view that I should attempt to construe the word "of" as used

in the titles to the suits. It appears to me that the word 'of' means simply residing in, living at, or belonging to or dwelling in a particular place. I am reinforced in this view by the opinion of Patterson, J., in *R. v. Stokes Kent Justices* (1838) 2 Jur. 564 at p.565 where he stated:

"The word 'of' certainly in general imports dwelling, therefore it may fairly mean prima facie in such an order as this that the party did reside in the place he is described as being of....."

see also *Day v. Peacock* (1865) 18 C.B.N. 702, p.722. As it is so, it follows that "of Akokwa" and "of Osina" in each of the two consolidated suits simply means that the named parties live in Akokwa or Osina, as the case may be. If representative were intended, the title would have read "for Akokwa" and "for Osina" which would have imported representation. It follows, therefore, that the learned trial Judge was right in his view of the parties, as expressed in the title to the suit. As it is so, the learned Justice of the Court of Appeal was in error to have held that representation was implied or expressed. It goes without saying also that the District Officer had no power to change the capacities of the parties when the matter came before him on appeal, from personal to representative capacities: and as evidence before the native court was not on record, I must hold that there is no basis for the alteration.

So the previous suit relied upon as *res judicata* was prosecuted and defended in the personal capacities of the persons named as parties therein. In the present suit, the two named plaintiffs said to be Umuawiri Family have also brought the action in their personal capacities against the defendant, again in his personal capacity. I believe that it is the law that, except where a question of standing by arises, and it has not arisen in this case, an action by two different individuals in their personal capacities cannot constitute *res judicata* in another suit by another set of different individuals suing or being sued in their personal capacities: see *Shonekan v. Smith* (1964) 1 All NLR 168. Above all, even if it is assumed without admitting that the parties in those suits represented their respective families it cannot be said that they are the same in this as in the previous suits relied upon as *res judicata*.

Evidence of P.W.2 and D.W 4 on record confirm that there is not that identity of interest between the parties in the previous suit and those in this suit. I believe it will be more apposite to read the evidence of D.W.2 where he stated under cross-examination thus:

5 *"We of Umuogueri were not concerned when Umuloeama
disputed land with Uzii people. We were not concerned because land
is owned in families in our village. Other parts of Umukegwu village
were not concerned with the land dispute between Uzii and
Umuoleama family in Umuokuko. Chief Patrick Okoli was the Chief
10 of Akokwa at the time Uzii people and Umuoleana disputed over
land. He was not a party to the land dispute. He does not own land
in Umuokuko."*

*"I was not represented in the land dispute between Umuakpaka
Ofeke and Umuokuko Akokwa.*

15 *I am not one of those ordered by the West African Court
of Appeal to vacate land in Ofeke Osina for Umuokuko. I belong to
Umuogueri Umuokuko. When Uzii people sued Umukegwu we of
Umuogueri were not concerned. Uzii people sued Okwu Ikpa people
in Umukegwu. We of Umuogueri were not concerned in the land suit
20 because we have no land in common with Okwu Ikpa people. We of
Umuogueri have no land in common with Umuezerahunanya
Umukegwu village."*

25 *"It is true that in Osina as in Akokwa and Umuokuko, land is
owned by families. As the Chief of Akokwa has his own family land
so also the Chief of Osina has his own family land."* These vital admis-
sions by a witness of the respondent not only reinforce the appel-
lants' case about there being no connection between the parties in
the present case with those in the previous cases relied upon as es-
30 toppel per rem judicatam, they also confirm that in Osina as in Akokwa,
the unit of land ownership is the family. So, it would have been otiose
to interpret the notes of the District Officer. Mr. Bex, to mean that
the parties represented Umukegwu Quarter of Akokwa and Eluama
quarter of Osina. I do not so hold. It follows from what I have been
35 saying that the learned Justices of the Court of Appeal were in error
when they held that the parties, in the instant case were the same
with those in the previous suits (Exhs. "J", "K", "L", "M", "N", and
"O"). The decision given in the previous suit will not bind the parties
in this suit so as to either ban the plaintiffs from bringing the action at

all or deprive the court of the jurisdiction to adjudicate upon it. This virtually disposes of this appeal: so I shall make short points of the remaining issues.

I shall next consider the 3rd issue as formulated on behalf of the appellants and the 1st, 3rd and 4th issues framed on behalf of the respondent. Appellants' contention in this respect is that the court below was in error to have used evidence extrinsic to the judgments relied upon as estoppel for determining whether the parties in the previous suit were the same with those in the present suit. In particular, learned Senior Advocate referred to the evidence of PW.2, PW.3, D.W.4 and D.W.5 as well as to Exhibits "B" and "E". It was on the ground that the learned trial Judge failed to consider these pieces of evidence which, according to the learned Justice of the Court of Appeal was in accord with the principle in *Ikpang & Ors. v. Edoho & Anor.* (1978) 2 L.R.N. 29 and *Iyaji v. Eyigebe* (1987) 3 NWLR (Pt.61) 523, that the learned trial Judge failed to come to the conclusion that the parties were the same in this and the previous suit. In his submission there is nothing in the principles decided by those cases to support what the court below did.

In his reply brief, learned Senior Advocate for the respondent submitted that the Court of Appeal was right. He cited the statement of Oputa, J.S.C., in *Iyaji v. Eyighe* (supra) at p.532 that: "*Res judicata cannot be decided in vacuo and without the back-ground facts. These facts may be facts as agreed or conceded or also facts found by the Court.*"

He argued that the expression "facts found by the Court" justified the court below in considering Exhs. "B" and "E" as well as evidence of PW.2, PW.3, D.W.2 and D.W.5 in trying to ascertain what the real position is as regards these vital issues - with respect to *res judicata*. This justified the court below in intervening to make necessary findings of fact, as it did, the parties having joined issues on them in their pleadings. He cited the cases of *Fabumi v. Agbe* (1985) 1 NWLR (Pt.2) 299, p.314; *Okafor v. Idigo* (1984) 1 SCNLR 481; *Akibu v. Opaleye & Anor.* (1974) 1 All NLR 344, 356, *Oghechie v. Onochie* (1988) 1 NWLR (Pt.70) 370. As these pieces of evidence had already been tendered, it would have been wrong and inequi-

table not to have used them to reach a decision in the matter. This would have been contrary to the grains of justice; as illustrated by the following cases - The State v. Gwonto & Ors. (1983) 1 SCNLR 142, p.160; Dr. Okonjo v. Dr. Odje (1985) 10 S.C. 267, Nofiu Surakatu v. Nigerian Housing Development Society (1981) 4 S.C. 20. Exh. B,
5 he contended shows the connection between the plaintiff in the present case with Eluama. Exh. "E" was an admission that Eluama existed in Osina. The evidence of D.W.4 shows that Ezihe is a kindred in Eluama and together with Umuagbagosi and Otuasi make up
10 Eluama in Osina. He also showed that the three sections contested the 1948 case. Evidence of D.W.5 showed clearly the relationship between himself and the defendants in Suit No. 153/47. All these pieces of evidence were rightly admitted to support the plea of estoppel, he submitted.

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I must begin by saying straight away that what is being urged in this case goes beyond the principles laid down in the cases of Ikpong (supra) and Iyaji (supra). Those two cases decided that when the case relied upon as res judicata was a judgment of a Native (or a
20 customary) court, it is necessary to look at the substance rather than the form of the proceedings. In Ikpong's case (supra) Aniagolu, J.S.C. stated at p.35:

"Firstly, in respect of the claims before those courts, it is necessary to look at the substance rather than the writ....."

25 In Iyaji's case (supra) this court, per Oputa, J.S.C., stated at p.530:

*"Another thing to note about the way the Court below handled the 'native' Court's judgments Exhibit D1, D2 and D3 is its failure to recognise that these judgments are not to be treated in the
30 same way that any appellate court would normally treat a judgment from the High Court where pleadings and plans are normally used and ordered. When dealing with these 'native' court's judgments the High Court is entitled to go beyond what appears on the face of the Claim or writ and ascertain from the entire evidence before the
35 native court, or customary court, or, as in this case, the Area Court, (including the inspection of the land in dispute) what was really the nature of the dispute and the land involved."*

I agree with Chief Williams that these decisions deal with the proper approach to the determination of the substance of a case

before these "native tribunals" as revealed by the record. They are no authority for the respondent's proposition in this appeal that the court can look beyond the contents of the record and receive evidence, documentary and oral, in order to decide whether the parties, issues and subject matter are the same.

So, it is a point I must have to decide in this appeal. Unfortunately I have not been referred to and have not found, any direct authority on the point. I must, therefore, have to decide it on a number of first principles. First *res judicata* is a matter of public policy designed to prevent a situation in which a person may have to litigate or defend the same cause twice. Secondly - and this arises from the first - *res judicata* is not a technical doctrine. This implies not only that it covers both the very points already decided and any issue which from the pleadings or the form of the issues in the former case was open to the plaintiff or putting up in a second action a plea which is inconsistent with any traversable allegation in the first or was raisable in the first suit: see on these Hals. Laws of England (4th Edn.) Vol. 16 paragraph 1533. It also implies that a lot of latitude is allowed in the interpretation of the true intendment of the previous judgment. But thirdly: *res judicata* is a part of estoppel by record: although not limited to formal record (see, for example *Re May* (1885) 28 Ch.D. 516, at p.518 and *Badar Bee v. Habib Menican Noordin* (1909) A.C. 615, P.C.), it is my view that once it is reduced into a judgment in writing, all the rules against contradicting, altering, adding to or varying the contents of a judgment by oral evidence will apply, subject to specified exceptions none of which is relevant here (see on this section 131 of the Evidence Act). It is of course a rule of great antiquity that the only proof of the contents of a court's proceeding in writing is the proceeding itself, or where permissible, a certified true copy thereof, produced.

On the above broad principles, it is my view that when an issue of *res judicata* is taken up by the defence in limine consideration will be limited, where the previous case was decided in a court where pleadings were ordered, to the pleadings and the judgment in that previous case compared with the pleadings in the case in hand.

But where it is taken up on the trial, the court while confining its consideration of it to the pleadings and the judgment cannot ig-

nore such explanations of minor nature as may emerge at the trial. The difference in a case where the issue relates to a case which was decided in a court, such as a Native, Customary or Area, court where no pleadings were filed, is that the court can look at the claim, the evidence and the judgment to decide what the substance of the previous case was. In the instant case I believe that the court was entitled to look at Exh. B if it was a previous case between the parties.

But I do not think it could take into account Exh. E, a newspaper publication which sought to introduce a rather controversial angle into the case on the issue of res judicata. As for the oral testimonies before the court, to wit: those of PW.2, PW.3, D.W.2, and D.W.5, I must point out that the question is not whether the court of trial or the Court of Appeal should make findings on them and use them to decide the case. The cases cited by the learned Senior Advocate for the respondent show that the court could do so. But where I have my grave doubts is whether on the issue of res judicata the elaborate pleadings such as those contained in paragraphs 2 to 15 of the amended statement of claim and the massive evidence called on them can be entertained in order to find a nexus between the parties in this suit and the consolidated cases relied upon as estoppel. Bearing in mind the fact that as observed by this court in *Yoye v. Olubode & Ors.* (1974) 10 S.C. 209, p.220 res judicata as a successful plea is a bar to the jurisdiction of the court; as evidence it is conclusive, I believe that such a laborious exercise is contrary to the whole essence of a plea of res judicata. I do not think it is right to allow such a massive extrinsic evidence. Moreover, as this court stated in *Mogo Chinwendu v. Mbamali* (1980) 3-4 S.C. 31, where a previous subsisting judgment between the same parties is not pleaded and used as estoppel, it can be used as a relevant fact. In the circumstances I believe it to be a better course when the link between the previous and the instant cases is rather tenuous to use the previous suit as a relevant fact rather than calling massive evidence to sustain a plea which, if it fails, will result in a full trial. However, the conclusion I had reached on the previous set of issues makes my above conclusions rather academic.

The appellants and respondent have placed their conflicting interpretations and laid their conflicting claims on the real value of

Exh. B, Okigwe High Court Suit No.HO/62/72 before F. O. Nwokedi, J.. In that case Matthias Nwosu and 2 Ors. of Ezihe Eluama in Osina brought an action against Emenike Ikeri & 4 Ors. of Umukegwu Akokwa claiming possession of "Uhu Nwaoma" land, situate at Osina and removal of houses of defendants on the land. The learned trial Judge entered judgment for the plaintiffs. The respondent in this case has submitted that it establishes a link between his people and Eluama who were parties in Exh. B. The appellants on the other hand rely on Exh. B to show that it had long been decided that the boundary between Osina and Akokwa was, and still is, the "Ekpe" trench. They maintain that the respondents misunderstand the import of Exh. B.

It is enough for me to refer to two passages in the judgment. The learned trial Judge at page 290, held:

"From the long and chequered history of this case I am satisfied that the issue of title to the land in dispute has long since been settled between the parties. I accept the evidence of the plaintiffs that the defendants who are from Umukegwu in Akokwa were living at Akokwa and only came over across the Ekpe Trench to their own lands at Ezihe Eluama at Osina. I also accept the plaintiffs' evidence that the defendants crossed over from Akokwa sometime in 1948. I do not believe the defendants that they were born and bred on the present site the subject matter of this dispute."

On respondent's people's claim to defences of laches in view of their long possession, the learned trial Judge found that both parties were in possession of portions of the land. He held:

"Title having already been settled in favour of the plaintiffs; it is clear from the above decision that defendants cannot be anything but trespassers to the land in dispute. Defendants have in their amended Statement of Defence set up the equitable defence of laches. I have considered the defence and I do not think that the defendants in the circumstances are entitled to avail themselves of this defence."

So, based on Exh. B, even if I agree that the parties, issues and subject matter in this case are the same with those in Exh. B - a point I do not have to decide in this case - I would still hold that the respondent and his people have no right to the land in dispute.

Finally, I shall consider the issue of retrial, I shall consider the issue of retrial, along with what appropriate order to make.

Chief Williams for the appellants submitted that the three ingredients of a successful plea of *res judicata* - parties, issues and subject matter - must be shown to be the same in the previous as well as the present case before the plea succeeds, They must co-exist; and so, the court below was wrong to have failed to consider the issues and subject matter and satisfy itself that they were the same in both cases that the parties in both cases were the same, it should order a retrial so that the courts below consider the questions of identity of issues and subject matter in both cases. Then he concluded as follows:

"The appellants humbly submit that the appeal ought to be allowed and the judgment of the High Court restored, or the case be sent back for a retrial because:-

(i) the plea of *res judicata* failed as the parties were not the same.
(ii) the findings of the learned trial Judge that the appellants established their title were not disturbed by the Court of Appeal;

or
(iii) if the parties are the same, two matters, namely, whether the issue and the subject matter are the same are still to be determined."

In his own submission, Mr. Balonwu stated that a retrial cannot be ordered where the plaintiff's case has failed completely and no irregularity of a substantial nature is apparent on the record, He cited *Ayoola v. Adebayo* (1969) 1 All NLR 159; the Court of Appeal found that the parties in this case were the same with those in the consolidated suits which was really the main question for determination, it became unnecessary and uncalled for to make an order of retrial to enable the trial court pronounce on those two other ingredients i.e. issues and subject matter, since that finding on parties meant that plaintiffs' case foundered in limine and should not see the light of day. He cited *Nwaneri & Ors. v. Orinwa & Ors.* (1959) SCNLR 316; (1959) 4 F.S.C. 132; *Fadiora v. Gbadebo & Anor.* (1978) 3 S.C. 219, p.288. He submitted that those two ingredients ought not to have been considered since they were not canvassed before the Court of Appeal since the appellants (respondents therein) did not cross-appeal on them.

For a proper consideration of the real question raised by this aspect of the appeal, I must advise myself that although this case

raises the usual broad question of which party is entitled to judgment, the answer can only be arrived at by a consideration of the relevant subsidiary issues. In this case, two subsidiary questions need to be answered, namely:

(a) Did the appellants, as plaintiffs, prove their case for a declaration of title and other consequential reliefs? Or

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(b) Did the respondent successfully substantiate his plea of *res judicata* so as to bar the court from even considering the plaintiff's case?

It is necessary to note that in civil matters, quite unlike in criminal cases, the onus of proof is not static. It keeps on shifting and on some issues it may be placed on the defendant: see on this *Osawaru v. Eziruka* (1978) 6-7.S.C. 135. In the instant case the onus of establishing or substantiating his plea of *res judicata* is squarely on the defendant: if he fails to do so by failing to establish any of the necessary ingredients, he is bound to fail on the issue. As it is so, I do not therefore agree with the learned Senior Advocate for the respondent that if the learned trial Judge failed to consider the necessary questions of issues and subject, matter, it was for the appellants (who were respondents in the Court of Appeal) to have cross-appealed. I believe it is trite that in our adversary system a party's opponent is entitled to take advantage of any fatal loophole in the party's case. In fairness to the learned Senior Advocate it was, perhaps, more the fault of the courts: but, with respects, he should have seen that successfully showing that only the parties in the two cases are the same without at the same time showing that the subject matter is the same cannot constitute a successful plea of *estoppel per rem judicatam*. He might have sought a way to remedy the fatal error of the courts. But then so, many naked facts such as the long established Ekpe ditch boundary were staring him in the face. No wonder then he chose the path of technicality which, as it turns out, is unavailing. The simple but fatal result is that the plea of *res judicata*, the burden of which lies on the respondent, fails both because, as I have found, the parties in this case are not the same with those in the previous consolidated suits and because it has not been found that the issues and subject matter in the two sets of cases are the same.

It follows that the ground upon which the appellants asked for a retrial in the alternative does not exist.

The next question is whether the appellants are entitled to judgment. I should refer to two vital findings of fact by the learned trial Judge of the defendant's/respondent's case, he said as follows:

"The defendant concentrated on his defence of res judicata and did not adduce any traditional history of the land in dispute. He did not even venture to state the boundaries of the land in dispute. His evidence that he lives on the land in dispute is not supported by his own plan Exhibit 'G' and that of the plaintiffs Exhibit 'A'. He appeared to have regarded the land shown in Exhibit 'G' on the south and south-eastern boundaries of the land in dispute as also the Land in dispute in this suit. The plaintiffs do not lay claim to those areas and, therefore, whether the defendant was born there or not, whether he lives there or not has nothing whatsoever to do with the land in dispute. The only possession shown by the defendant's witness; 4th D.W., of the land in dispute is the house built on the land by one Paulinus Ibeagwa while the land was the subject of litigation. The long possession evidence adduced by 4th D.W. is in respect of the same area in which the defendant above goes for this witness too. Put side by side I prefer and accept the evidence of the plaintiffs and their witnesses and reject that of the defendant and his witnesses. The defendant and his witness 4th D.W. did not impress me as truthful witnesses. There is evidence from both parties that when the original defendant now deceased, went on the land in dispute to build two houses as shown in Exhibit 'A' by the mark 'U/G' and in Exhibit 'G' by hatched oblong and x enclosed with a rectangle coloured yellow, the plaintiffs resisted the said defendant's and his workers' action by damaging the foundation blocks in exercise of their right of ownership and possession of the land in dispute. 1st plaintiff and others were charged to court in MOR/524C/74 Exhibit 'D' for willful and unlawful damage to cement block building. He and others were discharged on the merits at the close of the case for the prosecution."

Later, he also found:

"From the evidence before me I am satisfied and find as a fact that either under traditional history or under long possession, the plaintiffs have proved their case for declaration of title to the land called 'Ala Elugwu' verged green in Exhibits 'A' and 'G'. I make a specific finding of fact from a consideration of the totality of the evi-

dence before me that the eastern boundary of the 'Ala Elugwu' is 'Ekpe' an ancient trench or ditch shown on both Exhibits 'A' and 'G' and that the said 'Ekpe' is the natural boundary between Osina and Akokwa towns."

These findings are as devastating as they are conclusive against the defendant/respondent and in favour of the plaintiffs/appellants. They have marked the "Ekpe" boundary with a stamp of finality. The findings clearly support the learned trial Judge's judgment in favour of the plaintiffs who are the appellants in this court. Surprisingly in the respondent's (then appellant's) notice of appeal before the Court of Appeal (at pages 361-363) they filed only two grounds one on the issue of res judicata and the other the omnibus ground. No ground specifically attacked those terrible findings of fact against him. The result is that those facts stand. Now that the issue of res judicata has been settled against them those facts make it imperative that I must restore the judgment of the High Court.

In the result this appeal succeeds and is allowed. I set aside the judgment of the Court of Appeal in this case and restore the judgment of Ugoagwu, J. with costs of N800.00, in the High Court for right of occupancy, N1,000.00 damages for trespass and order of perpetual injunction against the defendant and in favour of the plaintiffs. I assess and award costs against the defendant in the sum of N600.00 in the Court of Appeal and N 1,000.00 in this court.

KARIBI-WHYTE JSC

I have had a preview of the judgment of my learned brother P. Nnaemeka-Agu, J.S.C. in this appeal. I agree entirely with the reasoning therein and conclusion that this appeal succeeds on all the issues argued.

I also hereby set aside the judgment of the Court of Appeal in this appeal and restore the judgment of the trial High Court.

I adopt the orders for costs and damages awarded by my learned brother Nnaemeka-Agu, J.S.C. in this appeal

KAWU JSC

I have had the privilege of reading, in draft, the lead judgment of my learned brother, Nnaemeka-Agu, J.S.C., which has just been delivered. I am in complete agreement with his reasoning and also with his conclusion that the appeal succeeds. For all the reasons comprehensively and lucidly set out in the lead judgment, I too will allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the High Court. I abide by all the consequential orders made in the lead judgment, including the orders as to costs.

BELGORE JSC

The appeal in any case must be decided on the grounds of appeal filed and as enunciated in the Briefs of Argument in support. There is no ground of appeal challenging the cogent and important findings of the trial judge on the boundary between the contending parties which he unambiguously placed at the Ekpe (moat) and the Court of Appeal ought not to have dwelt so deeply into this definite and conclusive finding of fact in the absence of anything perverse or unlawful or inadmissible in the evidence leading to that finding.

It is for the above reasons and fuller reasons in the judgment of Nnaemeka Agu, J.S.C., which I adopt as mine, that I also allow this appeal and set aside the decision of the Court of Appeal. I therefore restore the judgment of the trial Court and make consequential orders as to costs as in the judgment of Nnaemeka-Agu, J.S.C.

OMO JSC

I have been privileged to read in draft the judgment of my learned brother, Nnaemeka-Agu, J.S.C., and I agree with him that this appeal should be allowed.

The main issue canvassed in this case is whether the judgment in the consolidated Mbanasa Native Court Suit Nos. 152/47 and 2/48 constitute estoppel per rem judicatam vis-a-vis the present action on appeal, so as to oust the jurisdiction of the trial High Court from entertaining the present action filed by representatives of the

Umuawiri family of Osina against the respondent who is from Umukagwu village of Akokwa.

The High Court in its judgment held that these judgments (Exhibits J, K, M, N and O) taken together or singly did not constitute estoppel per rem judicatam because the parties are not the same. It then went on to hold that on the state of the pleadings and the evidence led the plaintiffs had succeeded in establishing their claims for a declaration of title to the land in dispute, damages for trespass and an injunction to restrain the defendants from trespassing on the land in dispute. The High Court did not consider the other two constituents of a successful plea of res judicata. To wit, whether the subject-matter and the issues raised in the action were the same.

On appeal to the Court of Appeal that court held on the contrary that the doctrine of res judicata applied because the present action is being litigated by representatives of the same village as the present parties, to wit, Ehiana (Osina) and Umukagwu (Akokwa). The present parties were therefore privies to the result of the previous action and bound by its result. It therefore set aside the judgment of the trial court and found for the defendants of Akokwa. Dissatisfied with this judgment the plaintiffs then appealed to this court.

The issues for determination have been set out in the lead judgment and I do not think it is necessary for me to reproduce same in this concurring judgment. The Court of Appeal in my view came to a wrong decision soon on the issue of parties because it did not base its decision on the pleadings of the parties that land in Osina (and indeed Akokwa) are owned by families not villages or towns vide paragraph 3 of the amended statement of defence and paragraph 1 of the amended statement of claim. It is therefore not possible, unless it is so specifically pleaded, for Eluama (Osina) village, or Umukagwu (Akokwa) to own land'. It is the families which constitute in Eluama and Umukagwu villages who hold their own individual lands. Any purported action by Eluama village in respect of ownership of land cannot therefore bind its constituent family.

Specifically Ben Igwillo the plaintiff in one of the consolidated actions even if he was head (Chief) of the Osina-town cannot litigate on behalf of the whole of Osina which does not own land as a unit. It may well be that a case of "standing by" can be made out, but not parties or privies. It however compounded its error by not adverting
5 its mind to the question of subject matter and issues. There is no reference in the consolidated native court actions relied on to constitute res judicata is the same of the land in dispute given to be the same as the name of the land presently in dispute. The effort of the
10 Surveyors called to establish this fact fall far short of what is required.

Clearly the decision that proof of subject-matter is subsumed in the proof of parties is not correct, and led the Court of Appeal to a wrong conclusion. For this and the further reasons given by my learned
15 brother Nnaemeka-Agu, J.S.C., in his judgment, I hereby allow this appeal. The decision of the Court of Appeal is hereby set aside and the decision of the trial High Court restored with costs to the appellants as set out in the lead judgment.

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