

SUPREME COURT OF NIGERIA
15TH APRIL, 1994. SC. 144/1989.
CORAM:- M. L. UWAI, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, A. I. IGUH, JJSC.

JIMOH AKINFOLARIN & 2 OTHERS PLAINTIFFS/
(For and on behalf of the Ansar-Ud-Deen Society Ode-Ondo)	APPELLANTS
AND	
SOLOMON OLUWOLE AKINNOLA DEFENDANT/ RESPONDENT

JURISDICTION - High Court - S. 9(1) of the High Court Law - That ousts High Court's original jurisdiction in customary matters - Where claim is not based on the matter of family status - Whether High Court lacks jurisdiction.

JURISDICTION - High Court - Lack of original jurisdiction in customary matters - Where question of headship of family incidental and not fundamental - Whether High Court's jurisdiction is ousted.

LAND LAW- Title - Family land - Plaintiffs' failure to establish their claim - Abundant evidence in support of Defendant's assertion - That land in dispute was granted to him by the family head & members - Plaintiffs' claim dismissed.

PLEADINGS - Family headship - Land matters - Move by Defendant in his pleading to establish root of his title - Whether tantamount to raising the issue of family headship.

PLEADINGS - Transfer of family Land - Whether principal members can transfer a valid title in the family property - Where not made an issue in plaintiffs' pleadings - Is a no issue before the appellate court.

FACTS

The Plaintiffs/Appellant claimed that the land in dispute was granted to them by Theophilus Adegoju together with some members of the Oloka family in 1954. That they planted cassava and

erected a signboard on the land, thereby going into possession. In 1973, certain developments led to the said Adegoju with some members of the family executing an agreement in their favour that confirmed the 1954 grant. Appellants filed an action against the Defendant/Respondent for a declaration of title, general damages for trespass and perpetual injunction. The Respondent established that the land in dispute was granted to him, in 1973 under customary law by Chief Akinboye head of the Oloka family together with some members of the family and relevant agreements were executed. Appellants' claim was based on their allegation that Adegoju that granted the land to them was the head of the Oloka family.

It was established that there was a chieftaincy tussle between Adegoju and Chief Akinboye between 1950 and 1956 which led to a gap in the family headship until Chief Akinboye was confirmed by the appropriate authority as the Oloka of Oka (i.e. the family head) in 1956. The trial court dismissed the Appellants' claim and found for the Respondent. Appellants' appeal to the Court of Appeal was also dismissed. Appellants have now further appealed to the Supreme Court to determine inter alia whether the trial High Court had jurisdiction to determine the issue of family status (headship) raised in this case. Issues raised by the Appellants were in the main hypothetical and academic and not related to the case set up by them at the trial.

HELD (unanimously dismissing the appeal)

1. The Appellants' claim being for a declaration of title to land, damages for trespass and injunction did not raise *ex facie* any issue which can possibly be construed as ousting the jurisdiction of the High Court within the frame work of S.9 of the High Court Law. For the Appellants from their claims as formulated did not seek any declaration in the matter of "family status" of Chief Akinboye and or Adegoju. (p. 1J9L 20)

2. On the strength of the authorities, the jurisdiction of the High Court was ousted by the proviso to S.9(1) of the High Court Law only where the issue of family status was the fundamental issue before the court. The headship of the Oloka family was only an incidental issue in this case which had long been settled and was not a fundamental issue for determination (p. 120 L 18)

3. Adegoju's claim to headship of the family was baseless and rightly rejected by the High Court in Exhibit E (judgment in a different suit) as an incidental issue in that suit. The question of Chief Akinboye's due approval as the Oloka (family head) by the prescribed Authority, being no longer in issue he was entitled to judgment in Exhibit E. The Ondo State High Court therefore, acted within its jurisdiction in Exhibit E and its judgment was neither invalid nor a nullity. (p. 1 22 L)

4. The issue of whether the Respondent has the locus standi to raise the issue of headship of the Oloka family as he was not a member of that family does not arise. What the Respondent did in his pleadings was to set out material facts in proof of his assertion that he purchased the land in dispute from the Oloka family with the consent of the recognised Oloja of Oka and head of the Oloka family, which he was perfectly entitled to do. (p. 126 L 24)

5. Whether or not in the absence of a substantive head of family, the principal members can transfer a valid title in the family property is a non-issue not being the Appellants' case. And the issue was neither raised in their pleadings nor was it suggested by them all through the trial of the suit. (p. 128 L 23)

6. Since it is established that the head of the Oloka family, Chief Akinboye, along with the principal members of the family duly made a grant of the land in dispute in 1973 to the Respondent under customary law, there was abundant evidence before the trial court upon which the Appellants' claims were dismissed in their entirety. (p. 129 L.32)

NOTABLE POINTS OF INTEREST

IGUH JSC

Determination of jurisdiction

It is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of a court entertaining the same. (p. 1J9L 17)

Judicial Precedents

2. The case of Nwafia v. Ubuha sought to be relied on by the Appel-

lants must be distinguished from the present action as the issue of family status was a fundamental and not an incidental issue for determination in Nwafia's case. (p. 119 L 35)

Validity of court's order until set aside

5 3. An order made by a court of competent jurisdiction even in ignorance of some essential fact which went to the validity of the order was not void or a nullity and the order stood and could not be discountenanced or ignored until it was set aside. (p. 125 L 23)

10 4. "It therefore seems to me crystal clear that a party who is aware of an order or judgment of a court of competent jurisdiction, whether valid or null, regular or irregular cannot be permitted to disobey or discountenance it unless and until such an order or judgment is duly set aside by a court of competent jurisdiction." (p. 125 L.30)

15 *Confining judgment to issues raised- Court not to make case for the parties suo motu*

5 5. It is an elementary and fundamental principle of the determination of disputes between parties that judgment must be confined to
 20 the issues raised by the parties. It is not competent for a court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties. (p. 127 L 25)

25 *Pleadings - binding effect thereof*

6. Parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be discountenanced by the court. (p. 127L 37)

30 *Court to limit itself to issues raised*

7. A court of trial must limit itself to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of the right to fair hearing.(p. 128 L 6)

35 *When sale of family land is void ab initio*

8. "It is enough for the purpose of this appeal to state that a grant or sale of family property by the principal members of the family without the consent of the head of the family is void ab initio." (p. 129 L 24)

ONU JSC

Whether grant of land was made with head of family's consent

9. The poser whether or not the Appellants' grant of the land in dispute was made with the knowledge and consent of the head of the Oloka family in 1954 would at best be misconceived and at worst irrelevant, the Appellants having admitted at trial that between 1950 and 1956 there was no head of the Oloka family. (p. 137 L13)

Whether family headship is directly in issue - Effect of counsel's admission

10. In the light of the fatal admission made by counsel for the Plaintiffs/Appellants during his address, the entire case of the Appellants as founded on their pleadings and over the mountain made of family status as fundamental, are in conflict with their counsel's admission when he said, "*it is also not in dispute that between 1950 and 1956, there was no Oloja of Oka*". (p. 138 L 7)

REPRESENTATION:

Adeleke Sanusi Esq. with Tewo Lamuye for the Appellants.
Prince Olu Mapo for the Respondent

CASES REFERRED TO

- Owoniboy Technical Service Ltd. v. John Holt Ltd. (1991) 6 N.W.L.R. (part 199) 550
- Mustapha v. Governor Lagos State (1987) 2 N.W.L.R. (part 58) 539 at 549
- Nwaifo v. A. G. Bendel State (1982) 7 S.C. 124
- Adeyemi v. Opeyori (1976) 9-10 S.C. 31
- Ajaka Izenkwe & Ors v. Nnadozie (1953) 14 W.A.C.A. 361 at 363
- Nwafia v. Ububa (1966) N.M.L.R. 219
- Aladegbemi & Anor v. Fasanmade (1988) 3 N.W.L.R. (part 81) 129
- Craig v. Kanseen (1943) 1 All E.R. 108 at 111
- Grafton Isaac v. Emery Robinson (1984) 3 N.W.L.R. 705
- Rossek & others v. A.C.B. Ltd and others (1993) 8 N.W.L.R. (part 312) 382
- Williams v. Sanusi (1961) All N.L.R. 334 at 337
- Ojiako v. Ogueze (1962) 1 All N.L.R. 58 at 61
- Hadkinsin v. Hadkinson (1952) p. 285 (1982) 2 All E.R. 567, 569
- Macfoy v. U.A.C. Ltd. 1961 3 E.R. 1169 at 1172 (1962) A.C. 152
- Issac v. Robertson (1984) 3 All E.R. 140 at 143

- Commissioner for Works Benue State and Another v. Devcon Development Consultants Ltd. & Another (1988) 3 N.W.L.R. (part 83) 407
 Emegokwue and Ekpenyong and others v. Chief Ayi (1973) 3 E.C.S.L.R 4
 Metalimpex v. AC Leventis & Co. Ltd. (1976) 2 S.C. 91
 5 J. O. Idahosa and Another v. D. N. Oronsaye (1959) 4 F S.C. 166
 James v. Mid-motors (1979) J1 and 12 S.C. 31
 Agbloc v. Sappor 12 W.A.C.A. 187
 Akpenc v. Barclays Bank (1977) 7 S.C. 47 at 59
 Aladegbemi v. Fasanmade (1988) 3 N.W.L.R. (part 81) 129 at 146
 10 Eguamwense v. Amaghizemwen (1993) 9 N.W.L.R. (part 315) at pap
 Aromolaran and Anor v. Oladele & Ors (1990) 7 N.W.L.R (part 162) at 368.
 Benson v. Ashiru (1967) 1 All N.L.R. 184 at 188
 Fadiora v. Gbadebo (1978) L.R.N. 97 at 101 (1978)3 S.C. 219at22f
 15 Ndiribe v. Ogbogu (1989) 5 N.W.L.R. (part 123) 599 at 602
 Aromire v. Oresanya (1938) 14 N.L.R. 116
 Odiase v. Agho(1972) 1 All N.L.R. (part 1) 170 at 176
 Folorunsho v. Adeyemi (1975) 1 NMLR 122
 Melifomvu v. Egbuji (1982) 9 S.C. 145
 20 Thomas v. Olufosoye (1986) 1 N.W.L.R. (part 18) 669 at 685 (S.C)
 Fawehinmi v. Akilu (1987) 4 N.W.L.R. (part 67) 797
 Bolajr v. Bamgbose (1986) 4 N.W.L.R. (part 67) 632 at 646
 Lukan v. Ogunsusi (1972) S.C. 40
 Enang & Ors. v. Fidelis Ikor Adu (1981) 11-12 S.C. 25 at 36
 25 Kalio v. Kalio (1975) S.C. 15 at 21
 Egonu v. Egonu (1978) 11-12 S.C. 11 at 123

STATUTES REFERRED TO

- High Court Law Cap. 44 Laws of Western Nigeria 1959 S.9(1)
 30 Constitution 1979 S.236
 Evidence Act S 73(1)(a)

LEAD JUDGMENT BY IGUH JSC

- 35 In the Ondo Judicial Division of the High Court of Justice, Ondo State, the plaintiffs, who are now the appellants, for themselves and on behalf of the Ansar-Ud-Deen Society, Ode, Ondo caused a writ of summons to issue against the respondent who therein was the defendant claiming, as subsequently amended, as follows:-

"(1) A declaration of title under Native Law and Custom to a piece of land situate and being at mile 2 Ondo Okitipupa Road and more particularly shown on Plan No. L & L/A3635 and Plan No. OB 4105;

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(2) N200.00 being general damages for trespass to the said plaintiffs' land; and

(3) A perpetual injunction restraining the defendant, his servants and/or agents from committing further trespass on the land."

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Pleadings were ordered in the suit and were duly settled, filed and exchanged.

At the subsequent trial, all three plaintiffs testified on their own behalf and called witnesses. The defendant also testified in his defence and called witnesses. At the conclusion of hearing, the learned trial Judge in a reserved judgment which was delivered on the 5th day of September, 1979, found for the defendant and dismissed the plaintiffs' claims in their entirety.

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Being dissatisfied with this judgment, the plaintiffs appealed to the Court of Appeal, Benin City Division, which in an unanimous decision on the 4th day of May, 1988 dismissed the appeal and affirmed the judgment of the trial court.

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The plaintiffs have now further appealed to this court against the said decision of the Court of Appeal. I shall hereinafter refer to the plaintiffs and the defendant in this judgment as the appellants and the respondent respectively.

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I think it is desirable at this stage to recapitulate the facts of this case. In doing so, I shall adopt the facts as ably set out in the judgment of the Court of Appeal which are as follows:-

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"The land in dispute belonged originally to the Oloka Chieftaincy family of Ondo under customary law. Chief Oloka of Oka was and is still the accredited head of the family. In 1950 there was a vacancy in the Oloka Chieftaincy following the death of the then Oloka of Oka. There was a protracted dispute in the family as to succession to the vacancy. One Theophilus Adegoju claimed to have been rightfully appointed to the office by the family while S.A. Akinboye also laid claim to a similar appointment. There were thus

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rival claims to the title.

The Oloka Chieftaincy is a recognised minor Chieftaincy with the Osemawe of Ondo as the prescribed authority who had (and presumably still has) the power to approve the appointment of an Oloka. On 14th July, 1956, the Osemawe of Ondo approved the appointment of S.A. Akinboye as the new Oloka of Oka.

On 10th April, 1954, Theophilus Adegoju and some members of the Oloka family made a grant of the land in dispute to the Ansar-Ud-Deen Society of Ondo (hereinafter is referred to as the Society) for the erection of a school. The appellants claimed that the Society went into possession and exercised acts of ownership on the land by clearing it and planting cassava therein; they also erected a signboard on the land. Following the reconstruction on the Ondo - Ore highway, part of the land granted to the Society was encroached upon by the road and the society reported this to Adegoju who with some members of the Oloka family on 27th December, 1973 executed an agreement (Exhibit A) in favour of the Society confirming the 1954 grant but in respect of the land remaining after deducting the part encroached upon by the new highway.

Meanwhile in May, 1973. Chief S. A. Akinboye the Oloka of Oka and head of the Oloka family together with some other members of the family sold under customary law, the land in dispute in two lots to the respondent and executed two agreements dated 14th May, 1973 and 24th May, 1973 (Exhibits K and K1) in his favour. The respondent claimed he went into possession cleared the land and planted therein cassava, maize and pineapple and later surveyed the land. He denied seeing any survey pillars or signboard on the land at the time of the sales to him."

It is necessary to observe that from the pleadings and evidence before the court the following facts are not in dispute between the parties namely:-

1. That the land in dispute originally belonged to the Oloka family.

2. That the land said to have been trespassed upon by the respondent is part and parcel of the land claimed by the appellants.

3. That both parties claimed the land through the Oloka family, and 5

4. That Chief Oloka, otherwise known as the Oloja of Oka is the traditional head of the Oloka Chieftaincy family.

It is also pertinent to point out that the learned trial Judge after a thorough consideration of the evidence adduced before the court found the following facts established, namely:- 10

1. That the appellants were not in possession of the land in dispute at the time of the institution of this action on the 27th day of May, 1974. 15

2. That it was the respondent who from the 20th May, 1973 at the least was in possession of the land in dispute.

3. That Chief Theophilus Adegoju whom the appellants claimed was the Oloja of Oka and the head of the Oloka family was never at any time the head of the Oloka family either before or after the 14th July, 1956. 20

4. That Chief S. A. Akinboye's appointment as the Oloja of Oka and the head of the Oloka family was duly approved by Oba Osemawe of Ondo on the 14th July, 1956. 25

5. That the said Oba Osemawe of Ondo as the prescribed authority under the law was the proper person with the requisite power to approve the appointment of the Oloja of Oka. 30

6. That whoever was so appointed and approved by the Osemawe of Ondo as the Oloja of Oka was also recognised as the traditional head of the Oloka family. 35

7. That there was an interregnum in the Oloka Chieftaincy between 1950 and the 14th July, 1956 on which latter date Chief Akinboye's appointment was approved by the Osemawe to fill the

vacancy.

8. That neither Adegoju nor Akinboye had any valid claim to the headship of the Oloka family during the period of the interregnum,

9. That the grant or disposition of the land in dispute to the appellants in 1954 and in 1973 by Adegoju was void ab initio as he was not the head of the family, and

10. That between 1950 and the 14th July, 1956, there were two factions in the Oloka family built around the two contenders to the vacant Chieftaincy stool and that the rival groups operated side by side as the Oloja of Oka.

I should observe that there was abundant evidence before the trial court in support of the above findings which the Court of Appeal fully endorsed. Having set out the salient facts of this case, I will now proceed to consider this appeal on its merits.

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

"(1). *Whether from the facts and issues joined by the plaintiffs and the defendant in this case, the point as to the headship of Oloka family in 1954 when the grant of the land in dispute was made to the plaintiffs was not directly in issue in this case so as to raise the question of family status for determination. If the answer is in the affirmative, whether the trial High Court had jurisdiction to determine the issue of family status so raised.*

(2) *Whether Exhibit E, a judgment of the Ondo State High Court relied upon by the Courts below against the appellant was not a nullity on the ground that the judgment was given without jurisdiction.*

(3) *Whether the respondent had locus standi to submit the issue of the headship of Oloka family in 1954 for determination by*

the trial court.

(4) Whether, in the absence of a substantive head of a family, the principal members of the family cannot transfer a valid title in the family property."

The respondent, for his own part, submitted that all the four issues formulated for determination by the appellants are totally misconceived and mainly academic having regard to the specific findings of facts made by the trial court and endorsed by the Court of Appeal. He set out one single issue which, in his view, is enough to determine the appeal. This issue reads as follows:-

"Whether the appellants bought the land in dispute in 1954 or in 1973 from the Oloka family with the consent of the head of the Oloka family."

A close study of the question posed in the respondent's brief shows that it is sufficiently encompassed by the issues raised by the appellants in their brief of argument. Accordingly, I shall in this judgment adopt the set of question set out in the appellants' brief.

At the oral hearing of the appeal, learned counsel for the appellants, proffered oral arguments in further elucidation of the submissions contained in their written brief. Learned counsel for the respondent, Prince Olu Mafo, who settled the respondent's brief of argument was absent in court although served with hearing notice for the hearing of the appeal. The respondent however adopted the brief of argument filed by his learned counsel in the appeal.

The main thrust of the appellants' complaint all the first issue is that the headship of the Oloka family in 1954 when the grant of the land in dispute was made to the appellants was directly in issue in this case and that this raised the question of family status for determination by the trial court. It was therefore contended that the learned trial Judge had no jurisdiction to entertain the suit by virtue of the proviso to Section 9(1) of the High Court Law of Western Nigeria Cap. 44, 1959 Laws of Western Region. It was argued that the question whether Chief Adegoju was the head of the Oloka family in 1954 was not a triable issue before the trial court as it concerned a matter relating to *"family status"* and that the Court of Appeal erred in law by holding that the trial court had jurisdiction to entertain the suit.

It was submitted on behalf of the respondent in his written brief that the headship of the Oloka family was not the paramount or primary issue in the case on hand and that this was merely incidental to the main issue which was a declaration of title to the land in dispute damages for trespass and an injunction.

I think it is right to observe that this issue of jurisdiction was never raised before the trial court. It is however a fundamental issue which can be raised at any stage of the proceedings up to the final determination of an appeal by the highest court of the land. See Owoniboy Technical Service Ltd. v. John Holt Ltd. (1991) 6 NWLR (Pt.199) 550; Osadebay v. Attorney-General Bendel State (1991) 1 NWLR (Pt. 169) 525; Petrojessical Ent. Ltd. v. Leventis Tech. Co. Ltd (1992) 5 NWLR (Pt. 244) 675; Okesuji v. Lawal (1991) 1 NWLR (Pt.170) 661; Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410 at 420 etc. I will therefore dispose of this issue of jurisdiction.

Section 9(1) of the High Court Law. Cap. 44, Laws of Western Nigeria 1959 which was applicable at the time the cause of action arose in this case (See Mustapha v. Governor, Lagos State (1987) 2 NWLR (Pt.58) 539 at 549, and Uwaifo v. A.G. Bendel State (1982) 7 S.C. 124 provides as follows:-

"9(1) To the extent that such jurisdiction may be conferred by the Regional Legislature, the jurisdiction by this Law vested in the High Court shall include all her Majesty's civil jurisdiction which at the commencement of this law was, or at any time afterwards may be exercisable in the Western Region for the judicial hearing and determination of matters in difference, or for the administration or control of property and persons, and also all her Majesty's criminal jurisdiction which at the commencement of this law, was, or at any time afterwards may be there exercisable for the repression or punishment of crimes or offences or for the maintenance of order, and all such jurisdiction shall be exercised under and according to the provisions of this Law and not otherwise:

Provided that, except in so far as the Governor may by order in council otherwise direct and except in suits transferred to the High Court under the provisions of Section 28 of the Native Courts

Ordinance the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death."

It seems to me clear from the above proviso that the High Court of the former Western Nigeria was precluded from exercising original jurisdiction in all matters which are subject to the jurisdiction of the customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death. Where, however, a claim is within the substantive enactment that is to say, within the terms of subsection (1) of Section 9 aforesaid, the High Court is not precluded from adjudicating thereon merely because in the course of such an adjudication, it becomes necessary to make some incidental or casual inquiry into any of the matters classified in the proviso in issue, See *Aderemi v. Opeyori* (1976) 9-10 S.C. 31.

In the first place, it is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of a court entertaining the same. See *Ajaka Izeikwe & Ors v. Nnadozie* (1952) 14 W A C A 361 at 363 and *Adeyemi v. Opeyori* (supra) at p. 51. In the case on hand, the appellants have claimed a declaration of title to land, damages for trespass and injunction. It seems to me indisputable that not one of the reliefs claimed raises *ex facie* any issue which can possibly be construed as ousting the jurisdiction of the High Court within the frame work of section 9 of the said High Court law. The appellants from their claims as formulated did not seek for any declaration in the matter of the "*family status*" of Chief Samuel Akinboye and/or Theophilus Adegoju. I therefore accept the respondent's contention that the trial court *ex facie* had ample jurisdiction to entertain the appellants' claims. I am further in agreement from the reliefs claimed that the question of "*family status*" was not directly or fundamentally in issue in the claims. It was only an incidental or casual issue which emerged in the determination of the fundamental question relating to title to land, damages for trespass and injunction which are the claims before the trial court.

The case of *Nwafia v. Ububa* (1966) NMLR 219 referred to by learned counsel for the appellants is worthy of comments and must be distinguished from the present action. In that case, the plaintiff claimed in the High Court of Eastern Nigeria that he was entitled in accordance with customary law to occupy and possess the house

known as "*Uno Obu*" with its appurtenances called "*Ilo Obu*", both of which by custom and as a matter of right must be under the management and control of the Okpala or the eldest surviving male child in the line of descent of the family. It seems to me plain from the very nature of the claim before that court that an issue relating to family status arose in that case as a fundamental and not an incidental issue for determination. That issue was the primary and the only issue which ex facie called for determination in the suit and arose directly from the very nature of the relief claimed. On appeal, it was held by this court that the only issue which called for determination in the suit was as follows:-

"Is the plaintiff the Okpala of the Dunu family? In other words, is he the surviving eldest male child of Dunu. This undoubtedly is an issue relating to family status"

The *Nwafia v. Ububa*, suit (*supra*), must be distinguished from the present case where any question of family status was merely incidental in the consideration of the appellants' claims. The court below so held and I have no reason to disagree with it on the point. I am satisfied on the strength of the authorities that the jurisdiction of the High Court was ousted by the proviso to Section 9(1) of the High Court Law only where the issue of family status was the fundamental issue before the court. I agree with the view of the Court of Appeal that the headship of Oloka family was only an incidental issue in this case especially in the fact of Exhibits J and J1 whereby the appointment of Chief Samuel Akinboye as the Oloja of Oka had long been duly approved by the prescribed authority, the Osemawe of Ondo with effect from the 14th July, 1956. It seems to me fully established that the question of who the Oloja of Oka and head of the Oloka family was had long been settled with effect from the 14th July, 1956 and was not a fundamental issue for determination in this action. In the circumstance, the first issue must be resolved in favour of the respondent.

I now turn to the second issue which questions whether Exhibit E, a judgment of the Ondo High Court in Suit No. AK/58/64 relied on by the courts below against the appellants was not a nullity on the ground that it was given without jurisdiction. It is the contention of the appellants that Exhibit E is a nullity and consequently that all reliance placed on it by the lower courts are nullities. They argued that since the main issue decided in Exhibit E by the High Court was the issue of the status of Akinboye and Adegaju in Oloka family, the judgment in that suit was delivered without jurisdiction in that it is caught by Section 9(1) proviso of the High Court

Law of Western Nigeria.

For the respondent, it was contended that the issue of who at all material times was the Oloka of Oka was settled as long ago as the 14th July, 1956 by the prescribed authority and that the point was no longer open to any dispute. Exhibit E is a declaratory action between Chief Samuel Akinboye, the Oloja of Oka as the plaintiff and Theophilus Adegoju as the respondent in respect of the Oloka family landed property, account of all monies received by the defendant in respect of the said property and perpetual injunction. It was submitted that all the High Court of Ondo State did in Exhibit E was to affirm the approval of Chief Samuel Akinboye as the Oloja of Oka by the prescribed authority with effect from the 14th July, 1956.

I have closely considered the arguments of learned counsel in this regard and wish to observe that the question posed by the second issue aforementioned appears to me mainly academic. In the first place, there is unchallenged evidence before the trial court to the effect that Chief Akinboye's appointment under customary law as the Oloja of Oka was duly approved by the prescribed authority since the 14th July, 1956. In this regard, the Court of Appeal before which the same was canvassed dismissed the same as follows:-

"The issue of headship of the family either before or after 14th July, 1956 could not have been raised bonafide by Adegoju whom as I have held earlier, is estopped from denying that Chief Akinboye became Oloka and head of the family from 14th July, 1956. To still refer to himself as the Oloka and head of family even in 1973 shows how mischievous Adegoju was. Adegoju could not have been head of the family unless he was approved by the Osemawe as the Oloja (otherwise known as Oloja of Oka). The learned trial Judge found and quite rightly in my view, that there was an interregnum lasting from 1950 to 14th July, 1956 when Chief Akinboye was approved as the Oloja thereby rejecting Adegoju's evidence that he was ever approved by the Osemawe as the Oloja of Oka. The family therefore had no head of family during that period of interregnum. To hold that each time before 1/10/79 there was a case in which the validity of a grant of Oloka family land was in issue and Adegoju, in spite of Exhibits E and H, claimed headship of the family, the jurisdiction of the trial High Court was ousted is to stretch the proviso to Section 9(1) to absurdity. For as long as Adegoju persisted in making his claim to headship of the family in any suit for so long would a trial High Court be obliged to pronounce on it not as a fundamental but

an incidental issue. For the issue of the headship of the family was no longer open to question since 14th July, 1956 when the Osemawe in exercise of his power as the prescribed authority, resolved the rivalry
 5 between Adegoju and Akinboye for that title by approving the latter as the Oloka."

I am with respect in complete agreement with the above observations of the Court of Appeal and fully endorse them. I accept
 10 the view of the Court of Appeal to the effect that Adegoju's claim to headship of the family in the suit was baseless and rightly rejected by the Ondo State High Court in Exhibit E, not as a fundamental but as an incidental issue in the suit. In my opinion, once it was established
 15 that Chief Akinboye had been duly approved as the Oloka by the prescribed authority, the issue of his status as the head of the Oloka family was no longer in issue and he was entitled to judgment in respect of his claims in Exhibit E. The Ondo State High Court therefore acted within its jurisdiction in Exhibit E and its judgment was
 20 neither invalid nor a nullity.

In the second place, even if Exhibit E were to be a nullity, and I do not so hold, it is the judgment of a court of competent jurisdiction and may therefore not be ignored or discountenanced without its being firstly set aside. An order made by a court of competent jurisdiction even in ignorance of some essential fact which went
 25 to the validity of the order was not void or a nullity and the order stood and could not be discountenanced or ignored until it was set aside. See *Oba Lawani Aladegbemi & Anor v. Oba John Fasanmade* (1988) 3 NWLR (Pt. 81) 129. In other words, an order or judgment
 30 of a court of competent jurisdiction remains valid and binding unless and until it is set aside by the trial court itself where it acted without jurisdiction or by an appeal court.

In the *Oba Aladegbemi's* case, (supra), Kayode Eso, J.S.C. at page 155 of the report put the matter as follows:-

35 ".....but more importantly is the fact that Lord Denning never said as is often claimed that a judgment of a court of competent jurisdiction could be ignored if it is found for any reason to be void without its being first set aside. He never said so and in my humble view if he had, it is with utmost respect not the law, for a court of competent jurisdiction, not necessarily of unlimited jurisdiction."

tion (and I will come to this anon) has jurisdiction to decide a matter rightly or wrongly. If that court never had jurisdiction in the matter, then its decision is without jurisdiction void but then should a court of law not even decide the point? That is, the court without jurisdiction decided without jurisdiction? Should the decision just be ignored. 5 Surely it would not make for peace and finality which a decision of a court seeks to attain. It would, at least, be against public policy for persons without the backing of the court to pronounce a court's decision a nullity, act in breach of the decision whereas others may set out to obey it. In my respectful view, it is not only desirable but necessary to have such decisions set aside first by another court before any act is built upon it despite the colourful dictum of the Law Lord in *U.A.C. v. Macfoy*, (supra)," 10

15

In the same case, Oputa, J.S.C. at page 162 of the report advanced his own contribution on the issue as follows:-

"The point that it needs an order of court to set aside even a judgment that is a nullity was brought out in *Craig v. Kanseen* (1943) 20 *All ER 108* at 111 per Green, M.R.:-

"An order which can properly be described as a nullity is something which the person affected by it is entitled *ex facie debito justitiae* to have set aside. As far as the procedure for having it set aside is concerned the court in its inherent jurisdiction can set aside its own order and an appeal is not necessary" 25

Whether the court sets aside its own order or an appellate court does it, the point being made is that there must be an application to a court to have the order set aside otherwise the order subsists - *Gratton Isaac v. Emery Robertson* (1984) 3 WLR 705. Therefore the ruling of Hedges, J. even if it was a nullity (which infact it was not) had to be set aside by a court and since Hedges, J. was no longer around, by an appellate court. 30 35

Quite recently, in the case of *Victor Rossek & Ors v. A.C.B. & Ors* (1993) NWLR (Pt. 312) 382, this court, in a full panel, had cause to consider this aspect of the law. It reiterated in clear terms that there is an unqualified obligation on the part of every person against whom

an invalid judgment of a court of competent jurisdiction is given to obey it unless and until it is set aside by the trial court itself where it acted without jurisdiction or by an appeal court. In his own contribution, Bello C.J.N., stated the law as follows:-

"I entirely agree with Chief Ajayi, *SAN* that a judgment of a court of law is presumed valid and the parties concerned are not only bound to obey it but the authorities charged with responsibility for the enforcement of judgments are also obliged to enforce it unless it is declared a nullity or set aside by a court of competent jurisdiction. It has never been the law of Nigeria as some of our judges, like judicial robots, have been parroting the dicta of Lord Denning in *Macfoy v. U.A.C.* (supra) that there is no need for an order of a court which is void to be set aside by a court and thereby implies that all and sundry have the right to disobey the order. It is not also the law of England: *Isaac v. Robertson* (supra).

It has never been the law that a party may review a judgment, regard it a nullity and disobey it. A prisoner who thinks that his conviction was a nullity cannot with impunity walk out of prison. Similarly, a judgment debtor cannot lawfully resist execution because he considers the judgment against him was null and void. Thus, a judgment of a court of law remains valid and effective unless it is set aside by an appeal court or by the lower court itself if it acted without jurisdiction or in the absence of an aggrieved party: *Williams v. Sanusi* (1961) All NLR 334 at 337; (1961) 2 SCNLR 129; *Ojiako v. Ogueze* (1962) 1 All NLR 58 at 61; *Adebayo v. Shonowo* (1969) 1 All NLR 174 at 194; *Ajao v. Alao* (1988) 5 NWLR (Pt. 45) 802 at 823; *Yonwuren v. Modern Signs (Nig) Ltd.* (1985) 1 NWLR (Pt. 2) 244; *Odiase v. Agho* (1972) 1 All NLR 170 at 176 and *Melifonwu v. Egbuyi* (1982) 9 S.C. 145"

I think it right to refer also to the lead judgment of Ogundare, J.S.C. in the said case of *Rossek v. A.C.B. Ltd.* (supra) where at page 434 of the report he restated the law on the issue as follows:-

"Chief Ajayi, *SAN*, contends that a judgment remains valid until otherwise so declared. Chief Solesi, for the 1st defendant, however contends that a judgment that is a nullity remains so ab initio and does not require an order of court to so declare it.

After examining the authorities, cited by the learned Senior Advocate, I must say I agree with him only to the extent that a judgment remains binding until it is set aside by a competent court. *Hadkinson v. Hadkinson* (1952) P. 285 (1982) 2 All ER 567, 569. To hold otherwise is to do the party against whom judgment has been obtained with the discretion to decide, in his wisdom, that the judgment is invalid and not binding on him. This, to my mind, is an invitation to anarchy. I do not understand the law to be so. And the often quoted dictum of Lord Denning, MR in *Macfoy v. U.A.C. Ltd* (1961) 3 All ER 1169 at 1172 (1962) A.C. 152 to the effect that: "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so, is no more than an obiter given per incuriam - See *Isaac v. Robertson* (1984) 3 All ER 140 at 143 per Lord Diplock. While I agree with the noble Master of the Rolls in his exposition of the distinction between acts that are void and those that are voidable, it is my humble view that his pronouncement (if it was meant to extend to a judgment or order of a court) that there would be no need for an order of court to set aside a void judgment cannot be correct; it is against the weight of judicial opinion. With profound respect, I do not subscribe to such view There is always a presumption of correctness in favour of a court's judgment and until that presumption is rebutted and the judgment is set aside, it subsists and must be obeyed "

It therefore seems to me crystal clear that a party who is aware of an order or judgment of a court of competent jurisdiction, whether valid or null, regular or irregular cannot be permitted to disobey or discountenance it unless and until such an order or judgment is duly set aside by a court of competent jurisdiction. See too *Craig v. Kanseen* (1943) 1 All ER 108 at 111. Exhibit E has not been set aside or declared null and void by any court of competent jurisdiction. Accordingly it must enjoy the legal presumption of regularity and must remain valid and binding on the parties concerned and their privies until it is set aside by the due process of the law. In the circumstance and for all the reasons that I have given above, issue two is resolved

against the appellants.

5 The third issue poses the question whether the respondent has locus standi to submit the issue of the headship of the Oloka family as at 1954 for determination by the trial court. It is the contention of learned counsel for the appellants that the respondent has no locus standi to raise the issue of the headship of Oloka family as he was not and did not claim to be a member of the said Oloka family nor did he have an interest in the Chieftaincy dispute in question.

10 A close study of the pleadings filed by the parties as amended discloses in clear terms that the respondent at no time submitted the issue of the headship of the Oloka family for determination by the trial court. This issue, as I have already observed earlier on in this judgment, was long settled in 1956 when the appointment of Chief
15 Samuel Akinboye as the Oloja of Oka was approved by the prescribed authority, the Osemawe of Ondo, pursuant to the provisions of the Chiefs Law. The issue merely arose incidentally in the resolution of facts in respect of the competing claims of the parties as to who had good title to the land in dispute.

20 The appellants had in their amended statement of claim averred that they obtained their grant of the land in dispute with the approval of the head and the principal members of the Oloka family. This averment of fact was duly traversed by the respondent in his amended statement of defence. The respondent further proceeded, as he was
25 entitled to do, to plead relevant facts in rebuttal of the said averments of the appellants. It seems to me clear that all the respondent did in his pleadings was to set out material facts in proof of his assertion that he purchased the land in dispute from the Oloka family with the consent of the recognised Oloja of Oka and head of the Oloka family. This, he was perfectly entitled to do. It ought also to be stressed
30 that the respondent from his pleadings and evidence before the trial court never invited the court to determine who the Oloja of Oka was in 1956, as a main issue but merely contended that he purchased the land in dispute from the recognised Oloja of Oka and head of the
35 Oloka family. With respect to learned counsel for the appellants, it is my view that the arguments advanced in support of issue three under consideration are entirely academic and inapplicable to the main issue in controversy between the parties in the case.

The Court of Appeal in dealing with the same issue of locus

standi disposed of the matter as follows:-

"It is contended by learned counsel for the appellants that the respondent had no locus standi to raise the issue of headship of the Oloka family as he was not a member of that family. I have examined the amended statement of defence, particularly paragraphs 5-7 earlier quoted by me. What the respondent did in those paragraphs was to set out the factual situation necessary to give validity to the sales to him of the two plots of the Oloka family land and to establish that the issue of the headship of the Oloka family was no longer open to question. As a purchaser of land from the family he was entitled to plead the facts set out in paragraphs 5-7 more so that the appellants in their pleadings held out someone else as head of the family at the time of the sales to the respondent. I therefore find no substance in the appellants' contention on this point. I hold that ground 3 fails."

I agree with the above observation of the Court of Appeal and fully endorse the same. Accordingly issue three is hereby resolved in favour of the respondent.

Issue four questions whether in the absence of a substantive head of a family, the principal members thereof may not transfer a valid title in the family property. The main submission here is that where there is no head of family, the principal members may validly alienate family property on behalf of the family.

I must, again with respect, confess that this issue seems to me entirely academic, highly speculative and totally irrelevant and unrelated to the appeal under consideration. In this regard, it cannot be over emphasised that it is an elementary and fundamental principle of the determination of disputes between parties that judgment must be confined to the issues raised by the parties. It is not competent for a court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties. See Commissioner for Works Benue State & Anor v. Devcon Development Consultants Ltd & Anor (1988) 3 NWLR (Pt. 83) 407; Nigerian Housing Development Society Ltd & Anor v. Yaya Mumuni (1977) 2 S.C. 57; Adeniji & Ors v. Adeniji & Ors (1972) 1 All NLR (Pt. 1) 278 and A.C.B. Ltd v. Attorney-General Northern Nigeria (1969) NMLR 231.

In the second place, parties are bound by their pleadings

128 Akinfolarin v. Akinola (1994) 5 KLR Iguh JSC
and evidence which is at variance with the averments in the plead-
ings goes to no issue and should be discountenanced by the court.
See Emegokwue & Ekpenyong & Ors v. Chief Ayi (1973) 3 E.C.S.C.R.
411; (1973) 1 NMLR 372; Kalu Njokuwu & Ors v. Ekwueme & Ors
(1973) 5 S.C. 293; National Investments and Property Co. Ltd. v.
5 Thompson Organisation Ltd. (1969) 1 All NLR 138 at 142 and
Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172.

Thirdly, a court of trial must limit itself to the issue raised by
the parties in their pleadings as to act otherwise might well result in
the denial to one or the other of the parties of the right to fair hear-
ing. See Metalimpe v. A.G. Leventis & Co. Ltd. (1976) 2 S.C. 91; Kalio
10 v. Daniel-Kalin (1975) 2 S.C. 15; George v. Dominion Flour Mills Ltd.
(1963) 1 SCNLR 117; Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; Shell
BP Ltd v. Abedi (1974) 1 All NLR (Pt. 1) 13 and Alhaji Ogunlowo v. Prince
Ogundare (1993) 7 NWLR (Pt. 307) 610 at 624. In other words, it is not
open to a party to rely on material facts which he should have but
15 had not pleaded at the trial because the other side had, owing to
their absence from the pleadings, lost the opportunity of calling evi-
dence to controvert them. See too J.O. Idahosa & Anor v. D.N
Oronsaye (1959) 4 F.S.C. 166, 1959 SCNLR 407.

The gravamen of the appellants' case from their pleadings is
20 that they obtained a grant of the land in dispute from the head of the
Oloka family and the principal members thereof. This averment was
controverted by the respondent and it was solely on this point that the
parties joined issue with regard to their competing claims to title to the land
in dispute. It was neither raised in their pleading nor was it suggested by the
25 appellants all through the trial of the suit that where there is no head of
family, the principal members of such a family may under some customary
or other law validly alienate family property on behalf of the family. I agree
with the submission of learned counsel for the respondent in his brief to the
effect that whether or not in the absence of a substantive head of family, the
30 principal members can transfer a valid title in the family property is a non-
issue as this was not the appellants' case. While it may be acceptable as an
academic exercise to theorise and speculate, the rules of court governing
pleadings do not recognise such an adventure.

In dealing with this issue which was also raised before it, the
35 Court of Appeal inter alia stated as follows:-

*"It was submitted that it was competent for the Oloka family
to have transferred title in the land in dispute to the appellants in
1954 even where it was held that neither Adegoju nor Akinboye was
the head of the family at that time.*

That may well be but as pointed out earlier in this judgment, this is not appellants' case. It was not pleaded nor evidence led to the effect that on the death of the former Oloka the members of the family met and either appointed an acting head or a committee of managers of the family property. There was evidence to this effect in Aromire v. Oresanya (1938) 14 NLR 116 (supra) but there was no such evidence. In Lukan v. Ogunsusi (supra). The latter case was a take over of power from the head of family just as in this case when in December 1973, Adegoju and his supporters executed Exhibit A in favour of the appellants. The conveyance the 'rebels' executed in Lukan v. Ogunsusi was held to be void. So also is Exhibit 'A' in this case.

Parties must confine themselves to issues raised in their pleadings and it is therefore not now open to the appellants to rely on the rights of members of a family to deal in family property where there is no head of family:- See: James v. Mid-Motors (1978) 11 and 12 S.C. 31."

I am in agreement with the above view of the Court of Appeal which are fully justified by the relevant issues and the evidence before the trial court.

In conclusion, it seems to me clear that the alleged grants of the land in dispute to the appellants in 1954 and in 1973 were made without the knowledge and consent of the recognised head of the Oloka family. The principles governing the grant or sale of family land are so notorious that I need not set them out here again.

It is enough for the purpose of this appeal to state that a grant or sale of family property by the principal members of the family without the consent of the head of the family is void ab initio. See Agbloee v. Sappor 12 WACA 187.

It is not in dispute that between 1950 and 1956, there was no Oloja of Oka and Chief Theophilus Adegoju who along with others purportedly made the alleged grant of the Oloka family land as the head of the family was infact not the head of the Oloka family. On the other hand, it is established that the head of the said family, Chief Samuel Akinboye, the Oloja of Oka, along with the principal members of the family duly made a grant of the land in dispute in 1973 to the respondent under customary law. Under the circumstance, it seems to me that there was abundant evidence before the trial court upon which the appellants' claims against the respondent were dismissed in their entirety.

This appeal is totally devoid of substance and it is accordingly dismissed with N1,000.00 costs to the respondent against the appellants.

UWAIS JSC

5 I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, J.S.C. I agree with the judgment.

It is quite clear from the facts of this case that the grant allegedly made in 1954 and 1973 of the land in dispute to the appellants were made contrary to the laid down principles, which govern the grant or sale of family land under Yoruba customary law, since the grants were made without either the knowledge or the consent of the true head of Oloka family. It is an established fact that the Oloka family had no head (that is Oloja of Oka) for the period 1950 to 1956. Therefore no valid grant could have been made during that period. Chief Theophilus Adegoju, who together with other members of the family, made the purported grant to the appellants of the Oloka family land had no authority to do so. The grant made to the respondent in 1973 of the land in dispute was made at a time when the Oloka family had a recognised head in the person of Chief Samuel Akinboye. As the grant was made with the concurrence of the principal members of the Oloka family, it was a valid grant under customary law.

20 In the circumstances, the appeal fails and it is hereby dismissed. The decision of the Court of Appeal is confirmed with 25 N1,000.00 costs to the respondent.

OGWUEGBU JSC

30 I have read in advance the judgment of my learned brother Iguh, J.S.C. just delivered. I agree with his opinion in all the issues for determination. I also agree with him that the appeal fails and I hereby dismiss it with N1,000.00 costs to the respondents.

ONU JSC

35 I had the privilege of a preview of the judgment just delivered by my learned brother Iguh, J.S.C. dismissing this appeal and with it, I am in entire agreement.

I wish however to add a few words of mine moreso, that I take the firm view that much energy has been dissipated in arguing for the better part of the issues identified by the appellants in their brief, what I consider to be academic matters as well as irrelevant theoretical questions against the judgment of the Court of Appeal sitting in Benin, which dismissed their appeal on 4th May, 1988. The judicial course steered by the case commenced at the Ondo High Court where the appellants as plaintiffs by their Writ of Summons dated 27th May, 1974 and filed on 30th May, 1974, followed by an amended statement of claim, sought the following reliefs:-

"(a) A declaration of title under Native Law and Custom to a piece of land in Ondo

(b) N200 damages for trespass; and

(c) A perpetual injunction restraining the defendant from further trespass over the land.'

Pleadings having been duly filed and exchanged, namely after the parties had amended their Statements of Claim and Defence respectively and the appellants had, in addition, delivered a Reply, the case eventually went to trial. The appellants thereafter gave evidence and called witnesses. The respondent did likewise. In what I consider to be a well considered judgment, the learned trial Judge dismissed all the appellants' claims on 5th September, 1979.

Being dissatisfied with the decision, the appellants lodged an appeal to the Court of Appeal, Benin on 7th September, 1979. The Court of Appeal, Benin (hereinafter referred to as the court below) after listening to the appellants' grouse also dismissed their appeal in its entirety on 4th May, 1988 as hereinbefore alluded to. Being aggrieved by that decision of the court below they have further appealed to this court. I will pause at this juncture to give a resume of the facts of the case if only to demonstrate its origin and its slow but sure career from 1974 to date.

On April 10, 1954 the Oloka family of Ondo which since 1950 had lost its head in the death of the former incumbent and had visibly had no successor to that position (the appellant assert otherwise by saying that Chief Theophilus Adegoju was the incumbent head of that family, during the period) was purported to have made a free gift, under Native Law and Custom of the disputed piece or parcel of land situated at Mile 2 on the Ondo-Okiti pupa Road to the Ansar-Ud-Deen Society, of the appellants, at the instance of Theophilus

Adegoju who testified as P.W.7 in the instant case and supported by all the principal members of that family. It is also appellants' case that since the grant of the land in dispute to them in 1954. Their Ansar-Ud-Deen Society (hereinafter simply referred to as the Society) had been exercising acts of ownership of it by clearing it of its bush, erected a huge signboard and pillars on it and also planted Cassava thereon. They in addition asserted that on 27th December, 1973 the Oloka family through their head, P.W.7 and other principal members, confirmed in writing the grant of 1954 to their society. They further stated that they were in possession of the land since 1954 until when in 1974, the respondent was seen by some members of the society, removing some cassava and their signboard. Thus, the suit giving rise to the case in hand was filed by them.

The respondent's case on the other hand was that the land in dispute originally belonged to the Oloka family; that the head of the Oloka family as a whole is Chief S.A. Akinboye (1st D.W. in the instant case) who is also the Oloja of Oka, approval for him to fill that position having been given by the Osemawe of Ondo who is the Prescribed Authority in accordance with Native Law and Custom. It is also the respondent's case that in May, 1973, 1st D.W. in his capacity as Oloja of Oka and head of Oloka family in conjunction with principal members of that family, granted land in two plots to him under Native Law and Custom; that the grants of the two plots were evidenced in writing by two Memoranda of Agreement dated 14th May, 1973 and the other dated 24th May, 1973 (vide Exhibits K and K1). He thereafter took possession of the plots and caused them to be cleared of weeds, planted several crops thereon and added that he saw neither a pillar nor a signboard before taking possession. He proceeded thereafter to survey the land. To say that all was therefore well within the Oloka family in the face of a factional family feud or rivalry over headship and user of land would be an understatement. Be that as it may, upon the dismissal of the appeal of the appellants by the court below, they promptly lodged a further appeal to this court as earlier stated, filing four grounds of appeal to attack the decision.

The parties exchanged briefs of argument in accordance with the rules of court. The appellants identified four issues, which the respondent ostensibly has adopted, as arising for determination. They are:-

(i) *Whether from the facts pleaded and issues joined by the plaintiffs and the defendant in this case, the point as to the headship of Oloka family in 1954 when the grant of the land in dispute was made to the plaintiffs was not directly in issue in this case so as to raise the*

question of family status for determination. If the answer is in the affirmative, whether the trial High Court had jurisdiction to determine the issue of family status so raised.

(ii) *Whether Exhibit E, a judgment of the Ondo State High Court relied upon by the court below against the appellants was not a nullity on the ground that the judgment was given without jurisdiction.*

(iii) *Whether the respondent had locus standi to submit the issue of the headship of Oloka family in 1954 for determination by the trial court.*

(iv) *Whether in the absence of a substantive head of a family, the principal members of the family cannot transfer a valid title in the family property.*

Not only are the issues submitted for determination by the appellants and set out above excepting issue 2, amorphous they are also not directly on point, since they are academic and hypothetical for the most part, as I shall seek to show in my consideration of them.

On the other side of the coin is the respondent's brief of argument which rather than being brief, succinct and to the point, is verbose. I will say no more about the briefs but go straight to consider the issues hereunder.

Issue 1:

Arguing this issue, learned counsel for the appellants after pointing out how clearly the cause of action in the suit giving rise to this appeal arose before the 1979 Constitution came into being to be precise that it was commenced in 1974 and therefore the law applicable thereto as the law at the time the cause of action arose. The cases of *Mustapha v. Governor, Lagos State* (1987) 2 NWLR (Pt.58) 539 at 549; *Adeyeye v. Ajiboye* (1987) 3 NWLR (Pt.61) 432; and *Uwaifo v. Attorney-General of Bendel State* (1982) 7 S.C. 124 were called in aid and argued that from then it follows that Section 236 of the 1979 Constitution which vests unlimited jurisdiction in the High Court of a State is inapplicable in this case, adding that the jurisdiction of the High Court of Ondo State in so far as this is relevant to this case was governed by Section 9 of the High Court Law of Western

Region Cap. 44, 1959. It is then contended that by virtue of the proviso to Section 9(1) (ibid) once "family status" is in issue in any matter and it is necessary to determine same before the court can finally and effectually pronounce on the subject matter, then the original jurisdiction of the High Court is ousted. For the proposition, the cases of *Nwafia v. Ububa* (1966) NMLR 219; and *Adeyemi v. Opeyori* (1976) 9-10 S.C.31 were cited in support. After referring us to several paragraphs of the Amended Statement of Claim, the Amended Statement of Defence and the Reply of the appellants as well as some of the trial court's findings, learned counsel for the appellants argued that the determination which the learned trial Judge embarked upon in relation to the issue of family status in this case was not merely incidental but fundamental as it informed the very conclusion which the learned trial Judge finally reached in dismissing the appellants' claim. He therefore submitted that the court below wrongly relied on the findings of the trial court on the family status of Adegaju and Akinboye in affirming the decision that the grant to the appellants in 1954 was void. It is further maintained that from the issues joined in this case, it is clear that the validity of the grant made to the appellants in 1954 was hinged on the headship of Oloka family; adding that the determination of the headship of Oloka family in 1954 is an issue of family status. Consequently, he argued, the issue of family status was radically and fundamentally in point in the case and not merely incidental. By virtue of Section 9 of the High Court Law (*supra*), it is contended that the trial court lacked jurisdiction to determine the issue of family status; consequently such determination amounts to a nullity and the decision of the court below based on this determination cannot stand. *Akpene v. Barclays Bank* (1977) 7 S.C. 47 at 59 was cited to buttress the contention adding that once the determination of the headship of Oloka family in 1954, being an issue of family status is removed from the jurisdiction of the trial court in this case, what we have left is the unchallenged evidence of the appellants concerning the grant of family land made by Adegaju as head of the family and other principal members of the family, the validity of which was never challenged by any member of Oloka family. Consequently, he concluded, the 1954 grant made to the appellants remains valid and subsisting. Learned counsel for appellants in his oral submission expatiated on all four issues for determi-

nation. He cited the case of Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.8) 129 at 146 in support thereof.

I agree with learned counsel for respondent's submission that this issue (issue one) like the others is inconsistent with the appellants' pleading in the trial court and so it is either lacking merit or at best purely academic. An illustration will do to bring out what I mean here as follows:-

In their Amended Statement of Claim at paragraph 8, the appellants averred thus:-

"The head of the Oloka family (Oloja of Oka-Theophilus A. Adegoju) and all principal members of the Oloka family gave on behalf of the Oloka family the said land to the Ansar-Ud-Deen Society of Ondo on the 10th of April, 1954 and confirmed the grant in writing on the 10th of April, 1954."

By this averment and their evidence at the trial court, the appellants traced their root of title and source of authority to the Oloja of Oka and head of Oloka family. The respondent in both his pleading and evidence disputed the appellant's averment and case set up in that respect. However, the evidence before the trial court which the learned trial Judge after a careful consideration accepted and the court below upheld is that:-

(a) the question of who the Oloja of Oka and head of Oloka family was had been settled by the approval given to the appointment of D.W.7 by the prescribed and consenting authority - the Osemawe of Ondo on the 14th of July, 1956.

(b) Exhibit 'E', the judgment in Suit No. AK/58/64 confirmed the question of the Oloja and headship of the Oloka family had been settled.

Thus, prior to 1974 and before Exhibit E was instituted, the minor chieftaincy of Oloja of Oka and/or headship of the Oloka family issue/question had been put to rest by the prescribed authority, the Osemawe of Ondo and under the then existing and applicable law, the Chiefs Law Cap. 19, Laws of Western Region of Nigeria, 1959. In other words, that the decision of the prescribed authority approving the appointment of Chief Samuel Akinboye (1st D.W.) as the Oloja of Oka was final and not open to question in any court. See Section 18(3), (4)(a) and (b) of the Chiefs Law (ibid) which provide as follows:-

"18(3)Where there is a dispute whether a person has been appointed in accordance with customary law to a minor chieftaincy the prescribed authority may determine the dispute"

5 *(4) The decision of the prescribed authority*

(a) to approve or not to approve an appointment to a minor chieftaincy or

(b) determining a dispute in accordance with subsection (3) of this section, shall be final and shall not be questioned in any court."

10

See Eguamwense v. Amaghizemwen (1993) 9 NWLR (Pt.315) 1 at 18. It is indeed invidious that appellants who incidentally are not members of the Oloka family should take it upon themselves to question or challenge the approval given to the appointment of 1st D.W. On the face of the pleadings and the issues joined by the parties to the instant case, the question of family status between 1st D.W. and 7th P.W. (Chief Theophilus Adegoju) was therefore no longer open to challenge nor ought to be re-opened in the suit giving rise to this appeal. This is because having been disposed of by the Osemawe of Ondo and ruled upon in Exhibit 'E' as earlier pointed out, it became an incidental and not a fundamental issue ousting the jurisdiction of the High Court as setout in the proviso to Section 9 of the High Court Law (ibid) which provided inter alia:-

25 *"..... the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death."*

(Italics is mine)

30 See also the provisions of Section 73(1)(a) of the Evidence Act which stipulates that:-

"73(1) The court shall take judicial notice of the following facts:-

35 *(a) all laws or enactments and any subsidiary legislation made thereunder having the force of law now or here before in force or hereafter to be in force, in any part of Nigeria;"* and the case of Aromolaran and Anor. v. Oladele & Ors. (1990) 7 NWLR (Pt.162) 359 at 368: and Benson v. Ashiru (1967) 1 All NLR 184 at 188. Be it noted that the main thrust of appellant's claims in the trial court were for a declaration of title under Native Law and Custom to a

piece of land and damages for trespass. They, as it were, did not seek the avoidance of the approval of the appointment of 1st D.W. by the Osemawe of Ondo - the prescribed authority, neither did they seek the nullification of the judgment contained in Exhibit 'E'. From the claim as formulated and the reliefs sought, it is manifestly clear that the question of 'family status' of 1st D.W. and P.W.7 were not directly in issue, rather it was an incidental issue albeit relevant to the just determination of the main issue in controversy, to wit whether the head and principal members of the Oloka family consented to the grant of Oloka family land to the appellants both in 1954 and 1973. The poser whether or not the appellants' grant of the land in dispute was made with the knowledge and consent of the head of the Oloka family in 1954 would at best be misconceived and at worst irrelevant, the appellants having admitted at the trial court that between 1950 and 1956 there was no head of the Oloka family. See the evidence of 4th P.W. (Alhaji Karimu Ijelu) who at page 72 of the Record of proceedings after admitting under cross-examination knowing of the dispute as to who was the Oloja of Oka and asserting that the land in dispute was granted to the Society by the head and principal members of the family went on to admit to the detriment of the appellants' case that:-

"It is the custom that the Oloka family cannot transfer land without the consent of the rightful Oloja of Oka."

The claim of the appellants therefore that P.W.7 (Chief Theophilus Adegoju) was an interregnum "head of the Oloka family" is unsustainable not having been borne out of the pleadings and evidence before the trial court. The conclusion arrived at by the court below when it stated at pages 355-356 of the record that:-

"Parties must confine themselves to issues raised in their pleadings and it is therefore not open to the appellants to rely on the rights of members of a family to deal in family property where there is no head of family....." cannot be faulted.

Besides, the valid decisions of the prescribed authority of 14th July, 1956 and Exhibit 'E' both constitute issue estoppel between the parties' privies. See *Fadiora v. Gbadebo* (1978) LRN 97 at 101; (1978) 3 S.C. 219 at 228; and *Ndiribe v. Ogbogu* (1989) 5 NWLR (Pt.123) 599 at 602, rationes 8, 9, 10 and 15. From facts established at the trial court and confirmed by the court below the Oloka family as a whole did not appoint 7th P.W. and his supporters be-

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tween 1950 and 1954 and even up to 1956 to act as interim managers of the Oloka family land nor was 7th P.W. appointed a factional head of the family or further still an interregnum *"head of the family"* as in *Aromire v.Oresanya (1938) 14 NLR 116*.

Issue 1, theoretical and non sequitur as it is, is accordingly
5 answered in the affirmative more so, in the light of the fatal admission made by learned counsel for them, Chief Gani Fawehinmi during his address when he stated categorically at page 121 lines 31 -33 of the record of proceedings thus:-

10 *"It is also not in dispute that between 1950 and 1956, there was no Oloja of Oka."*

This admission conflicted with the entire case of the appellants as founded on their pleading and over the mountain made of *"family status"* as a fundamental rather than an incidental question that came up as offshoot of the case of the appellants as made and
15 prosecuted. It does not therefore lie in the mouth of the appellants to seek to divest the court of jurisdiction having themselves properly and appropriately invoked its jurisdiction and placed before it a claim or set of reliefs which the High Court is competent to entertain and rightly entertained.

20 Issue 2:

My answer to this issue in the light of all I have said above is that Exhibit 'E' is not a nullity. To declare it null and void as requested by the appellants is misconceived and legally unwarranted. This is
25 because, when deciding the instant case the trial court placed reliance substantially on the appointment of 1st D.W. as the Oloka of Oka and head of the Oloka family by the prescribed authority, the Osemawe of Ondo on 14th July, 1956. There was therefore no question of the court deciding on the *"family status"*. The appellants had as plaintiffs not brought an action to declare Exhibit 'E' a nullity and I
30 cannot conceive of this court in its appellate role either declaring Exhibit 'E' a nullity or the trial court properly or legally proceeding to make only findings at variance with the findings contained therein it being a decision of a court of co-ordinate jurisdiction tendered to show that in the appellants' case for declaration of title to land, damages for trespass and perpetual injunction, there was incidental thereto
35 a minor chieftaincy tussle or dispute between 7th P.W. and 1st D.W. who themselves were not parties to the suit but rather witnesses thereat, a decision of which minor chieftaincy would be decisive of the matter one way or the other - the 1st D.W. being shown to be the victor in

that incidental question. The case of *Aladegbemi v. Fasanmade* (supra) relied on by learned counsel for the appellants for the proposition that an objection to jurisdiction can be raised at any time in the proceedings in a case or in subsequent proceedings arising there- 5 from, is in my respectful view inapposite to the instant case. This is because as there was no appeal against the decision in Exhibit 'E' to set same aside. Being the judgment of a court of co-ordinate jurisdiction, it remains valid and subsisting until set aside on appeal. See *Odiase v. Agho* (1972) 1 All NLR (Pt.1) 170 at 176; *Folorunsho v.* 10 *Adeyemi* (1975) 1 NMLR 128; and *Melifonwu v. Egbuji* (1982) 9 S.C. 145.

Issue 3:

I need commence the brief consideration of this issue by stating categorically as pointed out elsewhere in this judgment, that the respondent did not submit any issue of the headship of the Oloka family in 1954 for determination by the trial court for the sheer reason that the respondent in the first place is and was not a member of the Oloka family. He was a party to an action against the appellants, also not members of the Oloka family who through their society laid 20 claim to the land the respondent equally claimed as that allotted to him by the head of the Oloka family and the principal members thereof. The question of locus standi being made an issue in this case is therefore not only misconceived but down right irrelevant. The respondent never at the trial raised the question of "*family status*" 25 between 7th P.W. and 1st D.W. in that the issue had been settled in the recognition accorded 1st D.W. as Oloka family head by the Osemawe of Ondo as prescribed authority on 14th July, 1956. Faced with the pleading manifested in paragraphs 7, 8 and 9 of the appellants' Amended Statement of Claim, the respondent pleaded the factual situation in his Amended Statement of Defence in paragraphs 5, 30 6 and 7 respectively, namely that he (respondent) purchased his own parcel of land from the Oloka family with the consent of the recognised Oloka of Oka and head of the Oloka family, in the person of Chief S.A. Akinboye (1st D.W.). In their paragraphs 7, 8 and 9 of their 35 Amended Statement of Claim hereinbefore alluded to, the appellants had pleaded and in their evidence held out someone else, i.e. 7th P.W. Chief Theophilus Adegoju as head of the Oloka family. To the respondent therefore the tracing of his root of title and thus the

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validity and authenticity of his purchase from the Oloka family was
paramount. As locus standi denotes legal capacity to institute pro-
ceedings in a court of law (See Thomas v. Olufosoye (1986) 1 NWLR
(Pt.18) 669 at 685 S.C.; Fawehinmi v. Akilu (1987) 4 NWLR (Pt.67)
797; and Bolaji v. Bamghose (1986) 4 NWLR (Pt.67) 632 at 646 the
5 poser in this issue (Issue 3) as to whether the respondent had locus
standi to submit the issue of the headship of Oloka family in 1954 for
determination by the trial court in the light of all I have said hereinbe-
fore is at best a non-issue or at the bottom line irrelevant. The headship
of Oloka family (a minor chieftaincy) came into focus not to deter-
10 mine family status but to establish an incident thereto vide Section
18(3) of the Chief Law of Western Nigeria (ibid).

Issue 4.-

Here again the appellants have misconceived the gravamen
15 of their case by posing this issue, to wit by enquiring whether in the
absence of a substantive head of family, the principal members of the
family cannot transfer a valid title in the family properly. Not only is
this issue irrelevant, it is, in my considered view hypothetical. In the
first place at page 72, lines 30-35 of the record, 4th P.W., Alhaji Karimu
20 Ijelu testified as follows:-

*"In 1954, the land in dispute was granted to Ansar-Ud-Deen
Society by the head and principal members of the family. It is
the custom that the Oloka family cannot transfer land with
out the consent of the rightful Oloja of Oka."*

25 Secondly, at page 121 of the record, the appellants' counsel
admitted the following in his address before the trial court:-

*"It is also not in dispute that between 1950 and 1956, there
was no Oloja of Oka."*

30 Thirdly, appellants' counsel further admitted at page 122 of the Record
*"Chief Akinboye became the Oloja and head of the Oloka family
only in 1956"*. By the above admissions it is no more than a non
issue to speculate what would happen in the absence of a sub stantive
head of the family should the principal members purport to transfer
35 a valid title in the family property. This is because it was not the ap-
pellants' case that the principal members in the absence of the sub-
stantive head of the Oloka family transferred the land to them (ap-
pellants). What the appellants pleaded and the evidence they ad-
duced was that a free gift of the land in dispute was made to them by
the head of the Oloka family and all the principal members of the

Oloka family by PW1. See paragraphs 7, 8, 9, 10, 11 and 13 of the Amended Statement of Claim. See Exhibit 'A'.

The issues as formulated here which talks of the appellants buying the land in dispute either in 1954 or 1973 from the Oloka family is therefore at best an indulgence in a hypothetical or academic exercise which a court of law ought not to embark upon or engage in. See *Ikenye Dike & 2 Ors. v. Obi Nzekwa II & 3 Ors.* (1986) 4 NWLR (Pt.34) 144. Be that as it may, if at the trial in the trial court the picture which emerged at the end of the day through the admissions of learned counsel for the appellants alluded to above was that the Oloka family between 1950 and 1956 had no recognised head of Oloka then, any sale or disposition of the disputed Oloka family land taking place between a member or members of the Oloka family during that period with the appellants as buyers without the consent of the head of the family as in Exhibit 'A' (supra), was void. See *Lukan v. Ogunsusi* (1972) 5 S.C 40; *Ekpendu v. Erika* (1959) 4 FSC 79, (1959) SCNLR 186; *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt.110) 417 at 420; *Oyebanji v. Okunola* (1968) NMLR 221; and *Akerele v. Atunrase* (1969) 1 All NLR 201. And if such a sale took place after 14th July, 1956 i.e. after the Osemawe of Ondo, the prescribed authority had approved the appointment of 1st D.W. (Chief S.A. Akinboye) as the recognised Oloka of Oka then, any much purported sale of the disputed land or ratification thereof in which he (1st D.W.) was not a party would be void ab initio, See *Agbole v. Sappor* 12 WACA 187.

This is on the proposition that any purported sale of the same disputed parcel of land during the same period (1950-1956) to the appellants by 7th P.W. and the principal members of the Oloka family would similarly be void in that such a sale or disposition would amount to disposing of property over which they had no right - *Nemo dat quod non habet*. See *Akerele v. Atunrase* (supra). What the appellants pleaded and the evidence adduced at the trial was that 'a free gift of the land in dispute was made to them by the head of the Oloka family and all the principal members of the Oloka family vide paragraphs 7, 8, 9, 10, 11 and 13 of the Amended Statement of Claim at page 63 of the Amended Statement of Claim at page 63 of the record. On the state of the pleadings and the evidence led by the appellants in proof of these averments Issue 4 cannot arise for determination in this appeal principally because the appellants' case is that they ob-

tained their grant from P.W.7 who they regarded as the head of the Oloka family. It is not their case that they obtained their grant from the President of Oloka family and all the principal members of the said family. Hence, I agree with the submission of learned counsel for
 5 the respondent that the views expressed by the court below at page 355, lines 10-35 and page 356 lines 1-5 of the record, cannot be successfully impeached. The court below (per Ogundare, J.CA. as he then was) said:-

*"It was submitted that it was competent for the Oloka family
 10 to have transferred title in the land in dispute to the appellants in 1954 even where it was held that neither Adegoju nor Akinboye was the head of the family at that time.*

*That may well be but as pointed out earlier in this judgment,
 15 this is not pleaded nor evidence led to the effect that on the death of the former Oloka the members of the family met and either appointed as acting head or a committee of managers of the family property. There was evidence to this effect in Aromire v. Oresanya (supra) but evidence there was no such evidence of Lukan v. Ogunsusi (supra).*

*The latter case was a take-over of power from the head of
 20 the family just as in this case when in December, 1973, Adegoju and his supporters executed Exhibit 'A' in favour of the appellants. The conveyance the "rebels" executed in Lukan v. Ogunsusi was held to
 25 be void. So also in Exhibit 'A' in this case.*

*Parties must confine themselves to issues raised in their plead-
 ings and it is therefore not now open to the appellants to rely on the
 30 rights of members of a family to deal in family property where there is no head of family - See James v. Mid-Motors (1978) 11 and 12 S.C. 31."*

As it was not the appellants' case on the pleadings that there was an interregnum between 1950 and 1954 or that 7th P.W. was an interregnum head of the Oloka family, from their unequivocal and
 35 unambiguous stand taken in these averments, their Issue 4 ought to be struck out as an adventure in academics. Hence, as the issue raised here did not form part of their case; neither was it considered by the trial court nor the court below; the parties are bound by the case each put forward and tried to conclusion in the trial court. None of

them can now be heard to make a new case in this court on appeal without amending their writ of summons and pleadings. See *Kalio v. Daniel-Kalio* (1975) S.C. 15 at 21; *Etowa Enang & Ors. v. Fidelis Ikor Adu* (1981) 11-12 S.C. 25 at 36; and *Egonu v. Egonu* (1978) 5 11-12 S.C. 111 at 123.

For the fuller reasons set out in the judgment of my learned brother, Iguh, J.S.C. with which I entirely agree, I too will dismiss this appeal and make the same consequential orders inclusive of those as to costs. 10

ADIO JSC

I have had the advantage of reading, in draft, the judgment 15 just delivered by my learned brother, Iguh, J.S.C., and I agree with his reasoning and conclusion. The appeal has no merit and I too dismiss it with N1,000.00 costs to the respondent.

Appeal dismissed. 20

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