

taincy stool. Members of the appellant's family instituted an action against the 1st respondents' family over the chieftaincy matter in which the appellant represented his family as counsel. This suit was dismissed by the trial high court and there was no appeal against the judgment of the trial court. The appellant who appeared as counsel for his family in the former suit instituted against the 1st respondent's family has instituted the present proceedings against the 1st respondent's family over the same chieftaincy issue as in the former suit that was dismissed. His action was dismissed by the trial court which held among other things that the appellant is estopped per rem judicatam from instituting his action having participated in the former dismissed suit over the same issue.

He appealed to the Court of Appeal which also dismissed his appeal. He has further appealed to the Supreme Court to determine inter alia, whether he is estopped from instituting his present action in view of the former dismissed suit instituted by his family against the 1st respondent's family over the same chieftaincy issue and in which he acted as counsel to his family.

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Estoppel - Where the issues are the same

1. I have no reason to disagree with the concurrent findings of the two courts below on this question of whether the issues in the present proceedings are the same as the issues in the former suit. In both cases, the main issue is the membership of the 1st Defendant in the Afelele Ruling House. I am satisfied that the issues in the two cases are the same. (P. 266 C)

Estoppel - Doctrine of Standing by

2. The Plaintiff being a member of the Afelele Ruling House is bound by any decision in HIF/28/81 against the plaintiffs in that suit wherein they represented members of the said Ruling House. This apart, Plaintiff knew all along about that case as he was a junior counsel in it but did not seek to be joined as a named party; he stood by and was content being a counsel in it. On the doctrine of standing-by as propounded in Wytcherley v. Andrews (1871) L.R. 2P. & M. 327. 328 he would still have been caught by the doctrine of estoppel per rem judicatam. (P. 266 E)

Final or Interlocutory Order - Determining factor

3. It is trite law that it is by looking “at the order made and not the nature of the proceedings that the question is determined whether the said order is final in that it finally determines the rights of the parties, or interlocutory. (P. 268 D)

Judgment - Binding on parties until appealed against

4. While Aparar, J expressly refused, rightly or wrongly, the plaintiffs’ application for interim injunction pending determination of their suit, he made no express order in respect of the substantive action. His comments, however, appear to have put an end to the claims in Suit HIF/28/81; it has, in fact, terminated since then. The reasonable inference one can draw from his comments is that he equally refused those claims in limine on the premise that the 2nd defendant in that suit had been made the Olowu. That being so, he had thereby put a finality to the rights of the parties in that suit. The plaintiffs and those members of the Afelele Ruling House they represented (including the Plaintiff in the present proceedings) did not avail themselves of their right of appeal to the Court of Appeal. they remain, therefore, bound by Aparar J’s decision, however right or wrong it may be. (P. 269 G)

Plea of res judicata - Where the ingredients abound

5. All the ingredients of a plea of res judicata having been satisfactorily established by the Defendants, I am, therefore, in agreement with the two courts below that the plea succeeded and on that ground alone, the Plaintiffs’ claims were rightly dismissed (P. 270 A)

Concurrent findings of lower courts

6. There are thus concurrent findings of the two courts below to the effect that the 1st Defendant belongs to the Afelele Ruling House. The attitude of this Court to such concurrent findings has been laid down in a long line of cases. I have examined the evidence on record - both oral and documentary and find no good reason to disturb the concurrent findings in this case. The findings made by the learned trial Judge and affirmed by the Court of Appeal were reached after a dispassionate consideration of the totality of the evidence adduced in the case and ascription of credibility to the witnesses and are supported by the evidence. I affirm those findings. (P. 271 A)

NOTABLE POINTS OF INTEREST

BELGORE JSC***1. The aim of pleadings***

The “aim of pleadings is to allow the case of each party to be stated” clearly without ambiguity so that the opponent will know precisely the issues he is facing. (P. 273 E)

2. Pleadings - Must be strictly adhered to

Throughout the journey of a case from the trial Court up to the exhaustion of all appellate remedies a party may have, there must be strict adherence to what was fought at the trial Court by way of pleadings. Any matter not pleaded will have no bearing on the decision. (p. 273G)

3. Estoppel per rem judicatam - when it operates

Estoppel per rem judicatam operates when there has been a final decision by a Court of competent jurisdiction, whose decision has not been challenged legally e.g. by way of appeal, or if appealed against, final decision has been made by competent Court or Courts, and that decision is between their privies, and the issue or subject matter is the same. (P. 274 D)

ONU JSC***4. Estoppel per rem judicatam - Meaning of “party”***

For the purpose of the application of estoppel per rem judicatam, ‘party’ means not only a person named as such but includes one who, cognizant of the proceedings and of a fact that a party thereto is professing to act in his own interest, allows his battle to be fought by that party intending to take the benefit of the championship in the event of success. (P. 279 G)

REPRESENTATION

T.O. Akinrotimi Esq. for the 1st Respondent.

2nd Respondent unrepresented.

Appellant absent.

CASES REFERRED TO

Alase v. Ilu (1965) NMLR 66

- 256 Balogun v. Adejobi (1995) 1 KLR Ogundare JSC
 Wytcherley v. Andrews (1871) L.R. 2P. & M. 327
 Maradesa v. Governor of Oyo State (1986) 2 NWLR (pt 27) 125
 Ezewani v. Onwordi (1986) 4 NWLR (pt33) 27
 Salami v. Oke (1987) 4 NWLR (pt 63) 1
 Sodipo v. Lemminkainen (1985) 2 NWLR (pt 8)
 B Nwaneri v. Oriwu (1959) 4 FSC 132
 Nwosu v. Board of Customs and Excise (1988) 5 NWLR (Pt. 93) 225
 National Insurance Corporation of Nigeria v. Power and Industrial Eng.
 Co. Ltd. (1986) 1 NWLR (Pt 14) 47
 Atta II v. Bonsra (1958) AC 95
 C Technistudy v. Kelland (1976) 3 All E.R. 632
 Bozson v. Altrincham Urban District Council (1903) 1 K.B. 547
 Oguntimehin v. Tokunbo (1957) 2 FSC 56
 Cardoso v. Daniel (1986) 2 NWLR (pt 20) 1
 Savage v. Uwechia (1972) 1 All NLR (Pt. 1) 251
 D Management Enterprises v. Otusanya (1987) 4 SC 368
 Ojomu v. Ajao (1983) 9 S 22
 Are v. Ipaye (1990) 2 NWLR (pt 132) 298

STATUTES & RULES REFERRED TO

- E Supreme Court Rules 0.6 r. 8 (6)
 Evidence Act Cap 112 1990 S. 54
 Constitution of the Federal Republic of Nigeria 1979 S. 33(1)

LEAD JUDGMENT BY OGUNDARE JSC

- F By paragraph 52 of his very prolix amended Statement of Claim
 the plaintiff (who is the appellant) claimed from the defendants (now
 respondents):-
- (a) Declaration that the installation and/or coronation of the 1st
 G defendant as the Olowu of Orile-Owu is unlawful, null and void in that he
 is not a member of the Afelele ruling house whose turn it is to present a
 candidate for the stool and cannot validly be appointed as Olowu of Orile-
 Owu.
- (b) Declaration that the appointment of the 1st defendant as Olowu
 H of Orile-Owu is inconsistent with and contrary to the Olowu of Orile
 Owu Chieftaincy Declaration of 1958, as amended by Justice Ademola
 Commission of enquiry and is therefore null and void and of no effect, in
 that the 1st defendant is not a member of the Afelele ruling house.
- (c) Setting aside the appointment of the 1st defendant as Olowu

(d) A perpetual injunction restraining the 1st defendant, his servants, privies and agents from performing the functions, duties and rites attachable to the stool of Olowu of Orile-Owu.

(e) A perpetual injunction restraining the 2nd defendant from dealing with the 1st defendant as a member of Afelele Ruling House. *B* (italics are mine)

Pleadings were duly filed, exchanged and amended. The case later proceeded to trial at the conclusion of which the learned trial Judge (Adekola, J) dismissed plaintiff's claims, holding:

(a) that the plaintiff was estopped per rem judicatam from instituting his action, and *C*

(b) that on the merit, the claims must fail in that the 1st defendant is a member of the Afelele Ruling House whose turn it was to present a candidate to fill the vacancy in the Olowu of Orile-Owu chieftaincy.

The plaintiff was dissatisfied with the trial court's judgment and appealed unsuccessfully to the Court of Appeal (Ibadan Division) (Coram: Kutigi, J.C.A., as he then was, Omololu-Thomas and Sulu Gambari, J.C.A). He has further appealed to this Court upon 18 amended grounds of appeal. *D*

Briefs of arguments have been filed and amended by the parties. *E*
The plaintiff also filed an Amended Reply Brief. The plaintiff, who is a legal practitioner, appeared in person at the trial and in the Court of Appeal and in this Court. The defendants were represented by counsel. At the hearing of the appeal, the plaintiff was absent; he was reported ill but wrote to the court intimating that he was adopting and relying on his amended Brief and Reply Brief. Learned counsel for the 1st defendant appeared, he too adopted and relied on 1st defendant's Brief and offered no oral arguments. Counsel for the 2nd defendant was absent and being satisfied that he was aware of the hearing date, we considered the appeal argued on his brief - vide Order 6 rule 8(6) of the Rules of this Court. *F* *G*

The facts of this case briefly are as follows: On 16/7/81, Oba Saka Ogungbe Akinjobi II, the Olowu of Orile-Owu died and thereby created a vacancy in the chieftaincy. It was the turn of the Afelele Ruling House to present a candidate to fill the vacancy. The plaintiff is a member of that House on the maternal side. The 1st defendant claimed to be a member of the said House on the paternal side but plaintiff disputed this fact. After series of meetings, the members of the Afelele Ruling House *H*

finally submitted only the name of the 1st defendant to the Kingmakers.

The plaintiff denied this. The three available kingmakers, that is, Akogun, Olosi and Ejio, met and considered the nomination of the 1st defendant and unanimously appointed him to the office of Olowu of Orile-Owu. This appointment was approved by the 2nd defendant on 30/11/81 and the appointment was published in the Oyo State Gazette No. 49, Volume 6 of 3/12/81.

Some members of the Afelele Ruling House were unhappy about the 1st defendant's succession to the title of the Olowu of Orile-Owu. Hence Johnson Oyebamiji Maradesa, Joel Fasanya, Atinuke Irefin and Salawu Ogunsina, acting for themselves and on behalf of the Afelele Ruling house instituted Suit HIF/28/81 against James Adeboye Aworinde (1st defendant's half brother), 1st defendant, Irewole South-East Local Government Council with its Headquarters at Orile Owu and the Governor of Oyo State that is 2nd defendant in the present proceedings claiming:-

“(1) Declaration that the 1st and 2nd defendants, their servants, agents or privies are not members of the Afelele Ruling House of Orile Owu and therefore cannot vie for, contest, be nominated or be appointed as Olowu of Orile-Owu through Afelele Ruling House.

(2) An order for injunction restraining the 1st and 2nd defendants, their agents, servant” and privies from parading themselves about as members of the said Afelele Ruling House or otherwise contesting for the vacant stool of Olowu of Orile-Owu.

(3) An order of injunction restraining the 3rd and 4th defendants from treating and considering the 1st and 2nd defendants as members of Oba Afelele Ruling House of Olowu Chieftaincy title of Orile-Owu, for the purpose of appointing anyone of them as the Olowu of Orile-Owu through the Afelele Ruling House.”

On the interlocutory application for an interim injunction brought before the trial High Court presided over by Apará, J. (as he then was) all the three claims were impliedly refused. The plaintiff was a junior counsel appearing for the plaintiffs in that suit. There was no appeal against Apará,J.'s decision given on 24/2/82.

The plaintiff commenced the present proceedings on 1st May, 1982. On the state of the pleadings and evidence led at the trial, the learned trial Judge observed in his judgment, and quite rightly in my view, as follows:

"But the issues which are to be determined by the Court in this case are as follows:-

(a) Is 1st defendant a member of Afelele Ruling House whose turn it is to present the next of Olowu of Orile-Owu after the demise of late Oba Saka Ogungbe?

(b) If the 1st defendant should be found by the court to be a member of Afelele Ruling House, was his selection as the next Olowu of OrileOwu done according to the custom and tradition of Orile-Owu and according to the provisions of the Chiefs Law?

(c) More importantly will the doctrine of res judicata apply against the plaintiff who instituted the present action when as a matter of fact, he was a junior counsel in Suit HIF/28/81, which was subsequently dismissed by the High Court No.1"

Strangely, however, the plaintiff introduced at the Court of Appeal a new issue not raised in the pleadings. This new issue related to the competence of Irewole South East Local Government to initiate the process of filling the vacancy in the Olowu of Orile-Owu chieftaincy. This issue was resolved against him by the court below. The fact is that that court was in error to have allowed the plaintiff to raise the issue at all. The basis of the declaration sought in his claims (1) & (2) is the allegation that the 1st defendant was not a member of the Afelele Ruling House and not that the Irewole South-East Local Government was incompetent (not being the designated council) to initiate the process of filling the vacancy in the chieftaincy in dispute. He did not raise this issue in his pleadings nor did he join the Council as a party to the proceedings. At no time did he amend his pleadings and claims.

Indeed, going by his pleadings the plaintiff dealt with this council and its Secretary as the competent council and could not at the appeal stage resile from this position. In his amended statement of claim he pleaded, inter alia thus:

"24. Immediately the transition of the late Olowu was announced, the ruling house caused a letter to be addressed to the Secretary of the Council, informing him that only members of the ruling house are competent to elect a successor to the late Olowu.

25. The Secretary by a letter Ref. ISELGC45/31 of 7th September, 1981, with the view (sic) to ascertaining who the family head but the meeting ended in a deadlock because he invited among other persons the 1st defendants, Messrs. K. Adegbite, Adekunle Ogunyemi, and Momodu Asawo, members of the Elere and Usupori chieftaincy families.

26 The plaintiff and other members of the ruling house then refused to deliberate on the matters touching the affairs of their ruling house with the people whom they have no nexus

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B 29. At the said meeting, the Secretary used insulting languages against the leading members of the ruling house who protested against the way he was conducting the meeting, especially by getting instructions from Messrs. K.A. Adegbite, A. Ogunyemi and M. Asawo, who are not members of the ruling house.

C XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

31. By a letter dated the 6th October, 1981, the Secretary, Irewole South-East Local Government Council, Orile-Owu, forwarded the name of the 1st defendant to the office of the Governor, Ibadan, recommending him as the Olowu-elect and the Governor has approved the appointment, and 1st defendant was installed the Olowu on 11th December, 1981, and his coronation has been fixed for Saturday, the 13th of March, 1982, when he is also scheduled to receive the instrument of office from the 2nd defendant.

E 32. The nomination paper sent to the Secretary by Oje family and Aworinde family and the recommendation based on the said nomination paper were tainted with reprehensible frauds:

Particulars of frauds:

F (a) Since the abortive meetings of 25th September, 1981, the Secretary has never written to the ruling house, for further deliberations. Plaintiff will rely on the minutes of the meeting of 25th September, 1981.

(d) The thumb impressions of some chiefs were forged, especially of two dead kingmakers:-

G (i) Chief Bello Oluyonbo, the late Orunto who died on the 19th July, 1981, just three days after the demise of the late Olowu. Mr. Olayinka Oluyonbo, the late Orunto's eldest son, thumb printed as Chief Orunto, in the presence and in the office of the Secretary of Irewole South-East Local Government Council.

H (ii) Chief Odole died early in October, 1981 and before his death, he had been confined to bed for the past four years. His thumb impression was forged on the nomination paper in the presence and in the office of the Secretary of Irewole South East Local Government Council.

Also in the action HIF/28/81 instituted by the representatives of

the Afelele Ruling House to which the plaintiff admittedly belongs, the Irewole South-East Local Government was joined as a party by the plaintiffs in that case. In his evidence plaintiff testified:

“After the transition of Oba Saka Adeleke Ogungbemi II, my ruling House wrote to the Secretary of the Irewole South-East Local Government that it was only my family which is competent to select a candidate with a view to filling the vacant stool of Orile-Owu. The Secretary, Mr. Onigbogi wrote us a letter acknowledging the receipt of our letter. He later wrote another letter fixing a meeting in his office of 14/9/81.

Under cross-examination he, however said:

“Irewole South East Local Government has no legal backing. It was not created according to the Constitution.”

The plaintiff has raised in his amended grounds of appeal and written brief this issue once again. This issue is incompetent in this appeal and, therefore, additional grounds 6-8 are hereby struck out by me.

Before I go into the real issues in this appeal I need dispose briefly of another issue raised by the plaintiff. This is contained in his amended ground 16 which reads:

“The learned Justices of the Court of Appeal failed to exercise their judicial functions when they failed to set aside the appointment and approval of the 1st respondent, actions which were, a flagrant abuse of the process of law

Particulars:

(i) There was a motion dated the 3rd day of October, 1981, praying for an interim order to restrain the 2nd respondent from approving the appointment of the 1st respondent. See: Exhibits G-G4.

(ii) Despite the notice, the 1st respondent was appointed and his appointment was approved by the 2nd respondent.

(iii) The learned Principal State Counsel for the 2nd respondent gave an undertaking that approval would not be given before the final determination of the Suit No. HIF/11/81 - Maradesa v. Aworinde & Ors.”

The complaint here relates to what happened in the course of the proceedings in Suit No. HIF/28/81 against which there has been no appeal. If there had been a breach of an undertaking given by counsel in that case, it was for the plaintiffs therein to complain and not for the plaintiff to raise it in the present proceedings. It does not arise in the present proceedings and additional ground 16 will consequently be struck out. It is struck out by me.

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Plaintiff's amended ground 17 reads:

"The Learned Justices of the Court of Appeal failed in their judicial duties when they did not make any pronouncement on the conduct of the learned counsel to the 1st respondent, which misled the court to believe that Exhibit 'B' on which the Court of Appeal based its judgment, was tendered at the trial.

Particulars

- (i) The learned counsel to the 1st respondent wrote in his amended brief that Exhibit 'B' on which the Court of Appeal, made its finding was tendered in the Court below.*
- (ii) The learned counsel to the 1st respondent in his brief denied taking part in Suit No: M/75/84 - Prince Maradesa v. M.O.A. Adejobi.*
- (iii) The attention of the court below was called to the above particulars in the amended reply to the appellant."*

I do not see how this forms a complaint against the correctness of the judgment appealed against. It would appear that the plaintiff took pleasure in raising dust here and there rather than concern himself with the real issues involved in this case. I will say no more on this ground.

Two main issues arise for consideration in this appeal, that is:

1. Whether the plaintiff was estopped per rem judicatam from instituting this action, and
2. Whether the 1st defendant is qualified to be appointed Olowu of Orile-Owu, that is, whether he is a member of the Afelele Ruling House.

It is with these two issues I will now concern myself before considering other issues not hitherto disposed of.

1. Res Judicata:

Section 54 (formerly section 53) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990 provides:

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

The estoppel here is what is generally referred to as res judicata. The ingredients of the plea are stated by this Court in Idowu Alashe and Ors v. Sanya Olori Ilu (1965) NMLR 66 as follows:

(1) before the doctrine of estoppel per rem judicata can operate, it must be shown that the parties, issues, and subject matter were the same in the previous action as those in the action in which the plea is

(2) before the judgment in the earlier case can bind the plaintiff's family, it must be shown that the family knew of the case and participated in it in such a way that they can truly be regarded as parties.

(3) the principle as stated in *Wytcherley v. Andrews* (1871) L.R. 2 P & M. 327,328 can only apply in cases where the party sought to be estopped knew what was passing, and was content to stand by and let someone else in the same interest champion his cause and fight his battle.

Both the trial court and the court below have found that the plea of *res judicata* set up by the defendants succeeded. The plaintiff has contended in this appeal that the issues in Suit No. HIF/28/81 were not the same as the issues in the present proceedings. It is not disputed though that the subject matter - the Olowu of Orile-Owu chieftaincy is the same in the two actions.

1st defendant pleaded *inter alia* as follows in his amended statement of defence.

"23. Prince Johnson Oyebamiji Maradesa and 3 Ors instituted an action against Chief James Adeboye Aworinde and 3 Ors in Suit Number HIF/28/81 at the Ile-Ife High Court number one. The present 1st defendant was the 2nd defendant whose name was wrongly referred to as Moses Oladosu Adejobi Aworinde in the same Suit No. HIF/28/81.

24. That plaintiff was one of the counsel that unsuccessfully argued two motions for the plaintiffs/applicants in Suit No. HIF/28/81 at the Ife High Court No. One. The 1st defendant will rely on the writ of summons and the bodies of the motions in suit No. HIF/28/81 at the trial of this case.

25. The 1st defendant will contend at the trial of this case that the plaintiff is estopped from instituting the present action against him as he, the plaintiff, preferred to play the role of an advocate to that of a plaintiff while Suit No. HIF/28/81 was pending against the 1st defendant and three other Defendants at the Ile-Ife High Court Number one."

The 2nd defendant, for his part, pleaded *inter alia*:

"8. The 2nd defendant pleads that the plaintiff is estopped per rem judicata by virtue of the Ruling in Suit No. HIF/28/81 between Prince J.O. Maradesa and 3 Ors (For themselves and on behalf of Afelele Ruling House) and Chief James A. Aworinde and Moses O. Adejobi Aworinde (For themselves and on behalf of Aworinde (For themselves and on behalf of Aworinde Parakoyi Family) and 2 Others in that:
(a) The claim of the plaintiffs in the said action is in respect of substan-

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tially the same cause of action as that alleged in the Statement of Claim herein and the issues raised by the Statement of Claim in the said action were substantially the same as those raised in the Statement of Claim in this action. The 2nd defendant will at the trial refer to the said pleadings in the said action for their true terms and the issues raised therein.

B (b) The said action came on for trial before His Lordship the Honourable Justice Akin Aparo who, after hearing all the evidence tendered; by the plaintiffs and the defendants, dismissed the said action in the ruling delivered on 24th February, 1982. The plaintiff being dissatisfied have since filed an appeal against the said ruling.

C (c) The 2nd defendant will rely on this ruling as estopping the plaintiff from instituting the present action as the ruling covered the claims in this case.

9. The 2nd defendant in the alternative to paragraph 8 further pleads that the plaintiff is estopped from relitigating the issues of nomination and appointment of the 1st defendant as the Olowu of Orile- Owu the plaintiff having been represented in the said Suit No. HIF/28/81 by the plaintiffs named therein.”

In his reply to the 2nd defendant, the plaintiff pleaded:

E “6. The plaintiff avers in respect of paragraph 8 that the Suit No. HIF/28/81- Prince J. O. Maradesa & Ors v. Chief J.A. Aworinde & Ors was never tried and dismissed.”

At the trial, PW8, Johnson Oyebanji Maradesa gave evidence and in answer to a question by the plaintiff who led the witness in examination-in-chief, testified thus:-’

F “Afelele Ruling House mandated you to institute this action.”

The witness was a plaintiff in Suit No. HIF/28/81 against the two defendants and Other. Testifying under cross-examination at the trial of the present action, he deposed thus:

G “Yes I and three others instituted a civil action against the 1st defendant, his late brother, J.A. Aworinde and two Ors (sic) the High Court No. one Ile-Ife. The plaintiff in this case was one of the counsel who appeared for me and the others in the case which I instituted against the 1st defendant and three others. The Suit No. was HIF/28/81. The H plaintiff in this case was present in court when the case HIF/28/81 was being heard by the Judge in High Court No. one.

The plaintiff admitted as much in his evidence under cross-examination when he said:-

“I was the junior counsel in Suit HIF/28/81.”

Dealing with the issue of res judicata pleaded by the defendants, the learned trial Judge set out and compared the claims and averments in the Statement of Claim in HIF/28/81 (the former action) and HIF/11/82 (the present action) and concluded:

“Having regard to the type of writ of summons filed in Suit HIF/28/81 and the Amended Statement of Claim filed by the plaintiff in support of the writ, there is no doubt that the cause of action in Suit HIF/28/81 is substantially the same with the cause of section (sic) in Suit HIF/11/82. There is no doubt that the plaintiffs brought their action in Suit HIF/28/81 (for themselves and on behalf of Afelele Ruling House) and the plaintiff in Suit HIF/11/82 brought his action on his personal capacity but the cause of action in both Suit HIF/28/81 and Suit HIF/11/81 are the same. The cause of action in the two suits substantially is whether or not the 1st and 2nd defendants in Suit HIF/28/81 are members of Afelele Ruling House whose turn it is to present the candidate or candidates for the vacant stool of Olowu of Orile-Owu. If one carefully peruses the Amended Statement of Claim filed in Suit HIF/28/81 it will be crystal clear that many paragraphs in it are identical in contents to many paragraphs in the Amended Statement of Claim filed in support of the Writ of Summons filed in Suit. HIF/11/82. Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 of the Amended Statement of Claim in Suit HIF/28/81 are correspondingly identical with paragraphs 3, 4, 5-16 of the Amended Statement of Claim in Suit. HIF/11/82.

Paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 of the Amended Statement of Claim in Suit HIF/28/81 are correspondingly identical with paragraphs 18-34 of the Amended Statement of Claim filed in Suit HIF/11/82. Paragraph 40 of the Amended Statement of Claim in Suit HIF/28/81 is identical with paragraph 35 of the Amended Statement of Claim in Suit HIF/11/82. Paragraph 51 is identical with paragraph 42 of the Amended Statement of Claim in Suit HIF/11/82 while paragraph 55 is identical with paragraph 44 of the Amended Statement of Claim in Suit HIF/11/821”

In the lead judgment of Omololu-Thomas, J.C.A. (with which the other Justices that sat on the appeal in the court below agreed), the learned Justice said:

“I am also satisfied that the subject-matter, cause of action and the issues in the earlier suit are in substance the same as in the present suit. It seems to me that the earlier suit as disposed of hung on the membership of the 1st respondent in this suit as a member of Afelele Ruling House- the same premise on which the present suit as formulated hung.

The orders of injunction sought in the present suit are on similar terms as those of the earlier suit. Both actions relate to the same chieftaincy dispute and the cause of action: the filling of the vacant stool by the installation, nomination and appointment of the incumbent Oba of Orile-Owu. The authorities cited to wit: Okafor v. Idigo (1984) 1 SCNLR 481 at B 512; Chiekwe . v. Obiora (1960) 5 FSC 258 at 262; (1960) SCNLR 47; Ibiyemi v. Lawani Olusogi (alias Lawani Adesubu) (supra) and Okusanya v. Akawo (1941) 7 WACA 1 at 5 are in my humble view unhelpful to the appellant. The learned trial Judge was in my opinion correct in finding C that the appellant in this suit is estopped from relitigating the same cause of action as in the earlier suit (HIF/28/81), as respects which he was a 'party' in the same interest."

I have no reason to disagree with the concurrent findings of the two courts below on this question of whether the issues in the present D proceedings are the same as the issues in the former suit. In both cases, the main issue is the membership of the 1st defendant in the Afelele Ruling House. I am satisfied that the issues in the two cases are the same.

Are the parties in the two suits the same? It would appear that the plaintiff is no longer contesting the conclusion of the two courts E below on this question for he made no submissions on it in his brief. Suffice it to say that the plaintiff being a member of the Afelele Ruling House is bound by any decision in HIF/28/81 against the plaintiffs in that suit wherein they represented members of the said ruling house. This apart, plaintiff knew all along about that case as he was a junior counsel F in it but did not seek to be joined as a named party; he stood by and was content being a counsel in it. On the doctrine of standing-by as propounded in Wytcherley v. Andrews (1871) L.R. 2 P & M 327, 328 he, would still have been caught by the doctrine of estoppel per rem judicata.

Is the judgment in HIF/28/81 final or interlocutory? The plaintiff G hotly contests the conclusion of the two courts below that the High Court decision in the case is final. In his submissions he contends that "*since JJ did not dispose of the facts in issue in Suit No. HIF/28/81, the ruling contained therein cannot be final and was never final*" Exhibit JJ is the H Ruling of Apará, J. (as he then was) in HIF/28/81.

The respondents contend to the contrary. In his brief, 1st defendant submits as follows:

"6.08. It is humbly submitted that what was determined in either suit HIF/28/81 or Exhibit JJ was 'The custom with regard, to the signifi-

(sic) vis-a-vis, coronation in the making of an Oba and the rights of the parties.

6.09. Exhibit JJ is the ruling of the Honourable Mr. Justice Akin Aparara dated 24/2/82 in Suit HIF/28/81. Page 1 of Exhibit JJ contains the names of the parties and the 3 reliefs sought by the plaintiffs in the substantive B action. At pages 6-7 of Exhibit JJ Mr. Justice Akin Aparara said:

Counsel for both sides had already addressed me on the fate of the substantive action itself should I make this finding in my ruling. Their respective addresses are also on record. I have already quoted in extenso the reliefs sought on the obverse side of the amendment writ of C summons. The first relief sought was that the 1st and 2nd defendant etc. are not members of the Afelele Ruling House and therefore cannot vie for, contest or be appointed as the Olowu of Orile-Owu. On the strength of paragraph '9' of their supporting affidavit which I have referred to earlier on, this relief sought has been overtaken by events because the D 2nd defendant has already been installed as the Olowu. The second relief sought is on the same vein as the 1st relief sought. For same reason it will suffer the same fate. The 3rd relief sought is for an injunction restraining the 3rd and 4th defendants from treating and, considering the 1st and 2nd de- E defendants as members of the Afelele Ruling House for the purpose of appointing one of them as the Olowu of Orile-Owu. Again as the 2nd defendant has already been overtaken by events. Therefore, to continue with the substantive case itself on the face of the fore goings will be an exercise in futility. I say this bearing in mind the decision in Abubakri & Ors v. F Smith & Ors (1973) 6 S.C. 31 at 44 where it was held that a court should not make an order which will be unenforceable or of no avail even if allegations of the plaintiff are taken as established. Even if I grant the plaintiff the reliefs sought, of what use will it be seeing that the 2nd defendant has already been installed the Olowu of Orile Owu anyway. G

It is crystal clear from the above that Exhibit JJ contains a well considered ruling and final order of Mr. Justice Akin Aparara. The plain- tiffs in Suit HIF/28/81 have not appealed against the ruling and final order up till today. I respectfully submit that judgment liable to appeal remains final and valid until it is set aside by the higher court. H

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

It is humbly submitted that the ruling (Exhibit JJ) is a final order which affected the status of the parties in Suit HIF/28/82. The Supreme Court has decided in a number of cases that the test to be applied in

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deciding whether an order is a final or interlocutory one is to look at the order made and not the nature of the proceedings and what is to be determined is whether the rights of the parties are finally determined by the order.”

The learned trial Judge held in his judgment as follows:

B “In the first place it is my considered view that the ruling delivered by my learned brother on 24/2/82 in Suit HIF/28/81 was a final order and not interlocutory one. This is so because the order has no doubt affected the status of the parties to the case.”

The Court below, per Omololu-Thomas, J.C.A. observed:

C “In applying the tests I am of the humble opinion (notwithstanding that the nature of the application before Apará, J. was interlocutory) that the trial Judge’s decision covered not only the issues raised in the interlocutory application, but also the issues in the substantive suit including the relief sought. Such decision cannot in my view be described
D as interlocutory, as it appears to have finally determined the rights of the parties in the suit or their status.”

It is trite law that it is by looking at the order made and not the nature of the proceedings that the question is determined whether the said order is final in that it finally determines the rights of the parties, or interlocutory. The question that now arises is: what did Apará, J determine by his ruling of 24/2/82 in HIF/28/81 (Exhibit JJ in these proceedings)? It was a ruling on the plaintiffs’ application for an interim injunction to restrain the 2nd defendant/respondent (1st defendant/ respondent in the present proceedings) from parading himself about as the Olowu of Orile-Owu pending the determination of this
E suit.” The learned judge invited the parties to address him on the difference between “installation” and “coronation” of a natural ruler. Evidence was called on both sides on the issue and in his ruling he held:-
F

“I therefore hold that in the final analysis the 2nd defendant has
G been installed as the Olowu i.e.; the Oba of Orile-Owu. This is the assertion of the plaintiffs anyway at paragraph 9 of their supporting affidavit. I also hold that the coming coronation is a mere ceremony. The present application before me is therefore refused in its entirety.”

Paragraph 9 of plaintiffs’ affidavit supporting their application
H for interim injunction reads:-

“That the 2nd defendant was installed as Olowu of Orile-Owu and has since been preparing to move into the Olori conclave in preparation for his coronation.”

On the substantive claim, the learned Judge commented thus:

'Counsel for both sides had already addressed me on the fate of the substantive action itself should I make this finding in my ruling. Their respective addresses are also on record. I have already quoted in extenso the reliefs sought on the obverse side of the amendment writ of summons. The first relief sought was that the 1st and 2nd defendant etc. are not members of the Afelele Ruling House and therefore cannot vie for, contest or be appointed as the Olowu of Orile-Owu. On the strength of paragraph '9' of their supporting affidavit which I have referred to earlier on, this relief sought has been overtaken by events because the 2nd defendant has already been installed as the Olowu. The second relief sought is on the same vein as the 1st relief sought. For same reason it will suffer the same fate. The 3rd relief sought is for an injunction restraining the 3rd and 4th defendants from treating (sic) and considering the 1st and 2nd defendants as members of the Afelele Ruling House for the purpose of appointing one of them as the Olowu-Owu. Again as the 2nd defendant has already been overtaken by events. Therefore, to continue with the substantive case itself on the face of the foregoing will be an exercise in futility. I say this bearing in mind the decision in Abubakri & Ors v. Smith & Ors (1973) 6 S.C. 31 at 44 where it was held that a court should not make an order which will be unenforceable or of no avail even if allegations of the plaintiff are taken as established. Even if I grant the plaintiff the reliefs sought, of what use will it be seeing that the 2nd defendant has already been installed the Olowu of Orile-Owu anyway.

(Italics mine)

Surprisingly there was no appeal against this rather strange decision. As the ruling is not on appeal to this Court I shall refrain from commenting on its correctness or otherwise. I shall only concern myself with its effect.

While Aparajit expressly refused, rightly or wrongly, the plaintiffs' application for interim injunction pending determination of their suit, he made no express order in respect of the substantive action. His comments, however, appear to have put an end to the claims in Suit HIF/28/81; it has, in fact, terminated since then. The reasonable inference one can draw from his comments is that he equally refused those claim in limine on the premise that the 2nd defendant in that suit had been made the Olowu. That being so, he had thereby put a finality to the rights of the parties in that suit. The plaintiffs and those members of the Afelele Ruling House they represented (including the plaintiff in the present proceed-

ings) did not avail themselves of their rights of appeal to the Court of Appeal. They remain, therefore, bound by Apra J’s decision, however right or wrong it may be.

All the ingredients of a plea of *res judicata* having been satisfactorily established by the defendants, I am, therefore, in agreement with the two courts below that the plea succeeded and on that ground alone, the plaintiff’s claims were rightly dismissed.

2. Membership of 1st defendant in the Afelele Ruling House:

The only ground on which the declarations sought by the plaintiff in his claims (a) and (b) is premised is that the 1st defendant is not a member of the Afelele Ruling House whose turn it was to present a candidate to fill the vacancy in the Olowu or Orile-Owu chieftaincy following the demise of the previous holder of the office, Oba Saka Ogungbe Akinjobi II. The learned trial Judge, after a consideration of the welter of evidence led on both sides at the trial found:

1. *“I am more convinced by the evidence given by the defence that Oye-Gaha is the title ascribed to the chairman of all Princes and Princesses in Orile-Owu.”*

2. *“.....Oye Gaha is not a Chieftaincy title but only the name ascribed to the chairman of prince and princesses.”*

3. *I say without equivocation that the allegation of the plaintiff cannot be true that the chieftaincy title of Omolasin was bought from the rightful owner by late Chief James Aworinde with a paltry sum.”*

4. *The evidence given by the defence regarding the fact that 1st defendant and his family belong to Afelele Ruling House are more convincing.”*

5. *“Chief James Aworinde (1st defendant’s father) was during his life time the head of Afelele Ruling House”* (Brackets mine),

6. *“The family tree as given by the 1st defendant is more lucid, coherent and more consistent with truth than the vague account given by the plaintiff as to the pedigree of Afelele 1. I therefore accept the account given by the 1st defendant as to the family tree of Afelele 1.”*

The learned Judge then concluded:

“By reason of the foregoing point there is no doubt that 1st defendant who was a direct descendant of Afelele 1 from the male line has better claim to the then vacant stool of Olowu of Orile-Owu through Afelele Ruling House than the plaintiff who is from female line.”

On appeal to the Court below, that Court, Per Omololu-Thomas,

“There is, in view of all the foregoing, preponderant evidence in support of the findings of the trial Judge on the various issues as to the 1st respondent’s membership of Afelele Ruling House.” There are thus concurrent findings of the two courts below to the effect that the 1st defendant belongs to the Afelele Ruling House. The attitude of this Court to such concurrent findings has been laid down in a long line of cases. In a recent case - Elekwanwa Anero & Ors v. Eburunobi Eze & Anor SC 176/1988 in a judgment delivered on 13th January, 1995 (as yet unreported) but now reported in (1995) 1 NWLR (Pt. 370) 129. I summed up the practice in these words:

“The attitude of an appellate court to such findings has been laid down in innumerable cases beginning with Ometa v. Numa (1935) 11 NLR 18 (PC) and can be restated thus: this Court will not interfere with concurrent findings of fact of both the High Court and the Court of Appeal, supported, as they were by the evidence on record, unless special circumstances be shown indicating obvious errors in the findings and that miscarriage of justice will result if they are allowed to remain.”

I have examined the evidence on record - both oral and documentary and find no good reason to disturb the concurrent findings in this case. The findings made by the learned trial Judge and affirmed by the Court of Appeal were reached after a dispassionate consideration of the totality of the evidence adduced in the case and ascription of credibility to the witnesses and are supported by the evidence. I affirm those findings.

The plaintiff both in the court below and in this court has raised a lot of dust over a statement contained in the judgment of the trial court to the effect that:

“Having considered the whole evidence before me there is no doubt that there was minor irregularity in the procedure adopted but section 15 of the Chief’s Law Cap. 21 Law of Oyo State 1978 has been substantially complied with.”

It is his contention that having found there was irregularity in the procedure in the appointment of the 1st defendant as the Olowu, the trial Judge ought to have granted the declarations sought setting aside the appointment. Reacting to this contention, the court below, per Omololu-Thomas, J.C.A., observed:

“When the learned trial Judge said that there was minor irregularity in the procedure adopted he did not specify the irregularity, but then he had already considered and disposed of the second leg of the

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claim i.e. the declaration that the appointment of the 1st respondent is
inconsistent with and contrary to the Olowu of Orile-Owu Chieftaincy
declaration 1957 (as amended).

B In my view considering Ss. 4,14 and 15 of the Chiefs Law and
the evidence which the learned trial Judge accepted, it is really very
difficult in view of the findings of the trial Judge to see how the said
appointment can properly be declared to be inconsistent with and con-
trary to the chieftaincy declaration of 1957. The learned appellant's coun-
sel in my view fails to substantiate his contention on the issues raised."

C I agree with the views of the court below. The "irregularity"
spoken of by the trial Judge was not spelt out nor highlighted. In any
event the plaintiff's case is not that there was irregularity in the proce-
dure adopted in the appointment of the 1st defendant but that he is not a
member of the Afelele Ruling House. I think the learned trial Judge gaffed
but this has not occasioned any miscarriage of justice. I find no merit in
D plaintiff's complaint.

E The plaintiff raised a number of issues which only amount to
picking holes here and there. These issues have no relevance to the deter-
mination of the main issues raised by the pleadings in the court of trial. It
will amount to a waste of time pronouncing on these issues separately
and encourage the plaintiff to continue in the practice of leaving the sub-
stance and chasing shadows. It is sufficient for me to say that all such
issues formulated by him are devoid of any merit. Even where some of
these are found substantiated they do not in any way occasion any mis-
carriage of justice. For instance, while I agree with him that the court
F below was in error in its observation, Per Omololu-Thomas, J.C.A. that
"Here one observes that Exhibits D23 and D24 were written by certain
chiefs from Ago-Owu. The letter by Gbadela descendants of Ago-Owu.
The issues in this case relate to the stool of Olowu of Orile-Owu, and not
G Olowu of 'Ago-Owu' if there is any such chieftaincy stool"
as it is not the issue that Ago-Owu and Orile-Owu are different towns,
this error does not occasion any miscarriage of justice.

H Plaintiff's complaint that two Justices of the court of appeal
who sat on the appeal in Prince Asiru Maradesa v. Governor of Oyo
State and Moses Olayioye Adejobi Adedosu (1986) 2 NWLR (Pt. 27) 125
should not have sat on the appeal in the present proceedings is rather
frivolous and scandalous. That appeal was not before the court below
when plaintiff's appeal came before it nor was the attention of the Jus-
tices of that court drawn to it. If plaintiff felt there could arise a likelihood

of bias, it was his duty to draw attention of the court below to that fact. After all, he knew about the appeal and, as the Report shows, he was counsel to the appellants in the matter. From the report of the case, the issues therein are completely different to the issues in the present proceedings. The question of real likelihood of bias could therefore not have arisen. I can find no breach of the plaintiff's constitutional right to fair hearing. B

On the whole, I find no merit in this appeal which is hereby dismissed by me. I affirm the judgment of the court below and award N 1,000.00 costs of this appeal, to each defendant/respondent. C

BELGORE JSC

The plaintiff/appellant pointedly went against his own pleadings. Having dealt with Irewole South-East Local Government Council as the designated council to initiate the filling of vacancy of Olowu of Orile-Owu in his, averment, it is strange to find him turning round in Court of Appeal that the opposite is the case. To my mind, a fundamental procedural departure by the plaintiff was not noticed by the Court of Appeal in its advertent to this issue. The aim of pleadings is to allow the case of each party to be stated clearly without ambiguity so that the opponent will know precisely the issues he is facing. At the Court of Appeal, none of the respondents objected to this departure from the issues fought in the trial court by the plaintiff/appellant; had they objected by way of preliminary, objection, the issue would have been struck out in limine by that Court. None the less failure to raise objection cannot make good what was a new posture being raised in the case in the Court of Appeal. The issue that the Irewole South East Local Government Council was not the designated authority was never an issue contested in the court of trial, in fact the opposite was pleaded by the appellant. The judgment of my learned brother, Ogundare, J.S.C., copied verbatim the Statement of Claim as filed by the appellant and that explains how strange the new turn taken by the appellant in the Court of Appeal was. Throughout the journey of a case from the trial court up to the exhaustion of all appellate remedies a party may have, there must be strict adherence to what was fought at the trial court by way of pleadings. Any matter not pleaded will have no bearing on the decision. That has always been the *raison detre* of our procedural practice. *Ezewani v. Onwordi* (1986) 4 NWLR (Pt. 33) D E F G H

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27; Salami v. Oke (1987) 4 NWLR (Pt. 63) 1; Sodipo v. Lemnikainem
OY (1985) 2 NWLR (Pt. 8) 547 1.

In the suit leading to this appeal, there was no undertaking at any stage given by the respondents through their counsel that the appointment of first respondent would not be made. The undertaking in question was in another case that was finally decided and against which there is no appeal up to this moment. I am of the view that ground of appeal No.16 is merely adventurous as it has no bearing on this case.

The main issues for determination in this appeal, despite the rambling and seemingly confusing brief of argument by the appellant are:

1. Whether the plaintiff was estoppel per rem judicata from instituting this action, and

2. Whether the first defendant is qualified to be appointed Olowu of Orile-Owu by virtue of his being a member of Melele Ruling House.

Estoppel per rem judicata operates when there has been a final decision by a Court of competent jurisdiction, whose decision has not been challenged legally e.g. by way of appeal, or if appealed against, final decision has been made by competent Court or Courts, and that decision is between their privies, and the issue or subject matter is the same. It is based on *res inter alios acta alteri nocere non potest*. This principle is as old as the Common Law in this country and it operates for or against not only the parties in the court in the previous case but also their privies. Privies include all those who are related to the parties in blood, interest and title of the subject-matter. *Nwaneri v. Oriuwa (1959) 4 FSC 132; (1959) SCNLR 316; Alashe v. Olori-flu (1965) NMLR 66; Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523*. See also Section 54 Evidence Act, Laws of the Federation of Nigeria 1990 (Cap. 112).

Whether the first respondent is a member of Afelele Ruling House is a question of fact. Trial court resolved this in favour of the first respondent, Court of Appeal upheld this finding. Trial Court has the singular opportunity, as against the appellate courts, of seeing and hearing the parties and their witnesses and is thus always placed at great advantage to judge their credibility. Thus, it is not within the proper province of appellate court to disturb findings of fact by trial court unless such findings are at variance with the evidence in Court, or are based on illegality or are perverse. *Nwosu v. Board of Customs and Excise (1988) 5 NWLR (Pt. 93) 225; Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373; Oilfield Supply Centre Ltd. v. Johnson (1987) 2 NWLR (Pt. 58) 625; Ekwunife v. Wayne (W.A.) Ltd. (1989) 5 NWLR (Pt. 122) 422; Overseas Construction Ltd. v. Creek Enterprises*

Ltd (1985) 3 NWLR (Pt. 13) 407. Once the finding of facts by trial Courts are affirmed by the Court of Appeal the Supreme Court will not interfere with those concurrent findings subject to exceptions mentioned earlier. National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 14) 1; Akeredolu v. Akinremi (1989) 3 NWLR (Pt. 108) 164; Nnaji for v. Ukonu (1986) 4 NWLR (Pt. 36) 505; UB.A. Ltd. v. Tejumola (1988) 2 NWLR (Pt. 79) 662. There is nothing on the face of the records of the court below remotely indicative of wrong decision on findings of fact and in this Court it is not shown why those findings should be interfered with. B

It is for the foregoing reasons and reasons in the judgment of my learned brother, Ogundare, J.S.C., that I find no merit in this appeal and dismiss it. I also award N1, 000.00 as costs to each respondent against the appellant. C

OGWUEGBU JSC

D

I have had the privilege of reading in draft the judgment just delivered by my learned brother Ogundare, J.S.C. and I agree that the appeal be dismissed for lack of merit.

The appellant identified seventeen issues as arising for determination in the appeal. Two crucial issues calling for determination in the appeal have been rightly identified in the lead judgment namely, whether the appellant was estopped per rem judicatam from instituting the present action and whether the 1st respondent is qualified to be appointed Olowu of Orile-Owu, that is to say, whether he is a member of the Afelele Ruling House. E F

The plea of estoppel per rem judicatam is based on the ruling of Aparara, J. (as he then was) in Suit No. HIF/28/81. That action was instituted by Prince Johnson Oyebamiji and 3 others for themselves and on behalf of Afelele Ruling House against Chief James Adeboye Aworinde and Moses Oladosu Adejobi Aworinde for themselves and on behalf of Aworinde Parakoyi family as 1st and 2nd defendants. The Irewole- South East Local Government Council and the Governor of Oyo State were the 3rd and 4th defendants. G H

The 2nd defendant in the said proceedings is the 1st defendants/respondent in this appeal. Two of the three reliefs sought in the earlier case were:-

“(1) Declaration that the 1st and 2nd defendants, their servants,

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agents or privies are not members of the Afelele Ruling House of Orile-Owu and therefore cannot vie for, contest, be nominated or be appointed as Olowu of Orile-Owu through Afelele Ruling House.

(2)

(3) *An order of injunction restraining the 3rd and 4th defendants from treating and considering the 1st and 2nd defendants as members of the Oba Afelele Ruling House of Olowu Chieftaincy title of OrileOwu, for the purpose of appointing anyone of them as the Olowu of Orile-Owu through the Afelele Ruling House."*

The 1st defendant/respondent in this appeal who was the 2nd defendant in the previous proceedings is saying that the issue whether he is a member of the Afelele Ruling House was determined in the ruling of Aparu, J. in Suit No. HIF/28/81.

The question now is whether that ruling precluded the appellant from now seeking substantially the same relief as in Suit No. HIF/28/81. It is the contention of the 1st respondent's counsel that the appellant is so precluded on the ground of estoppel by res judicata because:

(i) The appellant was a party to the previous proceedings and he was a privy to them and

(ii) he acted as junior counsel for the plaintiffs in the said proceedings.

The general rule is that no person is to be adversely affected by a judgment in an action to which he was not a party because of the injustice of deciding an issue against such a person in his absence. There are two exceptions to this general rule:

(a) a person who is in privity with the parties is bound equally with the parties, in which case he is estopped by res judicata.

(b) a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

The next question is to determine the involvement and the interest of the appellant in the previous proceedings. The plaintiffs in the previous proceedings instituted the action for themselves and as representing Afelele Ruling House. The plaintiff/appellant in paragraph one of his Amended Statement of Claim in the present proceedings averred that he brought the action for himself and on behalf of the Afelele Ruling House of Orile-Owu. The 1st defendant/respondent was sued for himself and as representing Aworinde Parakoyi Family. There should therefore be no argument that the appellant is a member of the Afelele Ruling House which instituted the previous action. The subject matter of the

two proceedings as rightly found by the courts below are substantially the same. The appellant acted as junior counsel for the plaintiffs in the previous proceedings and knew the issue being fought in the said proceedings. He was not an active participant in the battle but was content to hire out his services. He was privy to the proceedings and is estopped from relitigating the matter afresh. See: Nana Ofori Atta II & Ors v. Nana Abu Bonsra & Or. (1958) A.C. 95; Ikpong & Ors. v. Edoho & Ors (1978) 6-7 S.C. 221 at 240; Alade v. Alemuloke (1988) 1 NWLR (Pt. 69) 207; Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523 and Wytcherley v. Andrews (1871) L.R. 2P & M.327. See also section 54 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 which provides:

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

It was the further contention of the plaintiff/appellant that the ruling of Aparu, J. in Suit No. HIF/28/81 (Exhibit “JJ”) was not final. The question whether a decision of a court is final or interlocutory, has created difficulty for the courts due to the uncertainty of judicial decisions on the issue. In Salter Rex & Co. v. Ghosh (1971) 2 All E.R. 865 Lord Denning M.R. said:

“It is impossible to lay down any principles about what is final or what is interlocutory.”

See also Technistudy Ltd. v. Kelland (1976) 3 All E.R. 632 at 634 and Gilbert v. Endean (1878) Ch.D. 259 at 268-269 where Cotton L.J. said:

“Those applications only are considered interlocutory which do not decide the rights of the parties, but are made for purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”

Section 277 of the Constitution of the Federal Republic of Nigeria, 1979 defines the word “decision” in relation to court, as “any determination of that court and includes judgment, decree, order, conviction, sentence, or recommendation”. There is no definition of the words “final” or “interlocutory” in the Constitution or any law or rules of court.

There have been various foreign/and local decisions on it. See *Bozson v. Altrincham Urban District Council* (1903) 1 K.B. 547. It was an action to recover damages for breach of contract. An order was made that the questions of liability and breach of contract only were to be tried and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties. He made an order dismissing the action. The plaintiff appealed against the order. It was held on appeal Per Lord Alverstone, CJ. at 548549:

"It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made, finally dispose of the rights of parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order."

The courts in this country, it would seem, have quoted and consistently applied the above view of Lord Alverstone. See *Akamuja Oguntimehin (The Oloja of Igbuowo) v. Tokunbo Omotoye* (1957) 2 F.S.C. 56; (1957) SCNLR 187; *Blay & Ors v. Solomon* (1947) 12 WACA 175; *Omonuwa v. Oshodin & Or* (1985) 2S.C. 1 at 22-23; (1985) 2 NWLR (Pt. 10) 924; *Afuwape & Ors v. Shodipe & Ors.* (1957) SCNLR 265; (1957) 2 FSC 62 at 63. There is no doubt therefore that the decision of *Apara, J.* in Exhibit "JJ" refusing all the claims of the plaintiffs was a final decision and there was no appeal against it. It was therefore binding on the parties and their privies including the present appellant.

For the above reasons and the fuller reasons contained in the lead judgment of my learned brother *Ogundare, J.S.C.* I would also dismiss the appeal, and hereby dismiss it with costs as ordered in the lead judgment.

ONU JSC

I have had the advantage of a preview of the lead judgment of my learned brother *Ogundare, J.S.C.* just delivered. I agree with his exhaustive and lucid consideration of what I too consider as the two main and relevant of the proliferated issues submitted at the instance of the appellant.

I however, wish to comment, albeit briefly on the issues in elaboration as follows:

On estoppel per rem judicatam, it is clear from the pleadings of the parties to the suit giving rise to the present appeal, to wit: Suit NO. HIF/11/82 and those in the earlier suit (motion dealt with as No. HIF/28/81 by *Akin Apara, J.* as he then was) in the plaintiffs' Amended Writ of

Summons and the Amended Statement of Claim in the latter Suit and the plaintiff's writ of summons and Statement of Claim in the former, coupled with the Evidence in support thereof, that the parties, issues and subject matter are the same. In Suit HIF/28/81 (Exhibit JJ), while the parties were Prince Johnson Oyebamiji Maradesa & 3 Ors (for themselves and on behalf of Afelele Ruling House) v. Chief James Adeboye Aworinde, 2. B Moses Adedosu Adejobi Aworinde (for themselves and on behalf of Aworinde Parakoyi Family), 3. Irewole South East Local Government Council, the Governor of Oyo State, in the instant case, but for the injection of a new plaintiff (the present appellant and the absence of Chief James Adeboye Aworinde and the Irewole South East Local Government Council, all other attributes of the cases as regards the parties, the subject-matter and issues are one and the same. See Cardoso v. Daniel C (1986) 2 NWLR (Pt. 20) 1. All these are irrespective of the fact that Exhibit JJ was a motion because upon its being decided by Akin Apará, J. D (as he then was) there was no appeal against that decision and the ensuing substantive case and so constituted a final decision. Moreover, the appellant in the present case was in that case the junior counsel for the plaintiffs/applicants who failed to join in the contest but rather watched his battle fought and lost by others he represented only now to start on a new venture of a case. See E Ikpan v. Edoho (1978) 6 S.C. 221; (1978) 2 L.R.N.29. In the latter case which involved a disputed piece of land, it was held by this Court that a party who is aware of the existence of court proceedings in respect of land and who does not intervene or does not make it known that he has an interest in the land, must be deemed to have F no interest therein. The case in hand having been tried on the merits, is therefore substantially the same as Exhibit JJ and upon the latter can be founded a plea of estoppel per rem judicata: See:

- (i) Alashe & Ors v. Sanya Olori Ilu (1965) NMLR 66
- (ii) Ihenacho Nwaneri & Ors v. Nnadikwe Oriuwa & Ors (1959) G 4 FSC 132; (1959) SCNLR 315.
- (iii) Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61).

For the purpose of the application of estoppel per rem judicatam party: means not only a person named as such but includes one who, cognisant of the proceedings and of a fact that a party thereto is professing to act in his own interest, allows his battle to be fought by that party H intending to take the benefit of the championship, in the event of success.

In other words, 'party' includes his privy. See section 54 (for-

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merly Section 53) of the Evidence Act. Cap. 112, Laws of the Federation
of Nigeria, 1990 which states:

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

C Since the plaintiff in the case in hand appeared as a junior counsel in Exhibit JJ and would have been one of the beneficiaries of that suit had it succeeded, the plaintiff can rightly be described as party to that suit which was disposed off at the High Court, Ile-Ife on 24/2/82. True it is that in the instant suit the plaintiff had asked for additional reliefs, albeit in both suits they (plaintiffs) sued the defendants in representative capacities. This makes the application of the doctrine of res judicata even stronger. See (1) *Savage v. Uwechia* (1972) 1 All NLR (Pt. 1) 251. (2) *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; 1962) 2 SCNLR 341.

E What was decided in Exhibit JJ was *“the custom with regard to, the significance of installation vis-a-vis coronation in the making of an Oba”* and the rights of the parties. That ruling and final order remains final and valid until set aside by the higher court. See

1. *Management Enterprises Limited v. Otusanya* (1987) 4 S.C. 369; (1987) 2 NWLR (Pt.55) 179
2. *Bakare v. Apena* (1986) 4 NWLR (Pt.33) 1
- F 3. *Melifonwu v. Egbuji* (1982) 9 S.C. 145, and
4. *Welli v. Okechukwu* (1985) 6 S.C. 133 at 142;

In the instant case, endorsed on plaintiff’s writ of summons, is claim (a) out of his several other claims wherein he similarly supplicated the trial court for:

G *“Declaration that the installation and or coronation of the 1st defendant as the Olowu of Orile-Owu is unlawful, null and void in that he not being a member of the Afelele Ruling House whose turn it is to present a candidate for the stool cannot validly be appointed as Olowu of Orile-Owu.”*

H Exhibit JJ being a final order affected the status of the parties therein. This court has decided in a host of cases that the test to be applied in deciding whether an order is a final or interlocutory one is to look at the order made and not the nature of the proceedings; indeed what is to be determined is whether the rights of the parties are finally

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determined by the order. See 1. Ude & Ors v. Agu & Ors (1961) 1 All
NLR 65 at 66-67; (1961) 1 SCNLR 98

2. Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5

3. Western Steel Works Ltd. v. Iron Steel Works Union (1986) 3
NWLR (Pt. 30) 617 at 626-7.

Instead of playing the role of a junior counsel in Exhibit JJ, the
plaintiff herein should have joined himself as one of the plaintiffs in that
earlier case and appealed against that decision of Aparara, J. instead of
relitigating the same cause of action in the present suit. 1st defendant
having laid the foundation for his plea of res judicata in paragraphs 23, 24
and 25 of his Amended Statement of Defence, when as 13th witness for
the plaintiff, the plaintiff herein said in examination in chief inter alia that:
“My family filed an action in court on 24/9/81 in Suit No. HIFI28/81.”
he had unwittingly provided what one may call a seal on the plea of
estoppel per rem judicata raised by the 1st defendant, thus making it to
succeed roundly. As this Court had occasion to say inter alia in Salawu
Yoye v. Lawani Olubode (1974) 10 S.C. 209 at 221 and 222:

*“The plea of res judicata therefore robs the court of its jurisdiction;
and that explains why in practice, the plea has always been used
only as a defence. It is a formidable weapon which may be pleaded in the
statement of defence or in the plaintiff’s reply to the Statement of De-
fence should the need arise”* See Ogale & Anor v. Alfred Asagba & Anor. in
re Asagba (1972) 1 All NLR 419. Thus, as recently decided by this court, when
in hands of defendant as in the instant case, it serves as a shield - See
Chinwendu v. Mbamali (1980) 3-4 S.C. 31 - whereas put in the hands of the
plaintiff it is to be likened to a sword: - See Ezewani v. Onwordi (1986) 4 NWLR
(Pt. 33) 27.

All that was necessary in considering the plea of res judicata
was before the trial court before which Exhibit JJ provided solid materi-
als. That court therefore came to the right decision that estoppel per rem
judicatam availed the 1st defendants. The court below was therefore
perfectly justified to have upheld the plea. Whether the learned trial Judge
in his findings held that the substantive suit was struck out or dismissed
is, in my view, immaterial, since Exhibit JJ which dealt with the substan-
tive suit is a final order that speaks for itself.

The decisions of the two courts below therefore amount to con-
current findings of facts which this court in numerous cases has held it
will be slow to disturb except the appellant can show special circum-
stances - either that there was a miscarriage of justice or serious violation

of some principles of law or procedure or that the findings are erroneous in procedural law. See *Ojomu v. Ajao* (1983) 9 S.C. 22 at 53; (1983) 2 SCNLR 156; *Ogiesoba Otubu & 2 Ors v. B.A.A. Guobadia* (1984) 10 S.C. 130; *Lamai v. Orbih* (1980) 5-7 S.C. 28 and *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718.

B My answer to issue 1 is in the positive. Issue 2 asks whether the 1st defendant is qualified to be appointed Olowu of Orile-Owu, that is, whether he is a member of the Afelele Ruling House.

All that the plaintiff was arguing here was that 1st defendant was not a member of the Afelele Ruling House. This vital point the trial court also resolved in favour of the 1st defendant based upon the following premises:-

The learned trial Judge found on the preponderance of evidence adduced by both parties firstly, that the plaintiff failed to prove that 1st defendant and his half brother, James Adeboye Aworinde, belonged to the Oye Gaha Chieftaincy Family and were therefore not members of Afelele Ruling House. Secondly, that the appointment of 1st defendant as Olowu of Orile-owu substantially complied with and was in conformity with tradition of Orile-owu people, acting on . Exhibit 'B' - the Amended Olowu of Orile-Owu declaration and that even if the 1st defendant and his half brother, James A. Aworinde took on the Oye Gaha Chieftaincy, though denied, nothing deterred them from aspiring to succeed to the Olowu of Orile-Owu Chieftaincy. It is in the light of this that I agree with the conclusion arrived at by the court below that the appointment of the 1st defendant as Olowu of Orile-Owu substantially complied with the custom and tradition of Orile-Owu people acting on Exhibit 'W' - the Olowu of Orile-Owu declaration.

Before concluding, I wish to touch briefly on a few things. The first is that the court below was right and indeed justified, in holding that the learned trial Judge adequately assessed all the evidence, oral and documentary, before him before coming to the conclusion he arrived at. Secondly, the issue raised that Irewole South-East Local Government Council was not constitutionally and validly created and was incompetent at the time, to process 1st defendant's appointment as Olowu of Orile-owu for placement before the 2nd defendant was not an issue before the trial court. As a matter of fact, the challenge by the plaintiff smacks of a litigant who blows hot and cold at the same time. For while he hobnobbed with the Secretary to the Council during the selection process, had he succeeded in being appointed the Olowu of Orile-Owu, he would have taken the benefit; but now that he lost, he has turned round to complain. He cannot

be allowed to eat his cake and have it at the same time.

Thirdly, the issue that there was an abuse of the process of law or contempt of court allegedly committed by the 2nd defendant in his act of approving the appointment of the 1st defendant as Olowu of Orile-Owu, was not established by the plaintiff. In that regard, plaintiff was shown to have been given a fair hearing in the two courts below and that his fundamental rights preserved under Section 33(1) of the 1979 Constitution were in no way breached. Nor did he show bias on the part of each or both of the courts below; the challenge to the competence and jurisdiction of the court below which was being raised as an issue before us here on appeal was never brought to its notice. It is too late to do so in this court. Finally, the decisions of the two courts below being concurrent findings, this court which has always adopted the attitude not to interfere with such decisions unless special circumstances are shown or that a serious miscarriage of justice or serious violation of some principles of law or procedure have been occasioned, will not do so now. See *Alhaji K.O.S. Are & Anor v. Raji Ipaye & Ors* (1990) 2 NWLR (Pt. 132) 298 at 317; *Ezewaniv. Onwordi* (supra). I therefore see no reason to disturb these findings which were arrived at after a dispassionate consideration of the evidence led at the trial.

For these and the fuller reasons contained in the lead judgment of my learned brother Ogundare, J.S.C. the entirety thereof to which I subscribed. I too dismiss this appeal with the same consequential orders as contained in the lead judgment.

ADIO JSC

I have had the opportunity of reading, in draft; the judgment just delivered by my learned brother, Ogundare J.S.C., and I agree that the appeal has no merit. I too dismiss it and abide by the consequential orders, including the order for costs.

There was an earlier suit, Suit No. HIF/28/81, instituted by certain members of Afelele Ruling House in relation to the filling of the vacancy in the Chieftaincy in question. Though the appellant in this appeal was not one of the plaintiffs in the earlier suit, he knew what was going on as he was a junior counsel to the plaintiffs in the said earlier suit. What happened in that earlier suit has had a significant effect on the fate of the present suit having regard to the fact that the ruling given by the learned trial Judge in relation to an application for an interim injunction pending the determination of the substantive claim, in the earlier suit, impliedly

refused the three claims in that suit. Another significant thing was that there was no appeal against the ruling.

The law is that where an application for an interim injunction pending the determination of the substantive claim is brought by a plaintiff, it is the duty of the learned trial Judge to ensure that he does not, in the determination of the application, determine the same issues that would arise for determination in the substantive action. See *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt. 247) 266 at page 287. As there was no appeal against the aforesaid ruling in the earlier suit, the ruling was subsisting at all material times to this suit. One of the legal implications, in the circumstances, was that the appellant was estopped per rem judicatam from instituting the present action because the issues, the parties, and the subject matter in the earlier suit and the present suit were the same. That was the conclusion reached by learned trial Judge which the court below rightly affirmed.

The claims in the earlier suit set out in the lead judgment and the claims in this suit clearly showed that the subject matter and the issues involved in both suits were the same. The plaintiffs in the earlier suit and the appellant are all members of Afelele Ruling House. The appellant knew of what was going on in the earlier suit as he was a junior counsel to the plaintiff in the earlier suit but was content to stand-by. The law does not allow a person to stand-by while his cause is fought by another person. If the person does not intervene and make his interest known, he will be deemed to have no interest because of his indifference to the outcome of the proceedings. See *Ikpan & Ors v. Edoho & Anor.*, (1978) 6-7 S.C. 221 at 240; and *Alade v. Alemuloke* (1988) 1 NWLR (Pt. 69) 207. The court below was, therefore, right in affirming the decision of the learned trial Judge that the plea of res judicata, succeeded.

On the question whether the 1st respondent was a member of Afelele Ruling House, there were, rightly in my view, concurrent findings of the learned trial Judge and the court below that the 1st respondent was a member of the aforesaid ruling house. This court does not interfere with a finding of the court below except when the finding is perverse. See *Kimdey v. Military Governor of Gongola State* (1988) 2 NWLR (Pt. 77) 445 at page 459. The finding of the learned trial Judge which the court below affirmed was not perverse.

It is for the above and the more detailed reasons stated in the lead judgment of my learned brother, Ogundare, J.S.C., that I too dismiss this appeal and abide by the consequential orders, including the order to costs.