

SUPREME COURT OF NIGERIA
FRIDAY 24TH FEBRUARY, 1995. SC. 3/1993
CORAM:- M. BELLO, S. M. A. BELGORE, I. L. KUTIGI,
M. E. OGUNDARE, A. I. IGUH, JJSC

1. ALHAJI LASISI OTAPO & 2 OTHERS

(For themselves and on behalf of

Ogbele Family of Iliwo-Oke
Compound, Otta)

..... PLAINTIFFS/RESPONDENTS

AND

1. ZACCHEUS FALEYE & 2 OTHERS

(For themselves and on behalf of

Ogbele Family of Iliwo-Odo
Compound, Otta)

.... DEFENDANTS/APPELLANTS

APPEALS - Powers of the Court of Appeal - Under s.16 of the Court of Appeal Act - Whether it can order a non suit - Which the trial court had no power to order.

PRACTICE & PROCEDURE - Non-suit - Where trial court has no power to order non suit under the applicable rules - Whether the Court of Appeal can make that order.

RES JUDICATA - Claim barred as being resjudicata - As rightly found by the trial court - Whether that court can make a finding - On an issue that was determined in the previous proceedings.

RES JUDICATA - Issue estoppel - An issue that has been founded upon in previous proceedings - Plaintiffs are estopped from relitigating that point under issue estoppel.

RES JUDICATA - Parties - Found to be the same - In previous and present proceedings notwithstanding plaintiffs' guise.

RES JUDICATA - Subject matter - Where same in previous and present proceedings - As found by trial court from the abundant evidence - Court of Appeal was wrong in holding otherwise.

FACTS

The plaintiffs/respondents sued the defendants/appellants in respect of a piece of land situate at Otta, Ogun State. The defendants pleaded estoppel and relied on various documents in proving that the case had been previously determined by courts of competent jurisdiction even up to the Supreme Court. The trial court found in favour of the defendants and dismissed the plaintiffs' claim as being caught by issue estoppel.

Plaintiffs' appeal to the Court of Appeal was allowed in part as that court ordered a non - suit. Being dissatisfied, the defendants have appealed to the Supreme Court against the Court of Appeal's judgments. Plaintiffs also filed a cross-appeal. The apex court had to determine inter alia, whether the Court of Appeal had jurisdiction to enter a non-suit when there is no statutory provision to that effect in the Ogun State High Court Rules. And whether the plaintiffs are caught by issue estoppel.

HELD (Unanimously allowing the defendants' appeal per **OGUNDARE.JSC**)

Whether Court of Appeal can order a non suit - Where trial court cannot

1. If the trial court had no power to order a non-suit, the Court of Appeal could not do so either. The conclusion I reach, therefore, is that the Court of Appeal was in error to have entered an order of non-suit. The defendants ground (1), therefore, succeeds.

Res Judicata - Same subject matter

2. I think the court below was wrong in holding that "in the absence of the survey plan No. AK 304 B, it will be difficult to say with certainty that the subject matter litigated upon in Exhibit 'A' is the same as the subject matter in the present proceedings." There is abundant evidence on the record to resolve this issue. On the strength of this piece of evidence, the learned trial Judge, rightly in my view, found that "the 4th PW admitted that the land in dispute is the same as the land in dispute in Exhibit 'A'. In order words the subject matter of the present action is the same as that in Exhibit 'A'.

Resjudicta - Issue estoppel

3. In Exhibit A, the defendants therein (now Plaintiffs as privies to those defendants) raised and relied on the title of their maternal ancestor, Talabi. The trial court in that case found that the defence put up, that is co-ownership through Talabi with the plaintiffs (now Defendants) was *without foundation*"

With this finding, the Plaintiffs cannot now relitigate the issue of title to the land in dispute under the guise of representing the Talabi family. They are estopped by Issue Estoppel from asserting that Talabi was a member of the Eleidi Atala family.

Res judicata - Parties found to be the same

4 The learned trial Judge, in my respectful view, was right to hold that notwithstanding the guise under which Plaintiffs claimed in the present proceedings, the parties in Exhibit A and the present action are the same.

Claim barred as being res judicata

5. Having found - and quite rightly too - that Plaintiffs' claims were barred by res judicata, he had no jurisdiction to make the finding that the parties were related, that issue having been contested and lost by the Plaintiffs in Exhibit 'A' The Plaintiffs are caught by issue estoppel from re-asserting that Talabi was related to the Defendants of the Eleidi Atala family. The learned Judge's finding to that effect is therefore erroneous and it is hereby set aside.

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Previous judgment not appealed against remains final

The purport of this judgment is rejection by the trial court of the claim of maternal relationship to the Eleidi Atala family raised by the defendants in that suit (the present Plaintiffs). Significantly, there was no appeal against that judgment which remains final and binding on the parties thereto.

BELLO CJN

2. When Court of Appeal has no power to order a non suit

For the reasons stated by my learned brother, the High Court Rules 1988 of Ogun State have not empowered that High Court to non-suit a Plaintiff and consequently, the Court of Appeal which under Section 16 of the Court of Appeal Act can make any order that the High Court can make, has no power also to order a non-suit. The Court of Appeal therefore erred in law by non-suiting the Plaintiffs.

IGUHJSC***3. Court to examine whether a matter is caught by res judicata***

The styling, restyling or misstyling of parties in actions will not prevent a court from examining the proceedings in issue and determining whether the parties in the present suit are the same as or privies to the parties in an earlier suit and thus caught by the doctrine of issue estoppel or res judicata. This is because it is not uncommon for parties who have lost in a land suit to employ all manner of devices to resurrect the land case under various names and guises in a bid to becloud the issue of estoppel or res judicata.

4. When a matter cannot be raised on principle of res judicata

Once a matter or issue is finally settled in a previous suit by a court of competent jurisdiction, such a matter or issue so settled can never again, on the principle of “rex judicata” or “issue estoppel” be raised or re-litigated in subsequent proceedings by those who were parties or privies to the previous proceedings.

REPRESENTATION

P.O. Jimoh - Lasis with A.F. Okunuga and A. Odunbaku for the Appellant.
Chief Milton P. Ohwovoriole, SAN, with J.J. Akanike
and Miss P.B Akpele for the Respondents/Cross-Appellants

CASES REFERRED TO

NIPOL Ltd. v. Biodun Investment and Property Co. Ltd (1992) 3 NWLR (Pt.232) 727 SC.

Idundun v. Okumagba (1976) 1 NWLR 200 at 200

Anyakwo v. A.C.B Ltd. (1976) 2 SC. 41, 59

Aro v. Fabolude (1983) 2 SC. 75.

Odua v. Nwanze (1934) 2 W.A.C.A. 98 at 100 - 102

Woluchem v. Gudi (1981) 5 S.C. 291

Nwaneir v. Oriuwa (1959) 4 F.S.C. 132

Alase v. Ilu (1965) N.M.L.R. 66

Abiodun v. Fasanya (1974) 11 S.C. 61 at 78

Iyaji v. Eyigebe (1987) 3 NWLR (Pt.61) 523 at 533

Ike v. Ugboaja (1993) 6 NWLR (Pt.301) 539 at 555

Adeoye v. Jinadu (1975) 5 S.C. 43 at 47

Ogundairo v. Okanlawon (1963) 1 All NLR 358

Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt.16) 264 at 276.

STATUTES AND RULES REFERRED TO

Court of Appeal Act. 1976 s. 16

High Court Civil Procedure Rules of Ogun State 1988

High Court Civil Procedure Rules 1977 of Ogun State O.30 r.3.

Court of Appeal Rules 0.1 r.20

B

LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in March, 1986, the plaintiffs for and on behalf of Talabi Famiiy of Iliwo-Odo Compound, Otta, sued the defendants for themselves and on behalf of Aiyelekun Family of Iliwo-Oke Compound in respect of the piece of land situate at Onigbodo in Otta, Ogun State. Pleadings were ordered, filed and exchanged. By paragraph 43 of their amended statement of claim the plaintiffs finally claimed as follows:

C

D

E

“a. A declaration that the plaintiffs who are members of the Talabi Branch of the Ogbele and/or Eleidi Atala Family of Iliwo-Odo compound Otta Ogun State are the persons entitled to the customary and/or statutory right of occupancy in respect of their farm lands which are well known to the defendant at Eleidi Atala land situate lying and being at Onigbodo along Old Osuke/ljagba Road Otta Ogun State as shown on Survey Plan No. PAT/OG/268/87 drawn by A.B. Apatira and dated 13th August, 1987 or the Area edged Yellow in the Survey Plan drawn by M. A. Seweje Licence Surveyor in this suit.

F

G

b. A declaration that the defendants who are members of the Ayelekun Branch of the Ogbele and/or Eleidi Atala family of Iliwo-Oke Compound Otta, Ogun State are the persons entitled to the customary right of occupancy in respect of their farm lands which are well known to the Parties Eleidi Atala land situate lying and being at Onigbodo along Old Osuke/ljagba Road Otta Ogun State as shown on the Survey Plan No. APT/OG/268/87 drawn by Licensed Surveyor A.B. Apatira Esquire.

c. Possession of the respective farm lands of the plaintiffs and the defendants well known to the parties on the ground particularly as shown on Survey Plan No. APT/OG/268/87 of 13th August, 1987 drawn by Licensed Surveyor A.B. Apatira Esquire.

H

d. Perpetual Injunction restraining the defendants, their servants, agents or privies from going into their respective farmlands, remaining thereon and from committing any acts or other acts inconsistent with the rights title interest or estate of the plaintiffs as shown on the said Survey

The defendants who are now appellants before us pleaded estoppel, they not only denied the traditional history pleaded by the plaintiff (who are now the cross appellants) but also pleaded inter alia as follows:

“11. *And the defendants state that the plaintiffs were customary tenants of the defendants, who have lost their customary holding as shown hereafter as per standing judgments of competent Courts of Law.*” B

12. *And in particular, as per the judgments in Suit Nos. IF/OT.12/81 and HCL/2A/83, plaintiffs have no right nor interest in the land in dispute.*
xxxxx

19. *Defendants further state that the plaintiffs have never at any time performed or exercised any acts of ownership on the land in dispute, and some have been peacefully disposed of their customary holdings as customary tenants at Igbo Eleidi after the judgments in Suits Nos. IF/CT. 12/81 and HCL/2A/83 for refusing to pay their customary tributes to the defendants’ family and for acts inconsistent with the title of the defendants on the land, by challenging their title thereon.* C D

20. *The defendants further state that members of Kole Family have in the past testified for the defendants’ family as customary tenants in respect of the defendants’ Igbo Eleidi.*

21. *In Suit No. AB/39/66, which culminated in. Suits Nos. AB/31/74 and SC/164/84, Sule Otapo from the Kole family and a full brother of the first plaintiff and father of the third plaintiff testified in Igbo Eleidi case as customary tenants of Eleidi Atala Family of the defendants herein.* E

xxxxx

25. *The late Asani Bada, otherwise known ss Asani Fatoso, himself a grandson of Kole, testified as 3rd P.W. in Suit No. AB/31/74 on the 16th day of November, 1977 as Customary tenant of the defendants herein and therein mentioned the names of other members of his Kole Family, including the 1st plaintiff herein and Sule Otapo, father of the 3rd plaintiff and Uncle of the 2nd plaintiff herein.* F G

26. *And the aforesaid Suit No. AB/31/74 in which judgment was entered for the defendants family herein as Eleidi Atala Family has been confirmed on Appeal in SC/164/85, and it is the same land that the plaintiffs now claim to be theirs in the same (sic) of Onigbode Iliwodo.* H

27. *The defendants further averred that Suits Nos. AB/33/66, AB/31/74, IF/OT.12/81, IF/OT.33/81 and HCL/2A/83 are all relating to the en*

tire Igbo Eleidi of the defendants, and the plaintiffs or members of their Kole family have all testified as customary tenants for the defendants in respect of the land in dispute as follows:-

(a) Suit No. AB/39/66 - Late Bello Ojubanire

(b) Suit No. AB/31/74 - Late Asani Bada, full brother of the 1st plaintiff.

(c) Suit No. IF/OT.12/81 - Sule Otapo

(d) . Suit No. IF/OT.33/81 - Sule Otapo

28. And the defendants shall at the trial use the above mentioned evidence of the plaintiffs and their predecessors against them as a 'statement against proprietary or pecuniary interests' of the plaintiffs as Admissions against interest by the plaintiffs under the Evidence Act.

29. The defendants state that in 1981, the aforementioned Sule Otapo cut and sold some logs of valuable woods to one Abudu Sediku off Igbo Eleidi; the land in dispute and the Eleidi Atala family, the defendants D herein, sued him in Suit No. IF/OT.33/81 and judgment was entered for the defendants in the said suit.

30. And the said Sule Otapo was left out in the present action and his son Rasheed Sule was substituted in his place as the 3rd plaintiff.

31. And all the plaintiffs herein are descendants of Kole and there E is no trace of Eleidi Atala Blood in any of the plaintiffs nor their ancestors.

32. The defendants further averred that in Suits Nos. IF/OT.12/81, the 1st defendants therein, is the father of the 3rd plaintiff in this suit, and the defendants obtained judgment in that suit; similarly, in Suit No. HCL/2A/83 wherein he was 3rd defendant and the defendant similarly won and the F Appeal there from is pending at Ibadan.

33. And in Suit No. IF/OT.12/81, the Otapo/Ijagba family, their servants, agents, and privies were restrained by a decree of injunction from entering, alienating or doing anything on Igbo Eleidi of the defendants herein and the said Otapo/Ijagba Family did not appeal against that judgment. G

34. And furthermore, an application for stay of Execution in Suit No. HCL/2A/83, made by the plaintiff herein and their predecessors was refused on the 13th day of December, 1984.

H 35. On the 25th day of September, 1984, in Suit No. HCL/2A/83, the defendants herein caused Form 40 under the Sheriff and Civil Process Law to issue against the 1st plaintiff herein as Alhaji Abudu Lasisi, as Mosudi Otapo and the 3rd plaintiff as herein, as Mosudi Otapo and the 3rd plaintiff

as Adio Otapo,”

The case proceeded to trial at which evidence was led and after addresses by learned counsel for the parties, the learned trial Judge in a reserved judgment found (1) that there existed a woman named Talabi; (2) that the plaintiffs through their mother Talabi are related to the defendants; (3) that in Suit No. IF/OT.12/81 (Exhibit A), the present plaintiffs have put their maternal relationship with Eleidi Atala (defendants’ family) in issue although they never mentioned the name of their maternal ancestor Talabi; (4) that the plaintiffs are by virtue of Exhibit A holding on to possession as customary tenants of the defendants through their privy in title Kole and not that they have any exclusive possession which may warrant the presumption of ownership; (5) that the 4th P.W. admitted that the land in dispute is the same as the land in dispute in Exhibit A in other words the subject matter of the present action is the same as that in Exhibit A; (6) that the parties in the present action are the same as the parties in Exhibit A; (7) that the plaintiffs are, therefore, bound by Exhibit A and cannot, therefore, relitigate any declaration of title on behalf of Talabi branch against the defendants; (8) that the plaintiffs are in confusion as to the area of land they claim and therefore, they have not proved the identity of the land being claimed by them. On the strength of these findings the learned trial Judge dismissed plaintiffs’ claims.

The plaintiffs being dissatisfied with the judgment appealed to the Court of Appeal. The defendants also cross-appealed against the finding of the learned trial Judge that the plaintiffs were related to them maternally. That court reasoned that in the absence of a Survey Plan No. AK/304B to which Exhibit A is attached it will be difficult to say with certainty that the subject matter litigated upon in Exhibit A is the same as the subject-matter in the present proceedings. The court, therefore allowed plaintiffs’ appeal in part, set aside the judgment of the trial court and entered an order of non-suit. The cross-appeal was dismissed. Being dissatisfied with the judgment of the Court of Appeal both parties have again appealed to this court. The defendants after obtaining the leave of court appealed against the whole decision while the plaintiffs appealed against the order of non suit maintaining that judgment should have been entered in their favour in terms of their claims. In accordance with the rules of this court the parties filed and exchanged their respective briefs of argument. In the defendants/appellant brief of argument the following five issues are set down as calling for determination in this appeal:

1. Whether the Court of Appeal had jurisdiction to enter a non-suit in

556 Otapo v. Faleye (1995) 2 KLR Ogundare JSC
the absence of statutory provisions in the Rules of Court application (sic) in
Ogun State High Court.

2. Even if the Court of Appeal had jurisdiction to enter a non-suit
(which is not conceded) was the order of non-suit made correct in the circum-
stances of this case.

B 3. Whether the learned Justices of Appeal Court were right when
they held that in the absence of tendering survey plan No. AK-304B, it is
extremely impossible to hold that by Exhibit A the plaintiffs are caught by
issue estoppel and cause of action estoppel.'

C 4. Whether the plaintiff are precluded by the doctrine of issue estop-
pel from re-opening the question of whether the plaintiffs and the defendants
are related by blood by Talabi and predicate this case on that traditional
history?

5. If so, is it not an abuse of the process of the court to attract a
dismissal order of the plaintiffs' claims in this case." .

D In the plaintiffs/respondents brief the following questions are set
down for determination:

"1. Whether the Court of Appeal has jurisdiction to enter a judg-
ment of non-suit by virtue of section 16 of the Court of Appeal Act, 1976.

E 2. Whether the judgment of the customary court Exhibit A created
estoppel *res judicata* and/or is the doctrine of *res judicata* applicable be-
tween members of the same family.

F 3. Whether the Court of Appeal were right in deciding two issues
out of several issues for determination having regard to the decision of the
Supreme Court in *Nipol Ltd. v. Biodun Investment and Property Co. Ltd.*
(1992) 3 NWLR (Pt. 232) 727 S.C

4. Applying the principles of law enunciated in *Idundun v.*
Okumagba (1976) 1 NMLR 200 at 200 whether the plaintiffs established
any or all the tests regarding acts of ownership and possession to their area
of the land in dispute."

G Both parties complained about the order of non-suit entered by the
court below the defendants on the ground that that court had no jurisdiction
to do so and the plaintiffs on. the ground that if the court below had consid-
ered the other issues raised before it, it would not have entered an order of
non suit but would have given judgment to the plaintiffs on their claims. I
think, therefore, that I should at this stage dispose of this issue.

H Section 16 of the Court of Appeal Act which states:

"The Court of Appeal may from time to time make any order neces-

sary for determining the real question in controversy in the appeal, and may

amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction"

only empowers the Court of Appeal to make an order which the court below could have made. The question that arises is this: could the trial High Court have made an order of non-suit if the circumstances so called for it? Mr. Lasisi Jimoh of counsel for the defendants submitted that under the High Court Civil Procedure Rules 1988 of Ogun State, there is no provision for a High Court to order non-suit unlike in the 1977 rules of court. Learned counsel then argued that the court therefore, would have no jurisdiction to make an order of non-suit. A fortiori the Court of Appeal would have no jurisdiction to enter an order of non-suit in an appeal coming before it from Ogun State. Chief Ohwovorile, SAN, leading counsel for the plaintiffs, in reply, submits that by virtue of section 16 of the Court of Appeal Act 1976 the Court of Appeal had full jurisdiction over the whole proceedings and had power to make the order that it made. With profound respect to the learned Senior Advocate, I do not share his view. The Court of Appeal by virtue of Section 16 can only make an order which the court of trial (did and from which appeal had come to it) could make. The provision of order 30 rule 3 of the High Court Civil Procedure Rules 1977 of Ogun State which read:

"The court may in any suit without the consent of parties non-suit the plaintiff where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court."

had been deleted from the 1988 Rules as there is no rule in that latter Rules similar to Order 30 rule 3 of the 1977 rules. That being so, the High Court of Ogun State would no longer have power to order a non-suit in any civil matter before it. The submission here is the same as the submission in the case of

John Orekie Anyakwo v. African Continental Bank Ltd. (1976) 2 S.C. 41, 59 where this Court Per Fatayi-Williams, J.S.C. (as he then was) observed:

“Until the new High Court of Lagos State (Civil Procedure) Rules, 1973 came into force on 1st September, 1973, the position in the High Court of Lagos State was not unlike that of the County Court in England. In the old Supreme Court (Civil Procedure) Rules which was in force in the High Court of Lagos State until the new Rules came into force, it is provided in Order XLV rule I therein as follows:

‘The Court may in any suit without the consent of the parties, non-suit the plaintiff where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court. ‘

Since there is no provision in the new High Court of Lagos State (Civil Procedure) Rules for an order of non-suit because the above rule has been deleted from the new Rules, it would appear that the power of the judges of the High Court of Lagos State to non-suit a plaintiff has been taken away. They are now in the same position as a judge of the High Court of Justice in England.

We think that the learned trial Judge, at the time he non-suited the plaintiffs on 31st July, 1974, had no power to do so.”

If the trial court had no power to order a non-suit, the Court of Appeal could not do so either. See: Jadesimi v. Okotieboh (No.2) (1986) 1 NWLR (Pt. 16) 264, 276 D-E. The conclusion I reach, therefore, is that the Court of Appeal was in error to have entered an order of non-suit. The defendants ground (1), therefore, succeeds.

I now come to the more important issue of estoppel pleaded by the defendants. The learned trial Judge found the plea successful and dismissed plaintiffs’ claims. But the Court of Appeal thought differently. The defendants relied on a number of previous judgments, particularly Exhibit A. These judgments are:

- (i) Suit Nos. IF/OT.12/81 - Exhibit A
- (ii) Suit No. AB/39/66 - Exhibits B, C & H
- (iii) Suit No. IF/OT.13/81 - Exhibit D
- (iv) Suit No. AB/31/74 - Exhibit K

In Exhibits B, C and K members of the plaintiffs’ family testified in favour of the defendants’ family in the various suits the latter instituted over

the land now in dispute against other families. And in each of these suits, which terminated in favour of the defendants those principal members of the plaintiffs' family that testified stated on oath that they (the plaintiffs) were customary tenants of the defendants on portions of the land and that they and their predecessor, Kole, before them were paying customary tributes to the defendants. For instance, in Exhibit K in an action between Z. Faleye & Ors (as representing the Eleidi Family) v. Imam Bamishebi & Ors (as representing the Itele and Odoba families) Asani Bada a principal member of present plaintiffs' family had testified on 16/11/77 thus:

Asani Bada, sworn on Koran, States in Yoruba, I live at Oruba quarter Otta, I am a farmer I am also known as Asarii Fatoso. I know the plaintiffs and the defendants and I also know the land in dispute. Part of the land in dispute was granted to my ancestor Kole by the plaintiffs' ancestor Eledi. Kole was paying yearly tributes! He paid oil, yams and kolanuts. Kole was cultivating the land. Kole is now dead. I am a great grandson of Kole. My father was Odu, Kole beg at Ige and Ige begat Odu.

Other children of Kole were Olubiye, Otapo, As at today, I and Sule Otapo, Bello Ojubanire (now dead), now farm on the land granted to Kole. I had been farming on this land three years before the Adubi War (1914). I pay yearly tributes to the 1st plaintiff. I give him a tin of palm oil and some corn. But whenever we were short of oil, we would give about half a tin of oil. We also give some yams as part of the tributes. I know Itele land. There is a road in-between the land in dispute and Itele land.

No member of my family had paid any tributes to any other family other than the Eledi family.

XXD by Oke:

The land on which I farm has these boundaries:

On the 1st side by Onigbado stream

On the 2nd side by Jagba family land.

On the 3rd side by Odota family land.

On the 4th side by Otta/Itele road.

Members of my family farming on the land in dispute are Lasisi Otapo, Abasi. Kaku and Sule Otapo. I am related to the Jagba family, the Jagba have no farm within the land in dispute. I know

Yesufu Oloyede. He farms on the land in dispute. Yesufu Lemomu, Gbadamosi Oyelekan, Coker Adesona, Shittu Adesona, Sila Amodu all farm within the land in dispute. Alimi Elegbede does not farm on the land in dispute. I knew Imam Bamisebi. He was a farmer. He was farming on Itele land, not on any part of the land in dispute."

e defendants, who were plaintiffs in that suit were successful in their claim to

title and appeals by the defendants therein to both the Court of Appeal and this court were unsuccessful - See Exhibit J.

Earlier in AB/39/66: E.A. Dosunmu & Ors v. Imam Bamishebi & Ors. Sule Otapo, father of the present 3rd plaintiff and full brother of the 1st plaintiff, had testified in favour of the present defendants who were plaintiffs in B that suit. On 15/1/74 he testified thus:

“6th P.W.: Sule Otapo sworn on the Koran States in Yoruba. I live at Otta. I am a farmer. I know the land in dispute. I farm on the land in dispute. My father farmed on the land in dispute before me. I inherited the land in dispute from my father. I am now about 60 years old. I was about 3 years old C at the time of Adubi Rising (1915-1916). My father inherited the land from his own father, my grandfather, Kole, Eledi granted the land to Kale. Kole used to give customary tributes to Eledi in respect of the land. I know Yesufu Otapo, Lasisi Otapo, and Abasi Otapo. Yesufu Otapo is now dead. Others are alive. Yesufu Otapo, Lasisi Otapo and I are full brothers. Abasi Otapo and I D are half-brothers. All of us farm on the land in dispute. We have on our land on the land in dispute. crops like cocoa, kola and oranges.

Cross examination by Kolawole - Eledi was the name of a person and not that of an idol. The land in dispute is the place called Igbo Eledi. To my knowledge no shrine is worshipped on the land in dispute. I don't know E Odota family at Otta. I have heard of Odota. It is a chieftaincy title. I don't know anything about the chieftaincy family. I know Gbadamosi Sekudi, he was the late Jaguna of Otta (Adele Odota). It was not Sekudi family that gave land to Kole to farm. I know that the traditional way of marking boundaries at Otta is to plant Akoko and Atori trees along the boundary. The F portions we are on the land in dispute is not small. It is big. I do not know all the farmers on the whole of the land in dispute. I know the defendants. The 2nd defendant is from Otta. The 1st defendant is from Itele. I don't know the defendant ancestors. There were no dealings between my ancestors and the defendants'. We, my brothers and I have never paid customary dues to the G defendants in respect of our land on the land in dispute. I know Coker Adeshona. I know Sanni Adeshona. I don't know Sule Sekudi. I know Coker . Adeshona farms on a portion of the land in dispute. I don't know where his brothers farm. I don't know Odota village. To my knowledge there is no village called Odota village at Otta.”

H Another principal member of the plaintiffs' family also gave evidence for the present defendants in that suit. Bello Ojubanire testified on 6/12/73 thus:

“4th P.W. Bello Ojubanire: Sworn on the Koran states in Yoruba. I live at Imape Otta. I am a farmer. I know the plaintiffs. I know the land in

dispute. I farm on it. I was born on the land in dispute. Kole was on the portion of the land in dispute. He farm before him. Kole was my great grand father. It was Eledi who granted the land to Kole. My younger brothers and I farm on the whole of the land granted to Kole by Eledi. The land my brothers and I farm touches Itele and the land my brothers and I farm touches Itele land on one side, this side extending as far as Onigbado stream. My brothers who farm with me on the land include Asani Bada, Amodu Kaku, Yesufu Otapo now dead. Asani Bada is also called Asani Fatorisa. We planted cocoa, oranges and leaves on the land we farm. We also plant yams and cassava. Itele people have never disturbed us on the land. We the descendants of Kole used to give customary tributes to Eledi family every year in recognition of their ownership of the land. Kole too used in his lifetime to give customary tributes to Eledi family.

Cross-examination by Kolawole:- Onigbado stream separates Eledi land from Itele land. It does not to my knowledge pass through Itele land. Itele land touches the land in dispute on one side only. I know the other boundaries of the land in dispute. They are (1) Otta Itele road; (2) Ijagba land. I don't know Odota family. I know that there is a chieftaincy title known as Odota of Otta. I knew Sekudi as the Odota of Otta. His full names are Gbadamosi Sekudi. It was not Odota family who put Kole on the land in dispute. My great grand father Kole came from Ilaro. Kole did not stay at Igbo Asedi in Otta. I am not related to the plaintiff. I don't know the farmland of the 2nd defendant. Kole never paid customary tributes to the defendants' family. The direct children of Kole never paid customary tribute to Itele family. The land in dispute is not in Itele Town. It is 3 miles from Itele Town." (italics mine)

As these three witnesses had died before the hearing of the present action in the trial High Court their earlier depositions were tendered in evidence. In their testimonies in these earlier actions none of these witnesses claimed to be related to the defendants through their maternal ancestor, Madam Talabi. The evidence they gave was undoubtedly against the interest being claimed by the plaintiffs in the present proceedings.

I now turn attention to the actions directly affecting the parties in this case. In Suit No. IF/OT.12/81 (Exhibit A), Z. Faleye & Ors, as representing the Eleidi Atala Family sued Sule Otapo & Ors., as representing the Otapo and Ijagba families claiming possession and injunction. The action was tried in the Ifo/Otta Customary Court Grade 1. Evidence was led on both sides. Sule Otapo gave evidence in the case and raised the issue of his relationship to the present defendants. He testified:

"I know the land in dispute, I am farming on the land. The land that the plaintiffs are claiming to be their own belong to me and the plaintiffs. I am a member of the plaintiffs family Eleidi Atala is my great grandfather but my mother is from another family. I now mean to say that Eleidi Atala is my ancestor on my mother side, but my father is from another family. Self and my
 B *family had been on the land for a very long time. I was born on the land. This year, I was surprised when the plaintiffs took this court action against me. Eleidi Atala was a stranger in Ota during his days during the reign of Oba Akinsewa the Olotu of Ota. Eleidi Atala was handed over to Ajagba as a stranger because Oba Akinsewa did not receive strangers. Ajagba later*
 C *gave Eleidi Atala his daughter to marry. Eleidi Atala later built a house at a place known and called Iliwo Odo Compound, Otun Ota. Ajagba gave Eleidi Atala land to farm and worship his idol because Eleidi Atala was an Ifa priest. Because I am a member of Eleidi Atala family with the plaintiffs I cannot pay any customary tributes to the plaintiff and the plaintiffs cannot*
 D *restrain me from entering the land in dispute. The plaintiffs cannot say that I should not fell any timber or economic trees on the land. I have two witnesses to call.*

XXD by 1st plaintiff:- *I remember I gave evidence at the High Court Abeokuta and stated that my father was paying customary tribute to Eleidi*
 E *Atala family on the land in dispute because the plaintiffs were drowned. Fatosu my step father gave evidence in the case also. I took Abudu the timber contractor to the plaintiffs when he fell timber on the land in dispute. When Dosunmu the half brother of the 1st plaintiff died my mother took an active part in the burial.*

F *XXD by 2nd plaintiff:- It is customary in Ota then that if a person who had been given land to build house and to farm or to be buried in his in-law's house if he died. I know very well that the land in dispute belonged to Eleidi Atala family. What I stated in court today is the truth."*

To question by court, Sule Otapo testified further:-
 G *"I know Yesufu Otapo now dead and Lasisi Otapo we are all members of Eleidi Atala family. I know Asani Bada now dead is my family but he did not relate to Eleidi Atala Family. I remembered Asani Bada and myself gave evidence at the High Court Abeokuta on the land in dispute and stated that we are customary tenants on the land in dispute. Ajagba did not give*
 H *Kole my great grandfather land to farm. What I stated in Court today and what I stated at the High Court Abeokuta which was tendered by the plaintiffs are truth."*

1st defendant 1st witness. Alhaji Abudu Lasisi Alagbe testified:
 I know the three plaintiffs. I know the 1st defendant we are from the

same father and mother. I know the 2nd defendants he is my junior brother like the 1st defendant we are all born by the same father and mother. I am also known and called Alhaji Abudu Lasisi Otapo. I know the 3rd and 4th defendants. Self, the 1st and 2nd defendants and the plaintiffs are members of the same family. The Eleidi Atala family. Eleidi Atala begat the grandfather of my mother. The land in dispute is the property of the plaintiffs and the 1st and 2nd defendants family which I am a member. There was never a time that a member of my family pays customary tribute to the plaintiffs. The plaintiffs have no right to claim or demand any customary tribute from the 1st and 2nd defendants.

XXD by 1st plaintiff:- We contested the case at Abeokuta High Court together as the same family; I was with the father of the plaintiffs. The case at Abeokuta High Court was started with the father of the plaintiffs, but the judgment was delivered after the plaintiffs' father died. It is a fact that Sule Otapo 1st defendants gave evidence at the High Court Abeokuta that he is customary tenant on the land in dispute.

xxxx

XXD by Court:- I know that it was the same land in which my junior brother the 1st defendant Sule Otapo gave evidence at the Abeokuta High Court that the plaintiffs are now claiming in this Court which I come to give evidence. I know that judgment was given in favour of the plaintiffs as the owners of Eleidi Atala farmland."

The 2nd defendant in the suit, Oni Otapo gave evidence, This is his testimony:

"I know the plaintiffs in this case. I know the 1st defendant he is my senior brother by birth from the same father and mother. I know the 3rd and 4th defendants, they are wives of my late senior brother Momo Odemuyiwa. I did not fell any timber on the land in dispute. There was never a member of my (sic that paid any customary tributes on the land that I am farming. The plaintiffs are the owners of the land which they are claiming possession in this suit. I am the third generation on the land. My own grandfather who is also the grandfather of the 1st defendant and 1st defendant's witness begged for the farmland for farming from the great grandfather of the plaintiff. Since our father died about forty years ago we did not pay any customary tribute to the plaintiffs as the owners of the land. I have no witness.

XXD. by the 1st defendant:- I know that the plaintiffs are the owners of the land because of the High Court judgment obtained at Abeokuta which declared them as the owners of the land. My mother's name is Talabi, the daughter

of Dada Alagbe. This Dada Alagbe born at Iliwo Odo Compound, Otun Ota.” (italics mine)

At the conclusion of evidence, the trial customary Court found as follows:

“Findings: We have carefully listened to the evidence adduced by both the plaintiffs and the defendant’s with their witnesses and the enrolment of judgment tendered was carefully gone through even the proceeding tendered for identification also was read. We found that the plaintiffs have well established their case. We found that the defence put by the 1st defendant Sule Otapo is without foundation, this Sule Otapo cannot come to this court to deny his evidence he has given before the highest court in Ogun State. There is no remedy for 1st defendant to change this part of his evidence which he has given on oath before the High Court. If this Sule Otapo gave that type of evidence at his age, he knew well the meanings of it. He cannot call himself a customary tenant on the land in dispute at the High Court Abeokuta and come to this court and call himself or members of his family customary owners of the same land. 1st and 2nd defendants are brothers of the same father and mother. The 2nd defendant Oni Otapo after telling this court on oath that his grandfathers were customary tenants of the plaintiffs went further to state that they never pay customary tribute to anyone. We do not believe this piece of evidence. A customary tenant must in Yoruba land and in Ota bound to pay customary tribute to his or her customary land owners. The 3rd and 4th defendants did not call any witness at all but told the court that their husband, late Chief Momo Odemuyiwa had a farmland on the land in dispute. They did not convince us at all as to why they are not liable to this claim. As their late husband Chief Momo Odemuyiwa has farm on the land in dispute the 3rd and 4th defendants ought to be paying the customary tributes to the plaintiffs. As the 3rd and 4th defendants did not tell the court that there is any other person which is responsible for the upkeep of their late husband’s farm we found the 3rd and 4th defendants liable. The 1st and 2nd defendants are also found liable to the claim as they are customary tenants of the plaintiffs. Plaintiffs claim succeeds and judgment is entered in their favour as claimed. The 1st, 2nd, 3rd and 4th defendants are hereby ordered to give possession of the area of farmland farmed by them to the plaintiffs on Igbo Eleidi farmland. Injunction is hereby granted restraining the 1st, 2nd, 3rd and 4th defendants, their servants, agents or privies from entering, alienating or doing anything on the land.”

The purport of this judgment is rejection by the trial court of the claim of maternal relationship to the Eleidi Atala family raised by the defen

dants in that suit (the present plaintiffs). Significantly, there was an appeal against that judgment which remains final and binding on the parties thereto.

Again in Suit No. IF/OT.13/81 instituted in the Ifo/Ota Grade I Customary Court, Zaccheus Faleye, Chief Jonathan Dosunmu and Michael Dosunmu, as representing Eleidi Atala family of Ota claimed from Chief Momo Ogunmuyiwa, Yekini Dada, Sule Otapo and 3 others, as representing the Ijagba family of Ota (1) declaration of title and an injunction. The defendants in the action some of whom are now plaintiffs in these proceedings) again raised their entitlement to the land in dispute through their ancestor, Ajagba whose family is now known as Ijagba family and that Talabi was a child of Dada Alagbe, a member of the Ijagba family. At the conclusion of trial, the trial court by majority decision dismissed plaintiffs' claims whereupon they appealed to the High Court of Ogun State in Suit No. HCL/2A/83 (Exhibit E). The appellate High Court allowed the appeal and granted the plaintiffs in that action their claims for declaration and injunction.

I have set above the earlier cases relating to the land in dispute. In the present proceedings the plaintiffs as representing the Talabi family laid claim to part of the land that has been the subject of litigation in the various earlier cases that have always terminated in favour of the defendants. The defendants pleaded estoppel per rem judicatam and issue estoppel. The learned trial Judge made the following findings of fact:

1.. That the parties in the present proceedings are the same as the parties in Exhibit A. He observed as follows:

"In my view, in Exhibit 'A' the present plaintiffs have put their maternal relationship with Eleidi Atala in issue although they never mentioned the name of their maternal ancestor Talabi. They had the opportunity of contesting this issue vigorously by appealing but failed to do so. Instead, they abandoned their interests and surrendered all their rights in Exhibit 'A' to the present defendants. Even though the action in Exhibit 'A' was instituted by the plaintiffs therein for themselves and on behalf of Eleidi Atala family against the defendants therein for themselves and on behalf of Otapo/Ijagba families, 4th P.W. has admitted that the present plaintiffs and the defendants relate to Ijagba family, therefore the parties are the same with the present parties."

2. *"In Exhibit A, the maternal relationship of the present plaintiffs to Eleidi Atala had been put to issue."*

3. *"The plaintiffs are by virtue of Exhibit 'A' holding on to possession as customary tenants of the defendants through their privy in title Kole*

and not that they have any exclusive possession which may warrant the presumption of ownership.”

4. *“The 4th P.W. admitted that the land in dispute is the same as the land in dispute in Exhibit ‘A’: In other words, subject matter of the present action is the same as that in Exhibit ‘A’.”*

B 5. *“The plaintiffs are therefore bound by Exhibit ‘A’ and cannot therefore relitigate any declaration of title on behalf of the Talabi Branch against the defendants.”*

He found the plea of estoppel successfully raised and dismissed plaintiffs’ claim.

C On appeal to the Court of Appeal (Ibadan Division) that Court, Per Ogwuegbu, J.C.A., as he then was, observed in the lead judgment:

“The learned counsel for the respondents/cross-appellants said that the learned trial Judge rightly identified the main issue for determination when he held at page 253 lines 14-41 of the record thus:

D *‘The real issues to be decided in this case, even though I have found that the plaintiffs and the defendants are related to each other through Talabi is whether this court can re-determine what has been determined as between them in previous actions, i.e. whether the plaintiffs are estopped from re-litigating the issues.’”*

E Learned cross-appellant’s counsel submitted that the appellants have not been able to fault the findings and conclusions of the learned trial Judge on issue one and urged the court to dismiss the appeal and uphold the decision of the trial Judge on res judicata.

F To my mind, a decision one way or the other will have decisive effect on the entire case. The question therefore is whether the appellants are caught by the plea of estoppel per rem judicata or not having regard to Exhibit ‘A’, ‘B’, ‘C’, ‘D’ ‘E’, ‘H’, ‘I’, ‘K’, and ‘L’.

G The learned Senior Counsel has argued that they are worthless and of no evidential value in the present case. The learned counsel for the respondents/cross-appellants contended that Exhibit ‘B’, ‘G’ and ‘K’ were tendered in the court below as admissions against interest and that Exhibits ‘D’, ‘E’, ‘F’, ‘L’, and ‘J’ were tendered in proof of acts of ownership and possession exercised by the cross-appellants’ family over Eleidi Atala land which is the subject matter of the present suit.

H He further contended that Exhibit ‘A’, which is more relevant to issue one created issue estoppel as well as cause of action estoppel against the appellants.

In the case of Chief Nkanu & Ors. v. Chief Onum & Ors (1977) 5 S.C. 11 & 18 it was held that for a defence or plea of res judicata to succeed the parties in the previous action which is pleaded in the present one must be the same the subject matter must be the same, the claim must be the same and the court which pronounced the judgment must be a court of competent jurisdiction. In addition the decision must be final.

In Exhibit 'A' the plaintiffs Zaccheus Faleye Chief Jonathan Dosunmu and Michael Dosunmu sued for themselves and on behalf of the Eleidi Atala Family of Otta. They sued Sule Otapo, Oni Otapo and two others for themselves and on behalf of Otapo and Ajagba families.

In the present proceedings, Alhaji Lasisi Otapo, Muraina Yusuf and Rasheed Sule sued for themselves and on behalf of Talabi family of Iliwo-Odo Compound, Otta, Ogun State. They sued Zaccheus Faleye, Chief Jonathan Dosunmu and Oye Akinwale for themselves and on behalf of Ayelekun family of Iliwo-Oke Compound, Otta, Ogun State.

The claims in Exhibit 'A' are as follows:

'The plaintiffs for themselves and on behalf of Eleidi Atala family of Otta claim against the defendants jointly and severally as follows:

(1) Possession of area farmed by the defendants their servants, agents or privies within Plan No. AK 304 B at Igbo Eledi on the ground that the defendants and members of their family now refuse or neglected to pay customary tributes to the plaintiffs inspite of repeated demands.

(2) The defendants fell out trees without the plaintiffs consent and permission.

(3) An order of injunction to restrain the defendants, their servants, agents or privies from entering alienating or doing anything on the land.

Declaration of title to the piece or parcel of farmland situate lying and being at Igbo Eleidi Ota had been granted in Suit No. AB/31174 vide Enrolment of judgment issued at Abeokuta under the seal of the court and hand of the Presiding Chief Judge of 8th day of May, 1978.'

In the present suit, the plaintiffs, claim against the defendants jointly and severally is for:-

'The plaintiffs who are the descendants of Talabi Branch of Akinola family claim against the defendants who are the descendants of Ayelekun branch of the said Akinola family the following reliefs:

(1) A declaration of title that the plaintiffs are persons entitled to customary right of occupancy in respect of the piece or parcel of land situate, lying and being at Onigbado along Osuake/Ijagba road, Otta, Ogun State also known as Iliwo-Odo land.

(2) A declaration that the defendants who are the descendants of Ayelekun branch of the same Akinola family are only entitled to the right of occupancy of the piece of parcel of land situate lying and being at Onigbodo along old Osuko/Ijeba road, Otta, Ogun State also known as Iliwo-Oke land a plan of both Iliwo-Odo land and Iliwo-Oke (sic) will be filed later on in this suit.

(3) Possession of the plaintiffs' said land the subject matter of this action.
 (4) Perpetual injunction restraining the defendants'..from going unto the said land and from committing any further acts of trespass.....

.....
 While in Exhibit' A' the plaintiffs in that suit averred that the land which possession they claimed is within plan No. AK 304 B at Igbo Eleidi and that declaration of title to the said farmland at Igbo Eleidi had been granted to them in Suit No. AB/31/74 as per enrolment of judgment issued at Abeokuta under the seal of the court and hand of the Presiding Chief Judge on 8th May, 1978. The survey Plan No. AK 304 B which showed the area of land the subject matter of the said proceedings in Exhibit' A' was not tendered by the respondents/cross-appellants in the present proceedings.

The enrolment of judgment dated 8/5/78 signed and sealed by the Chief Judge at Abeokuta is not before this court and probably was not tendered in evidence in the court below.

In the absence of the survey plan No. AK 304 B, it will be difficult to say with certainty that the subject matter litigated upon in Exhibit' A' is the same as the subject matter in the present proceedings.

This is my humble view despite Exhibits 'A', 'C' and 'K' because the evidence of Sule Otapo in Exhibit 'B' , Bello Ojubanire in Exhibit 'C' and Asani Bada in Exhibit 'K' were in respect of parcels of land in dispute in Suit Nos. AB/39/66 and AB/31/74. The reliefs sought and the subject matter of these suits were not stated in Exhibits 'B', 'C', and 'K'. The extracts of their evidence in the said proceedings are not enough to show the subject matter in litigation in those suits. Furthermore, it was submitted in the brief of argument of the learned senior counsel that there is appeal before this court in respect of Exhibit 'B', in the circumstances that decision in respect of the proceedings in Exhibit 'B' is not finally. (sic).

In the absence of this survey plan, it is extremely impossible to hold that by Exhibit' A' the appellants are caught by issue estoppel and or cause

of action estoppel.

The respondents/cross-appellants in my view failed to bring forward every point or evidence documentary or otherwise which would have helped their plea of res judicata.

If an action be brought and the merits of the question be discussed between the parties, and a final judgment obtained by either party, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps some objections or argument might have been urged upon the first trial which would have led to a different judgment.

From the foregoing, I am of the view that the plea of estoppel per rem judicatam does not avail the respondents/cross-appellants in this suit and it is material in the circumstances whether the parties are members of the same family or not."

Later in the judgment Ogwuegbu, J.C.A. further observed:

"I have taken into account the fact that the learned trial Judge appeared to have decided the case mainly on estoppel per rem judicatam. The evidence on that plea was not adequately considered by him and he failed to make a finding on survey Plan No. AK/304 B before upholding the plea of estoppel per judicatam".

On appeal to this Court both in the defendants/appellants' Brief and oral submissions of their learned counsel, it is strongly contended that the court below was in error in coming to the conclusion that the plea of estoppel per rem judicatam was not established by the defendants by virtue of Exhibit A. Needless to say that the learned leading counsel for the plaintiffs strongly supported the conclusion of the court below on that issue.

I think the court below was wrong in holding that "*in the absence of the survey plan No. AK 304B, it will be difficult to say with certainty that the subject matter litigated upon in Exhibit' A' is the same as the subject matter in the present proceedings.*"

There is abundant evidence on the record to resolve this issue. The 4th PW, Rasheed Sule (who, in fact, is the 3rd plaintiff) testified, inter alia, as follows:

"The land in dispute in this case is the same land in dispute in Exhibit 'A'. In Exhibit' A' the present plaintiffs sued as children of Otapo and Ijagba and not as the descendants of Talabi."
(italics mine)

On the strength of this piece of evidence, the learned trial Judge, rightly in my view, found that "*the 4th PW admitted that the land in dispute is the same as the land in dispute in Exhibit' A'.* In other words the subject matter of the present action is the same as that in Exhibit 'A'." It would not

appear that the learned Justices of the court below adverted their minds to this important piece of evidence. The evidence of the 3rd plaintiff (PW 4) becomes more crucial when the plaintiffs did not file a reply to the statement of defence where estoppel was pleaded on the strength of the litigations averred therein.

That is not all. The defendants produced and tendered in evidence as Exhibit 'M' a composite plan showing the land covered by Plan NO. AK 304 B used in Exhibit A. In explaining Exhibit M, the defendants' surveyor, Marcellin Auguston Seweje (3rd DW) testified thus:

"Plan No. AK 304B in Suit Nos. AB/39/66 and AB/31/74 was seen by me and made use of in preparing Exhibit 'M' - See Note I of it. I have returned Plan No. AK/304B to the defendants after completing Exhibit 'M'. Plan AK 304B form the part of the boundary of the area edged Yellow. The redline on Exhibit 'M' stands for Plan AK 304B. Suits IF/OT.12/81 and IF/OT.33/81 on Notes I of Exhibit 'M' are based on Plan No. AK 304B. The 2nd and 3rd defendants showed me round the land in dispute before I made Exhibit 'M' The 2nd defendant gave me Plan AK 304B."

He was not challenged nor was the correctness of Exhibit M impugned. With this piece of evidence and Exhibit M I find it difficult to understand the attitude of the court below to the non-tendering of Plan No. AK 304B.

On the findings of the learned trial Judge, supported as they were by the credible evidence before him, I fail to see how his conclusion that the plea of estoppel per rem judicatam succeeded, could be faulted. This court in *Aro v. Fabolude* (1983) 2 S.C. 75 Per Aniagolu, J.S.C., laid down once again the ingredients of the plea of res judicata in these words:

"In civil cases, before this principle is applied, the res (the subject matter) in contention must be the same; the issue, and the parties the same, in the new case as in the earlier proceedings. Where any of the three matters is missing in the new case a plea of res judicata will ordinarily fail (See: Odua v. Nwanze (1934) 2 WACA 98 at 100-102)"

It is contended before us that as the plaintiffs were sued in Exhibit A as representing Otapo/Ijagba family but that in the present case they sued as representing the Talabi family, therefore the parties in the two actions are not the same. With profound respect to the learned Senior Advocate, I am not impressed by this argument. In Exhibit A. the defendants therein (now plaintiffs as privies to those defendants) raised and relied on the title of their maternal ancestor, Talabi. The trial court in that case found that the defence, put up, that is co-ownership through Talabi with the plaintiffs (now defendants) was *"without foundation"*. With this finding, the plaintiffs cannot now relitigate

Otapo v. Faleye (1995) 2 KLR Ogundare JSC 571
the issue of title to the land in dispute under the guise of representing the Talabi family. They are estopped by issue Estoppel from asserting that Talabi was a member of the Eleidi Atala Family.

The learned trial Judge, in my respectful view, was right to hold that notwithstanding the guise under which plaintiffs claimed in the present proceedings, the parties in Exhibit A and the present action are the same. As this Court Per Aniagolu, J.S.C., put it in Aro v. Fabolude (supra) at page 100: B

“As part of the principle that society must discourage prolongation of litigation, the doctrine has been developed that a party to civil proceedings is not allowed to make an assertion against the other party, whether of facts or legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence, in a previous suit between the same parties or their predecessors in title, and was determined by a court of competent jurisdiction, unless further material be found which was not available, and could not, by reasonable diligence, have been made available, in the previous proceedings. See Mills v. Cooper (supra) at page 104”. C D

This takes me to the finding of fact made by the learned trial Judge to the effect that *“the plaintiffs through their mother Talabi are related to the defendants.”* This finding was the major complaint of the defendants in their appeal to the court below and which appeal that Court dismissed. It is again a complaint in their appeal to this Court as Issue 4. I think the complaint is well founded. Having found and quite rightly too - that plaintiffs’ claims were barred by res judicata, he had no jurisdiction to make the finding that the parties were related, that issue having been contested and lost by the plaintiffs in Exhibit ‘A’. The learned trial Judge acknowledged this fact when, in his judgment, he observed: E F

In my view, in Exhibit ‘A’ the present plaintiffs have put their maternal relationship with Eleidi Atala in issue although they never mentioned the name of their maternal ancestor Talabi. [This is incorrect because 2nd defendant in Exhibit A, Oni Otapo, gave the woman’s name as Talabi. They had the opportunity of contesting this issue vigorously by appealing but failed to do so. Instead, they abandoned their interests and surrendered all their rights in Exhibit ‘A’ to the present defendants.” G

(Square brackets are mine)

The plaintiffs are caught by issue estoppel from re-asserting that Talabi was related to the defendants of the Eleidi Atala family. The learned Judge’s finding to that effect is therefore erroneous and it is hereby set aside. H

B Talabi, which said finding is hereby set aside.

I award to the defendants costs of this appeal assessed at N1,000.00 and costs in the court below assessed at N750.00.

C

I had a preview of the lead judgment of my learned brother, Ogundare, J.S.C. I entirely agree with his reasonings and conclusion that the defendants' appeal succeeds and the cross-appeal of the plaintiffs fails.

D of the High Court dismissing the plaintiffs' claims. I endorse the order as to costs made by Ogundare, J.S.C.

E Appeal Act can make an order that the High Court can make, has no power also to order a non-suit. The Court of Appeal therefore erred in law in nonsuiting the plaintiffs.

F court that the land litigated upon in Exhibit “A” is the same land in dispute in this suit. In my view, the Court of Appeal did not correctly apply the principles stated in *Woluchem v. Gudi* (1981) 5 S.C. 291 and *Balogun v. Agboola* (1974) 10 S.C. 111 when it interfered with the findings of facts by the trial court.

G

BELGORE.JSC

H could not be faulted as it was based on ample facts in evidence before it and the law that is applicable'. I agree with the judgment of my learned brother, Ogundare, J.S.C. that Court of Appeal was in error to have set aside the trial Court's decision. For the fuller reasons adumbrated by him which I adopt as

mine, I also allow this appeal and dismiss the cross-appeal which has no merit. I make the same consequential orders as to costs.

KUTIGI.JSC

I read in advance the judgment just delivered by my learned brother Ogundare, J.S.C, with which I agree. Consequential I also follow the appeal and dismiss the cross-appeal and endorse order for costs. B

IGUH.JSC

My learned brother, Ogundare, J.S.C. has in the lead judgment set out the facts and the applicable law in this appeal. I do not consider it necessary to repeat them all over again. I need only say that I agree entirely with this reasoning and conclusions. C

The Campus Bellum as between the parties in this case is customary right of occupancy in respect of the pieces or parcels of land situate at Onigbado along the Old Osuke/Ijagba road, Otta, Ogun state and more particularly delineated and shown on the plaintiffs/respondents' survey plan No. APT/OG/268/87, Exhibit F. The main defence set out by the defendants/appellants was estoppel per rem judicatam. The question was whether the plaintiffs/respondents' survey Plan No. APT/OG/268/87, Exhibit F. The main defence setout by the defendants/appellants was estoppel per rem judicatam. E The question was whether the plaintiffs/respondents' claims are caught by the said plea of estoppel per rem judicatam having regard to Exhibits A, B, C, D, E, H, J, K, and L. D

It is trite law that for a defence or plea of res judicata to succeed, it must be shown that the parties, the subject matter and the issues in the previous action were the same as those in the action in which the plea is raised. See Ihenacho Nwaneri & Ors v. Nnadike Oriuwa & Ors (1959) 4 SCNLR 132; Idowu Alashe & Ors v. Sanya Olori flu & Ors (1965) (N.M.L.R. 66; Banire v. Balogun (1986) 4 NWLR (Pt.38) 747 at 754; Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228 and Chief Nkanu & Ors v. Chief Onum & Ors (1977) 5 S.C. 11 at 18. It is equally well established that the styling, restyling or mistyling of parties in actions will not prevent a court from examining the proceedings in issue and determining whether the parties in the present suit are the same as or privies to the parties in an earlier suit and thus caught by the doctrine of issue estoppel or res judicata. See Abiodun v. Fasanya (1974) 11 S.C. 61 at 78. This is because it is not uncommon for parties who have lost in a land suit to employ all manner of devices to resurrect the land case under various names and guises in a bid F G H

to becloud the issue of estoppel or res judicata. See too *Iyaji v. Eyigebe* (1987) 3 NWLR Cpt.61) 523 at 533. Once a matter or issue is finally settled in a previous suit by a court of competent jurisdiction, such a matter or issue so settled can never again, on the principle of “res judicata” or “issue estoppel” be raised or re-litigated in subsequent proceedings by those who were parties B or privies to the previous proceedings.

The learned trial Judge meticulously gave due consideration to the appellants’ plea of estoppel per rem judicatam and found as follows:

“The 4th P.W. admitted that the land in dispute is the same as the land in dispute in Exhibit A. In other words, the subject matter of the present C action is the same as that in Exhibit A. I have held above that the parties in the present action are ‘the same as in Exhibit A

The plaintiffs are therefore caught by the defendants’ plea of estoppel per rem judicatam and cannot therefore relitigate any declaration of title on behalf of the Talabi Branch against the defendants”.

D It cannot be over-emphasized that an appellate court will not ordinarily interfere with the findings of fact of a trial court which are supported by evidence unless such findings are perverse or clearly wrong. See *Balogun v. Agboola* (1974) 10 S.C. 111; *Ike v. Ugboala* (1993) 6 NWLR (Pt.301) 539 at 555; *Okpiri v. Jonah* (1961) All NLR 102 at 104; *Woluchem v. Gudi* (1981) 5 S.C. 291 E at 295 and 326 etc etc. There is evidence in the present case in support of the above findings of the learned trial Judge. Those findings are also neither perverse nor clearly wrong. In my view, the court below, if I may say with respect, was in error when it reversed those findings of the trial court without any solid justification.

F In this regard, it should be pointed out that one of the main reasons why the appellants’ plea of res judicata was rejected by the court below is because the customary court judgment, Exhibit A, without the relevant survey plan No. AK 304 B to which judgment in the suit was attached could not sustain the plea of estoppel per rem judicatam. Said the court below per the G lead judgment of *Ogwuegbu, J.C.A.*, as he then was:-

“The survey plan No. AK 304B which showed the area of land the subject matter of the said proceedings, in Exhibit A was not tendered by the respondents/cross-appellants in the present proceedings.

H In the absence of the survey plan No. AK 304B, it will be difficult to say with certainty that the subject matter litigated upon in Exhibit A is the same as the subject matter in the present proceedings.

In the absence of this survey plan, it is extremely impossible to hold

that by Exhibit A, the appellants are caught by issue estoppel and/or cause of action estoppel.

From the foregoing, I am of the view that the plea of estoppel per rem judicatum does not avail the respondents/cross-appellants in this suit.

.....
The Court of Appeal, if I may again say with profound respect, fell into a grave error in the above observation as there were clear admissions in the evidence of the plaintiffs/cross-appellants to the effect that the land litigated upon in Exhibit A was the same as the land in dispute in the present action. P.W.4, Rasheed Sule, who is the 3rd plaintiff/cross-appellant in his testimony before the trial court admitted in no mistaken terms that the land in dispute in the present action is the same as the land in dispute in Exhibit A. Said the witness:-

“The land in dispute in this case is the same land in’E2’80’a2 dispute in Exhibit A. In Exhibit A, the present plaintiffs were sued as children of Otapo and Ijegbaand not as descendants of Talabi”

In the face of the above admission which the trial court accepted, it seems to me clear that the question of the identity of the land in dispute in both actions cannot now be seriously argued to be in issue. In my view, it will amount to allowing the plaintiffs/cross-appellants to have a “*second bite at the cherry*” if their claims in this suit were entertained by the trial court. See Albert Adeoye v. Madam Jinadu (1975) 5 S.C. 43 at 47; Savage & Ors v. Uwuechia (1972) 1 All NLR 251 at 257-260; Madukolu v. Nkemdilim (1962) 1 All NLR 287 at 593. I therefore find myself unable to accept the view of the court below that the plaintiffs/cross-appellants’ claims have not been caught by the doctrines of estoppel per remjudicatum or issue estoppel and that the plaintiffs are not estopped from relitigating and claiming the reliefs sought in this suit against the defendants/appellants.

On the issue of ownership and possession of the land in dispute, the trial court after a painstaking analysis of the evidence adduced thereon made the following findings of fact, namely:-

‘The present plaintiffs in Exhibit A conceded the title in the said land to the present defendants through their grandfather, Kole, who was a tenant to the Eleidi Atala family. The present plaintiffs through their privy, Kole, in Exhibit A are still occupying the land in dispute despite that judgment.....

The plaintiffs are by virtue of Exhibit A holding on to possession as customary tenants of the defendants through their privy in title, Kole, and

not that they have any exclusive possession which may warrant the presumption of ownership."

It is significant that the above devastating findings against the plaintiffs/cross-appellants were neither appealed against nor did the court below make any comments whatsoever about them. In a claim for declaration of title to statutory or customary right of occupancy to land, if the defendant is able to adduce evidence oral or documentary, which has the effect of discrediting the plaintiff's evidence, such a declaration should be refused. See *Ogundairo v. Okanlawon* (1963) 1 All NLR 358. The position in the present case, as I see it, is that the defendants/appellants were found to have successfully adduced evidence which utterly discredited the entire foundation of the plaintiffs/cross-appellants' case. In such a situation, It seems to me that no other cause was open to the trial court than to dismiss the plaintiffs' claim in their entirety.

There is finally the question of the order of non-suit entered in the suit by the court below. It ought to be pointed out in this connection that as at the 11th July, 1989 when the High Court of Ogun State dismissed the plaintiffs/cross-appellants' claims, the applicable Rule of Court was the Ogun State High, Court (Civil Procedure) Rules which came into effect on the 25th February, 1988. These new Rules of court contained no provision for an order of non-suit and the question is whether the Court of Appeal had jurisdiction to enter a non-suit in the suit in the absence of statutory provision at all material times in the Rules of Court applicable in Ogun State High Court.

The general powers of the, Court of Appeal with, regard to appeals are contained in Section 16 of the Court of Appeal Act which provides as follows:-

"16. The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in case of an appeal from the court below in that court's

appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction” (italics supplied)

It is clear from the provisions of Section 16 of the Court of Appeal Act, 1981 that the Court of Appeal has powers to exercise full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance “ These powers have been spelt out in detail in Order I rule 20 of the Court of Appeal Rules 1981. I have given a close study to these provisions of Section 16 of the Court of Appeal Act, 1981 and Order I rule 20 of the Court of Appeal Rules, 1981 and it seems to me that their primary object is to enable the Court of Appeal to make any order or give such judgment which the Court below ought to have given for the speedy and satisfactory dispensation of justice according to law without having to remit the suit back to the trial court for any appropriate actions which the circumstances of the case may demand. It is therefore my view that the general purpose of these powers conferred on the Court of Appeal is to permit that court to exercise all the jurisdiction of a court of first instance with regard to the appeal before it. Accordingly, the Court of Appeal may only make orders or give such judgments which the Court of first instance at all material time is entitled under the law and rules to give but not otherwise. See *Mrs. Alero Jadesimi v. Adolo Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264 at 276.

In the present case, it is not in dispute that the provision for an order of non-suit had been deleted from the Ogun State High Court Rules with effect from the 25th February, 1988, well before the 11th July, 1989 on which latter date the High Court of Ogun State delivered its judgment in the suit. It therefore seems to me clear that as at the 11th day of July, 1989 when the trial court delivered judgment in this suit, it had no jurisdiction to enter an order of non-suit in the action as that power had been taken away from it with effect from the said 25th February, 1988. See *John Anyakwo v. African Continental Bank Ltd.* (1976) 2 S.C. 41 at 59. Consequently, the court below was in error when it entered anon-suit in its judgment as it had no jurisdiction to do so since it could only give judgments or make orders which the court of first instance was entitled under that law to make.

It is for these and the more elaborate reasons contained in the lead judgment of my learned brother, Ogundare, J.S.C. that I too, hereby allow this appeal, set aside the decision of the court below and restore the judgment of the trial court. The cross-appeal is without substance and it is accordingly dismissed. I abide by the consequential orders including the order as to costs therein contained.