

SUPREME COURT OF NIGERIA
7TH APRIL, 1995. SC.265/1988
CORAM:- M.BELLO CJN, I.L KUTIGI,
M.E. OGUNDARE, Y.O. ADIO, A.L IGUH, JJSC.

RICHARD EZEANYA & 3 OTHERS

(For themselves and on behalf
of the members of Ezeanya family)

.....APPELLANTS

AND

GABRIEL OKEKE & 2 OTHERS

(For themselves and on behalf
of the members of Uhudike family)

.....RESPONDENTS

APPEALS - Findings of trial court - As to applicable customary law - Where faultless and fully supported by evidence - Whether appellate court would interfere.

APPEALS - Issues for determination - Academic and speculative issue that does not arise - Whether to be determined.

APPEALS - Error of law - By the Court of appeal - In substituting its findings for those of the trial court.

EVIDENCE - Custom - Appellants' evidence of custom - Where not controverted by the respondents - Whether trial court rightly accepted it.

PLEADINGS - Issue - Not raised in the parties' pleadings - Raised by the Court of Appeal suo motu - Whether prejudicial and in breach of a party's right to fair hearing.

RES JUDICATA - Identity of the res - Whether the subject matter is the same - In the past criminal and present civil action.

RES JUDICATA - Issue - Previous criminal case of assault - Present civil action for declaration of title to land - Whether the issues are the same.

RES JUDICATA - Parties - In previous criminal proceedings fought in personal capacities - Whether same as parties in the present civil action -

Contested in representative capacity.

FACTS

The plaintiffs/respondents before the Anambra State High Court filed an action against the defendants/appellants. Plaintiffs claimed declaration of ownership, court's order to redeem, and possession of the land in dispute situate at Nnokwa. It is not in dispute that the land in issue originally belonged to Okenwe. But the parties have different stories as to certain events that befell the land. The plaintiffs claimed that the land was pledged by Okenwe to the defendants' ancestor, Ezeanya for which reason they sought to redeem it vide this action, The defendants contended that the said Okenwe surrendered the land in dispute to Ezeanya but that following the traditional ceremony of slaughtering a goat in respect of the land by Ezeanya as sanctioned and endorsed by the elders and people of Nnokwa, the land in accordance with established native law and custom of Nnokwa people became the outright property of Ezeanya.

The trial court found for the defendants and dismissed the plaintiffs' claim. It held that a certain previous criminal case, Exh. "C" operated as *res judicata* against the plaintiffs. An appeal to the Court of Appeal filed by the plaintiffs was upheld and plaintiffs' claim was granted. Being dissatisfied, the defendants have now appealed to the Supreme Court and raised two issues for determination. The apex court did not uphold the defendants' contention that Exhibit "C" operated as *res judicata* against the plaintiffs. But their appeal was allowed on the issue of whether the land was a redeemable pledge.

HELD (Unanimously allowing the appeal per lead judgment of **IGUH JSC**)

Res Judicata - Parties

1. I have closely studied Exhibit C and it appears to me plain that the parties therein were entirely different from the parties in the present case. This is quite apart from the fact that the parties in the criminal proceedings, Exhibit C, fought their criminal battle in their personal capacities as against the parties in the present action who contested their civil claims in their respective capacity. Where an action is brought against a defendant personally and prosecuted to judgment, and later a further action is brought to him in a representative capacity by the plaintiff in the original action, the judgment is not *res judicata* as the parties to the respective action are not the same, since in one action the defendant is sued personally and in the other as representative of a class of persons. (p. 863 C)

Res judicata - Identity of the res

2. On the issue of the identity of the res, it seems to me clear that the subject matter in dispute in Exhibit C was an iroko tree on the land in dispute which the accused persons felled without the permission of the complainant. This is unlike the res in the present action which is a piece or parcel of land as shown in their Plans Exhibits A and B. The identity of this land is not in dispute between the parties. I therefore find myself unable to hold that the subject matter of the litigation in the two cases is the same. (p.863G)

Res judicata - Issue

3. On the question of the claims and the issue in the two cases, it is not in dispute that Exhibit C is a criminal charge of assault and conduct likely to cause a breach of the peace against the accused persons. The present action, on the other hand, is in respect of declaration of title to land and orders for the redemption and possession of the land. With respect, I am unable to accept that the claims and issues in both cases are the same. No doubt, the accused persons in Exhibit C put the defence of a claim of right made in good faith over the land upon which the iroko tree stood. This however could not convert a straight forward criminal case of assault to a civil claim of declaration of title to land. (p. 863 H)

Academic and speculative issue that does not arise

4. Thus, as far as the real issues for determination between the parties in this appeal go, the question of whether a decision in a criminal case can operate to found an estoppel per rem judicatam hardly arises. In my judgment, this question, as far as this appeal goes is entirely academic, speculative and hypothetical and I must in accordance with the well established principle of this court decline to decide the present appeal. (p. 867 E)

Appellants' evidence of custom - Not controverted

5. Reference must also be made at this stage to one or two facts which are relevant to the Nnokwa native law and custom relied upon by the appellants. The first is that although the said custom was fully pleaded by the appellants and testified upon, the respondent did not attempt in any way to controvert the same. It is trite that where evidence given by a party to any proceedings was not challenged by the opposite party, who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence on the issue of the applicable native law

and custom remained uncontroverted and was in my view rightly accepted by the trial court. (p. 871 D)

Findings of trial court

6. The law is well settled that an appellate court will not ordinarily interfere with the findings of fact made by a trial court except in such circumstances as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn conclusions from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. In the present case, the findings of the trial court appear to me clearly faultless, unimpeachable and fully supported by evidence before it. The evidence of Nnokwa customary law which the trial court accepted as established and applied was given not only by the appellants who asserted the custom but also by D. W. 2 D who was not a party to the suit. Additionally there was the evidence of the respondents' own witness, P.W.2, who as the natural ruler of Nnokwa testified that he knew the history of the land in dispute, the custom of his people and that the land belonged to Okenwe originally but is now the property of the appellants' family. (p. 872 D)

Error of law - By the Court of Appeal

7. What the Court of Appeal did was to embark on a lengthy academic disquisition into the incidents of a simple or straight forward case of pledge and inevitably arrived at the conclusion that once a pledge, always a pledge. In consequence, it proceeded to substitute its own findings for those of the trial court without regard to the native law and custom prevailing at Nnokwa which was satisfactorily established at the trial and accepted by the trial court. With profound respect, it seems to me that this is a serious error of law on the part of the court below. (p. 872 G)

Issue - Not raised in the parties pleadings

8. In the present case, the question of whether or not the native law and custom relied upon by the appellants is contrary to public policy, equity and good conscience was neither raised as an issue in the pleadings of (I H parties nor was the matter canvassed by them whether in the trial court or before the court below. Indeed at no time did the respondents, whether directly or indirectly, suggest whether in the trial court or before the court below that the said customary law was contrary to public policy equity and good conscience as propounded by the Court of Appeal. What the court

below did was to raise the point suo motu and proceeded to resolve the same in favour of the respondents without giving the appellants an opportunity to be heard on the point. With profound respect to the Court of Appeal, this procedure was grossly erroneous on point of law as it was prejudicial to the appellants and constituted a breach of their right to fair hearing. (p. 873 G)

B

NOTABLE POINTS OF INTEREST

IGUH JSC

1. *Limitation of res judicata in a representative action*

So, too, where an action is brought by a plaintiff in a representative capacity against another person, personally, and the action is prosecuted to judgment where the defendant succeeds, that judgment is res judicata to the extent that it determines the personal rights of the defendant in the subject matter of the action; but it is not resjudicata of any interests the defendant may later represent in an action brought against him in a representative capacity. (p. 863 E)

2. *Proper import of s. 34(1) Evidence Act*

It seems to me indisputable from a close study of section 34(1) of the said Evidence Act that it concerns the relevance of evidence for proving in a subsequent proceeding the truth of the facts therein stated and has nothing to do with a judgment, decision or finding in a criminal case or matter and whether or not they can found estoppel per rem judicatam in a subsequent civil proceeding. (p. 865 D)

F

3. *Whether a criminal case cannot operate as res judicata in a civil action*

Reference was also made to section 34(2) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria which provides that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of that section. Learned respondents' counsel submitted that if the provision of section 34(2) of the Evidence Act is applied, it would become obvious that a finding or decision in a criminal case cannot operate as resjudicata in a civil proceeding because the parties cannot be the same. With respect to learned counsel, I must state that I find it a bit difficult to accept the proposition of law he sought to make in respect of the said section 34(2) of the Evidence Act. Upon a close consideration of this proposition, it appears to me that learned counsel did focus his attention only to the narrowest meaning of the term prosecutor which in common parlance includes The State, Commissioner of Police, Attorney-

H

General or the Director of Public Prosecutions. The term “prosecutor” or, indeed, “prosecutrix”, without doubt, means more than these institution and public offices and has been equally defined to mean a person who takes proceedings against another in the name of the state, usually, either the person injured, or the police, or in graver crimes, the Attorney-General B of the Director of Public Prosecutions. The prosecutor may be a private person, in which case he is generally the person specially injured by the crime. (p. 865 E)

C 4. *Parties can be same in criminal and subsequent civil proceedings*

In other words, a “prosecutor” or “prosecutrix” clearly includes a “complainant” in a criminal case. In the circumstances, it cannot be correct to suggest that if the provisions of section 34(2) of the Evidence Act are applied, it would become obvious that a finding in a criminal case cannot D operate as resjudicata in a subsequent civil proceeding because the parties cannot be the same. The parties can of course be the same particularly where an offence is both a crime and a tort. (p. 866 D)

5. *Proof of native law and custom*

E There can be no doubt that native land and custom, otherwise also known as customary law, are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless they an of such notoriety and have been so frequently followed or applied by the courts that judicial notice ought to be taken without evidence required F proof thereof. (p. 870 A)

REPRESENTATION

G. U. E. Peter-Okoye (Mrs.) for the appellants
G Respondents absent and unrepresented

CASES REFERRED TO

Nwosu v. Udejaja (1990) 1 N.W.L.R. (Part 125) 188
H Udeze v. Chidebe (1990) 1 N. W.L.R. (Part 141) at 155 G-H
Ajao v. Alao (1986) 5 N. W.L.R. (part 69) at 231 A - B
Hunter v. Chief Constable of West Midlands (1981) 3 All E.R. 727
McIlkenny v. Chief Constable of West Midlands Police Force (1980)2 All E.R. 227 at 234-240

- Ekpoke v. Usilo (1978) 6-7 S.C. 187
 Yoye v. Olubode (1974) 1 All N.L.R. (Part 2) 118
 Shitta-bey v. Lagos Executive Development Board (1962) 1 All N.L.R. 373
 Timitimi v. Amebebe (1953) 14 W.A.C.A. 374 8
 U.A.C. Ltd. v. Macfoy (1961) 3 All E.R. 1172
 Salati v. Shehu (1986) 1 N.W.L.R. 198 B
 Ainida v. Oshobgja (1984) 7 S.C. 68 at 76
 Olujmle v. Adeagbo (1988) 2 N.W.L.R. (Part 75) 2384t 251 A B
 R. v. Ltd. Governor Eastern Region, Ex Parte Chiagbana 2 F.S.C. 46 3
 Akym v. Egymah 3 W.A.C.A. 65
 Adomba v. Odiese (1990) 1 N.W.L.R. (Part 125) 165 at 178 C-E C
 Yoye v. Olubode (1974) 1 All N.L.R. (Part 2) 118 at 122
 Alasa v. Ilu (1965) N.M.L.R. 66
 Holington v. Hewthorn & Co. Ltd (1943) 1 K.B. 587 or (1943) 2 All E.R. 35
 Kaduna State v. Dada (1986) 4 N.W.L.R. (Part 38) 687 D
 Oyediran v. Alebiosu (1992) 6 N.W.L.R. (Part 249) 55 at 558
 Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at 81
 Boshali v. Allied Commercial Exporters Ltd (1961) All N.L.R. 917
 West African Shipping Agency (Nig) Ltd. v. Kalla (1978) 3 S.C. 21 at 31
 Okpiri v. Joah (1961) All N.L.R. 102 at 104-105 E
 George v. Dominion Flour Mills Ltd (1963) 1 S.C.N.L.R. 242
 Nkwocha v. Governor of Anambra State (1984) 6 S.C. 302
 Nwaneri v. Oriuwa (1959) 4 F.S.C. 132
 Fadior v. Gbadebo (1987) 3 S.C. 219 at 228

STATUTES & RULES REFERRED TO

- Supreme Court Rules 0. 2 r. 11(1), 0.6. r. 8 (6)
 Evidence Act Cap 112 Laws of the Federation of Nigeria ss. 34(1) & (2), 54 G
 Constitution of the Federal Republic of Nigeria ss. 22, 33

LEAD JUDGMENT BY IGUH JSC

In the High Court of former Anambra State of Nigeria, the plaintiffs, who are now the respondents, for themselves and on behalf of the members of Uhudike family instituted an action against the appellants,

who therein were the defendants, for themselves and on behalf of the members of Ezeanya family claiming jointly and severally as follows-

- “1. A declaration that the plaintiffs are the owners of the piece and parcel of land otherwise known as and called “Ana Okenwe” situate at Nnokwa, the annual value of which is ten pounds.
- B 2. An order of the court for the plaintiffs to redeem the said land from the defendants .
- 3. Possession of the said land. ”

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

C The case accordingly proceeded to trial and the parties testified on their own behalf and called witnesses.

It is, perhaps, convenient at this stage to set out briefly the background facts to the dispute between the parties.

The plaintiffs’ case is that the land in dispute is known as and D called “Ana Okenwe” and is situate at Nnokwa town. The boundaries thereof are more particularly delineated in their survey Plan No. EC.9/73 tendered at the hearing as Exhibit A. The land was originally the property of one Okenwe, a member of their family, who died without a surviving male issue. As representatives of the Uhudike family to which Okenwe belonged, E the plaintiffs claimed that they inherited all his property in accordance with their native law and custom.

It is not in dispute that the land in issue originally belonged to Okenwe. From the pleadings of the parties and the evidence before the trial court, it is common ground that the original ownership of the land was in F Okenwe. The real issue between the parties is that whilst the plaintiffs claimed that the land was “pledged” by Okenwe to the defendants’ ancestor, called Ezeanya, the defendants contended that the said Okenwe “gave” or “surrendered” the land in dispute to Ezeanya but that following the traditional ceremony of the slaughtering of a goat or goats in respect of the G land by Ezeanya as sanctioned and endorsed by the elders and people of Nnokwa, the land in accordance with established native law and custom of Nnokwa people became the outright property of Ezeanya. The defence case is that the ceremony of the traditional slaughtering of a goat or goats in respect of land at Nnokwa, such as the land Okenwe gave to Ezeanya, H symbolises that such land has undergone customary caputis demunitio and acquired the status of irredeemability under the customary law of Nnokwa. Accordingly the land thereafter became the property of Ezeanya in perpetuity.

The story of the alleged pledge as presented by the plaintiffs is that

one of the two sons of Okenwe, Ekwebelu, stole yams from one Okeke Ezekwemba of Abor family, Nnokwa. It is common ground that yam stealing in Nnokwa was not only a grave crime but that it also constituted an abomination under Nnokwa customary law. The offender was called upon to perform propitiation rites to appease the gods. If he refused to do so, he was, in the words of Anselm Ezeugo, the 3rd plaintiff, *"either ostracised or sold into slavery or even killed."* Accordingly Ekwebelu was taken to *"chukwu"*, an oracle, to clear himself but never returned. The 3rd plaintiff claimed that Ekwebelu was sold into slavery under the pretext that he was being taken to *"chukwu"*. According to him, Ezeanya had taken Ekwebelu *"on bail"* before the sojourn to *"chukwu"*. As Ekwebelu did not return, C Ezeanya's bond was estreated and Nnokwa people imposed on him a penalty of 9 bags of cowries, a goat, chicken, 9 yams and 9 kola nuts.

On the other hand, P.W.1, Philip Ibezi's version of the said penalty was that as Ekwebelu did not return from *"chukwu"*, Okenwe was called upon by Nnokwa elders to appease the gods with the items above D enumerated for his son being thereby confirmed or declared a thief by the oracle. As Okenwe could not pay the penalty, Ezeanya stood surety for him. Okenwe continued to reimburse Ezeanya until it appeared two bags of cowries remained outstanding. Okenwe could not produce this outstanding balance of two bags of cowries and in consequence fled Nnokwa with his E only surviving son to a neighbouring town, Nnobi for shelter. His said son later died without an issue. Ezeanya brought the matter to the people of Nnokwa who decreed that he should take the lands of Okenwe until Okenwe's family repaid the two bags of cowries.

The defendants, on the other hand, presented an entirely different F story with regard to the transaction in respect of the land. According to them, Okenwe had three sons. The 1st son, Ekwebelu was sold because he stole yams in Nnokwa. His remaining two sons, Onyeguili and Mmuodozie also stole yams from the compounds of Ezenwali and Okeke Egwuonwu G respectively. As they were both brought before Nnokwa people, Okenwe pleaded with Ezeanya to stand surety for his said two sons so that they might not be sold into slavery or killed. Ezeanya agreed and the two sons of Okenwe were released on bail, Ezeanya further gave Okenwe at the latter's request the sum of five pounds with some yams. In return, Okenwe surrendered or gave his land with the economic trees thereon to Ezeanya. Not H long afterwards, Okenwe fled with his sons to Nnobi.

Following this development, the people of Nnokwa held Ezeanya whose bond was entreated and he was ordered to pay the prescribed pen-

alties to redeem himself. It cost Ezeanya seven cows and the sale into slavery of 3 of his daughters to pay the said penalties. Thereafter, Nnokwa elders endorsed the surrender of land earlier made by Okenwe to Ezeanya. Ezeanya was also made to slaughter a goat in respect of the land in accordance with the tradition and usages of Nnokwa people. The defendants B asserted that by the native law and custom of the people of Nnokwa, the traditional slaughtering of a goat or goats in respect of such land transaction at Nnokwa confirms the irredeemability of the land so given or surrendered.

One vital point which must be stressed is that whereas, according C to the plaintiffs, it was Nnokwa people who customarily gave Okenwe's land on "*pledge*" to Ezeanya as Okenwe had then fled to Nnobi, the defendants' case is that it was Okenwe himself who 'surrendered or gave his land to Ezeanya before he fled to Nnobi as aforesaid.

I think it ought to be mentioned that both parties in their pleadings D pleaded the Nnobi Native Court case No. 171/1928. The proceedings and judgment in that case were tendered by the defendants at the hearing as Exhibit C. Exhibit C is a criminal action brought by one Ogbannuegwu of the plaintiffs' family against. David Onyido, Okeke Ilobi and Igwediobi, all of the defendants' family for assault and conduct likely to cause, a breach E of the peace by felling by force, the complainant's iroko tree without his permission. It is not in dispute that the Iroko tree in question was within the piece or parcel of land now in dispute.

The Nnobi Native Court in its judgment held as follows:-

"Chiefs' Reasons: We have gone through this case carefully and ascer-
F *tained from the elders that the land and the iroko tree belonged to the*
accused persons' late father named Ezeanya. The old man Okeleafor who
is the oldest man at Nriokwa will swear oath with six persons namely,
Okeke, Ekeagu, Nwadike, Okongwu, Nnabuike and Okeke Unaku, the el-
G *ders, that the land and iroko tree belonged to the father of accused per-*
sons. They will swear Ana. After swearing of the oath, the land and the
iroko will belong to the accused persons,
judgment - "Finding the Accused persons not guilty and discharged."

.....Oath was
sworn by the seven elders named Okeleafor, Okeke, Ekeagu, Nwadike,
H Okongwu, Nnabuike and Okeke Unaku according by this 25/7/28

.....
J.O
Abadom
C.CN.C

25/7/28"

It is the defendants' case that the issue of ownership of the land in dispute had been decided against the plaintiffs per Exhibit C, that the plaintiffs cannot now circumvent this decision by their recent claim now based on pledge and that the plaintiffs are estopped from claiming title to or from alleging the existence of a redeemable pledge in the face of Exhibit C which B must operate as *res judicata* against them.

At the conclusion of hearing, the learned trial Judge, Awogu, J., as he then was, after an exhaustive review of the evidence dismissed the plaintiff's claims in their entirety on the 28th October, 1983.

Being dissatisfied with the said judgment, the plaintiffs lodged an C appeal against the same to the Court of Appeal, Enugu Division which in a unanimous decision set aside the judgment of the trial court on the 30th March, 1988 and substituted therefore, judgment for the plaintiffs as per their writ of summons with costs. Aggrieved by this decision of the Court of Appeal, the defendants have pursuant to leave granted by the court below D on the 27th June, 1988 appealed to this court.

Pursuant to the rules of this court, the parties, through their respective counsel, filed and exchanged their written briefs of argument. The defendants, who hereinafter will be referred to as the appellant also filed a reply to the respondents' brief of argument. E

The two issues identified on behalf of the appellants which this court is called upon to determine are as follows:-

"1. Whether the Court of Appeal ought not to have upheld the trial court's conclusion that Exhibit C amounted to estoppel per rem judicatam (sufficient to prevent the respondents from relitigating title to the F land in dispute); and

2. Whether it was correct for the Court of Appeal to conclude that Ezeanya took up possession of the land in dispute by virtue of a redeemable pledge."

The plaintiffs, who hereinafter, will be referred to as the respondents, for their own part, set out three issues in their brief of argument as arising in this appeal for determination. These are -

"1. Whether Exhibit 'C' which was the judgment of the Native Court in Suit No. 171/1928 constitutes estoppel per rem judicatam to disentitle the plaintiffs/respondents from instituting the action they took in the H High Court.

2. Whether the Court of Appeal rightly considered the transaction by which the land in dispute came into the possession of the defendants/appellants' ancestor, Ezeanya, as a pledge rather than as a forfeiture.

3. Whether the trial court had jurisdiction to do what it did, namely, to award title of the land on which stood the iroko tree to the accused persons by ordering an oath swearing after it had acquitted and discharged them of assault and conduct likely to cause a breach of the peace."

I have closely examined these questions set out by learned counsel B in their respective briefs of argument. In my view the issues formulated by the respondents are not only sufficiently covered by the issues identified by the appellant, they seem to me enough for the determination of this appeal. I will accordingly adopt the set of questions raised by the appellants in their brief of argument for my consideration of this appeal.

C At the oral hearing of the appeal, learned counsel for the appellants, G.U.E. Peter-Okoye (Mrs) proffered oral arguments in further elucidation of the submissions contained in her written brief. Both the respondents and their learned counsel, Senator N.N. Anah, who settled the respondents' brief of argument, were absent in court although served with D hearing notice in respect of the appeal. Accordingly the court proceeded with the hearing of the appeal ex parte pursuant to the provisions of order 2 rule 11(1) and order 6 rule 8(6) of the rules of this court on the briefs filed by both parties.

The first issue raised by the appellants is whether the court below E ought not to have upheld the trial court's conclusion that Exhibit C amounted to estoppel per rem judicatam, sufficient to prevent the respondents from relitigating title to the land in dispute. It was submitted by learned counsel for the appellants, G.U.E. Peter -Okoye (Mrs) that Exhibit C operated as res judicata against the respondents. Relying on the decision in Nwosu v. F Udejaja (1990) 1 NWLR (Pt.125) 188, Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) at 141, G-H, Ajao v. Alao (1986) 5 NWLR (Pt.45) at 802 and Olujinle v. Adeagbo (1988) 2 NWLR (Pt.75) 238 at 251 A - B, learned counsel stressed that unlike proceedings before the High Court, it is the substance and not the form of an action in a Native Court that ought to be G of any importance. In her view, Exhibit C, although criminal in form, was in all respects a civil claim in substance. The accused persons in Exhibit C were acquitted and discharged followed by an order of the court for them to swear on oath and take the land in dispute which they claimed to be their own: She pointed out that Exhibit C ex facie shows that the accused H persons duly swore the prescribed oath. Learned counsel contended that the parties, the subject matter of the land in dispute and the issues for determination in both Exhibit C and the present action are the same. She called in aid the decisions in Hunter v. Chief Constable of West Midlands and Another (1981) 3 All E.R. TP and Maclikenny v. Chief Constable of

West Midlands Police Force and Another (1980) 2 All E.R. 227 at 234-240 and submitted that even if Exhibit C were to be treated as a purely criminal matter, it can still found estoppel per rem judicatam in a subsequent civil suit. She therefore argued that on a proper consideration of the effect of Exhibit C as res judicata the Court of Appeal ought to have upheld the finding of the learned trial court to the effect that the respondents were estopped from relitigating the issue of title to the land under whatever guise. B

The second issue formulated by the appellants poses the question whether the Court of Appeal was correct to hold that the land in dispute was given or surrendered to Ezeanya by way of a straight forward “pledge” which therefore was ordinarily redeemable as the respondents contended. C The main argument of the appellants on this issue is that the court below was in gross error by failing to advert its mind to the significant and effect of Nnokwa customary law as to the killing of a goat in respect of a land transaction, such as the one in issue in the present case. It is their submission that the learned trial Judge having exhaustively evaluated the evidence D of the parties and the applicable local customary law and made findings thereon, the court below was in gross error to have disturbed the said findings which were fully supported by evidence before the trial court. They contended that the trial court having rejected the plaintiff/respondents’ version of the transaction between Okenwe and Ezeanya and rightly pronounced E on the irredeemability of the land in dispute in accordance with Nnokwa customary law, there was no option open to the trial court than to dismiss the plaintiffs’ case. They further argued that the court below was in error by failing to dismiss the respondents’ appeal before it.

Learned Senior Advocate of Nigeria, Senator N.N. Anah, in his F respondents’ brief argued that the learned trial Judge was in a serious error on the issue of estoppel per rem judicatam and that the Court of Appeal was right to reverse his decision on the point. He pointed out that Exhibit C is a criminal action brought by one Ogbannuegwu of the respondents’ family in his personal capacity against three individuals of the appellants’ family in their personal capacities for assault and conduct likely to cause a breach of the peace. He stressed that Ogbannuegwu in Exhibit C was fighting his personal battle in the criminal charges against the three named accused persons and that neither the plaintiffs nor the defendants, as family groups, were either parties to or had any legal interest in the criminal H prosecution. He referred to the decision of this court in Ekpoke v. Usilo (1978) 67 S.C. 187 and submitted that the general principle of law is that no person may be adversely affected by a judgment in an action to which he was neither a party nor a privy because of the injustice in deciding an

issue against him in his absence. He further cited the decisions in *Yoye v. Olubode & others* (1974) 1 All NLR (Pt.2) 118 and *Shitta-Bey and others v. Lagos Executive Development Board and others* (1962) 1 All NLR 373 and submitted that the onus is on him who sets out the plea of *res judicata* as a defence to establish conclusively that the parties, the subject matter B and the claim and the issue in the two cases concerned are the same.

Learned Senior Advocate, then argued that neither the parties, nor the subject matter or indeed, the claim and the issue in both Exhibit C and the present case are by any means the same. He attacked the findings of the learned trial Judge to the effect that although Exhibit C was a criminal matter in form, it was infact a civil claim in substance and contended that by no stretch of the imagination can a criminal charge of assault and conduct likely to cause a breach of the peace tantamount to a civil claim for a declaration of title to land. According to learned Senior Advocate, the Native Court went on a frolic of its own to make an award as to title to the D land when its ownership was a non issue in the proceedings. He referred to the decisions in *Timitimi v. Amebebe* (1953) 14 WACA 374, *U.A.C. Ltd v. Macfoy* (1961) 3 All E.R. 1172 and *Salati v. Shehu* (1986) 1 NWLR (Pt.15) 198 and submitted that the award of title to the land per Exhibit C is a nullity as the Nnobi Customary Court had no jurisdiction to make the award E in such a criminal trial.

On the second issue, learned Senior Advocate submitted that the appellants neither pleaded any custom nor led evidence on the significance and the effect of slaughtering a goat in respect of the land in dispute. He argued that no custom was pleaded by the appellants which displaced the F principle that “once a pledge, always a pledge” and submitted that any such custom even if pleaded would be declared repugnant to natural justice, equity and good conscience and contrary to public policy. He therefore urged the court to dismiss this appeal.

I think I should mention that the appellants in their reply brief G stressed that an attack on the Native Court’s findings, as the court below did, cannot now be launched 61 years after the decision of the court in the absence of a proper appeal against the same. In this regard, the decisions in *Amida v. Oshoboja* (1984) 7 S.C. 68 at 76 and *Ajao v. Alao* (1986) 5 NWLR (Pt.45) 802 at 818 were called in aid. The appellants submitted H that the Court of Appeal could only examine the question whether Exhibit C amounted to estoppel and not whether Exhibit C is without fault or correct in law. I will now examine the two issues for determination in this appeal.

The first issue poses the question whether Exhibit C amounted to

estoppel per rem judicatam sufficient enough to prevent the respondents from relitigating title to the land in dispute. In this regard, the learned trial Judge gave some consideration to Exhibit C and arrived at the conclusion that it operated as estoppel per rem judicatam against the respondents' claims. Said Awogu, J. as he then was:-

*"The testimony of the 2nd plaintiff in the 1928 case which was B
tendered as Exhibit C in these proceedings showed that the land in question
was the one which Ezeanya got from OkenweAlthough
a criminal matter in form, Exhibit C was really a civil claim in substance.
As a result, the accused persons in Exhibit C were acquitted and discharged
followed by an order of the court for them to swear an oath and then take C
the land which they claim to be their own. Exhibit C further shows that the
oath was duly sworn. Although the defendants did not plead it as estoppel
per rem judicatam, I have no doubt in my mind that it operates as such
against the plaintiffs.....The issue of the ownership of the land
in dispute has been decided against the plaintiffs as per Exhibit C. They D
cannot now circumvent the decision by a new claim based on pledge."*

The first observation that must be made is that the question of whether or not Exhibit C operates as estoppel per rem judicatam in the present action is entirely a matter of law. In this regard, it ought to be borne E in mind that Exhibit C is a native court proceedings.

It is a matter of common knowledge that pleadings were not filed in the native courts and consequently the appellate courts have consistently held:-

(i) That it is not the form of an action in a native tribunal that F must be stressed where the issue involved is otherwise clear. It is the substance of such a claim that is the determinant factor.

(ii) Proceedings in a native court have to be carefully scrutinised to ascertain the subject matter of the case and the issues raised therein.

(iii) It is permissible to look at the claim, findings and even the G evidence given in a native tribunal to find out what the real issues were.

(iv) In dealing with proceedings from native courts, appellate courts must not be unduly too strict with regard to matters of procedure as the whole object of such trials is that the real dispute between the parties should be adjudicated upon.

(v) As long as native courts acted in good faith, listened fairly to H both sides and gave opportunity to the parties to present their case and correct or contradict any relevant statement prejudicial to their view, they cannot be accused of offending against the rules of natural justice and their

decisions on the real issues between the parties ought not to be disturbed without very clear proof that they are wrong. See generally *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt.75) 238 at 251 A-B, *Chief Awara Osu v. Ibor Igiri* (1988) 1 NWLR (Pt.69) 231 A-B, *Ajao v. Alao* (1988) 5 NWLR (Pt.45) 802 at 822 D-E, *Mate Nono Paertetter Okuma v. Tsutsu* 10 WACA 89, *B Chukwunta v. Chukwu* 14 WACA 341, *Nwosu v. Udejaja* (1990) 1 NWLR (Pt.125) 188, *R v. Lt. Governor, Eastern Region. ex parte Chiaghana* 2 FS.C. 46 and *Kwamin Akyin v. Essie Egymah* 3 WACA 65. Having said this, it will now be necessary to examine what was before the Nnobi native court in Exhibit C.

C Exhibit C, without doubt, was a straight forward criminal action or private prosecution brought by one Ogbannuegwu of the plaintiffs/respondents' family as complainant against three accused persons namely David Onyido, Okeke Ilobi and Igwediobi of the defendants/appellants' family - all in their personal capacities. In it, the accused persons were D arraigned on a two count charge of -

(i) Assault and

(ii) Conduct likely to cause a breach of the peace by felling by force the complainant's iroko tree without his permission

All accused persons entered a plea of "not guilty" to the charge E whereupon the complainant testified on his own behalf but called no witness. It is clear from his cross-examination that the accused persons raised the defence of claim of right in answer to the charge. The proceedings, however, remained a simple criminal charge. Accordingly neither the members of the complainant's family nor those of the accused persons could be F expected to have joined in the contest in view of the purely personal nature of the charge, namely common assault and conduct likely to cause a breach of the peace.

Turning now to the question of *res judicata*, it was long settled that if a cause of action in a present suit had been determined in a previous suit, G that cause of action became merged in the judgment: *Transit in rem judicatum*. It is an application of the rule of public policy that no man shall be vexed twice for one and the same cause on the same issues. See *Adomba v. Odiese* (1990) 1 NWLR (Pt.125) 165 at 178 C-E: However for the plea of *res judicata* to succeed, there must at least be established that the identity of parties (or privies), the identity of the *res*, namely, the subject matter of the litigation and the identity of claim and the issue in both the present and the previous actions are the same. The burden is on the party who sets out the defence of *res judicata* to establish conclusively:-

(i) That the parties in the previous and present suits are the same

- (ii) That the subject matter of litigation in the two cases is identical and
- (iii) That the claim and the issue in the two cases are the same.

See *Oke v. Atoloye* (1986) 1 NWLR (Pt. 15) 241 at 260, *Yoye v. Olubode and others* (1974) 1 All NLR (Pt.2) 118 at 122 and *Idowu Alasa and others v. Sanya olori ilu* (1965) NMLR 66, etc. etc. Once the above three ingredients of *res judicata* are conclusively established, the court cannot regard such previous judgment as mere evidence. It is conclusive and estops the plaintiff from making any claim contrary to the decision in the previous judgment. The next question must be whether these main ingredients of *res judicata* were conclusively established by the appellants in the present case as found by the learned trial Judge.

I have closely studied Exhibit C and it appears to me plain that the parties therein were entirely different from the parties in the present case. This is quite apart from the fact that the parties in the criminal proceedings, Exhibit C, fought their criminal battle in their personal capacities as against the parties in the present action who contested their civil claims in their representative capacity. Where an action is brought against a defendant personally and prosecuted to judgment, and later a further action is brought against him in a representative capacity by the plaintiff in the original action, the judgment is not *res judicata* as the parties to the respective actions are not the same, since in one action the defendant is sued personally and in the other as representative of a class of persons. So, too, where an action is brought by a plaintiff in a representative capacity against another person, personally, and the action is prosecuted to judgment whereby the defendant succeeds, that judgment is *res judicata* to the extent that it determines the personal rights of the defendant in the subject matter of the action; but it is not *res judicata* of any interests the defendant may later represent in an action brought against him in a representative capacity. See *Shitta-Bey and others v. Lagos Executive Development Board and others* (1962) 1 All NLR 373. These situations do not however present themselves in the present case in view of my finding that the parties in both cases are not the same.

On the issue of the identity of the *res*, it seems to me clear that the subject matter in dispute in Exhibit C was an iroko tree on the land in dispute which the accused persons felled without the permission of the complainant. This is unlike the *res* in the present action which is a piece or parcel of land as shown in their plans Exhibit A and B. The identity of this land is not in dispute between the parties. I therefore find myself unable to hold that the subject matter of the litigation in the two cases is the same.

On the question of the claims and the issue in the two cases, it is

not in dispute that Exhibit C is a criminal charge of assault and conduct likely to cause a breach of the peace against the accused persons. The present action, on the other hand, is in respect of declaration of title to land and orders for the redemption and possession of the land. With respect, I am unable to accept that the claims and issues in both cases are the same.

B No doubt, the accused persons in Exhibit C put up the defence of a claim of right made in good faith over the land upon which the iroko tree stood. This however could not convert a straight forward criminal case of assault to a civil claim of declaration of title to land.

There is one final point that calls for some comment before I conclude the issue of *res judicata*. This is the submission of learned appellants' counsel, G.U.E. Peter Okoye (Mrs) to the effect that a decision in a criminal case can be advanced successfully as constituting estoppel *per rem judicatam* in a subsequent civil proceeding. For this proposition, she relied on the decisions in *MacLikkenny v. Chief Constable of West Midlands Police Force & Another* and *Hunter v. Chief Constable of West Midlands* supra.

Learned counsel for the respondents, C. O. Anah Esq. in his reply observed as follows:-

"..... *Lord Denning was influenced in his decision (in Macllkennys case) that a finding in a criminal case can establish res judicata in a civil proceeding by the provision of section 11 of the Civil Evidence Act, 1968 in England which allows a previous conviction to be admissible in a subsequent civil proceedings to establish the fact that the man committed the offence.*

F *With very great respect Lord Denning's view might be right in England based on the English Evidence Act of 1968 but certainly cannot be correct in Nigeria because section 11 of the English*

Evidence Act is not in pari materia with section 34 of the Nigerian Evidence Act. Under the Nigerian Law, evidence in a previous proceedings is only admissible under certain conditionalities which include that the proceeding was between the same parties or their privies if we apply section 34(2) of our Evidence Act, it becomes obvious that a finding or decision in a criminal case cannot be used as a res judicata in a civil proceedings because the parties cannot be the same

H (Italics and words in brackets supplied)

The first observation that must be made is that this appeal originated from the High Court of Anambra State. Learned respondents' counsel by his reference to the Nigerian Evidence Act was obviously referring to the Evidence Act, Cap. 112. Volume VIII, Laws of the Federation of

Nigeria, 1990, section 34(1) of the said Act relied on by learned counsel deals with the relevance of certain evidence for proving, in a subsequent proceeding, the truth of facts therein stated. It provides as follows-

34(1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable

provided

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding."

It seems to me indisputable from a close study of section 34(1) of the said Evidence Act that it concerns the relevance of evidence for proving in a subsequent proceeding the truth of the facts therein stated and has nothing to do with a judgment, decision or finding in a criminal case or matter and whether or not they can found estoppel per rem judicatam in a subsequent civil proceeding.

Reference was also made to section 34(2) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria which provides that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of that section. Learned respondents' counsel submitted that if the provision of section 34(2) of the Evidence Act is applied, it would become obvious that a finding or decision in a criminal case cannot operate as res judicata in a civil proceeding because the parties cannot be the same.

With respect to learned counsel, I must state that I find it a bit difficult to accept the proposition of law he sought to make in respect of the said section 34(2) of the Evidence Act. Upon a close consideration of this proposition, it appears to me that learned counsel did focus his attention only to the narrowest meaning of the term prosecutor which in common parlance includes The state, Commissioner of Police, Attorney-General or the Director of Public Prosecutions. The term "prosecutor" or, indeed, "prosecutrix", without doubt, means more than these institution and public

offices and has been equally defined to mean a person who takes proceedings against another in the name of the State, usually either the person injured, or the police, or in graver crimes, the Attorney-General or the Director of Public Prosecutions. The prosecutor may be a private person, in which case he is generally the person specifically injured by the crime. When the crime is of a heinous nature or likely to go unpunished for want of a prosecutor, the proceedings are conducted by the Director of Public Prosecutions in the name of the Attorney General. See Jowitt's Dictionary of English Law 2nd Edition, Volume 2 page 1449 and Osborn's Concise Law Dictionary, 7th Edition at P267. It includes any person at whose instance the prosecution has been instituted. See Words and Phrases Legally Defined, 2nd Edition, Volume 4, Page 207. It also refers to one who instigates the prosecution upon which an accused is arrested or who prefers an accusation against the party whom he levels the commission of a criminal offence against.

In particular, there is a private prosecutor who similarly is one who sets in motion the machinery of criminal justice against a person whom he believes to be guilty of a crime by laying an accusation before the proper authorities and who is not himself an officer of Government. See Black's Law Dictionary, 1991 Edition, page 849. In other words, a "prosecutor" or "prosecutrix" clearly includes a "Complainant" in a criminal case. In the circumstances, it cannot be correct to suggest that if the provisions of section 34(2) of the Evidence Act are applied, it would become obvious that a finding in a criminal case cannot operate as *resjudicata* in a subsequent civil proceeding because the parties cannot be the same. The parties can of course be the same particularly where an offence is both a crime and a tort. See *Mclikenny v. Chief Constable of West Midlands Police Force & Another* and *Hunter v. Chief Constable of West Midlands & Another*, *supra*

Attention should be drawn at this stage to section 54 of the Evidence Act which provides:-

"54. 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."

The above provision would appear to suggest that every judgment whether civil or criminal, is conclusive proof, as against the parties and their privies of facts directly in issue and actually decided by the court, and appearing from the judgment itself to be the ground on which it was based

unless, of course, 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. But I will say no more in this judgment on this issue for reasons which will shortly become apparent.

Reverting now to the question whether a decision in a criminal case can operate to found an estoppel per rem judicatam in a subsequent civil proceeding, I think I should mention that I am not oblivious of the decision of the English Court of Appeal in *Hollington v. Hewthorn and Co. Ltd.* (1943) 1 K.B. 587 or (1943) 2 All E.R. 35 where it was stated that a civil court must base its findings on the facts pleaded before it without any regard to the proceedings before another tribunal and that to this end, a certificate of a conviction cannot be tendered in evidence in a civil proceedings. I am also aware of the decision of the West African Court of Appeal in *M.A. Oyewole v. J. Kelani* (1948) 12 WACA 327 where, upon a case stated, it was pronounced that evidence of conviction of a person for a criminal offence arising out of an accident which is later on the subject of civil proceedings to which that person is a party is inadmissible at the civil trial. It ought however to be noted that those decisions were given before the coming into force of section 54 of the Evidence Act. But be these as they may, I have already held that neither the parties nor the subject matter of the litigation, the claims or the issues in Exhibit C are the same as the parties, the res, the claims or the issues in the present action. In these circumstances, it seems to me clear that Exhibit C cannot therefore operate as estoppel per rem judicatam in this civil proceeding. Thus, as far as the real issues for determination between the parties in this appeal go, the question of whether a decision in a criminal case can operate to found an estoppel per rem judicatam hardly arises. In my judgment, this question, as far as this appeal goes is entirely academic, speculative and hypothetical and I must in accordance with the well established principle of this court decline to decide the point in the present appeal. See *Nkwocha v. Governor of Anambra State* (1984) 1 SCNLR 634; (1984) 6 S.C. 302 and *Governor of Kaduna State v. Dada* (1986) 4 NWLR (Pt.38) 687. It suffices to state that in view of all my findings above, my answer to issue number one must be in the negative. I will now examine the second issue for determination in this appeal.

The second issue for determination is related to grounds (iii) and (iv) of the appellant's grounds of appeal which complain as follows-

“(iii) The Court of Appeal was wrong to substitute their own finding for the finding of the learned trial judge which finding was amply supported by evidence.

(iv) The judgment of the Court of Appeal is against the weight of evidence"

The pith and substance of the argument of learned counsel for the appellants under the second issue is that the Court of Appeal was in error to have held that the land in dispute was given or surrendered to Ezeanya by virtue of a straight forward or simple "pledge" which was therefore redeemable as the respondents claimed. It is the contention of learned counsel that the court below wrongly waded into an unnecessarily long discourse on the incidents of a straight forward case of pledge and failed to appreciate the real nature of the transaction between the parties' ancestors as disclosed in evidence and as found by the learned trial Judge. She argued that the court below erred in law by substituting its own findings for those of the trial Judge which findings were amply supported by evidence. She described it as grave misdirection and erroneous on the part of the court below to have failed to advert its mind to the significance and effect of Nnokwa customary law with regard to the slaughtering of a goat or goats in respect of the surrender of land under circumstances such as exist in this case. It was submitted that the trial court having exhaustively evaluated the evidence of the land transaction and the custom applicable thereto rejected the plaintiffs/respondents' version and accepted the appellants' evidence on the issue and pronounced on the irredeemability of the land in dispute according to Nnokwa customary law. She argued that in the circumstances, no other course was open to the trial court and the court below than to dismiss the respondents' claims in their entirety.

The respondents' submissions in answer to the second issue is mainly that the appellants neither pleaded any custom nor led any evidence on the significance and the effect of slaughtering a goat in respect of the land in dispute. Learned Senior Advocate considered that any such custom even if pleaded would be declared repugnant to natural justice, equity and good conscience and contrary to public policy.

I have earlier on in this judgment set out as extensively as possible what is in dispute between the parties and the evidence adduced by each side in support of their case. It suffices at this stage to restate that the real issue between the parties is that whilst the respondents claimed that the land was pledged by Okenwe to the appellants' ancestor Ezeanya, the appellants contended that Okenwe gave or surrendered the land to Ezeanya but that following the traditional ceremony of the slaughtering of a goat in respect of the land by Ezeanya as sanctioned and endorsed by the elders and people of Nnokwa, the land in accordance with the customary law of Nnokwa people became the outright property of Ezeanya. The appellants added that the aforesaid traditional ceremony of slaughtering a goat in

respect of land at Nnokwa, such as the land Okenwa gave to Ezeanya symbolised that such land had acquired the status of irredeemability under Nnokwa native law and custom otherwise also known as Nnokwa customary law. The land thereby became the property of Ezeanya in perpetuity. I will now examine the appellants' pleadings to ascertain whether, as learned respondents' counsel submitted, the custom they relied on was not pleaded B in their Statement of Defence.

Paragraphs 12, 13 and 14 of the appellants Statement of Defence averred as follows:-

"12. Okenwe desperately wanted to save his remaining two sons from being sold into slavery or killed and so requested Chief Ezeanya to C give him financial assistance and protection. Chief Ezeanya, the ancestral father of the defendants, appealed to the people of Nnokwa who allowed him to take Okenwe's two sons, Onyeguili and Muodozie on bail. He later gave Okenwe some yams and money valued about ten naira and in return Okenwe surrendered and transferred forever his land called Okwu-Ogba to D him as shown verged green in Survey Plan No. MEC/908/75. Under this arrangement Okenwe fled to Nnobi with his said two sons, Onyeguili and Muodozie where their successors are now living.

13. Angered by this exodus of Okenwe and his two sons, Onyeguili and Muodozie from Nnokwa to Nnobi, the entire Nnokwa Community besieged the premises of Chief Ezeanya and demanded equivalent but heavy E cash payment for the said Okenwe's two sons. Hard pressed by the irate natives they imposed heavy penalty on Chief Ezeanya to compensate for Okenwe's two sons in order to appease the angered mother earth and the F divinities because an abomination had been committed. To meet this demand, chief Ezeanya sold his three daughters namely, Nkanabaku, Anamenechi and Abalumogo into slavery together with his seven cows and other belonging and paid for Okenwe's two sons.

14. After going through the ordeal and punishment in the matter, all the Nnokwa people including the Chiefs and elders representing the nine G villages including the plaintiffs' village, Eziana, endorsed the grant of Okenwe's land as shown in Survey Plan No. MEC/908/75 to Chief Ezeanya forever; this was followed by the traditional slaughtering of a goat given to the Nnokwa Community by Chief Ezeanya. Subsequently the said land belonged to Chief Ezeanya and his successors forever. This transfer of the said H land to Chief Ezeanya is irredeemable in accordance with Nnokwa native law and custom and was not conditional as alleged in paragraph 14 of the Statement of Claim."

(Italics supplied for emphasis)

A close study of the averments in the above paragraphs of the appellants' Statement of Defence clearly shows in very clear terms that the custom relied upon by the appellants was fully and exhaustively pleaded.

There can be no doubt that native law and custom, otherwise also known as customary law, are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless they are of such notoriety and have been so frequently followed or applied by the courts that judicial notice ought to be taken without evidence required in proof thereof. See *Giwa v. Erinmilokun* (1961) 1 SCNLR 377; (1961) All NLR (Pt.2) 294 at 295. On the issue of proof, it has been described as unsafe to accept the testimony of the only person asserting the evidence of custom as conclusive. It is desirable and certainly good law that a person other than the party asserting the custom should also testify in proof or support thereof. See *Ekpenga v. Ozoula* 11 (1962) 1 SCNLR 423 and *Oyediran v. Alebiosu* (1992) 6 NWLR (Pt.249) 500 at 558. I will now examine the evidence tendered by the appellants in proof of this custom.

The 2nd appellant, Godwin Ukpaka in his evidence testified inter alia as follows:-

"One Okenwe of Umuoma had 3 sons. The 1st son was sold because he stole yams in Nnokwa. His name is Ekwebele. The remaining two were Onyeguili and Mmuodozie. Onyeguili stole yams from the compound of Ezenwali in Nnokwa while Mmuodozie stole yams from the compound of Okeke Egwuonwu of Nnokwa. Both sons were brought before Nnokwa people. Their father, Okenwe requested Ezeanya to stand as surety for the two boys so that they may not be killed or sold. Ezeanya agreed and the boys were released. Okenwe then asked Ezeanya to give him 35.00 (now N10.00) and some yams, and in return, gave Ezeanya his lands, economic trees. The land is called ANI OKWUOBA. Okenwe then escaped with his two sons to Nnobi. Following this, the people of Nnokwa held Ezeanya and asked him to produce the boys for whom he stood surety. Ezeanya was made to pay the penalty. It cost him 7 cows and the sale into slavery of 3 of his daughters. Ezeanya was also made to kill a goat before taking over the lands of Okenwe. By Nnokwa custom, the killing of the goat symbolised that the land became irredeemable and Ezeanya's forever. Okenwe and his sons left no descendants in Nnobi."

There is also the testimony of D.W. 2, Paul Udeh, an old man of 95 years who was neither a party to the case nor did he belong to the appellants' family. The witness came from Isingbede, Nnokwa and he testified as follows in respect of the said custom, namely -

"Originally, the land in dispute belonged to Okenwe. Okenwe was

a relation of Ezeanya. The sons of Okenwe stole yams. Nnokwa held the children. Ezeanya took them on bail so they will not be killed by Nnokwa. Okenwe told Ezeanya to take his lands. Ezeanya gave yams and N10.00 Okenwe then fled with the children to Nnobi. Nnokwa asked Ezeanya to B produce Okenwe and his sons. When Ezeanya failed to do so, he had to sell his possessions to redeem himself. Thereafter, Ezeanya killed 9 goats and was asked to take the land as his own. By Nnokwa custom, if goats are killed in respect of a piece of land, it is no longer redeemable."

It seems to me from the averments in the appellants' Statement of C Defence together with the evidence in support thereof that it cannot be seriously argued the appellants neither pleaded the custom in issue nor led any evidence in respect of the significance and effect of slaughtering a goat or goats with regard to land, such as the one given or surrendered by Okenwe to Ezeanya in accordance with Nnokwa customary law. D

Reference must also be made at this stage to one or two facts which are relevant to the Nnokwa native law and custom relied upon by the appellants. The first is that although the said custom was fully pleaded by the appellants and testified upon, the respondents did not attempt in any way to controvert the same. It is trite that where evidence given by a party E to any proceedings was not challenged by the opposite party, who had the opportunity to do so, it is always open to the court seised of the matter to action such unchallenged evidence before it. See Isaac Omoregbe v. Daniel Lawani (1980) 3-4 S.C. 108 at 117, Odulaja v. Haddad (1973) 11 S.C. 357, Nigerian Maritime Services Ltd v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81 and F Adel Boshali v. Allied Commercial Exporters Ltd. (1961) 2 SCNLR 322; (1961) All NLR 917. The appellants' evidence on the issue of the applicable native law and custom remained uncontroverted and was in my view rightly accepted by the trial court. See West African Shipping Agency (Nig) Ltd. v. Alhaji Musa Kalla (1978) 3 S.C. 21 at 31 and Imana v. Robinson (1979) 3-4 S.C. G 1 at 22.

Secondly, there is the evidence of Gabriel Nwokafor Ezekwem, the Igwe or natural ruler of Nnokwa who as the custodian of the custom of Nnokwa people, testified for the respondents as PW.2. He said:-

"I know the parties to this action. I know the land in dispute. The H land in dispute now belongs to Ezeanya family of the defendants. Originally, the land belonged to one Okenwe, now deceased. Okenwe belonged to the plaintiffs' family! I know the custom of Nnokwa I know the history of the land in dispute. I live in boundary with the land in dispute....."

It seems to me clear from his evidence that the appellants are the undisputed owners of the land in dispute. This witness was called by the respondents who, never treated him as a hostile witness. Indeed, on his evidence which is in line with the appellants' case, the respondents' claims were liable to dismissal as the trial court rightly did.

The learned trial Judge after a thorough consideration of the evidence adduced by both parties accepted the appellants' version of the land transaction and disbelieved the evidence of the respondents on this sole issue in controversy between them. Said the learned trial Judge -

"There is certainly no doubt in my mind that D.W.2 (Paul Udeh) was a witness of truth. Despite his age, his memory was sharp, the hearing good and his agility surprising for his age. I have no hesitation therefore in preferring the version of the story told by the defendants to that told by the plaintiffs" (Italics and name in brackets supplied for emphasis)

The law is well settled that an appellate court will not ordinarily interfere with the findings of fact made by a trial court except in such circumstances as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn conclusions from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. See Okpiri v. Jonah (1961) 1 SCNLR 174; (1961) ALL NLR 102 at 104-105, Benmax v. Austin Motors Co. Ltd. (1955) All E.R. 326, Maja v. Stocco (1968) 1 ALL NLR 141 at 149, Woluchem v. Gudi (1981) 5 S.C. 291 at 295-296 etc. etc. In the present case, the findings of the trial court appear to me clearly faultless, unimpeachable and fully supported by evidence before it. The evidence of Nnokwa customary law which the trial court accepted as established and applied was given not only by the appellants who asserted the customs but also by D.W.2 who was not a party to the suit. Additionally there was the evidence of the respondents' own witness, P.W.2, who as the natural ruler of Nnokwa testified that he knew the history of the land in dispute, the custom of his people and that the land be belonged to Okenwe originally but is now the property of the appellants' family. What the Court of Appeal did was to embark on a lengthy academic disquisition into the incidents of a simple or straight forward case of pledge and inevitably arrived at the conclusion that once a pledge, always a pledge. In consequence, it proceeded to substitute its own findings for those of the trial court without regard to the native law and custom prevailing at Nnokwa which was satisfactorily established at the trial and accepted by the trial court. With profound respect, it seems to

me that this is a serious error of law on the part of the court below.

One last point deserves attention. This is the issue raised suo motu by the court below to the effect that the customary law relied upon by the appellants in this proceeding is contrary to public policy, equity and good conscience and ought to be discountenanced.

B

With very great respect to the Court of Appeal, it cannot be over-emphasized and this court has repeatedly warned against decisions of court being founded on any ground in respect of which it has neither received argument from or on behalf of the litigants before it, nor even raised by or for the parties or either of them. See *Shitta-Bey v. Federal Public Service Commissioner* (1981) 1 S.C. 40 and *Sande V Abdullah* (1989) 7 SCNJ 216 at 229; in *Chief Ebba v. Chief Ogodo & Another* (1984) 4 S.C. 84 at 112, Eso, J.S.C. succinctly put the matter as follows:-

"With utmost respect, it should be plain to Court of Appeal that when an issue is not pleaded before it, it has no business whatsoever to deal with it. A Court of Appeal is not a Knight errand looking for skirmishes all about the place."

See too *Florence Olusanya v. Olufemi Olusanya* (1983) 1 SCNLR 134; (1983) 3 S.C. 41 at 56-57. Courts of law must therefore limit themselves to the issues raised by the parties in their pleadings as to do otherwise might well result in the denial to one or the other of the parties right to fair hearing. See *Metalimpex v. A.-G. Leventis & Co. Ltd* (1976) 2 S.C. 91, *George v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 242, *Kalio v. Kalio* (1977) 2 S.C. 15, *Shell BP. Ltd. v. Abedi* (1974) 1 All LR (Pt. 1) 13 and *Alhaji Ogunlowo v. Prince Ogundare* (1993) 7 NWLR (Pt.307) 610 at 624. On no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without giving the parties an opportunity to be heard on the point, particularly the party that may suffer as a result of the point so raised suo motu. See *Ugo v. Obiekwe* (1989) 1 NWLR (Pt.99) 566 at 581, *Okafor v. Felix Nnaife* (1972) 3 ECSLR 261, *Ejowhomu v. Edok-Eter Mandilas Ltd.* (1986) 5 NWLR (Pt.39) 1, *Adegoke v. Adibi* (1992) 5 NWLR (Pt.242) 410 at 420, *Atanda v. Lakanmi* (1974) 3 S.C. 109, *Ajao v. Ashiru* (1973) 11 S.C. 23, etc, etc. If it does so, it will be in breach of the parties right to fair hearing. *Sheldon v. Bromfield Justices* (1964) 2 Q.B. 573 at 578 and *Regina v. Hendon Justices. ex parte Gorchein* (1973) 1 WLR 1502.

In the present case, the question of whether or not the native law and custom relied upon by the appellants is contrary to public policy, equity and good conscience was neither raised as an issue in the pleadings of the parties nor was the matter canvassed by them whether in the trial court or before the court below. Indeed at no time did the respondents, whether

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directly or indirectly, suggest, whether in the trial court or before the court below that the said customary law was contrary to public policy, equity and good conscience as propounded by the Court of Appeal. What the court below did was to raise the point suo motu and proceeded to resolve the same in favour of the respondents without giving the appellants an opportunity to be heard on the point. With profound respect to the Court of Appeal, this procedure was grossly erroneous on point of law as it was prejudicial to the appellants and constituted a breach of their right to fair hearing.

Having carefully considered the second issue for determination in this appeal, I entertain no doubt that the same must be resolved in favour of the appellants.

In the final result, this appeal accordingly succeeds and it is hereby allowed. The judgment and orders of the court below are hereby set aside. The decision of the trial court dismissing the respondents' claims is hereby restored together with the order as to costs therein made. The appellants are entitled to the costs of this appeal in the sum of N1,000.00 in this court and N500.00 in the court below.

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BELLO CJN

I have had a preview of the judgment delivered by my learned brother, Iguh, J.S.C. He has comprehensively considered all the issues canvassed. I entirely agree with his reasonings and conclusion. I also set aside the judgment and orders of the Court of Appeal and restore the judgment and order made by the trial court. I endorse the order as to costs.

I agree that it is not necessary for the determination of this appeal to decide the wider issue as to whether a decision in a previous criminal case can operate to found an estoppel per rem judicatam in a subsequent civil action. The wider issue is therefore academic and hypothetical and this court always refrains from determining such issues: *Nkwocha v. Governor of Anambra State* (1984) 1 SCNLR 634; (1984) 6 S.C. 362 and *Governor of Kaduna State v. Dada* (1986) 4 NWLR (Pt.38) 687.

There is a need to emphasize the answer to the narrow issue whether the acquittal of the accused, David Onyido, Okeke Ilobi and Igwediobi all of the defendants, in the criminal case in the Native Court for assault and conduct likely to cause breach of the peace by felling by force the iroko tree belonging to Ogbannuegwu of the plaintiffs' family who was the complainant, can be relied upon as constituting *res judicata* in the instant case. It is

trite law for a plea of *res judicata* to succeed, it must be shown that the parties, the subject matter and the issues in the previous action were all the same as those in the action in which the plea is raised: see *Ihenacho Nwaneri and others v. Nnadikwe Oriuwa and others* (1959) 4 F.S.C. 132, *Idowu Alase and others v. Sanya Olori Ilu and others* (1965) NMLR 66, *Banire v. Balogun* (1986) 4 NWLR (Pt.38) 746 at 753, *Fadiora v. Gbadebo* (1978) 3 B.S.C. 219 at 228 and *Chief Nkanu and others v. Chief Onun and others* (1977) 5 S.C. 11 at 18.

In the instant case, the parties are the four named plaintiffs for themselves and on behalf of the members of Ezeanya family and the three named defendants for themselves and on behalf of the members of Uhudike family, whereas in the previous criminal case, the parties were the three accused persons and the prosecutor, Mr. Ogbannuegwu. By reason of sections 22 and 33 of the Constitution, no member of the defendants family other than the three accused could have been punished, if the previous criminal case had resulted in conviction but the decision of the court in the instant case is binding on every member of the two families. The parties in the previous criminal case were not therefore the same as in the instant case. Furthermore, the subject matter in the previous criminal case was the iroko tree, whereas the vast area of land upon which the iroko tree stood is the subject matter of the present case. It is clear the subject matters are not the same. Again, although the issue in the previous criminal case was the “ownership” of the iroko tree, the accused persons were not obliged to prove ownership even within the balance of probability as is required of a plaintiff in a civil action. It was sufficient for them to prove a bonafide claim of right in their defence: see *R v. Nicholas Vega* (1938) 8WACA 8 and *Selvanayagam v. The King* (1951) A.C. 83. It also follows that the issue for determination in the present case is not the same as that in the previous case. The Court of Appeal was therefore right in holding that the plea of *res judicata* could not be sustained but erred in law in concluding that the transaction was a redeemable pledge.

Finally, the Court of Appeal indeed made serious error in law by suo motu declaring the Nnokwa customary law, which was sufficiently proved, to be contrary to public policy, equity and good conscience without giving the parties the opportunity to be heard on the matter, particularly the appellants here at who were adversely affected by the decision of the Court of Appeal.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Iguh, J.S.C. I agree with his conclusion that this appeal succeeds and is allowed with N 1,000.00 costs to the appellants. I subscribe to the consequential orders made in the said judgment. .

OGUNDARE JSC

I have had a preview of the judgment of my learned brother Iguh, J.S.C. just delivered. I too allow this appeal, set aside the judgment of the court below and restore the judgment of the trial High Court dismissing the plaintiffs' claim. I abide by the order for costs made in the judgment of my learned brother Iguh, J.S.C.

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just read by my learned brother, Iguh, J.S.C., and I agree that the appeal should be allowed. I allow the appeal and abide by the consequential orders including the order for costs. Appeal allowed.

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