

SUPREME COURT OF NIGERIA18TH JULY, 1995. SC. 190/1991

**CORAM:- M.L. UWAI, LL. KUTIGI, E.O. OGWUEGBU,
S.U. ONU, Y.O. ADIO, JJSC.**

EZEKIELADEDAYO

(Head of Agbonbifa Ruling House forAPPELLANT
himself and the Agbonbifa Ruling House)

AND**ALHAJI YAKUBU BABALOLA & 7 OTHERSRESPONDENTS**

COURTS - Jurisdiction - Issue that was properly joined by the parties -
Whether the High Court had jurisdiction to adjudicate thereon

ESTOPPEL - Privies - Whether the parties are privies - In the present and
the past proceedings.

ESTOPPEL - Issue - That has been settled by a court of competent jurisdic-
tion - Is binding upon the parties

RES JUDICATA - Issue estoppel - Previously determined action - By a court
of competent jurisdiction - Whether the issue can be canvassed again in
another action.

FACTS

This interlocutory appeal is against the decision of the court Appeal, Jos Division reversing the ruling of Fabiyi, J. of the High Court of Kwara State. The ruling of the learned trial Judge on the motion by the 1st to 6th Defendants praying the trial court to dismiss. In limine the suit instituted by the appellant for certain declarations, inter alia, that - (i) their (the Agbonbifa) Ruling House is the sole ruling house to the throne of Elesie of Esie, (ii) the appointment of the 1st defendant as the Elesie of Esie and its approval by the Kwara State Government is null and void and of no effect. The defendants prayer was that the suit was an abuse of court process, the subject matter of it having been decided in another case. The trial court refused their prayer.

The defendants appealed to the court of Appeal which decided in their favour. It is against that decision of the court of Appeal that the appellant has appealed to the Supreme Court raising one issue.

ISSUE FOR DETERMINATION:

“Whether the Court of Appeal was right in upholding the contention of the Respondents that the holding of the Court in Suit No. KWS/OM/5/86 to the effect that Agbonbifa family was not a ruling house family, constitute issue estoppel between the Appellant and the Respondents.”

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

Estoppel - Privies

1. The 1st defendant in the present proceedings is privy in blood to the 3rd defendant in the earlier proceedings and the 1st plaintiff in the earlier case was the same sole plaintiff in the latter case suing for himself and as representing Agbonbifa Ruling House on each occasion. The court below was right when it held that the parties in both suits are privies. (p. 1519 E)

Issue that has been settled

2. I am in complete agreement with the above conclusion of the court below. The issue has been settled by a court of competent jurisdiction and parties are bound by the determination of the issue. This court put a final seal on the matter when it dismissed the appeal of the appellants and affirmed the decision of the Court of Appeal in the earlier case. (p. 152 I B)

Previously determined action

3. The courts should not encourage prolongation of a dispute and must also discourage proliferation of litigation hence the Latin maxims: Interest reipublicae ut sit finis litium (Co. Litt.303) and Nemo debet bis vexari si constat curiae quod sit pro una et eadem causa (5 Co.614). If an action is brought and the merits of the question are determined between the parties and a final judgment is obtained by either, the parties are concluded, and cannot canvass the same issue again in another action. (p. 1521 H)

Courts - Jurisdiction

4. Finally, the High Court of Kwara State had Jurisdiction to adjudicate on the issue whether Agbonbifa family is a ruling family for Elesie Chieftaincy because that issue was properly joined by the parties, evidence was led on it and a decision was also made on it. That issue was also crucial in the determination of that previous case. The Jurisdiction of the court is derived from section 236 of the 1979 Constitution. (p. 1522 A)

NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

1. When issue estoppel may arise

Within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule is that once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. Issue estoppel may arise where a plea of *res judicata* could not be established because the cause of action are not the same. (p. 1519 H)

2. Conditions for the application of issue estoppel

The conditions for the application of the doctrine of issue estoppel have been established. These are that: 1. The same question was decided in earlier proceedings; 2. The judicial decision said to create the estoppel was final; and 3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. (p. 1521 F)

Essence of res judicata

3. The doctrine of *res judicata* of which issue estoppel is a specie, is a fundamental doctrine of all courts that there must be an end to litigation. Public policy also demands that once a court of competent jurisdiction has settled by final decision, the matters in contention between the parties, they should leave the courts alone. (p. 1521 G)

KUTIGIJSC

4. Whether issue estoppel and res judicata are governed by the same set of requirements

I am however mindful of the fact that we are here concerned with the doctrine of “issue estoppel” as distinct from “*res judicata*” and that issue estoppel may arise where a plea of “*res judicata*” could not be established simply because the causes of action are not the same. And to that extent I think Chief Ate Bobalola, Senior Counsel for the appellant was wrong when he said the two are governed by the same set of requirements. I must say that the Court of Appeal also erroneously held that view. (p. 1523 F)

5. Nature and scope of the doctrine of issue estoppel

I have carefully examined the record of proceedings in this case and I am satisfied that the above conditions for the application of the doctrine of “Issue estoppel” have been satisfied. A party is precluded from contending in

perpetuity any precise point which having been once distinctively put in issue has been properly determined against him. And even if the objects of the first and second actions are different (as in this case), the finding on a matter which come directly (not collaterally or incidentally vide *SPENS v. I.R.C.* (1970) 3 All ER 295 at 301, (1970) 1 WLR 1173 at 1187) in issue in the first action, provided it is embodied in a judicial decision that is final (also as in this case), is conclusive in a second action between the same parties and their privies. It has been held that this principle would apply whether the point involved in the earlier decision and as to which the parties are estopped, is one of fact or one of law or one of mixed law and facts. (p. 1524 B)

REPRESENTATION

Chief Afe Babalola, S.A.N. with L.O. Fagbemi Esq. for the Appellant
Prince J.O. Ijaodola for 1st to 6th Respondents
Alhaji M. A. Sanni, Attorney-General, Kwara State with S.A. Mohammed,
D.C.L., Kwara State for the 7th & 8th Respondents

CASES REFERRED TO

Ezenwa v. Kareem (1990) 3 N.W.L.R. (pt. 138) 258
Banire v. Balogun (1986) 4 N.W.L.R. (Pt. 38) 746
Omoloye v. Attorney-General, Oyo State (1988) 4 N.W.L.R. (Pt. 64) 267
Omotesho v. Oloriegbe (1988) 4 N.W.L.R. (Pt. 87) 225
Odjevewedge v. Echanokpe (1987) 61
Patkun Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd (1988) 5
N.W.L.R. (Pt. 93) 138
Cardoso v. Daniel (1986) 2 N.W.L.R. (Pt. 20) 1 at 17
Henderson v. Henderson (1984) 3 Hare, 114
Jones v. Lewis (1919) 1 K.B. 328 at 344
Cardoso v. Daniel (1986) 2 NWLR (Part 20) 1
Dzungwe v. Gbishe (1985) 2 NWLR (Part 8) 528
Chinwendu v. Mbamali (1980) 3-4 S.C. 31
Bamishebi v. Faleye (1987) 2 NWLR (Part 54) 51 at 58
Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2) (1967) 1 AC. 853
Fabunmi v. Oyewumi (1990) 6 N.W.L.R. (Part 159) 728, 737
Ehimare v. Emhonyon (1985) 1 NWLR 177
F.H.A. v. Sommer (1986) 1 NWLR (Part 17) 533

LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal against the decision of the Court of Appeal, Kaduna Division on an interlocutory appeal from the ruling of Fabiyi, J. dated 24:3:88

refusing the application of the 1st to 6th defendants to dismiss the suit filed by the plaintiff in limine.

The plaintiff, Chief Gabriel Titiloye as head of Agbonbifa Ruling House instituted the action which led to the present proceedings for himself and as representing Agbonbifa Ruling House of Isale Esie.

In paragraph 38 of the amended statement of claim, the plaintiff sought the following reliefs:

“(1) A declaration that the Native Law and Custom relating to the selection of Elesie of Esie in force in Esie is as contained in records of the Government of Kwara State and Irepodun Local Government Council i.e.

(i) that Elesie of Esie is selectable only from Esie Ruling House.

(ii) Succession in rotation or alternative of the two Ruling Houses shall be in the following order: Ita-Ajado Ruling House in Oke-Esie and Agbonbifa Ruling House in Isale Esie.

(2) A declaration that the purported nomination, installation, designation and parading of the 1st defendant as Elesie of Esie by the 2nd - 6th defendants was and is not in accordance with the Native Law and Custom of Esie, irregular, in violation of the Kwara State Chief (sic) Edict, null and void and of no effect.

(3) (i).....

The 1st to 6th defendants filed a motion on notice for an order dismissing the suit in limine as it constituted an abuse of court process in that the issue to be determined had already been decided in an earlier suit, namely, Suit No. KWS/OM/5/86: Chief G.A. Titiloye & 4 ors. v. Chief J. Omoniyi Olupo & 4ors.

In paragraphs 3 - 6 of the affidavit in support of the application deposed to by one Rasak Azeez, he averred as follows:

“3. That I have read Exhibit 1 hereunder and I agree with the two counsels (sic) that the issue sought to be determined in the present suit namely, that Agbonbifa family is a ruling house of Esie has already been determined in Exhibit 1.

4. That I have the feeling that it is in the interest of justice that the present suit would be dismissed in limine on the ground I have stated in paragraph 3 of this affidavit.

5. That the judgment of the court in the said suit No. KWS/OM/5/86 is attached to this affidavit and marked Exhibit

6. That the plaintiff/respondent’s application for a writ of summons is hereby annexed as Exhibit 2.”

The plaintiff filed a counter-affidavit of sixteen paragraphs. Paragraphs 4 - 10 are relevant to the application:

“4. That I was the first plaintiff in Suit No. KWS/OM/5/86 - Chief

Titiloye & Ors. v. O. Olupo & Ors. (hereinafter called Atankoro Land Case) and the cause before that court relates to trespass to and wrongful acquisition of C. of O. on our land at Atankoro by the Managing Director of Oyelotin Greenfield Limited.

5. That I did not at any time in the above Atankoro land case alleged (sic) or claimed (sic) in my pleadings any chieftaincy matter, infact my case has nothing to do with chieftaincy of Elesie of Esie. B

6. Oba Jacob Oyeyipo was sued personally for his unconscionable conduct in the purported transfer of land in dispute and neither Esie Community nor any of its chief (sic) was joined as defendant or represented. C

7. That I attach herewith a copy of the amended statement of claim in the Atankoro Land Case, it is marked Exhibit GAT I.

8. That in the Atankoro Land Suit none of the present defendant (sic) is a party to this suit, (except the Irepodun L.G.A.) and none in that suit raised in their statement of defence any chieftaincy issue or the Elesie of Esie chieftaincy for that matter. It was not a matter in dispute or upon which the court was called or invited to adjudicate upon. That I attach herewith a copy of the statements of defence filed by Oba Jacob Oyeyipo and other persons it is marked Exhibit GAT II and GAT III. D

9. That I know as a fact that none of the counsel in the Atankoro Land Case addressed the court on chieftaincy of Elesie of Esie or any chieftaincy matter for that matter. E

10. That myself and the other plaintiff on (sic) that Land appealed to the Court of Appeal, Kaduna, against the judgment of court dismissing our claim.”

The learned trial Judge, Fabiyi, J., after oral arguments by both learned counsel dismissed the motion. He held as follows: F

“On a careful look at the claims in both suits, it can be seen that they are not the same. The claim in the earlier suit as per Exhibit GAT I relates to Atankoro land whereas the claim in this suit relates to Elesie Chieftaincy. To that extent subject matter is not the same. Estoppel by res Judicata can hardly come to bear in the prevailing circumstance..... There is no iota of doubt that for a judgment to ground estoppel, it must be a final and valid judgment. A judgment which has been appealed against is not a final judgment the validity of such a judgment is on a balance.....” G H

The defendants appealed to the Court of Appeal, Kaduna Division against the ruling of Fabiyi, J. The only issue before the court below was whether the plaintiff who was the respondent in that court was caught by the plea of issue estoppel. It found that the plea succeeded. The plaintiff was

dissatisfied with this decision of the court below and appealed to this court.

The main issue formulated by the appellant as arising for determination in this appeal is:

“Whether the Court of Appeal was right in upholding the contention of the respondents that the holding of the court in Suit No. KWS/OM/5/86 to the effect that Agbonbifa family was not a ruling house family, constitute issue estoppel between the appellant and the respondents.”

The two sets of respondents (1st - 6th and 7th - 8th) adopted the above issue identified by the appellant.

Having set out the reliefs sought by the plaintiff who is the appellant in this court, it is necessary to reproduce the reliefs sought by the plaintiffs in the earlier suit (Suit No. KWS/OM/5/86).

The plaintiff/appellant in the present proceedings was the 1st plaintiff in the earlier proceedings. In the said suit he sued for himself and as representing Agbonbifa Isale Esie family. The following were the defendants:-

1. Chief J. Ominiye Olupo,
2. Oyeloti Greenfield Ltd.
3. Oba Jacob Oyeyipo (His Highness the Elesie of Esie),
4. Governor of Kwara State and
5. Kwara State Commissioner for Works, Land and Survey.

In paragraph 29 of their amended statement of claim, the plaintiffs' claims were as follows:

“29. Whereof the plaintiffs claim a declaration

(i) That the plaintiffs being occupiers and holders of the piece and parcel of land situate and lying at Atankoro Area, Esie measuring about 500 hecres (sic) under customary rights are persons deemed to be holders or occupiers to whom customary rights of occupancy had been issued in respect of the land or persons entitled to be issued with customary rights of occupancy on the land upon application.

(ii) That issuance of customary and statutory right of occupancy C. of O. No. 6322 in favour of 2nd defendant by the 4th and 5th defendants in and over the said land is vitiated by irregularities absence of proper authorisation, false claim. Therefore null and void.”

Pleadings were filed and exchanged in the said suit. The case proceeded to trial. At the close of the evidence and addresses of counsel, the learned trial Judge, Orilonise, J. in a reserved judgment, dismissed the claims of the plaintiffs. He made the following findings of fact amongst others:-

“I do not accept the story of the plaintiffs that their forefathers first settled on the land in dispute at Atankoro from where they moved to the

present site of Esie for if this was so, the families of the plaintiffs would have been the Elesie of Esie till today as opposed to a situation where of the 17 Elesies that had reigned none of the 10 recent past Elesie' s (sic) only one was a relation of his.

...I therefore believe the evidence of both the plaintiffs and the defendants and conclude that the Agbonbifa family to which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie Chieftaincy is concerned."

It is this finding of Orilonise, J. in the earlier case that formed the foundation of the plea of issue estoppel in the present proceedings.

Both learned counsel adopted their respective briefs of argument filed on 12/10/93 and 6/1/94. Chief Afe Babalola, S.A.N. both in his brief and oral submissions contended that the court below did not apply properly the five conditions which must be established in order to sustain the plea of issue estoppel. It was his submission that in the earlier suit which was a land case, the parties were Chief G.A. Titiloye (suing for himself and Agbonbifa Isale Esie family) as 1st plaintiff and four other families as 2nd - 5th plaintiffs. That the defendants in the same suit were Chief Omoniye Olupo, Oyeloti Greenfield Ltd., Oba Jacob Oyeyipo (His Royal Highness, the Elesie of Esie), the Governor of Kwara State and the Commissioner for Works, Lands & Survey, Kwara State. He also named the parties to the present suit.

He further submitted that there is no evidence to show that the defendants in the present suit are privies of the defendants or any of them in the earlier suit; that Oba Samuel Oyeniyi (Asanlu of Esie) was expressed to be sued in his personal capacity and not in a representative capacity and that the capacity in which the 3rd defendant in the earlier suit was sued is very crucial. He cited the cases of Olowu v. Alanu (1959) S.C.N.L.R. 214 and Okorie v. Udom (1960) S.C.N.L.R. 326. It was his contention that there is no evidence that the 1st to 6th defendants held any mutuality of interest with the defendants in the earlier suit. He referred the court to the cases of Shola Coker & Ors. v. Sanyaolu (1976) 9-10 S.C. 203 at 223-224, Udo & ors. v. Ohot & Ors. (1989) 1 NWLR (Pt.95) 59 at 77, Amos Aro v. Salami Fabolude (1983) 1 SCNLR 58 and Iyaji v. Eyigebe (1987) 7 S.C.N.J 148 at 162-163; (1987) 3 NWLR (Pt.61) 523 at 534. We were referred to Halsbury's Laws of England 3rd edition Volume 15 paragraphs 343 and 379.

As to the subject matter, Chief Babalola, S.A.N. stated that the claim in the earlier suit was purely land and that there is nowhere in the pleadings where the question of entitlement to the Esie Chieftaincy stool was raised. It was his further submission that no issue was joined between the parties on the traditional history of the founding of Esie or as to who was the first

founder or settler and that the point was not distinctly put in issue and determined with certainty. He cited the cases of Udo & Ors. v. Obot & Ors. (1989) 1 NWLR (Pt.95) 59 at page 77; Bamishebi v. Faleye (1987) 2 NWLR (Pt.54) 51 at 561; Dzungwe v. Gbishe (1985) 2 NWLR (Pt.8) 528 at 538 and Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1 at 5, 37 and 47.

B The learned Senior Advocate of Nigeria also submitted that the High Court in Suit No. KWS/OM/05/86 had and still has no jurisdiction to adjudicate on an issue not made out or joined on the pleadings, namely, whether or not Agbonbifa family is a ruling family and that the jurisdiction of the court is limited and circumscribed by the pleadings of the parties. He referred to the cases of Elufioye v. Halilu (1990) 2 NWLR (Pt.130) 1 at 27-28; Akinbi v. Military Gov. Ondo State (1990) 3 NWLR (Pt. 140) 525 and Adeyemi v. Opeyori (1976) 9-10 S.C. 31 at 51.

D It was further submitted that where an appeal is pending on a given judgment, it is reasonable to hold on and allow such judgment to be used as basis for a plea of estoppel.

Prince Ijaodola, learned counsel for the 1st to 6th respondents referred to paragraph 8 of the plaintiffs' amended statement of claim in the earlier case. It reads:

E *The 3rd defendant is sued personally for his unconscionable role, as the traditional Ruler of Esie, in Irepodun Local Government Area. He is not a member of the plaintiffs' families and has no interest, right or power of any nature on the land in dispute."*

He also referred to paragraph 6 of the 3rd defendant's statement of defence in the earlier case.

F He stated that the Court of Appeal and this court affirmed the findings of Orilonise, J. including ground two which concerned the finding that Agbonbifa family is not a ruling family for Elesie Chieftaincy.

G He further submitted that the High Court of Kwara State had jurisdiction over the previous land case as well as the present Chieftaincy suit. He referred to section 236 of the 1979 Constitution and that the appellant herein misconstrued the meaning of the term "*final judgment*". He urged us to dismiss the appeal.

H Mr. Sanni, the Attorney-General and Commissioner for Justice, Kwara State who appeared for the 7th and 8th respondents submitted in his written brief and oral argument that sameness of parties will apply not only where numerous parties in the earlier suit are ex facie the same in the latter case with those in the earlier case but also where parties in the latter case are privies to those in the earlier case. He cited the cases of Ezenwa v. Kareem (1990) 3 NWLR (Pt.138) 258, Coker v. Sanyaolu supra; Banire v. Balogun (1986) 4 NWLR (Pt.38) 746; Omoleye v. Attorney-General, Oyo State (1987) 4 NWLR (Pt.64)

267 and Omotesho v. Olorieghe (1988) 4 NWLR (Pt.87) 225.

He further stated that the plaintiff in both cases is the Agbonbifa family; that the 2nd and 4th plaintiffs were related to Agbonbifa family by blood and descent and that the 1st plaintiff in the earlier case was also the sole plaintiff in the present suit.

As to the 1st defendant/respondent in the present case, it was his submission that he is the successor in title to the late Elesie of Esie Oba Jacob Oyeyipo (3rd defendant in the earlier case) and that the 2nd to 6th defendants/respondents herein are sued in their official capacities because they recognised and approved the succession of the 1st defendant to the stool.

He contended that the 1st defendant in the present suit is the main defendant; that the 7th and 8th defendants are also sued in their official capacities and the 3rd defendant in the earlier case was also the main defendant therein. He listed the materials which were before the learned trial judge upon which he reached his conclusion that the 1st defendant in the present case is privy to the 3rd defendant in the earlier case. Learned counsel referred the court to paragraph 7 of the affidavit of the 1st to 6th defendants in support of their application to dismiss the present suit in limine and paragraph 25 of the amended statement of claim in the present proceedings. He stated that the parties in both the present and the earlier suits are privies.

Learned counsel further stated that the 3rd defendant in the earlier case was sued as Elesie of Esie and all allegations made against him were in his capacity as Elesie of Esie; that the 1st defendant in the present suit is sued as the successor in title to the 3rd defendant in the earlier case. (The Elesie of Esie).

As to the subject matter, the learned Attorney-General contended that in the earlier land case, the issue as to whether the appellant's family had ever ruled over Esie to establish their claim of first settler arose in the earlier case and was distinctly determined and that the respondents herein prayed the court to use that finding in the present case which is a claim that the appellant's family is entitled to the stool of Elesie of Esie. It was further submitted that parties joined issue on this point.

Learned counsel referred the court to the judgment of this court in earlier case which was reported in Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519 at 544 and the conclusion reached by this court on the issue of first settler or founder of the parcel of land in dispute in the earlier case.

He further submitted that suit No. KWS/OM/5/86 determined finally the case between the parties and that a decision of a court of competent jurisdiction even if appealed against is binding on the parties until set aside.

He cited the cases of *Odjevwedje v. Echanokpe* (1987) 3 S.C. 47 at 72; (1987) 1 NWLR (Pt.52) 633; *Iyowuawi v. Iyowuawi* (1987) 4 NWLR (Pt.63) 61 and *Patkun Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd.* (1988) 5 NWLR (Pt.93) 138. We were urged to dismiss the appeal.

B I will now examine the ingredients which must be met in order to sustain the plea of issue estoppel. The 1st plaintiff in the earlier case was Chief G.A. Titiloye. He instituted the action as head of Agbonbifa Ruling House, for himself and as representing the Agbonbifa Ruling House. In the present suit the same Chief G.A. Titiloye was the sole plaintiff. He sued for himself and on behalf of Agbonbifa Ruling House. There is no doubt that he was the main plaintiff in both suits and the suits were instituted by him in representative capacities. He is dead and was substituted by the present appellant.

C As to the defendants in both proceedings, Oba Jacob Oyeyipo, the Elesie of Esie was the 3rd defendant in the earlier case. In paragraph 8 of the amended statement of claim in the earlier case, the plaintiffs averred:

D *"The third defendant is sued personally for his unconscionable role, as the Traditional Ruler of Esie, in Irepodun Local Government Area. He is not a member of any of the plaintiff's families and has no interest, right or power of any nature on the land in dispute."*

E In the same suit, the 1st - 3rd defendants averred as follows in paragraphs 6, 8 and 9 of their joint statement of defence:

"6. The Oba is the owner of an unoccupied land as a result of his being, or his ancestors being, the first settler.

F *8. The defendants aver that the 1st and 2nd defendants' interested (sic) parcels of land were communal land held by the 3rd defendant by right of his being the personification of Esie Community.*

G *9. The defendants aver that land over which the 2nd defendant has obtained the Certificate of Occupancy No. KW6322 and the proposed extension are part of land traditionally held by the Elesie of Esie (3rd defendant) in his capacity as the personification of Esie community....."*

In paragraphs 6 and 7 of the joint statement of defence of the 1st to 6th defendants in the present suit, they averred as follows:

H *"6 That Oko-Odo is a different and distinct settlement from Esie and that since Esie was founded it was the descendants of Baragbon that have ruled Esie without any exception or interruption.*

7. That the defendants plead that this suit is an abuse of court process in that the main issue to determine (i.e. whether the plaintiff's family is a ruling house for the stool of Elesie) has already been determined by this Honourable Court presided over by the Hon. Justice B.I. Orilonise in G.A. Titiloye & 4 Ors. v. Chief J.Omoniyi Olupo & 4 Ors; Suit No. KWS/OM/5/86

where the plaintiff herein was the 1st plaintiff and the 3rd defendant was the predecessor of the present 1st defendant as the Elesie of Esie.....”

In paragraphs 22 and 25 of the amended statement of claim in the present suit, the plaintiff pleaded:

“22. The plaintiff avers that Oba Iti-Ajado was a powerful Oba who was himself a warlord feared by all his contemporaries ... who reigned between 1842 - 1860.

25. The plaintiff avers that these sons of Oba Iti-Ajado had at various times and dates constituted themselves into Iti-Ajado Ruling House dominated the throne of Elesie of Esie to the exclusion of other descendants of the earlier Elesies..... and the last reigning Elesie Oba Jacob Oyeyipo was a direct descendant of the late Oba Iti-Ajado lineage and the first defendant is also from the same lineage.”

(Italics are for emphasis only).

This is an admission by the plaintiff/appellant that the 1st defendant in the present suit is privy to the 3rd defendant in the earlier suit. I am also satisfied that the 3rd defendant was sued in his capacity as the Elesie of Esie in the earlier suit irrespective of the phrase “is sued personally” appearing in paragraph 8 of the amended statement of claim in that suit. See Ezenwa v. Kareem (1990) 3 NWLR (Pt.138) and Coker v. Sanyaolu (1976) N.S.C.C. 566 at 575.

The 1st defendant in the present proceedings is privy in blood to the 3rd defendant in the earlier proceedings and the 1st plaintiff in the earlier case was the same sole plaintiff in the latter case suing for himself and as representing Agbonbifa Ruling House on each occasion. The court below was right when it held that the parties in both suits are privies.

As to the subject matter, the application before the trial court was based on issue estoppel as distinct from cause of action estoppel. The earlier suit was for declaration of customary right of occupancy to a parcel of land whereas the present proceedings concern the setting aside of the installation of the 1st defendant as the Elesie of Esie and a declaration that the next Elesie of Esie be selected from Agbonbifa Ruling House amongst other reliefs.

It is the contention of the respondents that in the earlier case, it was decided that the plaintiff/appellant’s family is not a ruling family as far as the Elesie Chieftaincy is concerned.

I have to emphasize that within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule is that once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again.

1520 Adedayo v. Babalola (1995) 7 KLR Ogwuegbu JSC
Issue estoppel may arise where a plea of res judicata could not be established because the cause of action are not the same. See Fidelitas Shipping Co. Ltd. v. V/O Export Chleb (1965) 2 All E.R. 4 at 8-9, Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228; Thoday v. Thoday (1964) 1 All E.R 341; Aro v. Fabolude (1983) 1 SCNLR 58; and Hoystead & Ors. v. Commissioner of Taxation (1926) A.C. 155 at 170.

B In the earlier case, the issue whether Agbonbifa family is a Ruling family was distinctly put in issue and it was solemnly determined against them. The issue whether the appellant's family had ever ruled over Esie to establish its claim of first settler arose in the earlier proceedings. The 1st plaintiff in that suit raised the issue in paragraph 8 of his amended statement of claim which was reproduced earlier in this judgment.

C The 1st-3rd defendants in paragraphs 6, 8 and 9 of their joint statement of defence traversed the said paragraph 8 of the amended statement of claim. The issue of the traditional history of the founding of Esie and who was the first founder, his title and the entitlement of the appellant to succeed his ancestor were put in issue in the earlier case. The appellant joined issues with the respondents on those points.

D Evidence was led on the issues. Based on these, the learned trial Judge Orilonise, J. made his findings. The findings were based on paragraph 8 of the amended statement of claim of the 1st plaintiff, paragraphs 5-11 of the statement of defence of the 1st-3rd defendants, paragraph 3 of the statement of defence of the 4th and 5th defendants and the evidence adduced by the parties.

E The Court of Appeal agreed that suit No. KWS/OM/5/86 was a land case and held as follows:

F *"In that case the plaintiff's case was predicated on a platform of traditional history which was given before the trial court which raised the issue of whether or not the Agbonbifa family belong to a Ruling Family as far as the Elesie Chieftaincy Stool is concerned. This issue was considered in the judicatum (sic) proceedings. The parties gave evidence on the issue. After investigating the evidence of all the parties, the court held as follows:*

G *"I therefore believe the evidence of both the plaintiff and the defendant and conclude that Agbonbifa Family to which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie Chieftaincy is concerned."*

H Like in the Aro v. Fabolude case supra, the cause of action was land but the issue estoppel raised and considered was whether Aro-Orija ever had a son.

Applying the above guideline of the Supreme Court, it is my view that since the court in the earlier land case held that Agbonbifa Family to

which the plaintiffs (i.e. Respondents herein) claim to belong is not a Ruling Family as far as the Elesie Chieftaincy is concerned, the substratum of the plaintiffs (i.e. respondents) claim had gone and any claim made by them such as in the new Chieftaincy Suit on the basis that they are entitled to the Elesie of Esie stool must necessarily fail.

I am in complete agreement with the above conclusion of the court below. The issue has been settled by a court of competent jurisdiction and parties are bound by the determination of the issue. See *Cardoso v. Daniel & Ors.* (1986) 2 NWLR (Pt.20) 1 at 17 and *Henderson v. Henderson* (1843) 3 Hare, 114.

This court put a final seal on the matter when it dismissed the appeal of the appellants and affirmed the decision of the Court of Appeal in the earlier case. See *Chief G.A. Titiloye & Ors. v. Chief J. Omoniyi Olupo & Ors.* (1991) 7 NWLR (Pt.205) 519 at 544 where it held:

"It is a notorious fact that the first settler or founder of a parcel of land becomes the owner of the land and the head of subsequent settlers on the land. His descendants derive title to the land from him. It accords with the common sense that the Head or ruler of the settlement at any given time should be one of the descendants of the founder of the land."

Even if the objects of the first and second actions are different as in the present case, the finding on a matter which came directly in issue in the first action - Whether the Agbonbifa family is a ruling family for the purpose of the Elesie Chieftaincy Stool was embodied in the earlier decision. That decision is final and conclusive in this second action which involves the parties or their privies.

In this case, the conditions for the application of the doctrine of issue Estoppel have been established. These are that:

1. The same question was decided in earlier proceedings;
2. The judicial decision said to create the estoppel was final; and
3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The doctrine of *res judicata* of which issue estoppel is a specie, is a fundamental doctrine of all courts that there must be an end to litigation. Public policy also demands that once a court of competent jurisdiction has settled by final decision, the matters in contention between the parties, they should leave the courts alone.

The courts should not encourage prolongation of a dispute and must also discourage proliferation of litigation hence the latin maxims: *interest republicae ut sit finis litium* (Co. Litt. 303) and *Nemo debet bis vexari, si constat*

curiae quo sit pro una et eadem causa (5 Co. 61).

If an action is brought and the merits of the question are determined between the parties and a final judgment is obtained by either, the parties are concluded, and cannot canvass the same issue again in another action.

Finally, the High Court of Kwara State had jurisdiction to adjudicate on the issue whether Agbonbifa family is a ruling family for Elesie Chieftaincy because that issue was properly joined by the parties, evidence was led on it and a decision was also made on it. That issue was also crucial in the determination of that previous case.

The jurisdiction of the court is derived from Section 236 of the 1979 Constitution which provides:

“236.(1) Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal, power, duty, liability, privilege, interest, obligation or claim is in issue or(2)”

In the result, the appeal is dismissed and the judgment of the court below is affirmed. The respondents are entitled to costs which I assess at N1,000.00.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C. I entirely agree with the judgment and do not desire to add anything.

I too dismiss the appeal with N1,000.00 costs to the respondents.

KUTIGI JSC

The main and real issue submitted by the parties for determination in this appeal is -

“Whether the Court of Appeal was right in upholding the contention of the respondents that the holding of the court in Suit No. KWS/OM/5/86 to the effect that Agbonbifa Family was not a ruling house or family constitute issue estoppel between the appellant and the respondent.”

In suit No. KWS/OM/5/86 now reported as Titiloye & Ors. v. Olupo & Ors. (1991) 7 NWLR (Pt.205) 519; (1991) 9 - 10 SCNJ 122, the appellants as plaintiffs sued the respondents as defendants at the High Court for a declaration amongst others that the plaintiffs being occupiers and holders of a piece

of land were the persons deemed to be holders or occupiers to whom a customary right of occupancy to the parcel of land would be issued. The parties founded their case on traditional evidence and based their titles to the land on the first settlers thereon being their ancestors. At the conclusion of the trial, the learned trial Judge dismissed the plaintiffs' case. They appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the trial court. The plaintiffs further appealed to the Supreme Court. A panel of seven justices (full court), heard the appeal and unanimously dismissed it and affirmed the decisions of the two lower courts. It is therefore doubtless that the decision in the suit was final. It was in this same suit that the learned trial Judge of the High Court held thus:-

"I do not accept the story of the plaintiffs that their forefathers first settled on the land in dispute at Atonkoro from where they moved to the present site of Esie for if it were so the families of the plaintiffs would have been the Elesie of Esie till today as opposed to a situation where of the 17 Elesies that had reigned, none was a descendant of the 1st plaintiff or where of the 10 recent past Elesies only one was a relation of his. P.W.2 in fact said that the 3rd defendant who is also Elesie is not related to him or to any of the plaintiffs and this is confirmed by both D.W.1 and D.W.2. I therefore believe the evidence of both plaintiffs and the defendants and conclude that the Agbonbifa family to which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie Chieftaincy stool is concerned."

Above is now the subject matter of this appeal.

In the present proceedings paragraph 38 of the Amended Statement of Claim clearly show that the reliefs being claimed include a declaration that under native law and custom Elesie of Esie is selectable from Agbonbifa Ruling House and that the purported nomination and installation of the 1st defendant as Elesie of Esie is null and void. I am therefore of the view that the subject matter of litigation which was land in the previous suit is not the same as the chieftaincy dispute in the present proceedings. I am however mindful of the fact that we are here concerned with the doctrine of "issue estoppel" as distinct from "res judicata" and that issue estoppel may arise where a plea of "res judicata" could not be established simply because the causes of action are not the same. And to that extent I think Chief Afe Babalola, Senior Counsel for the appellant was wrong when he said the two are governed by the same set of requirements. I must say that the Court of Appeal also erroneously held that view,

Now, the conditions for the application of the doctrine of "issue estoppel" have been stated as being that -

1. the same questions were decided in both proceedings;
2. the judicial decision said to create the issue estoppel was final;

3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

(See *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd. (No.2)* (1967) 1 AC 853 at 953; (1966) 2 All E.R. 536 at 565 per Lord Guest; *Halsbury's Laws of England*, 4th Edition, Para. 1530, Vol. 16)

I have carefully examined the record of proceedings in this case and I am satisfied that the above conditions for the application of the doctrine of “*issue estoppel*” have been satisfied. A party is precluded from contending in perpetuity any precise point which having been once distinctively put in issue has been properly determined against him. And even if the objects of the first and second actions are different (as in this case), the finding on a matter which came directly (not collaterally or incidentally vide *Spens v. I.R.C.* (1970) 3 All E.R. 295 at 301; (1970) 1 WLR 1173 at 1187) in issue in the first action, provided it is embodied in a judicial decision that is final (also as in this case), is conclusive in a second action between the same parties and their privies. It has been held that this principle would apply whether the point involved in the earlier decision and as to which the parties are estopped, is one of fact or one of law or one of mixed law and facts (see *Jones v. Lewis* (1919) 1 K.B. 328 at 344, *Re Graydon, Ex Parte Official Receiver* (1896) 1 QB. 417).

It is for the above reasons and for those given by my learned brother Ogwuegbu, J.S.C. in the lead judgment which I read before now, that I dismiss the appeal with N1,000.00 costs in favour of the respondents.

F **ONU JSC**

Having had the privilege of a preview of the judgment of my learned brother Ogwuegbu, J.S.C. just delivered, I agree with him that this appeal lacks merit and ought to fail.

G I wish, however, to make a few comments in elaboration as follows:-

I do not intend to go into the facts of this case as adequate care has been taken of them to need any repetition here.

The main or dominant issue submitted for our determination in this appeal goes thus:

H “*Whether the Court of Appeal was right in upholding the contention of the respondents that the holding of the Court in Suit No. KWS/OM/5/86 to the effect that Agbonbifa family was not a ruling house or family constitute issue estoppel between the appellant and the respondents.*”

To sustain a plea of res judicata to which issue estoppel is a specie as held by this court in the case of Michael Ezenwa v. Olalekan Kareem (1990) 3 NWLR (Pt.138) 258 at pages 264, 267 and 268 the party pleading it must satisfy the following conditions, to wit:

(i) that there was an adjudication of the issues joined by the parties. B

(ii) that the parties (or their privies as the case may be) are the same in the present case as in the previous case;

(iii) that the issue and subject matter are the same in the previous case as in the present case;

(iv) that the adjudication in the previous case must have been given by a Court of competent jurisdiction; C

(v) that the previous decision must have finally decided the issues between the parties, that is, the rights of the parties were finally determined. See also Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1: Dzungwe v. Gbishe (1985) 2 NWLR (Pt.8) 528: Chinwendu v. Mbamali (1980) 3-4 S.C. 31: Udo v. Obot (1989) 1 NWLR (Pt.95) 59: Bamishebi v. Faleye (1987) 2 NWLR (pt.54) 51 at 58: Iyaji v. Eyiegbe (1987) 3 NWLR (Pt.61) 523 and Ikpong v. Edoho (1978) 6-7 S.C. 221. Whether the Parties are the same? D

My learned brother, Ogwuegbu, J.S.C. has in his judgment clearly demonstrated that the parties in Suit No. KWS/OM/5/86 are the same as those in KWS/OM/17 /87. It is in this wise that I agree with the learned Attorney General of Kwara State and Mr.Ijaodola that sameness of the parties will apply not only to situations where the numerous parties in the earlier suit are ex facie the same in the latter case with those in the earlier case, but also where the parties in the latter case are privies to those in the earlier case. Thus, as Diplock, L.J. put it in Mills v. Cooper (1967) 2 WLR 1343 at page 1350 where the doctrine of issue estoppel was considered as an arm of estoppel per res judicata. E F

“That doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element of his cause of action or defence, if the same assertion was an essential element in the previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.” G H

See also Amos Ogbesusi Aro v. Salami Fabolode (1983) 2 S.C. 57 at 100-104; Alhaji Amida v. Taiye Oshoboja (1984) 7 S.C. 68; New Brunswick Railway Co. v. British & French Trust Corporation Ltd, (1939) A.C.I. 43 (P.C); Fidelitas Shipping Co. Ltd. v. V/O Export chleb (1966) 1 Q.B. 630, 640 (per Lord Denning) and cited with approval by this court in Y.A. Lawal v. Yakubu Dawodu & Anor. B (1972) 1 All NLR (Pt.2) 270. 282.

In Coker v. Sanyaolu (1976) N.S.C.C. 566, 575 this court per Idigbe J.S.C., held:

“..... *Privies*” in relation to the doctrine of *Res Judicata* are of three classes and they are:

- C 1. *Privies in blood (as ancestor and heir)*
2. *Privies in law (as testator and executor. intestate and administrator) and*
3. *Privies in Estate (as Vendor and Purchaser. Lessor and Lessee)”*

See also Cardoso v. Daniel (supra); Banire v. Balogun (1986) 4 NWLR (Pt.38) D 746; Omoloye v. A.-G., Oyo State (1987) 4 NWLR (Pt.64) 267; Omotesho v. Oloriegbe (1988) 4 NWLR (Pt.87) 225.

The parties in the two cases, KWS/OM/5/86 and KWS/OM/17/87 are the same because they are “*privies in blood*”. The plaintiff in the case on appeal herein (KWS/OM/17/87) hails from the Agbonbifa family. In the earlier E case (KWS/OM/5/86), the 1st plaintiff, Chief G.A. Titiloye, was from the Agbonbifa family to which 2nd and 4th plaintiffs. Chief Enoch Afolayan and Chief J.O. OyinJoye respectively were related by blood and descent. See Exhibit 1. The 3rd and 5th plaintiffs therein, Mr. Ezekiel Ore Olayinwole and Chief Peter Oyeniyi respectively, were grantees of the 1st plaintiff. In the main, 1st F plaintiff in the earlier case (KWS/OM/5/86), was also the sole plaintiff (later appellant) in the latter case, KWS/OM/17/87.

The 1st defendant (1st respondent in the present appeal is the successor in title to the late Elesie of Esie, Oba Jacob Oyeyipo who was 3rd defendant in Suit KWS/OM/5/86. While 2nd to 6th defendants (2nd to 6th G respondents in the present appeal) were sued only as the persons who in their official capacity recognised and approved the succession of the 1st respondent. Similarly, 7th to 9th defendants were sued also in their official capacity as recognising authority for the appointment of 1st respondent. The 1st respondent in the instant appeal is therefore the main defendant as the cause of H action could not have been maintained without him. There was therefore abundant evidence upon which the court below arrived at the conclusion that the 1st respondent in this case was a privy to the 3rd defendant, the late Oba Jacob Oyeyipo, Elesie of Esie. The above principle as was clearly restated in Ezenwa v. Kareem (supra), is to the effect that a son is a privy to his late father.

This point is also more than amply illustrated by the pleadings of the parties in instant case where the appellant as plaintiff had pleaded in paragraph 25 of his amended statement of claim inter alia that-

“.....the last reigning Elesie Oba Jacob Oyeyipo was a direct descendant of the late Oba Ita-Ajado lineage and the first defendant is also from the same lineage.”

and the 1st to 6th defendants/respondents in paragraph 7 of their joint statement of defence averred inter alia -

“.....the plaintiff herein was the 1st plaintiff and the 3rd defendant was the predecessor of the present 1st defendant as Elesie of Esie.”

Issues having been joined the decision of the court below, on the pleadings amounted to an admission by the appellant of privity by blood the 3rd defendant in the earlier case and the appellant herein a finding which, in my view, cannot be faulted. That which is admitted needs no further or better proof. See Omonfoman v. Okoeguale (1986) 5 NWLR (Pt.40) 179; Balogun v. Labiran (1988) 3 NWLR (Pt.80) 66, 69; UBN v. Nnoli (1990) 4 NWLR (Pt.145) 506, 545 and Olale v. Ekwelendu (1989) 3 N.S.C.C. 145; (1989) 4 NWLR (Pt.115) 326. The court below was therefore right when it held as follows:-

“I also observed that the appellant’s herein were the 1st-6th defendants in the new Chieftaincy suit while the 1st plaintiff in the earlier case sued in a representative capacity on behalf of the Agbonbifa family. There is no doubt that the parties in both past and the present suits are privies thereby satisfying condition (b) supra.”

Be it noted that condition (b) referred to above is that set out under (ii) at page 2 above.

While it is correct to say as the appellant did, that the earlier case, Suit No KWS/OM/5/86 (Exhibit I), is a case on land and that the one giving rise to the appeal herein, suit No. KWS/OM/17/87 is on chieftaincy, the substance of the matter is that in the former the chieftaincy issue of whether the appellants in the latter had ever ruled over Esie to establish their claim of first settler arose and was distinctly determined with certainty and solemnity. The learned trial Judge in the latter case had held as follows (thus, in fact, not emphasizing on the claim of title to land) that -

“I therefore believe the evidence of both the plaintiffs and the defendants and conclude that the Agbonbifa family to which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie chieftaincy stool is concerned.”

And in the present case, the original plaintiff, Chief G.A. Titiloye, deceased now substituted by the present appellant, Ezekiel Adedayo, having

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sued as “*Head of Agbonbifa Ruling House for himself and the Agbonbifa Ruling House*” would sink or swim with the fortunes of that family. The respondents were, in my view, for their own part, entitled to raise and succeed, (as they did by way of a motion in limine by relying on the doctrine of issue estoppel. In this regard, learned Senior Advocate for the appellant, Chief Afe Babalola, in both his brief and oral arguments, tended, with utmost due respect, to dwell on cause of action estoppel and not on issue estoppel. Explaining the latter doctrine with which we are here concerned in the cases of Y.A. Lawai v. Chief Yakuhu Dawodu and Anor. (1972) 1 All NLR (Pt.2) 270, 707, 718 (Reprint) and Fabunmi v. Oyewusi (1990) 6 NWLR (Pt.159) 728, 737, this court citing with approval the statement of Lord Denning, M.R. in Fidelitas Shipping Co. Ltd. v. V/O Export chleb (supra) said:

“*But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again.*”

Having regard to the principle stated above, the reliance the learned Senior Advocate for the appellant placed on the cases of Udo v. Obot (1989) 1 NWLR (Pt.95) 59 and a host of other cases such as Ladega v. Durosimi (1978) 3 S.C. 91 at 100; Bamishehi v. Faleye (supra); Dzungwe v. Gbishe (supra) and Cardoso v. Daniel (supra) as well as Halsbury’s Laws of England, 3rd Edition Volume 15, Para. 355, pages 182-183, rather than supporting the appellant’s contention, is of no avail to him. Indeed, the excerpt in Halsbury’s Laws of England, 4th Edition, Volume 16, paras. 1528, 1529 at pages 1028 and 1029 the learned Senior Advocate placed before us on 8th May, 1995 when he made his oral submission has to do with the conditions or essentials of res judicata a far-fetched albeit all embracing phenomenon, but not issue estoppel, the latter which is but a specie of the former as earlier pointed out.

Furthermore, the contention of the appellant that the issue of traditional history of the founding of Esie and who was the first founder thereof was not put in issue in the earlier case, is in my view, incorrect. The name of the settler, his title and the entitlement of the appellant to succeed his ancestors were all put in issue and more importantly, that relating to whether appellant’s house was a ruling house. The appellant having joined issues on these points with the respondents by going as far as to lead evidence on them, the court below by relying on paragraph 8 of the Amended Statement of Claim of the appellant, paragraphs 4-14 of the Statement of defence of the 1st to 3rd respondents and paragraph 3 of the statement of defence of the 4th and 5th respondents, in the earlier case (Suit KWS/OM/5/86) held, rightly in my view, that the traditional history of the Elesie was joined in those pleadings between

the parties to need any proof, traverse, reply or denial thereof. See Overseas Construction Co, Nigeria Ltd. v. Creek Enterprises Nig. Ltd. (1985) 3 NWLR (Pt.13) 407; Ehimare v. Emhonyon (1985) 1 NWLR (Pt.2) 177 and B.F.H.A v. Sommer (1986) 1 NWLR (Pt.17) 533.

In the instant case, KWS/OM/17/87, both the right to land and to the headship of a community became issues wherever any claim to one of them is founded on traditional history of being first settler. The learned trial Judge found issues joined on these points and evidence was led on them. On the specific issue of whether the appellant is entitled to the Elesie Chieftaincy, the learned trial Judge did not reach a conclusion. Rather, he found nothing to choose between the evidence of both parties and said after a review of the evidence that:

"I therefore believe the evidence of both the plaintiffs and the defendants"

But he concluded that:-

'The Agbonbifa family which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie Chieftaincy Stool is concerned.'

The dicta of Karibi-Whyte, J.S.C, in Udo's case and another cases cited with it by the appellant, which required that the precise point must have been distinctly put in issue and the issue with certainty and solemnity determined and precisely met by the facts of the case, are in my opinion, not elements missing from the instant case.

In the instant case there was a specific finding against the appellant that his family is not a ruling house with respect to the Elesie Chieftaincy. See Chinwendu v. Mbamali (1980) 3-4 S.C. 31. No matters were left to inference.

That The Adjudication in the Previous Suit Must Have Been Given by a Court of Competent Jurisdiction

It will only suffice to say here that the appellants having vigorously contested and pursued on appeal by contending that the trial court had no jurisdiction to decide on the issue of the entitlement or otherwise of the Agbonbifa family to the throne of Elesie because such was not submitted to it for adjudication, and lost this point both in Court of Appeal and in this court, the entire matter has now been laid to rest and to use the words of the Honourable Attorney-General for the 7th and 8th respondents. Appellant is seeking *"a second bite at the Cherry by seeking to reopen it again for trial."* In the case (i.e. the earlier case of suit No. KSW/OM/5/86) which is reported as Chief G.A Titiloye & 4 Ors. v. Chief J. Omoniyi Olupo & 4 Ors. (1991) 7 NWLR (Pt.205) 519, 544; (1991) 9-10 S.C. N.J. 123, 148 S.C. Akpata, J.S.C. while dismissing the appellant's appeal on the point, reproduced with approval the

“.....Agbonbifa family to which some of the plaintiffs claim to belong is not a ruling family as far as the Elesie Chieftaincy Stool is concerned.”

The learned Justice held further as follows:

B *“It is a notorious fact that the first settler or founder of a parcel of land becomes the owner of the land. His descendants derive title to the land from him. It accords with common sense that the head or ruler of the settlement at any given time should be one of the descendants of the founder of the land.”*

C When the respondents in the case in hand had prayed the trial court to strike out the suit in limine as an abuse of the process of court, it was contended then that since the point was being contested in the then pending appeal, the appellant must have to sink or swim by the outcome of the appeal and not by instituting another action alongside the appeal. The appellant having failed by losing the appeal reported above, has nothing left but a mere D shell. There must indeed be an end to litigation.

Whether the Judgment in the earlier suit (i.e. Suit No. KWS/OM/5/86 finally decided the issue of entitlement to the Chieftaincy Stool of Elesie between the parties?

E In the light of all I have said above Suit No. KWS/OM/5/86 (Exhibit 1) and copied into the record at pages 6 to 40, determined finally this case between the parties thereto forever. In *Odjevwedje v. Echanokpe* (1987) 3 S.C. 47, 72; (1987) 1 NWLR (Pt.52) 633, *Eso J.S.C.* on the status of a judgment held thus:

F *“A decision of a court of competent jurisdiction not appealed against or which appealed against has not been set aside, exists forever between the parties.”*

(Italics mine for comment)

See also *Iyowuawi v. Iyowuawi* (1987) 4 NWLR (Pt.63) 61 and *Patkun Industries v. Niger Shoes Ltd.* (1988) 5 NWLR (Pt.93) 138. Suit No. KWS/OM/5/86 (Exhibit 1), as demonstrated above is a decision which appealed against, has not been set aside either in the court below where it was appeal No. CA/K/180/87 or in this court where it was prosecuted as Appeal No. S.C. 23/1989 and finally reported as *Titiloye v. Olupo* (supra).

H The end result of all I have been saying is that the issue has become an academic question. This court does not indulge in such an exercise in futility. See *Overseas Construction Company (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd. & anor.* (1985) 3 NWLR (Pt.13) 409; *Nzom v. Jinadu* (1987) 1 NWLR (Pt.51) 533 at 537 and *Fawehinmi v. Akilu* (1987) 12 S.C. 136; (1987) 4 NWLR

Adedayo v. Babalola (1995) 7 KLR Onu JSC 1531
(Pt.67) 797. The lone issue canvassed is accordingly resolved against the appellant.

It is for these reasons and the more comprehensive ones contained in the judgment of my learned brother Ogwuegbu, J.S.C. that I too dismiss this appeal as lacking in merit. I make the same consequential orders as contained in the judgment.

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ADIO JSC

I have had a preview of the judgment just read by my learned brother, Ogwuegbu, J.S.C., and I agree that the appeal does not succeed. I too dismiss it and I abide by the consequential orders, including the order for costs.

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