

18TH JULY, 1995. SC. 211/1989

**CORAM:- M.L.UWAIS, M.E. OGUNDARE, U.MOHAMMED,
Y.O.ADIO, A.IIGUH, JJSC**

EZEWUIHE IKOKU AND 3 ORS.

..... PLAINTIFFS/
RESPONDENTS/APPELLANTS

AND

RUEBEN EKEUKWU AND 3 ORS.

..... DEFENDANTS/
APPELLANTS/ RESPONDENTS

APPEALS - Findings of fact - Where they are unchallenged court is not competent to decide on them.

ESTOPPEL - Issue Estoppel - Past and present proceedings - question must be directly in issue in both proceedings - For issue apply.

ESTOPPEL - *Res Judicata* - Where land in dispute is different from previous proceedings - Plea of *res Judicata* cannot succeed

ESTOPPEL - Issue estoppel - Absence of statement of defence in proceedings - Whether issue estoppel is established.

FACTS

In a protracted land dispute, some members of the plaintiffs' family sued members of the defendants' family over a piece of land, which dismissed. Both parties acted in representative capacities for their The present suit, in which both parties are also acting in representative capacities for the same families, is in respect of a piece of land lying north of the land in dispute in the previous 1963 case. The plaintiffs' claim to title was opposed by the defendants who equally claimed title to the pleaded both estoppel per rem judicatam and issue estoppel. The plaintiffs claimed that the land in issue this time is different, and the trial judge upheld the claim. The judge then went into the merits of the case and land to the plaintiffs.

Dissatisfied, the defendants appealed to the Court of Appeal, Enugu Division, alleging that both portions of land were contained in survey plan and still raised the issue of estoppel. The defendants' appeal was upheld. The

plaintiffs have now appealed to the Supreme Court raising three issues for determination.

ISSUES FOR DETERMINATION

“(i) *Whether the findings made by the High Court of Owerri Judicial Division in Suit No. HOW/109/63 - Unachukwu Nwadiabo & Ors. v. Nlemadim Akukwe & Ors., and the evidence of PW2 - Ejike Chidolue and D W2 - Pius Ndenu justify in law the conclusion of the Court of Appeal to the effect that the two pieces of land Uhu and Ekpe were the subject matters of 1963 litigation between the parties and consequently caught by the defence of estoppel per rem judicatam.*

(ii) *Whether the Court of Appeal was right in law in rejecting the findings of the court of trial to the effect that the respondents did not make out a case of res judicata and of material contradictions in the evidence of the appellants and thereafter substituting its own findings from the accepted facts.*

(iii) *Whether the court of appeal was right in holding, contrary to the finding of the court of trial, that the respondent placed before the court of trial materials upon which a plea of estoppel per rem judicatam could be founded.* “

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

Res Judicata - Where land in dispute is different

1. I have examined the two plans used by the parties in the 1963 case, that is, exhibits ‘C’ and ‘D’, the plans tendered in the present proceedings, exhibits ‘B’ and ‘E’ and the judgment in the 1963 case, exhibit ‘H’ and have come to the conclusion that the land in dispute in the 1963 case is different from land in dispute in the present case. The parties agree that the land now in dispute is to the north of the land in dispute in the 1963 case and this is borne out by their plans and Exhibit H. That being the case, therefore, the court below, with profound respect, was wrong in holding as it did, that the plea of res judicata succeeded. The lands in dispute in the two cases not being the same, that plea cannot succeed. (p. 1615 F)

Issue Estoppel - Finding in question must be directly in issue

2. Issue estoppel relates to barring a party from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceeding. The finding however, must come directly and not collaterally or incidentally in issue in the first action. True enough, the learned trial judge in the 1963 case made a finding which is now relied upon by the

defendants that the land to the north of the land in dispute in the case before him, belonged to the defendants. For this finding to sustain issue estoppel it must be that the land to the north of the land in dispute came directly in issue in the proceedings in the 1963 case. (p. 1616 A)

Issue Estoppel - Whether established

3. In the light of all I have been saying, I must, therefore, conclude that the learned trial judge was right when he held that in the absence of the of defence in that case it could not be said that the land to the north in dispute was in issue. With respect to the learned Justices of below, I do not agree with them that the plea of issue estoppel was successfully established by the defendants. (p. 1616 G)

Appeals - unchallenged findings of fact

4. The court below did not consider nor pronounce on the findings of the fact relating to traditional history, ownership, etc. made by the learned trial judge notwithstanding the grounds of appeal before it. It has, therefore, left undisturbed those findings. There is not before us any appeal challenging those findings. I will, therefore, make no pronouncement on then therefore, set aside the decision of the court below on the issue of res judicata and issue estoppel, it follows that the decision of the court below must be set aside and that of the trial High Court restored. (p. 1617 C)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Title - When not to be granted to a defendant

Where, as in Exhibit H, a plaintiff claims a declaration of title to some land and it is dismissed, the law is settled that it will be wrong to declare respect thereof in favour of the defendant if he had not sought for such a relief by way of counterclaim. (p. 1620 C)

2. Estoppel - Observation that cannot ground estoppel

The principle is well established that it is not each and every observation or remark made by the court that qualifies as a decision or determination of the court. In my view, the observation of the learned trial Judge in Exhibit H on the issue of ownership of the land north and south of the land in dispute in that case was clearly incidental, inconclusive and incapable of sustaining a plea of estoppel per rem judicatam or issue estoppel as it concerned an issue neither raised by the parties on the pleadings nor canvassed at the trial. (p. 1621 B)

REPRESENTATION

Chief A.B.C. Iketuonye, SAN with O. Ofoiri for Appellants
N.A. Nnawuchi, ESQ. for the Respondents

CASES REFERRED TO

Aro v. Fabolude (1983) 2 SC. 75
Ledga v. Durosimi (1978) 3 SC.91
New Brunswick Railway Co. v. British and French Trust Corporation Ltd.
(1939) AC. 1 43
Oke v. Atoloye (1986) 1 N.W.L.R. (Part 15) 241 at page 260
Yoye v. Olubode (1974) 1 All N.L.R. (Part 2) 118 at page 122
Alasa v. Ilu (1965) N.M.L.R. 66
Nwaneri v. Oriuwa (1959) S.C.N.L.R. 316
Banire v. Balogun (1986) 4 N.W.L.R. (Part 38) 746 at page 753
Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228
Nkanu v. Onun (1977) 5 S.C. 13 at 18
Fidelitas Shipping Co. Ltd. v. V/O Exportchib (1966) 1 Q.B. 630
Y.A. Lawal v. Chief Yakubu Dawodu (1972) 8/9 S.C. 83 at page 105
Sosan v. Ademuyiwa (1986) 3 N.W.L.R. (Part 27) 241
Ntiaro v. Akpan 3 N.L.R. 10
Maja v. Stocco (1968) 1 All N.L.R. 141 at page 149

BOOKS REFERRED TO

Halsbury's Laws of England (4th Edition) vol. 16 para 1530 p. 1030
Res Judicata - Spencer Bower and Turner (2nd Edition) p. 18

LEAD.JUDGMENT BY OGUNDARE JSC

The main issue that calls for determination in this appeal is in respect of the plea of res judicata and/or issue estoppel raised by the defendants (who are now respondents in this appeal) in their pleadings. The plaintiffs (now appellants) have sued the defendants claiming -

(a) declaration of title to two pieces or parcels of land known and called Uhu land and Ekpe land, and

(b) an injunction restraining the defendants etc. from committing further acts of trespass on the said pieces of land.

Pleadings having been ordered, filed and exchanged, the case proceeded to trial at the end of which the learned trial Judge, in a reserved judgment, rejected the plea of estoppel per rem judicata and/or issue estoppel raised by the defendants. He considered the case on the merits and found for the plaintiffs, entering judgment in their favour in terms of their claims. Being

dissatisfied with that judgment the defendants appealed to the Court of Appeal (Enugu Judicial Division) on one original and six additional grounds of appeal. In their Appellants Brief, the defendants posed three questions as calling for determination and these were:

B “(a) Having regard to the evidence (oral and documentary) before the trial court can it be said that the doctrine of estoppel per rem judicatam or at least issue estoppel was not established in this case so as to preclude the plaintiffs/respondents from asserting any claim over the land in dispute (or at least part of it) against the defendants/appellants) or re-opening the issues raised and determined in a court of competent jurisdiction?

C (b) If the answer to the first issue raised above is in the negative, was the learned trial Judge right in entering judgment for the plaintiffs/respondents over the land in dispute in the face of a subsisting and valid judgment of a court of competent jurisdiction.

D (c) Apart from estoppel having regard to the totality of the evidence before the lower court can it be said that the plaintiffs established their case so as to entitle them to judgment.”

The Court of Appeal in its judgment dealt primarily with the plea of estoppel per rem judicatam and issue estoppel raised by the defendants and which formed the subject matter of questions (a) and (b) in the appellants’ Brief. Question (c) was not considered, except rather obliquely, in the lead judgment of Olatawura J.C.A. (as he then was). Suffice it to say that the learned Justices of the court below found that the plea of res judicata and/or issue estoppel succeeded. Olatawura J.C.A. concluded his leading judgment (with which the other Justices agreed) in these words:

F “From whatever angle one looks at this appeal, either on the issue of estoppel per rem judicatam or issue estoppel or on the totality of the evidence given before the learned trial Judge, the case of the plaintiffs/respondents ought to have been dismissed.

G It is no longer necessary for me to consider the other grounds of appeal since the appellants have succeeded on grounds 1, 2, 3, 5 and 7. The appeal is allowed.”

H Being dissatisfied with the setting aside by the Court of Appeal of the judgment of the trial High Court which went in their favour, the plaintiffs have now appealed to this court upon three grounds of appeal which, without their particulars, read as follows:

“1. The learned Justices of the Court of Appeal erred in law when they held that the findings made by the High Court of Owerri Judicial Division in its judgment in Suit No. HOW/109/63 - Unachukwu Nwadiigbo & ors. Nlemadim Akwukwor & ors, to the effect to wit:-

'I find as a fact that the defendants are the owners in possession of the land in dispute and the lands north and south of the land in dispute the northern boundary extending to the area verged green and forming boundary with the plaintiffs. I find as a fact that the defendants have farmed and are still farming the land in dispute. I am satisfied that the defendants had given sufficient evidence of possession and acts of ownership (and supported by the evidence of the plaintiffs' first witness) and would have entitled them to a declaration that they are the owners of the land had there been a counter-claim are in law sufficient to sustain a plea of estoppel per rem judicatam in the present action instituted by the plaintiffs in respect of the land lying to the north of the land in dispute in 1963.

2. *The Court of Appeal erred in law in substituting its own findings for the finding of the trial court to the effect that the defendants who raised the plea of res judicata did not place before it sufficient facts from which it could find that the subject-matter of the present action was the same as that of 1963.*

3. *The Court of Appeal erred in law in holding contrary to the court of trial, that there were material contradictions in the evidence of plaintiffs' witnesses relating to the boundaries between the land in dispute in 1963 and the land in dispute in 1978."*

Pursuant to the rules of this court, the parties filed and exchanged their respective briefs of argument. In the appellants' brief three issues were set down as calling for determination in this appeal. They read:

"(1) Whether the findings made by the High Court of Owerri Judicial Division in Suit No. HOW/109/63 - Unachukwu Nwadiho & Ors. V. Nlemadim Akukwe & Ors., and the evidence of P.W.2 - Ejike Chidolue and D.W.2 - Pius Ndenu justify in law the conclusion of the Court of Appeal to the effect that the two pieces of land Uhu and Ekpe were the subject-matters of 1963 litigation between the parties and consequently caught by the defence of estoppel per rem judicatam.

(ii) Whether the Court of Appeal was right in law in rejecting the findings of the court of trial to the effect that the respondents did not make out a case of res judicata and of material contradictions in the evidence of the appellants and thereafter substituting its own findings from the accepted facts.

(iii) Whether the Court of Appeal was right in holding, contrary to the finding of the court of trial that the respondent placed before the court of trial materials upon which a plea of estoppel per rem judicatam could be founded."

The defendants for their part also raised three issues in the respondents' brief, two of which are identical to the issues raised by the plaintiffs in

their own brief. The first issue raised by the respondents which to my mind is not encompassed by any ground of appeal is a non-issue and is, therefore, discountenanced.

Let me at this stage state rather briefly the facts as they are relevant to the issues before us. There has been a protracted land dispute between the two parties. In 1963 Nwadiigbo and one other member of the plaintiff's family sued some members of the defendants' family in suit No. HOS/109/63 in respect of a piece of land. Both parties acted in representative capacities for their families. Judgment was delivered in the case on 19th day of November 1966. The plaintiffs' case was dismissed. In that judgment the learned trial Judge found:

"On the whole the evidence led by the plaintiffs is far from being satisfactory. I have no hesitation in preferring the case presented by the defendants to that presented by the plaintiffs. The plaintiffs' case is full of contradictions and irrelevances.

I find as a fact that the defendants are the owners in possession of the land in dispute, and the lands north and south of the land in dispute, the northern boundary extending to the area verged green, and forming boundary with the plaintiffs."

The plaintiffs claimed that their family appealed against that judgment but because of the civil war that intervened, the records got lost and the appeal was never heard till today. Subsequently the present plaintiffs instituted an action against the present defendants which terminated in a non-suit for want of prosecution. The present suit in which both parties again represented their respective families is in respect of the land to the north of the land in dispute in the 1963 case. The plaintiffs claimed title to that land. The defendants equally claimed title to it and went on to plead estoppel per rem judicatam and/or issue estoppel. The plaintiffs contended that the land in dispute in 1963 was not the same as the land in the present proceedings. The learned trial Judge agreed with them, went into the merits of the case and found for them. The defendants appealed to the Court of Appeal which set aside the judgment of the learned trial judge and held that res judicata and/or issue estoppel applied and dismissed plaintiffs' claims. Hence the appeal to this court by the plaintiffs. In the course of the trial, the plans used by the parties in the 1963 case were tendered in evidence as well as the amended statement of claim in that case. The statement of defence was, however, not tendered. The judgment in that case was also tendered in evidence.

As all the questions formulated relate to the plea of estoppel raised by the defendants, I shall consider them together. The learned trial Judge observed in his judgment as follows:

"I shall deal with the defence of estoppel per rem judicatam which the defendants have amply raised both in their pleading and evidence in court. The defence of estoppel per rem judicatam is based upon two considerations: Firstly that of public policy on the principle 'interest rei publicae ut sit finis litium.' (it being in the interest of the State that there should be an end to litigation) and secondly, that of hardship to the individual on the principle nemo vexari pro eadem causa; nemo his puniri pro delicto' - (that he should not be vexed twice for the same cause)." B

This was the famous dictum of Lord Blackburn in the case of Lockyer v. Ferryman 2 A.C. 5/9. The defendants in paragraph 5 of their amended statement of defence pleaded as follow:

'In further answer to paragraphs 4 & 5 the defendants state that in 1963 in Suit No. HOW /209/63 the plaintiffs represented by Unachukwu Nwadiogo and Maduako Onyekwele sued the defendants represented by Nkemadium Akukwu, Reuben Ekeuku, Ugorji, Osuagwu, Anyaegbu Ibewere and Madukaji Igbo over land which they called 'Okpofo' and 'Oborouku' which they showed in their plan No. UND/29/63 but which embraced portions of the defendants farmlands (same as now) filed plan No. P.O/41/64 and the area verged green in the present plan No. P.O. IMO 153/78 filed with this statement of defence and also in plan No. P.O./E340/75 filed in Suit No. HOG/37/77. 'Ani Ekpe, 'Okpuachi', 'Nkpauzi', 'Nkputu', 'Okpu Eke' and Oboroukwu' shown in the plan No. PO/41/64 and the present plan are the same. The land which was in dispute in 1963 case is the same as the portion verged brown in the defendants present plan.' C D E

In his evidence the 1st defendant stated in part as follows:

'We have however been to court with the plaintiffs over a part of the lands now in dispute.' F

The defence of estoppel per rem judicatam is a special defence and as such the onus is on the defendants to establish it in their evidence. The 1st defendant gave evidence that the previous case between the parties was decided in Owerri High Court about 18 years ago. He tendered Exhibit H - the judgment of the High Court, Owerri and Exhibit F - amended Statement of Claim filed by the plaintiffs in the previous case." G

After a review of the evidence before him he went on to say:

"Counsel also referred me to paragraph 8 of Exhibit F - the amended statement of claim in HOW/109/63 which states as follows:

'The portion of land north of the land in dispute is known as and called 'Uhu' meaning an old dwelling place and designated in plan No. UND/29/63 attached to the plaintiffs statement of claim 'plaintiffs land not in dispute' is owned individually by the people of Amakpuruede Izombe. H

Counsel for the defendants argued that by paragraph 8 above

land in dispute and therefore the finding of the learned trial Judge that the land north of the land in dispute to the area verged green belonged to the defendants. In the 1st place the plan of the land in dispute in HOW/109/63 which was tendered in evidence as exhibit is not before me. The area in
B respect of which the learned Judge made this finding cannot be determined. An attempt to determine the area will drive this court into the realm of speculation. In the second place I do not agree that by paragraph 8 above the plaintiffs put the land to the north of the land in dispute in 1963 in issue. For a matter to become an issue the pleadings of both parties on the matter
C must be considered. I have not seen the defendants reply to the said paragraph 8 as to determine whether issue was joined by the defendant on that averment. Moreover the defendants made no claim. In determining whether the defence of estoppel per rem judicatam has been established the court has to consider only findings on matters which were directly (sic) issue as it is
D only such findings that are conclusive not those that were collateral or incidental; See the case of Coker v. Sanyaolu (1976) 9- 10S.C. 203. While trial court will usually respect findings of fact made by a court of co-ordinate jurisdiction, it must take its findings based on the evidence before it. See the case of Ibeziako v. Nwaghogu & Anor. (1972) 1 All NLR (Pt.2) 200"

E Then he stated the law relating to the defence of estoppel per rem judicatam in these words:

"In a defence of estoppel per rem judicatam the party raising it must establish it and this he must do by showing that all the constituents of the defence are present and these, according to Spencer Bower & Turner on Res
F Judicata 2nd edition page 18, are as follows:

1. That there was a legal decision
2. That it was pronounced.
3. That the court that pronounced it was competent.
4. That the judicial decision was final.
- G 5. That the judicial decision was or involved a determination of the same question, that sought to be controverted in the litigation in which the estoppel was raised, and
6. That the parties and/or privies are the same."

And concluded:

H "I hold the view after a thorough evaluation of the evidence before me on this issue that the 5th constitution (sic) that is to say, that the judicial decision was or involved a determination of the same question as that sought to be controverted in the litigation in which the estoppel was raised, has not been established by the defendants. I find as a fact that the area of land in

dispute in 1963 has not been shown by the defendants to be the same as the area in dispute in this case or part of it. I specifically find that the area in dispute in the 1963 case is quite different from the area now in dispute between the parties. The defence of estoppel per rem judicatam therefore fails." The learned Justices of the court below did not agree with him. Olatawura J.C.A. (as he then was), in his leading judgment (with which the other justices B agreed) observed as follows:

'The defendants' present plan is Exhibit E. The reference in Exhibit shows the area in dispute in HOW/109/63 verged brown. This is within the entire area verged green in the said Exhibit E'

He further observed:

"It should be noted the plaintiffs' plan in 1963 was Exhibit C. When one looks at Exhibit B the plan made by the plaintiffs/respondents in this case, it is plain according to the reference to Exhibit B that what was said to be in dispute in 1963 were two pieces of land; Oborofo Land And Oboroukwu Land. The land said by the plaintiffs/respondents to be in dispute now lies D north of Oborofo and Oboroukwu."

He held:

"In my view the land known and called 'Uhu' was in issue. It cannot now be true as found by the learned trial Judge that only the land edged yellow was in issue in 1963."

Finally he found as follows:

"A careful reading of all the plans, most especially, Exhibits B and E will leave no one in doubt that the land now in dispute is clearly shown on the appellants' plan to be on north of the land in dispute in 1963."

He finally concluded that the plea of estoppel succeeded.

I have examined both the two plans used by the parties in the 1963 case, that is, Exhibit C and 'D', the plans tendered in the present proceedings. Exhibits 'B' and 'E' and the judgment in the 1963 case, Exhibit 'H' and have come to the conclusion that the land in dispute in the 1963 case is different from the land in dispute in the present case. The parties agree that the land now in dispute is to the north of the land in dispute in the 1963 case and this is borne out by their plans and Exhibit H. That being the case, therefore, the court below, with profound respect, was wrong in holding as it did, that the plea of res judicata succeeded. The lands in dispute in the two cases not being the same, that plea cannot succeed. - See: Aro v. Fabolude (1983) 2 S.C. 75; (1983) 1 SCNLR 58. For the plea of res judicata to succeed the land now in dispute must either be the same as the land in dispute in the 1963 case or a part of it. That is clearly not the case here as shown more vividly in the plan of the plaintiffs Exhibit 'B' and the plan of the defendants Exhibit 'E' and passages in

Although the plea of res judicata, in my respectful view, was rightly rejected by the learned trial Judge, that is not the end of the matter. The next question is whether the plea of issue estoppel is available to the defendants. Issue of estoppel relates to barring a party from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceeding. See: *Ladega v. Durosimi* (1978) 3 S.C. 91. The finding however, must come directly and not collaterally or incidentally in issue in the first action - See: *Halsbury's Law's of England* (4th edition) Vol. 16 paragraph 1530 at page 1030. True enough, the learned trial Judge in the 1963 case made a finding which is now relied upon by the defendants that the land to the north of the land in dispute in the case before him, belonged to the defendants. For this finding to sustain a plea of issue estoppel it must be that the land to the north of the land in dispute came directly in issue in the proceedings in the 1963 case. To determine this issue one has to look at the pleadings in that case. Exhibit 'F' is the plaintiffs' amended statement of claim in that case. In paragraph 8 thereof, the then plaintiffs pleaded as hereunder:

"The portion of land north of the land in dispute is known and called 'Uhu' meaning an old dwelling place and designated in plan No. UND/29163 attached to the plaintiffs' Statement of Claim, 'plaintiffs' land not in dispute' is owned individually by the people of Amakpuruede Izombe."

The statement of defence used by the defendants in that case was not before us as it was never tendered by the defendants. One can, therefore, not say that the then defendants joined issue with the then plaintiffs in respect of the land to the north of the land in dispute. I am not unaware of the fact that the then defendants in their plan Exhibit 'D' showed the extent of a piece of land to the north and the south of the land in dispute which, going by the reference notes on that plan was said to be the whole land claimed by the defendants. But issues are joined on pleadings and not on plans. In the absence of the pleadings of the defendants in the 1963 case one cannot, by merely looking at the plan, conclude that an identifiable and certain piece of land to the north of the land in dispute in the 1963 case was also in issue. The plan of the plaintiffs in that case Exhibit 'C' does not indicate the extent of any land which the plaintiffs in the case pleaded belonged to certain individuals.

In the light of all I have been saying, I must, therefore, conclude that the learned trial Judge was right when he held that in the absence of the statement of defence in that case it could not be said that the land to the north of the land in dispute was in issue. With respect to the learned Justices of the court below, I do not agree with them that the plea of issue estoppel was successfully established by the defendants. See *Aro v. Fabolude* (supra) at

and *French Trust Corporation Ltd.* (1939) A.C.1 43 was cited with approval by this court: Lord Romer had said:

“It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of or been fundamental to the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter.” B

Since it cannot, on the evidence at the trial, be said that the land to the north of the land in dispute in the 1963 case was in issue in that case the ownership of that land could not be said to form the ratio of or been fundamental to the decision in that case. C

In view of all that I have said above, I must decide issues (I), (II) and (iii) in favour of the appellants.

The court below did not consider nor pronounce on the findings of fact relating to traditional history, ownership etc. made by the learned trial Judge, notwithstanding the grounds of appeal before it. It has, therefore, left undisturbed those findings. There is not before us any appeal challenging those findings. I will, therefore, make no pronouncement on them. Having therefore, set aside the decision of the court below on the issue of *res judicata* and issue estoppel, it follows that the decision of the court below must be set aside and that of the trial High Court restored. D E

In conclusion, I allow this appeal, set aside the judgment of the court below together with the order for costs made by it and restore the judgment of the trial High Court together with the order for costs made by that court. I award to the plaintiffs N 1,000.00 costs of this appeal and N400.00 as costs of the appeal in the court below. F

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I agree with it. Accordingly, the appeal succeeds and it is hereby allowed with N1,000.00 costs to the appellants. G

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Ogundare, J.S.C., in draft, and I agree with him that there is merit in this appeal. After going through the respective plans of the parties, Exhibits B and E in 1963 case, it is plain that the land in dispute in 1963 is not the same as the land the parties are fighting for in the case in hand. H

The averment in paragraph 8 of the plaintiffs' Amended Statement of Claim in 1963 case explains more that the land now in dispute is not the same as the land in dispute in 1963. I have observed from the respective plans of the parties that the land in dispute has been put north of the land the parties litigated for its title in 1963.

B Paragraph 8 reads:

"The portion of land north of the land in dispute is known and called 'Uhu' meaning an old dwelling place and designated in Plan No. UND/29/63 attached to the plaintiffs' Statement of Claim. 'Plaintiffs' land not in dispute is owned individually by the people of Amakpuruedele Izombe."

C *(Italics mine for emphasis)*

From the pleadings in the present case and the respective plans of the parties, it is clear that the land in dispute in the present case was shown to be north of the land in dispute in 1963 case. The opening words in paragraph D 8 of the amended statement of claim of the plaintiffs in 1963 case speak of "land north of the land in dispute". This points to the fact that the land north of the land in dispute in 1963 was not part of the land which the parties engaged in a law suit in 1963. I therefore agree that both pleas of res judicata and issue estoppel were quite rightly rejected by the learned trial Judge.

E For the above reasons and the fuller reasons in the lead judgment I too allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court. I abide by the order made in the lead judgment on costs.

F

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just delivered by my learned brother Ogundare, J.S.C., and I agree that the appeal succeeds. Accordingly, I allow the appeal and abide by the consequential G orders, including the order for costs.

IGUHJSC

H I have had the privilege of reading in advance the lead judgment just delivered by my learned brother, Ogundare, J.S.C. He has comprehensively considered all the issues canvassed and I agree entirely with his reasonings and conclusion.

On the issue of estoppel per rem judicatam, it is clear, and the parties are ad idem on the point, that the land in dispute in the present action is north of the land in dispute in the 1963 case, Exhibit H. This is borne out by their

respective pleadings as well as their survey plans, Exhibits B and E. For a plea

of estoppel per rem judicatam to succeed, there must at least be established that -

(i) the identity of the parties (or privies)

(ii) the identity of the res, namely, the subject matter of the litigation B
and

(iii) the identity of the claim and the issue in both the previous and the present action in which the plea is raised are the same. The burden is on the party who sets out the defence to establish the same. See *Oke v. Atoloye No.2 (1986) 1 NWLR (Pt.15) 241* at page 260, *Yoye v. Olubode and others (1974) 1 All NLR (Pt.2) 118* at page 122, *Idowu Alashe and others v. Sanya Olori Ilu (1965) NMLR 66*, *Nwaneri v. Oriuwa (1959) SCNLR 316* etc. Accordingly, the subject matter of the dispute in the present action being land north of the land in dispute in Exhibit H, the doctrine of estoppel per rem judicatam cannot apply. See too *Banire v. Balogun (1986) 4 NWLR (Pt.38) 746* at page 753; *Fadiora v. Gbadeho (1978) 3 S.C. 219* at 228 and *Nkanu v. Onum (1977) 5 S.C. 13* at 18. In my view, the plea of estoppel per rem judicatam was rightly rejected by the learned trial court and the conclusion of the court below to the contrary is, with respect, untenable having regard to the pleadings and evidence before the court. There is next the question of issue estoppel which is generated by the judgment Exhibit H. The question raised is whether the reference by the learned trial Judge in Exhibit H that the piece of land lying north and south of the land in dispute in the 1963 action belonged to the defendants is a determination of an issue submitted by the parties in that case to found an issue estoppel in favour of the defendants in the present action. C
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It cannot be disputed that, subject to impeachment on any of the recognised valid grounds, a judgment of a court of competent jurisdiction in civil proceedings is conclusive proof as against the parties and privies of not only matters actually decided but the grounds of the decision where these have been put in issue and actually decided upon by the court. It is equally clear that within a single cause of action, there may emerge several issues raised which are necessary for the determination of the whole case. Once any such issues have been distinctly raised and determined between the parties by the court, neither party, as a general rule, is permitted to relitigate the same issues all over again in a subsequent suit between them. See *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb (1966) 1 Q.B. 630* at page 640 per Lord Denning M.R., *YA. Lawal v. Chief Yakuhu Dawodu and Another (1972) 8/9 S.C. 83* at page 105; *Wilson Etiti v. Peter Ezeobibi (1976) 12 S.C. 123*; *Nwaneri v. Oriuwa (1959) 4 F.S.C. 132*; (1959) SCNLR 316; *Sosan v. Ademuyiwa (1986) 3 NWLR (Pt.27) 241* at pages 242 - 243 and 251. F
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In the 1963 case Exhibit H, the learned trial Judge purported to make a finding of fact that the defendants are the owners in possession of the land in dispute together with the lands north and south of the land in dispute, the northern boundary extending to the area verged green and forming boundary with the plaintiffs. Indeed the trial Judge went further to express his satisfaction that the defendants had given sufficient evidence of possession and acts of ownership as would have entitled them to a declaration that they were the owners of the land had there been a counter-claim. The real questions that arise from the above "*findings*" are whether, apart from the land in dispute, the ownership of the lands north and south thereof were thereby lawfully adjudged to be the property of the defendants and whether these findings can be said to constitute issue estoppel in the present case in favour of the defendants.

The first point that ought to be made is that where, as in Exhibit H, a plaintiff claims a declaration of title to some land and it is dismissed, the law is settled that it will be wrong to declare title in respect thereof in favour of the defendant if he had not sought for such a relief by way of counter-claim. See *Ntiaro v. Akpan* (1918) 3 NLR 10; *Ezeokeke v. Umunocha Uga and others* (1962)2 SCNLR 199; (1962) 1 All NLR 482 etc.

In the second place, it seems to me plain that the defendants failed to establish that issue was joined by the parties with regard to the said land north and south of the land in dispute in the 1963 case. Indeed the defendants' plan No. OP/IMO 153/78, Exhibit D, showed the land in dispute in the 1963 case verged brown. The plaintiffs, on the other hand, showed the land in dispute between the parties in their plan No. ECIS/108/79 Exhibit C, verged yellow. Both parties were in clear agreement on the issue of the identity of the land in dispute in the case. From their said plans, it is clear that the land then in dispute did not include the land north and south thereof. It cannot therefore be seriously argued that the pieces of land north and south of the land in dispute in Exhibit H were in issue between the parties in the suit.

There is next the question of the pleadings filed by the parties in Exhibit H. Although the plaintiffs' Statement of Claim in that case was rightly tendered before the trial court at the hearing of the present suit, it seems to me strange that the defendants' Statement of Defence was not similarly tendered to assist the court in arriving at a conclusive decision as to whether or not the said land north and south of the land in dispute in Exhibit H was really in issue between the parties in that suit. It cannot be over-emphasized that issues joined in a suit are, as a rule, identified or determined from the pleadings of the parties. I therefore think that the trial court was right when it held that in the absence of the pleadings filed by both parties in the 1963 case, it could not

accept the defendants' contention that the subject matter of the case before it which concerned the piece or parcel of land north of the land in dispute in the 1963 case was in issue in the said 1963 case.

In this connection, it ought to be observed that trial courts must confine themselves to the issues raised by the parties in their pleadings and, to act otherwise, might well result in the denial to one or the other of the parties of the right to fair hearing. See *Melalimpex v. A.G. Leventis and Co. Ltd.* (1976) 2 S.C. 91; *George v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117; *Alhaji Ogunlowo v. Prince Ogundare* (1993) 7 NWLR (Pt.307) 610 at 624 etc. The principle is well established that it is not each and every observation or remark made by the court that qualifies as a decision or determination of the court. See *A.V. Deduwa and others v. Daniel Okorodudu and others* (1976) 9 & 10 S.C. 329 at page 341. In my view, the observation of the learned trial Judge in Exhibit H on the issue of ownership of the land north and south of the land in dispute in that case was clearly incidental, inconclusive and incapable of sustaining a plea of estoppel per rem judicata or issue estoppel as it concerned an issue neither raised by the parties on the pleadings nor canvassed at the trial. See *Wilson Etiti v. Peter Ezeobibi* (1976) 12 S.C. 123.

In conclusion, it appears to me that the Court of Appeal embarked upon its own evaluation of the evidence of the parties in this case and proceeded to make its own findings thereupon when it was not established that the trial court's same exercise on the issue was perverse or otherwise faulty. With great respect, this is erroneous on the part of the court below. See *Okpiri v. Jonah* (1961) All NLR 102 at page 104-105; (1961) 1 SCNLR 174; *Maja v. Stocco* (1968) 1 All N.L.R. 141 at page 149; *Woluchem v. Gudi* (1981) 5 S.C. 291 at page 295 and 326 etc.

It is for the above and the more elaborate reasons contained in the judgment of my learned brother, Ogundare, J.S.C. that I too, allow this appeal. Accordingly the judgment and orders of the court below are hereby set aside and the decision of the trial court is restored together with the order for costs therein made. I abide by the order for costs contained in the lead judgment.

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