

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1996. SC. 115/1992
CORAM:- M. L. UWAIJ CJN, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

RAPHAEL EGWUONWO NKWO
& 3 OTHERS (For themselves and on
behalf of the people of Ndiowu Town. PLAINTIFFS/
APPELLANT/CROSS RESPONDENTS

AND

1. S. A. UCHENDU
(For himself and on behalf of
Umuagu Village Ufuma Town) 1ST DEFENDANT/
RESPONDENT/CROSS APPELLANT

2. NATIONAL ROOT CROPS
PRODUCTION COMPANY LIMITED 2ND DEFENDANT/
RESPONDENT/CROSS APPELLANT

COURTS - *Native Courts - Proceedings before them - Appellate court can look at the evidence - So as to ascertain issues in dispute before the native court.*

ESTOPPEL - *Issue estoppel - Pledged by the defendants - Whether successfully established.*

ESTOPPEL - *Resjudicata - What a party invoking the doctrine must show - Whether privity of the parties is established.*

ESTOPPEL - *Resjudicata - Issues and subject matter - Where same in the two proceedings - Whether trial court rightly held that resjudicata is applicable.*

FACTS

The plaintiffs filed an action against the defendants before the Anambra State High Court claiming inter alia, title to the land in dispute. Plaintiffs relied on traditional history and acts of possession and a Native Court Suit. The defendants relied on some Native Court suits as constituting issue estoppel against the plaintiffs as privies, and as constituting estoppel per rem judicatam.

The trial court dismissed the plaintiffs' case in its entirety and held that issue estoppel and resjudicata were applicable. Plaintiffs appeal to the Court of Appeal was dismissed on ground of issue estoppel alone and at

court held that *res judicata* was not applicable. Plaintiffs have further, appealed to the Supreme Court raising 4 issues, while the defendants cross-appealed.

ISSUES FOR DETERMINATION

“1. Whether there is any basis for the Court of Appeal to hold, it did, that Mgbom people were the landlords of the Ndiowu people;

2. Whether there is any legal basis for the Court of Appeal to that the 1956 case (Exhibits F and G) were between the present plaintiffs the people of Ndiowu, and the people of Umuagu Ufuma: Etc. see p. 271

HELD (Unanimously dismissing the appeal and upholding the cross-appeal per lead judgment of **MOHAMMED JSC**)

Native courts - Proceedings before them

1. Exhibits “E”, “F” and “G” relied upon by the defendants in their plea of estoppel are proceedings before native courts. It is trite that in order to ascertain the issues in dispute in proceedings before such courts, a High Court or an appellate court hearing an appeal in the matter can look at evidence with a view to identifying the issues in dispute before the native court. (p. 274 B)

Res judicata - What a party invoking the doctrine must show

2. The 1916 case (Exhibit “E”) was between Mgbom people and Ufuma people and Mgbom people asserted their over-lordship over the plaintiffs (Ndiowu people). The 1956 case was between Ndiowu people as plaintiffs and Ufuma people as defendants. In the said case, Ndiowu people based their claim on a grant from Mgbom people. They cannot therefore escape the only conclusion of privity between them and Mgbom people. A litigant who invokes the doctrine of estoppel per rem judicatam must show that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea is raised. (p. 275 G)

Issue estoppel

3. From all the findings of the courts below including the native courts, the defendants successfully established their plea of issue estoppel having regard to the reliance of the plaintiffs on Aghomili River as a boundary coupled with the finding that they are in privity with the people of Mgbom. I will therefore answer all the four questions identified in the plaintiffs brief in the affirmative. Their appeal therefore fails. It is hereby dismissed (p. 276 G)

Identity of the land in dispute

4. Having regard to the super-imposition of the specified portions of Exhibit “A” “H” on Exhibit “D” by D.W.I, the court below was wrong included that the 1st defendant’s plea of estoppel per rem judicatam the super-imposition of Exhibits “H” and “A” on Exhibit “D”, any uncertainty as to the identity of the piece of land the subject of the 1956 case (Exhibits F & G) and that in dispute in the present case was put to rest. (p. 278 A)

Res judicata - Issues and subject matter

5. The parties in Exhibits “F” and “G”, the issues and the subject matter are the same as those in the proceedings giving rise to this appeal. In addition the court that decided the 1956 case (Exhibits F and G) was competent and its decision was final. The learned trial judge gave due consideration to these requirements and he was right in his conclusion that the plea of estoppel per rem judicatam succeeded. Parties are not permitted to begin fresh litigations on the same cause of action which had been decided by a court of competent jurisdiction whose decision is final. If this is allowed, litigation will have no end except when legal ingenuity is exhausted. I am of the opinion that in all the circumstances, the learned trial judge was right to hold that the plaintiffs were estopped per rem judicatam from bringing the claim before him. The cross-appeal succeeds and it is hereby allowed by me. (p. 278 B)

NOTABLE POINTS OF INTEREST**IGUH JSC*****1. Whether identity of land was established***

With profound respect, I am unable to accept the view of the court below that the plan used by the parties in the 1956 case, Exhibit F, was not produce before the trial High Court in this case in proof of the common of the land in dispute in both the previous and the present cases. The plan Exhibit H used in the 1956 case, Exhibit F, was, without doubt, tendered before the trial court and used before that court. From the records, it would appear that what happened was that the plan, although tendered and used at the trial before the native court and particularly on appeal before the Resident’s court, was not duly marked. (p. 283 A)

2. Proceedings before native courts - Whether a violation of natural justice

I agree entirely with these observations of the learned trial Judge as, strictly speaking, there were no rules governing proceedings before native courts

and on appeal therefrom and as long as those courts acted in good faith listened fairly to both sides and gave fair opportunity to the parties to present their case and to correct or contradict any relevant statement prejudicial to their view, they could not be accused of offending against the rules of natural justice. (p. 283 F)

REPRESENTATION

Chief O. B. Onyali for the plaintiffs
Defendants absent and unrepresented

CASES REFERRED TO

- Chukwunta v. Chukwu 14 W. A.C.A. 341
Nwaneri v. Oriuwa (1959)4 F.S.C. 132
Nwaneri v. Oriuwa (1959)4 F.S.C. 132
Yoye v. Olubode (1974)1 All N.L.R. (Part 2) 188 at 123
D Oke v. Atoloye (1985) 1 N.W.L.R. (Part 15) 241 at 260
R. v. Lt. Governor, Eastern Region, Ex Parte Chiagbana 2 F.S.C. 46
Ezewanyi v. Onwordi (1986) 4 N.W.L.R. (Part 33) 27

LEAD JUDGMENT BY OGWUEGBU JSC

E The plaintiffs' claim in the Amawbia/Awka Judicial Division of the High Court of the then Anambra State holden at Awka is set out in paragraph 33 of the amended statement of claim and reads:

"Wherefore, the plaintiffs claim against the defendants jointly and severally as follows:-

F *(a) The sum of N500,000.00 being general damages for the trespass committed by the defendants on the plaintiffs' land called Igbariam and Ofia Udo;*

(b) Perpetual injunction restraining the defendants by their servants or agents from further trespass to the said land,

G *(c) A declaration that the plaintiffs are the persons entitled or deemed to be entitled to the customary right of occupancy to the said Igbariam and Ofia Udo land."*

At the close of pleadings and after various amendments by both parties the case proceeded to trial. Uyanna J. as he then was dismissed the plaintiffs claim in its entirety. Their appeal to the Court of Appeal, Enugu Division coram Kutigi, Oguntade and Uwaifo, J.J.C.A. was unanimously dismissed. The plaintiffs have now appealed to this court on four grounds of appeal. The defendants also cross-appealed against the same judgment. I will in the course of the judgment refer to the appellants as plaintiffs and the

cross-appellants as the defendants.

In their brief of argument, the plaintiffs identified the following issues as arising for determination in the main appeal:

“1. Whether there is any basis for the Court of Appeal to hold, as it did, that Mgbom people were the landlords of the Ndiowu people;

2. Whether there is any legal basis for the Court of Appeal to hold that the 1956 case (Exhibits F and G) were between the present plaintiffs, the people of Ndiowu, and the people of Umuagu Ufuma;

3. Since the lands involved in Exhibits E, E1 and F and G (the 1916 and 1956 cases) could not be ascertained with any certainty, whether the Court of Appeal was right to hold that the plaintiffs were caught by the doctrine of issue estoppel and their action must fail;

4. Whether, in the circumstances of this case, the Court of Appeal was right in holding that the plaintiffs' case failed on the basis of the 1956 case, and it was not necessary to consider the evidence of traditional history, or whether the Court of Appeal ought to have entered judgment for the plaintiffs based on their traditional history which was not controverted.

In the defendants view, the following issues arise for determination in the main appeal:

“(a) Whether the people of Ndiowu are privies of the Mgbom people for the purposes of estoppel; and

(b) Whether the Court of Appeal was correct in holding that the appellants were caught by the doctrine of estoppel.”

In the cross-appeal, the defendants submitted the following issues for determination:

“Whether the trial Court was justified in holding that the people of Ndiowu were estopped from relitigating the issue of title to the land in dispute? or In the alternative Whether on the materials in the Record the Court of Appeal was justified in holding that the plea of estoppel per rem judicatam could not succeed?”

The facts of the case briefly stated are that the plaintiffs brought the action for themselves and on behalf of the people of Ndiowu in Orumba Local Government Area of Anambra State. They sued 1st defendant for himself and on behalf of the people of Umuagu Ufuma in the same Anambra State.

In their amended statement of claim, the plaintiffs relied on traditional history and acts of possession. They traced their genealogy from their ancestor Owu Udeada to the present day. They also relied on Ajalli Native Court Suit No.41/1910. The 1st defendant pleaded and relied on Ajalli Native Court Suit Nos. 420,421 and 422 of 1916 between the people

of Mgbom (whom they claim to be plaintiffs landlords) and the people of Ufuma (1st defendant's people) as constituting issue estoppel against the plaintiffs as privies to the Mgbom people.

The 1st defendant also pleaded the judgment and findings in Agudo Native Court Suit No. 193/1955 and Appeal No. 9/1956 as constituting estoppel per rem judicatam against the plaintiffs. The case of the 2nd defendant hung on that of the 1st defendant.

The main appeal and the cross-appeal are mainly on the application of the doctrine of estoppel by the courts below. In paragraphs 10, 11 and 12 of the statement of defence, the 1st defendant averred as follows:

"Paragraph 10: In Ajalli Native Court Suits No. 420, 421 and 422 of 1916 the plaintiffs' landlords, the people of Mgbom by their representatives and spokesman Nweke of Mgbom sued the people of Ufuma (defendant's people) in respect of land called by the Mgboms as OKPUNO MGBOM (or OKPUNO NWEKE MGBOM). The Mgboms specifically claimed AGHOMILI stream and river as the boundary between Mgbom and Ufuma. The said Native Court specifically found AGHOMILI was not the boundary between MGBOM and UFUMA. The defendants will plead ISSUE ESTOPPEL against the plaintiffs being tenants of Mgbom people and will contend that the plaintiffs are estopped from claiming AGHOMILI as the boundary with UFUMA. The said 1916 cases are hereby pleaded and will be founded upon. The defendants will also rely on the boundary demarcated in that case between MGBOM and UFUMA which said boundary is shown as the South Western boundary of the area verged blue on the defendant's plan. The Mgboms and Ufuma have always respected this boundary.

11. The Mgbom land abutting on this boundary is called OKPUNO NWEKE MGBOM and the UFUMA (1st defendant's) land abutting the said boundary is called Okwu Ajirija.

12. In Agudo Native Court Suit No. 193/55 and Appeal No. 9/56 the plaintiffs, the Aro Settlers on Mgbom land, in a desperate endeavour to claim the 1st defendant's Uguwu (sic) Ajirija land under the guise of claiming Okpuno Nweke Mgbom land instituted an action against the 1st defendant claiming declaration of title to Okpuno Nweke Mgbom Land and gave the boundary between them and the 1st defendant as AGBOMILI river or stream. The plaintiffs lost right in the Native Court, in the District Officer's Appeal Court and in the resident's Appeal Court. The proceedings, Plan No. NC17/56 and judgments in this case are hereby pleaded and will be founded upon."

In paragraph 29(a) of their amended statement of claim, the plaintiffs averred as follows:

"The plaintiffs will plead:

(a) that the cases being stated all the time by the 1st defendant to have taken place between his people and Mgbom do not concern the plaintiffs as the plaintiffs were no parties to them, and were not tenants to Mgbom which they say is a fabricated name, and the lands referred to in them are not the land now in dispute; furthermore, the so-called case No. 193/55 and Appeal No. 9/56 were not between the plaintiffs people and the defendants, and was a collusive action between the defendants and persons masquerading as Ndiowu people, and the land then in dispute does not refer to the land now in dispute; B

(b)

(c)

At the hearing of the Appeal before us, the defendants and their counsel were absent. Pursuant to Order 6 rule 8(6) of the Supreme Court Rules, the appeal was treated as having been argued on the briefs. The defendants' counsel filed a notice of intention to rely on a preliminary objection to wit: D

"that issues 1 and 4 as framed in the Appellants' brief of Argument are incompetent and ought to be struck out. AND FURTHER TAKE NOTICE that the ground of this objection is that:

the said issues 1 and 4 are not based on any grounds of appeal before this Honourable Court." E

This objection was answered in the plaintiffs' reply brief filed on 30/1/95. The court was also referred to the supplementary record of appeal at pages 314A to 314D where the plaintiffs applied for leave to appeal on questions of law and mixed law and fact and the court below granted the said leave on 25/2/92. Since leave to appeal on mixed law and fact was granted by the court below, the preliminary objection is accordingly overruled. F

As to whether the people of Ndiowu (plaintiffs) are privies of the Mgbom people for the purpose of estoppel, learned plaintiffs counsel argued in the appellants' brief of argument that the court below endorsed the finding of the learned trial judge that Mgbom people were the landlords of Ndiowu people (plaintiffs) and that the trial judge made this finding without sufficient evidence. It was further submitted that the lower court was wrong to hold that the 1956 cases (Exhibits "F" and "G") were between the present plaintiffs - Ndiowu and the people of Umuagu Ufuma -1st defendant's people when the learned trial judge found that the parties in the 1916 and 1956 cases were from Mgbom and Ufuma. G H

The learned defendants/respondents' counsel submitted in the de

defendants/respondents brief that there is copious evidence of privity between Mgbom and Ndiowu and the conclusions therefrom are inescapable. The court was referred to Exhibit E, where one Nweke testified that Mgbom people are landlords of Ndiowu (present plaintiffs), Exhibit "F" where one Alexander Omenukor of Ndiowu testified that the land in dispute in that case Agudo Native Court Suit No.9/56 was given to them by Mgbom people in the olden days and Exhibit "G" where the Resident in his appellate jurisdiction held that the plaintiffs in that case failed to prove their title to the land they claimed.

Exhibits "E", "F" and "G" relied upon by the defendants in their plea of estoppel are proceedings before native courts. It is trite that in order to ascertain the issues in dispute in proceedings before such courts, a High Court or an appellate court hearing an appeal in the matter can look at the evidence with a view to identifying the issues in dispute before the native court. See: Chukwunta v. Chukwu & Ors 14 WACA 341.

As to the 1916 case (Ajalli Native Court Suit No.420 of 1916), the claim was for the return of land called Okpuno Mgbom unlawfully occupied by the defendants. One Nweke (the plaintiff) testified as follows:

"I am a native of Mgbom, landlord of Ndiowu. The land in dispute called Okpuno Mgbom is our land. We have boundary with Ufuma, a river called Aghomili is boundary between us and Ufuma, the defendant."

In their judgment Chief Ezeilo held that neither Aghomili river nor Aja Nwofia is the boundary between Mgbom and Ufuma. The court proceeded to fix the boundary between Mgbom and Ufuma.

In Exhibit "F" the claim was for:-

"1. Declaration of title to that piece and parcel of land known as Okpuno Nkwere Mgbom situate at Agbata Ndiowu.

2. 500 (sic) damages for trespass on the said land.

3. The plaintiffs seek an order from the court restraining the defendants, their servants and agents from further acts of trespass on the said land."

The plaintiffs were Alexander Omenukor and 3 others as plaintiffs and Samson Orah and 4 others as defendants. In Exhibit "F" Alexander Omenukor testified as follows:

"I am Alexander Omenukor of Ndiowu. The land in question belongs to us. The land was given to us by Mgbom people in the olden days

Q. by No.1 defendant: As you have admitted being strangers, is it for you to dispute the boundary with us, or for Mgbom people?

Ans. We have to dispute the boundary with you as we have been given the land."

In its judgment in Exhibit “F” the Agudo Native Court members who heard the case found as follows:

“Plaintiffs admitted that they are strangers, and that it was Mgbom people who placed them on the land where they live and farm. If the plaintiffs (sic) are strangers to their Mgbom landlords, they have no right to declare (sic) title to the land.....For all these reasons, we do not agree with the statement by the plaintiffs and their witnesses, we dismiss plaintiffs claim and award defendants cost of their plan.” (The underlining is for emphasis only).

The plaintiffs in Exhibit “F” appealed to the District Officer who on 23/10/56 upheld the decision of the Agudo Native Court. The plaintiffs further appealed to the Resident’s Court. On 8/5/59, the Resident saw no reason to interfere with the judgment of the court below. He therefore dismissed the appeal. Part of his judgment reads:

1. It seems clear to me having studied the evidence, the plans, having heard the parties and witnesses and having inspected the land, that the plaintiffs have been permitted to live and farm on parts of the land in dispute (i.e. the whole land, not merely that concerning the present case) for a very long time. Both Mgbom people and Umuagu-Ufuma people have given them these rights but have lived and farmed there simultaneously with plaintiffs

Nevertheless, I do not consider that any absolute right has been given to the plaintiffs in respect of any part of the land; there seems to be no question of title, and though they have occupied parts of it, they have never done so exclusively. The present case as has been pointed out, concerns only a portion of the total land in dispute. The same comments that apply to the whole apply to that, and I do not find that Plaintiffs have proved title to it.”

From a thorough examination of Exhibits “E”, “F” and “G”, it does not lie in the mouth of the plaintiffs to contend that:

1. There was insufficient evidence of the existence of Mgbom;
2. That Mgbom people are not landlords of the plaintiffs; and
3. That the 1956 case was between Mgbom people and Ufuma people.

The 1916 case (Exhibit “E”) was between Mgbom people and Ufuma people and Mgbom people asserted their over-lordship over the plaintiffs (Ndiowu people). The 1956 case was between Ndiowu people as plaintiffs and Ufuma people as defendants. In the said case, Ndiowu people based their claim on a grant from Mgbom people. They cannot therefore escape the only conclusion of privity between them and Mgbom people.

A litigant who invokes the doctrine of estoppel per rem judicatam

must show that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea is raised. See: Nwaneri & Ors. v. Oriuwa & Ors. (1959) SCNLR 316; (1959) 4 FSC. 132.

The court below found that the parties in the 1956 case and those in the present proceedings are the same. The Agudo Native Court in Exhibit B “F” found that:

1. The plaintiffs failed to show that Aghomill River was the northern boundary with Ufuma people.

2. The plaintiffs were stranger elements on the land which they claimed and could not therefore know the boundary of the land owned by their landlords - Mgbom people, and

C 3. The plaintiffs were the tenants of the people of Mgbom.

The two appellate courts did not interfere with these findings.

The court below also made the following findings:

“The plaintiffs however had decided against them the question that Aghomill River is not the boundary between their land (vis-a- vis the Mgboms) and the 1st defendant’s people. That being the position, they cannot re-open the same question. It has previously been decided against them that the plaintiffs were tenants to the people of Mgbom in respect of an uncertain area of land which however terminates not at Aghomill River.

The consequence of the findings in the 1956 case is to completely E destroy the plaintiffs case. The only way they could have succeeded was to show distinctly the piece of land upon which their ancestor Owu Udeada first settled and distinguish such land from that in respect of which the Agudo Native Court had found that they were tenants to the Mgboms. The plaintiffs did not do this

The 1st defendant has no counterclaim. It is sufficient for him to show that Agbomili River was not the boundary between his people Umuagu Ufuma and the Mgboms who were found to be the plaintiffs landlords. The force of the 1956 judgment was sufficient to make plaintiffs case flounder as it did. It is my conclusion that even if the lower court had erroneously F concluded that the land verged yellow in Exhibit D was the one adjudged in G favour of the 1st defendant in 1956 case, that error would still not advance the plaintiffs case.”

From all the findings of the courts below including the native courts, the defendants successfully established their plea of issue estoppel having regard to the reliance of the plaintiffs on Aghomill River as a boundary H coupled with the finding that they are in privity with the people of Mgbom. I will therefore answer all the four questions identified in the plaintiffs brief in the affirmative. Their appeal therefore fails. It is hereby dismissed.

In the cross-appeal, the defendants contended that on the materials

in the record of appeal, the court below should have upheld the finding of the learned trial Judge that the people of Ndiowu were estopped from relitigating the issue of title to the land in dispute.

The learned trial Judge was right when he held that Exhibits “E”, “E1”, “F” and “G” were binding on the entire community of Ndiowu. The basis for this conclusion is contained in his following observation: B

“Much latitude is given when considering procedure in the Native Courts. Though the Writ of Summons may not be expressed as such the nature of the action (whether it is representative or not) can be ascertained in respect of Native Court Suits by reading the proceedings and judgments The nature of the evidence did not suggest that the action was individually taken. It was an action taken by those on record for the benefit of the community.” C

On going through the proceedings, I am of the same view with the learned trial Judge that the actions in Exhibits “E”, “E1”, “F” and “G” were instituted, prosecuted and defended in representative capacities even though their representative nature were not expressly stated. In Exhibits “F” and “G”, the plaintiff represented Ndiowu people and the defendants represented Ufuma people. The Resident also recognised this in Exhibit “G” and highlighted it in his judgment. D

The issues contested in Exhibits “F” and “G” are precisely the same issues being contested in the present proceedings except that the name of the land in dispute changed. As to whether the subject matter of the 1956 case is the same as in the present proceedings, the learned trial Judge was perfectly right when he held: E

“Having examined the three plans closely and the evidence given by the surveyor in examination in chief and cross-examination it is clear beyond doubt that the land which in the 1956 suit in Exhibits F and G was called Nkwerre Mgbom as indicated in Plan No.17/56 is called by the plaintiffs in the present Suit “Ofia Udo land” in the plan Exhibit A.” F

Cyprian Nwosu (PW. 3), a licensed surveyor testified for the plaintiffs in the present proceedings. In the course of his cross examination, he was shown Exhibit D prepared by Godfrey C. Odumodu (D.W.1) - a licensed surveyor who testified for the defendants. PW. 3 agreed that Exhibit A was super-imposed on Exhibit “D”. He was specifically referred to key 4 in Exhibit “D” - a piece of land verged red therein claimed by the plaintiffs. He also agreed that the area verged pink in Exhibit “A” corresponded with the portion verged red in Exhibit “D”. The portion C verged pink in Exhibit “A” and red in Exhibit “D” also corresponded with the portion verged pink in Exhibit “H” except for a minor variation in the north-west of Exhibit “D”. Exhibit “H” when super- G
H

imposed on Exhibit "D" showed that the area in dispute demarcated in Exhibit "D" tallied with the area called "Igbariam" and "Ofia Udo" land in Exhibit "A".

Having regard to the super-imposition of the specified portions of Exhibits "A" and "H" on Exhibit "D" by D.W.1, the court below was wrong when it concluded that the 1st defendant's plea of estoppel per rem judicatam failed. By the super-imposition of Exhibits "H" and "A" on Exhibit "D", any uncertainty as to the identity of the piece of land the subject of the 1956 case (Exhibits F & G) and that in dispute in the present case was put to rest. The parties in Exhibits "F" and "G", the issues and the subject matter are the same as those in the proceedings giving rise to this appeal. In addition, the court that decided the 1956 case (Exhibits F and G) was competent and its decision was final. The learned trial Judge gave due consideration to these requirements and he was right in his conclusion that the plea of estoppel per rem judicatam succeeded. See: *Chiwendu v. Mbamali & Ors.* (1980) 3-4 SC 31 at 56-57; *Yoye v. Olubode & Ors.* (1974) 10 SC 209 at 221-222 and *Ige & Ors. v. Farinde & Ors.* (1994) 7 NWLR (Pt.354) 42.

Parties are not permitted to begin fresh litigations on the same cause of action which had been decided by a court of competent jurisdiction whose decision is final. If this is allowed, litigation will have no end except when legal ingenuity is exhausted. I am therefore of the opinion that in all the circumstances, the learned trial Judge was right to hold that the plaintiffs were estopped per rem judicatam from bringing the claim before him. The cross-appeal succeeds and it is hereby allowed by me.

There will be costs of N1,000.00 in favour of the defendants.

F _____

UWAIS CJN

I have had the privilege of reading in advance the judgment read by my learned brother Ogwuegbu, J.S.C. I agree with the judgment and have nothing to add.

Accordingly, the main appeal fails and it is hereby dismissed. The cross-appeal succeeds and it is hereby allowed. Costs assessed at N1,000.00 is hereby awarded against the appellants/ respondents in favour of the respondents/appellants.

H _____

MOHAMMED JSC

I agree that this appeal must fail for the reasons given in the lead

judgment written by my learned brother, Ogwuegbu, J.S.C. Since the main appeal, based on the question whether the plaintiffs were estopped from suing in respect of the land in dispute due to the application of the doctrine of issue estoppel, has failed, the cross-appeal must automatically succeed. I agree that the appellants' case is not justiciable in view of the fact that the parties in the 1956 case before Agudo Native Court and those in the present proceedings are the same. Consequently, the main appeal has failed and it is dismissed. The cross-appeal succeeds and it is allowed. I abide by the orders made by my learned brother on costs.

ONU JSC

I had the privilege to read in draft the judgment of my learned brother Ogwuegbu, J.S.C. just delivered and I agree with his reasoning and conclusions that the main appeal fails and it is accordingly dismissed while the cross-appeal succeeds and it is allowed by me.

I abide by the consequential orders made therein including those as to costs.

IGUH JSC

I have had the privilege of reading in advance, the lead judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I am in complete agreement with him that the plaintiffs appeal is totally devoid of substance and should be dismissed. I also agree that the 1st defendant's cross-appeal is entirely meritorious and ought to be allowed.

A close study of these appeals discloses that the main issue for determination is whether or not the claim in the suit by the plaintiffs' people of Ndiowu against the 1st defendant's people of Umuagu, Ufuma is caught by the doctrines of estoppel per rem judicatam and/or issue estoppel. The learned trial Judge, Uyanna, J., as he then was, had at the conclusion of trial in the High Court of the Amawbia/Awka Judicial Division of Anambra State of Nigeria held that both estoppel per rem judicatam and issue estoppel operated in favour of the 1st defendant against the plaintiffs by virtue of the decisions in the Agudo Native Court Suits, Exhibits E - E 1, F and G.

The Court of Appeal, for its own part, had held on appeal that the plea of estoppel per rem judicatam did not operate against the plaintiffs as the land in dispute in the previous cases was not established to be the same as the land in dispute in the present case. It was however of the view that

issue estoppel was established against the plaintiffs in that their claim that Aghomili River was their northern boundary with the 1st defendant of Umuagu Ufuma was dismissed in Exhibit F.

For the plea of res judicata to succeed, it must be established that the identity of the subject matter of the litigation, the identity of the claim and the issue in both the previous and the present actions are the same. The burden is on him who relies on the plea to establish:-

(i) That the parties or their privies in the previous and the present suits are the same.

(ii) That the claim and the issue in both cases are the same.

(iii) That the subject matter of litigation in the previous and present suits is identical. See: Idowu Alashe & Ors. v. Sanya Olori-Ilu (1965) NMLR 66; Iheanacho Nwaneri & Ors. v. Oriuwa & Ors. (1959) 4 FSC 132; (1959) SCNLR 316; Yoye v. Olubode & Ors. (1974) 1 All NLR (Pt. 2) 118 at 123; Oke v. Atotoye (1986) 1 NWLR (Pt.15) 241 at 260 etc. Once the above three ingredients are conclusively established, the court cannot regard the previous judgment as mere evidence as it estops the plaintiff from making any claim contrary to the decision in such previous judgment of which he was a party. The next question must be whether these three main ingredients of res judicata were conclusively established by the 1st defendant in the present case.

In this regard, the trial court was of the view that the parties, the issues and the res in both the previous and the present cases were the same. Said the learned trial Judge:-

“For issue estoppel to apply, the court must satisfy itself that the parties were the same in both suits; the subject matter of the claim was the same; the land was the same

Therefore I should first of all find out whether the conditions for issue estoppel as regards Aghomili have been complied with. I have no doubt that the plaintiffs in both cases were from Mgbom and that the defendants were from Umuagu Ufuma. The fact that the plaintiffs come from Mgbom and defendants from Ufuma is clear from the record of proceedings.”

A little later in his judgment, the learned trial Judge went on:-

“The next question is whether the land in Exhibits E, (E1) and F and G is the same as the land in the present proceeding and whether the parties are the same

In the present proceeding, the 1st defendants got the plan used in Exhibit F - No. MC17/56, Exhibit H, superimposed on the (defendants') plan Exhibit D and verged yellow on Exhibit D. The D.W.1 the surveyor for the defendants said that the area verged yellow on Exhibit D is the area on

Exhibit H (id.3) called Ukwu Ajirija land which is verged pink on Exhibit H (id.3). The area verged pink on Exhibit H corresponds with the area verged yellow on Exhibit D. He also said he superimposed Plan No. PO/E/30/81 on Exhibit D and it covered the area verged brown on Exhibit D

*..... I am therefore satisfied that the land in dispute on plan Exhibit A - plaintiffs plan in this case and superimposed on defendants plan Exhibit D and thereon verged red is part of the land that was adjudicated upon in Exhibits F and G (1956 case). Plaintiffs in that case lost to the defendants. Plaintiffs in the present case in evidence denied knowledge of the case and that in any case it was an action taken by a few individuals not representing the community. I watched P.W.1 and P.W. 2 as both gave evidence. I do not believe that they did not know about the case of Mgbom or Ndiowu. I am satisfied that P.W.1 was one of the witnesses in Exhibit F (1956 case). It is a fact that the writ of summons is not expressed to the effect that it is a representative action. Much latitude is given when considering procedure in the Native Courts. Though the writ of summons may not be expressed as such the nature of the action can be ascertained in respect of Native Court suits by reading the proceedings and judgments: *Chukwunta v. Chukwu (1952) 14 WACA 341.**

Again I have considered the proceedings in the 1916 and 1956 cases. The nature of the evidence did not suggest that the action was individually taken. It was an action taken by those on record for the benefit of the community. I am satisfied that the judgment in Exhibits E (E1) and F and G are binding on the entire community of Mgbom or Ndiowu."

He concluded:-

"I have given careful thought to the case of the plaintiffs and defendants I have however come to the conclusion that the land plaintiffs claim in the present suit is part of the land their predecessors lost in Suit No. 193/55 and Appeal No. 9/56. I am also satisfied that the plaintiffs have indulged in changing the names of portion of land involved in Suits Exhibits E(E1) and F and G in order to institute the present suit. The plaintiffs cannot overturn the facts of history overnight and they must in the interest of peace live within the spirit of the Agreement 1911 which as one witness for the plaintiffs stated is part of the Aro Tradition."

The Court of Appeal, for its own part, affirmed the findings of the trial court to the effect that the parties and the issues in the previous and present cases are the same. Said the Court of Appeal per the lead judgment of Oguntade, J.C.A. to which Kutigi, J.C.A., as he then was, and Uwaifo,

J.C.A. concurred:-

"The 1st defendant also tendered as Exhibit 'F' the proceedings and judgment of the Agudo Native Court in Suit No. 9/56. The decisions of the District Officer and Resident on the two successive appeals on the judgment in the case of Agudo Native Court were similarly tendered. The plaintiffs in the case were the representatives of Ndiowu while the defendants were the representatives of Umuagu-Ufuma. It is important to bear in mind that the current suit is also being fought by the representatives of Ndiowu as plaintiffs and 1st defendant as the representative of Umuagu-Ufuma."

It continued:-

"I have said earlier in this judgment that the parties in the 1956 case and the current one are the same. It is also clear that some of the issues in the previous case and this one are the same. The identical issues are (1) whether the plaintiffs were the tenants of the people of Mgbom and (2) whether Aghomili was the boundary between the land of the Mgboms and Ufuma people."

On the issue of the subject matter of the litigation, the Court of Appeal was unable to accept the finding of the learned trial Judge on the point. It observed:

"Although the judgment of the Agudo Native Court implies that the defendants in the case provided a plan, no copy of the plan used by both parties has been tendered in the current case. The result is that the extent of the land claimed by the plaintiffs in the 1956 case is not ascertained. All that is clear is that the plaintiffs claimed that Aghomili River was their boundary with the defendants."

It concluded:-

"From the above, it is clear that both the plaintiffs and the defendants in the 1956 case produced plans before the resident's court. The resident said that the boundary of land as shown by the defendants in Plan No. NC/17/56 was an unreasonable one

..... The only reason why one cannot conclude that this was a case to which a plea of estoppel per rem judicatam could be upheld is the failure of the 1st defendant to produce a plan of the land to which the previous judgment relates and which is identical with the land in dispute in this case."

Accordingly, the court below held that the plea of estoppel per rem judicatam did not avail the 1st defendant in this case. It gave as its reason for so holding that the plan used by the parties in Suit No. NC.17/56, Exhibit F was not produced in the present action. In the view of the court below, the identity of the land in dispute in Exhibit F was not established by the 1st

defendant to be the same as the land in dispute in the present action.

With profound respect, I am unable to accept the view of the court below that the plan used by the parties in the 1956 case, Exhibit F, was not produced before the trial High Court in this case in proof of the common identity of the land in dispute in both the previous and the present cases. The plan, Exhibit H used in the 1956 case, Exhibit F, was, without doubt, tendered before the trial court and used before that court. Indeed the court below recognised this fact for immediately after it had observed on the alleged failure of the 1st defendant to produce a plan of the land in dispute in Exhibit F, it continued as follows:-

"...Exhibit H which was tendered is lacking in that quality. It ought not to have been accepted by the lower court as a plan of land adjudged in favour of the defendants in the 1956 case. My conclusion therefore is that the plea of estoppel per rem judicatam raised by the 1st defendant ought to have failed."

From the records, it would appear that what happened was that the plan, although tendered and used at the trial before the native court and particularly on appeal before the Resident's court, was not duly marked. In this regard, the trial High Court had this to say:-

"Counsel for the plaintiffs had strenuously argued that Exhibit H should be rejected because it was not marked. I should think that the argument should be that since the judgment pertains to Native Court proceedings the important point is whether there is proof that it was used in any of the Native Courts. Admittedly, the plan Exhibit H was not marked in the Native Court but there is enough evidence from the Resident's judgment that he relied on the plan in arriving at his decision. The principle has always been not to apply the same strict measures in matters of procedure that are applicable in the Magistrate's court or High Court to the Native Court or Customary Court proceedings."

I agree entirely with these observations of the learned trial Judge as, strictly speaking, there were no rules governing proceedings before native courts and on appeal therefrom and as long as those courts acted in good faith, listened fairly to both sides and gave fair opportunity to the parties to present their case and to correct or contradict any relevant statement prejudicial to their view; they could not be accused of offending against the rules of natural justice. See: R. v. Lt. Governor Eastern Region, Ex parte Chiagbana (1957) SCNLR 98; 2 FSC 46. The Court of Appeal was therefore in error when it held that the plan, Exhibit H, which was used before the Native Court and on appeals therefrom in Exhibit K was not produced before the trial High Court as the same was duly tendered by the 1st defendant before the said

trial High Court and admitted in evidence and duly marked Exhibit H as aforesaid. The plan, Exhibit H, clearly shows the piece and parcel of land in dispute in the Agudo Native Court Suit, Exhibit K and I can find no reason for endorsing the view of the court below to the effect that Exhibit H ought not to have been accepted in evidence by the learned trial Judge. It was a relevant and material piece of evidence which, in my view, was rightly admitted in evidence by the trial court.

After a close examination of all the plans tendered before the court, the learned trial court observed thus:-

"In the present proceeding, the 1st defendants got the plan used in Exhibit F-No. NC17/56, Exhibit H, superimposed on the defendants' plan Exhibit D and verged yellow on Exhibit B. The D.W1, the Surveyor for the defendants said that the area verged yellow on Exhibit D is the area on Exhibit H (id.3) called Ukwu Ajirija land which is verged pink on Exhibit H (id. 3). The area verged pink on Exhibit H corresponded with the area verged yellow on Exhibit D Having examined the three plans closely and the evidence given by the surveyor in examination-in-chief and cross-examination it is clear beyond doubt that the land which in the 1956 suit in Exhibits F and G was called Nkwerre Mgbom as indicated in Plan No. 17/56 is called by the plaintiffs in the present suit "Ofia Udo Land" in the plan Exhibit A. In Exhibit D after the superimposition of the three plans on it (Exhibit D) Nkwerre Mgbom still appears on the South West of the land then in dispute in 1956

I am therefore satisfied that the land in dispute on plan Exhibit A plan in this case and superimposed on defendants' plan Exhibit D and thereon verged red is part of the land that was adjudicated upon in Exhibits F & G (1956 case). Plaintiffs in that case lost to the defendants."

Concluding, the learned trial Judge as I have already mentioned stated:-

"I have however come to the conclusion that the land in plaintiffs claim in the present suit is part of the land their predecessors lost in Suit No. 193/55 and Appeal No. 9/56. I am also satisfied that the plaintiffs have indulged in changing the names of portion of land involved in Suits Exhibits E(E1) and F and G in order to institute the present suit."

I have given a close study to the above observations of the learned trial Judge and can find no reason whatever to fault the same. I therefore reject the view of the court below that the identity of the land in dispute in Exhibit K is uncertain. From a close examination of the relevant plans, I find myself in total agreement with the learned trial Judge that the land in dispute on the plaintiffs plan Exhibit A as superimposed on the defendants plan Exhibit D and therein verged red is part and parcel of the land that was

adjudicated upon in the 1956 case, Exhibits F & G in favour of the defendants. Consequently, it is my view that the plea of estoppel per rem judicatam was fully established by the 1st defendant in this case and that the court below, with respect, was in error to hold otherwise.

On the question of issue estoppel, both the trial court and the court below are in agreement that this applies in favour of the 1st defendant against the plaintiffs in this case. In this regard it ought, perhaps, to be observed that where an issue has been canvassed and adjudicated upon by a court of competent jurisdiction between two parties, it is binding in a subsequent suit between the same parties or their privies. See: Samuel Fadiora & Anor v. Festus Gbadebo & Anor (1978) 3 SC 219 at 228-229; Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 27 etc.

In the present case, two facts were identified by the two courts below on which issue estoppel must operate in favour of the 1st defendant against the plaintiffs. The first is the issue of Aghomilli which was put in issue in Exhibit F as to whether, as then claimed by the present plaintiffs of Ndiowu, it constituted the boundary between them and the 1st defendant's people of Umuaga Ufuma. This claim by the plaintiffs people of Ndiowu was rejected by the court in Exhibits F and G and they cannot now relitigate the issue with the 1st defendant's people of Umuaga Ufuma in this case.

There is the second issue which concerns the plaintiffs claim to ownership of the land in dispute in the 1956 case. It was held in that case that the plaintiffs were stranger elements on the land and were on the said land, not as the owners thereof, but by the permission of the Mgbom people, their landlords. The plaintiffs have again raised the same issue in the present case and it seems to me unarguable that they are now estopped from doing this as the issue must operate against them in favour of the 1st defendant as issue estoppel. I entirely agree with both courts below that issue estoppel was successfully raised by the 1st defendant against the plaintiffs in the present action.

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother that I, too, dismiss the plaintiffs appeal as totally devoid of merit. The 1st defendant's cross-appeal succeeds and it is hereby allowed by me. I subscribe to the order for costs made in the lead judgment.