

SUPREME COURT OF NIGERIA
16TH APRIL, 1996. SC. 45/1990
**CORAM:- S.M.A. BELGORE, M.E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.**

IN THE MATTER OF THE BOUNDARY DISPUTE BETWEEN ILOBU AND
IFON COMMUNITIES

THE STATE
AND

1. THE COMMISSIONER FOR BOUNDARIES SETTLEMENT, OYO STATE
2. YESUFU OLADIPO AKINYOOYE (ON BEHALF OF IFON COMMUNITY)
Ex parte CHIEF SALAMI ADESHINA (ON BEHALF OF ILOBU COMMUNITY)

EVIDENCE - Affidavit - Averments in affidavit - Where not denied by counter affidavit - The facts may be regarded as duly established.

ESTOPPEL - Res judicata - Need to prove all the ingredients - Whether subject matter is the same in this case.

ESTOPPEL - Sameness of issues - Land dispute - Whether the issues in the past suit - Are the same in the present suit before the Commissioner.

JURISDICTION - Boundary determination - Whether the High Court has jurisdiction - To determine the boundary between two communities - Under the Boundaries Settlement Law.

LAND LAW - Boundary between two communities - Dismissal of plaintiff's claim per Se - Does not confer title on the defendant.

RES JUDICATA - Subject matter - Averment in affidavit that subject matter is different - Where not denied - Legal implication.

FACTS

A matter to determine the boundaries between Ilobu and Ifon Communities was pending before the Commissioner for Boundaries Settlement, Oyo State, (the 1st respondent). The applicant/appellant, Chief Adesina, secured an order of prohibition from the High Court against the 1st respondent's (Commissioner), restraining him from entertaining the said boundary dispute

on the ground that his jurisdiction has been ousted by two previous courts' judgments between the same parties and on the same subject matter. The claim in the high court judgment was for declaration of title while the one before the 1st respondent was for determination of boundaries.

An appeal to the Court of Appeal against the ruling of the High court granting the order of prohibition was allowed as the prohibition was set aside. Being dissatisfied, the appellant has now appealed to the Supreme Court raising a lone issue.

ISSUES FOR DETERMINATION

Whether the 1st respondent was estopped from proceeding with the determination of the boundary between Ifon and Ilobu communities referred to him by the appropriate authority under the Local Government and Community boundaries Settlement Law, Cap. 69 of the Laws of Western Nigeria, 1959.

HELD (Unanimously dismissing the appeal per lead Judgment of **ADIO JSC**)
Res judicata - Subject matter - Averment is affidavit

1. The doctrine of res judicata will operate only where it is shown that the parties, issues and subject matter are the same in the previous case as those in the action in which the plea is raised. The question then is whether the subject matter in the claim for declaration of title was the same as the subject matter in the boundary dispute before the 1st respondent. The 2nd respondent averred in a counter-affidavit that the area of the land involved in the demarcation of the boundary in the boundary dispute before the 1st respondent extended beyond the land that was subject-matter of the claim for declaration of title in Suit No. HOY/20/70. The averment aforesaid was not denied. If a party deposes to certain facts in an affidavit, his adversary, who wishes to dispute the facts so stated, has a duty to swear to an affidavit to the contrary, otherwise the facts deposed to may be regarded as duly established. (p. 698 B)

Res judicata - Need to prove all the ingredients

2. Further, a plea of estoppel per rem judicatam deprives the court of jurisdiction to determine an issue to which it relates, if it succeeds. All the ingredients must, therefore, be proved. None of them can be presumed. In NO. HOY/20/70 survey plans were filed showing the land in dispute in that case and were tendered during the proceedings in the High Court. In the matter before the 1st respondent there was a composite plan showing an area stretching over a larger expanse of land between the appellant and the 2nd respondent. There was nothing on record showing what effort was made to compare the survey plans in the case in the High Court and the matter before the 1st respondent before coming to the conclusion that the subject matter in them was the same.

That was a matter which should have been properly ascertained before the conclusion that the subject-matter was the same. The subject matter could not, in the circumstances of this case, be the same. It could not be presumed. (p. 698 F)

Jurisdiction - Boundary determination

3. The foregoing was not all. The issue involved in the matter before the High Court, HOY/20/70, was a declaration of title to a parcel of land. That was a matter within the jurisdiction of the High Court but which was not within the jurisdiction of the 1st respondent. What was before the 1st respondent was the determination of the boundary between Ifon community and Ilobu community which was an area stretching over a larger expanse of land. Jurisdiction, in the present circumstances, means the power of a court or a Judge to entertain an action. Consequently, a High Court has no jurisdiction to determine the boundary between two communities under the Local Government and Community Boundaries Settlement Law, Cap. 69 of the Laws of Western Nigeria, 1959 and the 1st respondent had no jurisdiction to entertain a claim for a declaration of title to a parcel of land. (p. 699 A)

Title - Boundary between two communities

4. The question then was that as the High Court had no jurisdiction to determine the boundary between the appellant and the 2nd respondent, the decision in the case before it could not purport to determine the boundary between the appellant and the 2nd respondent referred to the 1st respondent under the Boundaries Settlement Law. In any case, what happened was that the claim of the 2nd respondent was dismissed. In a claim for a declaration of title, the dismissal of the plaintiffs claim does not, without a counterclaim, confer title on the defendant. This is because such a judgment decrees no title to the defendant, not having sought the declaration. (p. 699 F)

Estoppel - Sameness of issues

5. The boundary which the 1st respondent was required to determine was the boundary between the appellant and the 2nd respondent which was to be fixed under the provisions of the Boundaries Settlement Law. It was not, as contended by the appellant, "Ross Boundary". The boundary referred by the appropriate authority under the Law to the 1st respondent has not been deter-

mined. The issues in HOY/20/70 concerning a claim for declaration of title are not the same as the issues involved in the determination of the boundary referred to the 1st respondent under the Law. (p. 700 B)

NOTABLE POINTS OF INTEREST**ADIO JSC*****1. When clumsy brief may still be considered***

No doubt the brief filed for the appellant was very clumsy and was not in the proper form. I agree that after setting out the only issue formulated in relation to the appeal, the learned counsel for the appellant, in the brief of the appellant, based the argument on the grounds of appeal. However, the preliminary objections were not argued at the hearing of this appeal. One really should ordinarily not completely ignore a brief filed for a party. In the interest of justice and in order not to unduly rely on technicality, one would make the best that one can in relation to the brief of the appellant. (p. 696 A)

2. Meaning of res judicata

What the principle of res judicata means is that where a competent court has determined an issue and entered judgment thereon neither of the parties to the proceedings may relitigate that issue by formulating a fresh claim since the matter is res judicata. (p. 696 F)

3. Boundary demarcation - Difference between High Court's and Commissioner's approach

Before coming to a conclusion on this aspect of the matter one has to mention that the things which the 1st respondent is required to take into consideration for the purpose of demarcating a boundary are not necessarily the line as things which the High Court is to take into consideration for purchase of granting a declaration of title. A court of law like the High Court in the determination of the matters before it does not take extraneous matters, such as administrative convenience, into consideration. In certain circumstances a Commissioner may under section 6(2) of the Law take administrative convenience into consideration for the purpose of the determination of boundary under the provisions of the Boundaries Settlement Law. (p. 699 H)

BELGORE JSC***4. Res judicata - What is it all about?***

Once a matter is decided and it is final, final in the sense that all remedies of appeal have been exhausted or where no appeal is lodged, that decision is

final between the parties or their privies in respect of the same subject matter. Thus the matter is final and closed between the parties and their privies which include their successors or agents in respect of the same subject. It is a matter

already judicially decided. That is what res judicata is all about. The parties, the issues and subject-matter must therefore be the same. (p. 700 F)

REPRESENTATION

Mr. A. Fashanu (with him Mr. O. Aminu) for the appellant

B Chief S. A. Adejumo for the respondent.

CASES REFERRED TO

Obiora v. Osale (1989) 1 N.W.L.R. (Pt. 97) 278

Madukolu v. Nkemdilim (1962) 1 ALL N.L.R. 587

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

Ajomale v. Yaduat (No. 2) (1991) 5 N.W.L.R. (Pt. 191) 266

Agbaje v. Ibru Sea Foods Ltd (1972) 5 S.C. 50 at p. 55

Ike v. Ugboaja (1993) 9 KLR 62

His Highness L. O. Adeyemi v. Attorney-General of Western State of Nigeria

D (1984) 6 S.C. 135

Abisi v. Ekwealor (1993) 9 KLR 99

Kodilinye v. Odu 2 W.A.C.A. 336

STATUTE REFERRED TO

E Local Government and Community Boundaries Settlement Law

Cap 69 Laws of Western Nigeria 1959 s.6(2)

F **LEAD JUDGMENT BY ADIO JSC**

On the application of the applicant/appellant, Chief Salami Adesi (on behalf of the Ilobu community, the High Court of Oyo State, Osogbo Judicial Division, granted an order of prohibition directed against the Commissioner for Boundaries Settlement (hereinafter referred to as the 1st respondent), before whom a boundary dispute between Ilobu and Ifon communities (appellant and 2nd respondent, respectively) was pending. The order restrained the 1st respondent from entertaining the aforesaid boundary dispute on the ground that his jurisdiction had been ousted by the judgments in Suits Nos. HOY/20/70 and FCA/1/19/68 between the same parties and on the same subject matter.

H Copies of the relevant papers served on the 2nd respondent as party affected or interested in the matter.

The defunct Government of the Western State of Nigeria has, under the Local Government and Community Boundaries Settlement Law, Cap. 69 of

the Laws of Western Nigeria, 1959, referred the aforesaid dispute to the 1st respondent. About the same time, the 2nd respondent instituted an action in the High Court against the appellant. It was suit No. HOY 20/70 and it was in relation to a parcel of land along an area within the land involved in the aforesaid boundary dispute before the 1st respondent. The claim in the action instituted in the High Court was for a declaration of title to the land in question edged pink: on plan No. LL 3412 dated 14th August, 1963 and for an injunction restraining the defendants, their servants and agents from entering or using the land in dispute in the suit without the authority or consent of the plaintiff. The 2nd respondent filed an application before the 1st respondent challenging his jurisdiction to entertain the boundary dispute. The 1st respondent ruled that he had jurisdiction and there was no appeal against the ruling.

The survey plan to be used in the proceedings in the boundary dispute before the 1st respondent was drawn and hearing of the dispute was about to commence when the appellant filed an application in the High Court for an order of prohibition restraining the 1st respondent from commencing the hearing in the proceedings in the boundary dispute in view of the judgment of the High Court, dismissing the 2nd respondent's claim in suit No. HOY/20/70 for a declaration of title to the land in question in that case and for an injunction, and of the dismissal by the Court of Appeal of the appeal lodged against the judgment of the High Court. The application or the order of prohibition was granted. Dissatisfied with the ruling of the High Court, the 1st respondent lodged an appeal to the Court of Appeal. The court below allowed the appeal and set aside the ruling of the High granting an order of prohibition against the 1st respondent. Dissatisfied with the judgment of the court below, the appellant lodged an appeal to this court.

The appellant and the 2nd respondent duly filed and exchanged briefs. The appellant filed the appellant's brief and the 2nd respondent filed the 2nd respondent's brief. Certain preliminary objections were raised in the respondent's brief to the grounds of appeal because, according to the 2nd respondent, two of them were incompetent as leave which was necessary was not obtained before they were filed. Another complaint was that one of the three grounds of appeal should be presumed to have been abandoned as it was not argued at all in the appellant's brief. It was pointed out that though three grounds of appeal were filed only one issue was formulated. Finally, there was complaint that instead of basing argument on even the only one issue formulated in the

appellant's brief, the appeal was argued on the basis of the grounds of appeal.

No doubt the brief filed for the appellant was very Clumsy and was not in the proper form. I agree that after setting out the only issue formulated in relation to the appeal, the learned counsel for the appellant, in the brief of the appellant, based the argument on the grounds of appeal. However, the preliminary objections were not argued at the hearing of this appeal. One really should
B ordinarily not completely ignore a brief filed for a party. In the interest of justice and in order not to unduly rely on technicality, one would make the best that one can in relation to the brief of the appellant. See Obiora v. Osale, 1 N.W.L.R. (pt. 97) 278. Two issues were formulated in the 2nd respondent's brief but they raised similar questions. In my view, the only main and fundamental issue raised
C in the appellant's brief is sufficient for the determination of this appeal. The aforesaid main issue, as slightly amended, is as follows:

Whether the 1st respondent was estopped from proceeding with the determination of the boundary between Ifon and Ilobu communities referred to him by the appropriate authority under the Local Government and Community
D Boundaries Settlement Law, Cap. 69 of the Laws of Western Nigeria, 1959.

The question raised under the said main and/or fundamental issue is based on the contention, by the appellant, that the boundary between the Ilobu community and the Ifon community had been determined in the civil action, Suit No. HOY /20/70, by the High Court, The claim of the 2nd respondent for, Inter
E alia, a declaration of title to the parcel of land edged pink in plan. No. LL 3412, which was within an area involved in the boundary dispute, was dismissed by the High Court and the appeal lodged against the judgment to the Court of Appeal was also dismissed. The appellant relied on the legal principle of res judicata. What the principle of res judicata means is that where a competent
F court has determined and issue and entered judgment thereon neither of the parties to the proceedings may relitigate that, issue by formulating a fresh claim since the matter is res judicata See. Madukolu v. NkemdiIim, (1962) 1 All N.L.R. 587. Onu, I.C.A. (as he then was) gave consideration to the question in the lead judgment of the court. He stated, inter alia, as follows:-

G “The first question one ought to ask oneself is whether declaration of title to land is co-extensive and co-terminus with declaration of the disputed boundary and whether it was unnecessary for the applicant to go to court’ to contest what had already been determined..... Be that as it may, in the circumstances of this case, can a declaration of title to the land
H be rightly said to be co-extensive and co-terminus with declaration of the disputed boundary?

.....In the case on appeal before us, Suit No. HOY/20/70 (Exhibit

A) does not constitute a declaration of title to land since while the party on notice/appellant failed to get declaration that did not ipso facto declare the applicant who did not counter-claim in that case owners, of the land in dispute.”

His Lordship pointed out that the dismissal of the case of the 2nd respondent in Suit No. HOY/20/70 by the High Court did not confer title the land in dispute on the appellant that did not counter-claim. B

The appellant’s view was as stated in the appellant’s brief, that the question of the boundary between the Ilobu community and Ifon community was determined by the judgment of the High Court in Suit No. HOY/20/70 and the 2nd respondent could not raise it again before the 1st respondent., It was appellant’s contention that, “Ross Boundary” was issue in Suit No. HOY/20/70 and since the question on it was resolved in favour of the appellant, the 2nd respondent could not raise it again. In the view of the appellant, the only issue for determination before the 1st respondent was as to the correct interpretation of ‘Ross Boundary’ which was the same issue in Suit No. HOY/20/70 and which was determined in favour of the appellant. For that reason, the 2nd respondent was estopped from raising the issue of “Ross Boundary” before the 1st respondent. Consequently, the court below was wrong in holding that res judicata was not applicable in this case. C D

It was pointed out in the brief of the 2nd respondent, that although the High Court did not, in Suit No. HOY/20/70, grant a declaration of title in favour of the 2nd respondent in respect of the specific area, the court did not grant a declaration of title to the parcel of land in favour of the appellant. It. was submitted that the issue of the boundary between the appellant and the 2nd respondent was still at large and remained undetermined. For that reason, the appropriate authority was competent to refer the issue of the determination of the boundary between the two communities to the 1st respondent for determination and, for that purpose, what was referred by the appropriate authority to the 1st respondent for determination was the boundary between the two communities and not the interpretation of the so-called “Ross Boundary”. E F G

It was further argued, in the brief of the 2nd respondent that the issue for determination in the boundary dispute between the two communities referred by the appropriate authority to the 1st respondent was not the interpretation to be given to “Ross Boundary” and that, in any case, the 1st respondent had no jurisdiction to grant a declaration of title to land nor did the High Court have jurisdiction to determine a boundary between two communi H

698 State v. Commissioner (1996) 4 KLR Adio JSC
ties under the Local Government and Community Boundaries Settlement Law,
Cap. 69 of the Laws of Western Nigeria, 1959. In the determination of a boundary
under the provisions of the law, a Boundaries Settlement Commissioner like the
1st respondent may take certain things into account or consideration but which
are irrelevant in proceedings before the High Court which does not take
administrative convenience into consideration.

B For the main contention for the appellant, the appellant relief on the
plea of res judicata. The doctrine of res judicata will operate only where it is
shown that the parties, issues and subject matter are the same in the previous
case as those in the action in which the plea is raised. See Nwaneri & Ors. v.
C Oriuwa & Ors. (1959) 4 F.S.C. 132. The question then is whether the subject
matter in the claim for declaration of title was the same as the subject matter in
the boundary dispute before the 1st respondent. The 2nd respondent averred
in a counter-affidavit that the area of the land involved in the demarcation of
the boundary in the boundary dispute before the 1st respondent extended
D beyond the land that was subject matter of the claim for declaration of title in
Suit No. HOY/20/70. The averment afore said was not denied. If a party deposes
to certain facts in an affidavit, his adversary, who wishes to dispute the facts
so stated, has a duty to swear to an affidavit to the contrary, otherwise the facts
deposed to may be regarded as duly established. See Ajomale v. Yaduat (No.
E 2), (1991) 5 N.W.L.R (Pt. 191) 266; and Agbaje v. Ibru Sea Foods Ltd., (1972) 5
S.C. 50 at p.55. If the extent or area of the land involved in the demarcation of
boundary between the appellant and the 2nd respondent was greater than that
involved in the claim for declaration of title in Suit NO. HOY/20/70 certainly
could not be said that the subject matter in the claim for declaration of title was
the same as the one in the determination of the boundary between the appellant
F and the 2nd respondent referred to the 1st respondent. Further, a plea of
estoppel per rem judicatam deprives the court of jurisdiction to determine an
issue to which it relates, if it succeeds. All the ingredients must, therefore, be
proved. None of them can be presumed. See Ike v. Ugboaja (1993) 6 N.W.L.R.
G (pt. 301) 539. In Suit No HOY/20/70 survey plans were filed showing the land
in dispute in that case and were tendered during the proceedings in the High
Court. In the matter before the 1st respondent there was a composite plan
showing an area stretching over a larger expanse of land between the appellant
and the 2nd respondent. There was nothing on record showing what effort was
made to compare the survey plans in the case in the High Court and the matter
H before the 1st respondent before coming to the conclusion that the subject
matter in them was the same. That was a matter which should have been properly

ascertained before the conclusion that the subject-matter was the same. The
subject matter could not, in the circumstances of this case, be the same. It could

not be presumed.

The foregoing was not all. The issue involved in the matter before the High Court, HOY/20/70, was a declaration of title to a parcel of land. That was a matter within the jurisdiction of the High Court but which was not within the jurisdiction of the 1st respondent. What was before the 1st respondent was the determination of the boundary between Ifon community and Ilobu community which was an area stretching over a larger expanse of land. Jurisdiction, in the present circumstances, means the power of a court or a Judge to entertain an action. Consequently, a High Court has no jurisdiction to determine the boundary between two communities under the Local Government and Community Boundaries Settlement Law, Cap. 69 of the Laws of Western Nigeria, 1959 and the 1st respondent had no jurisdiction to entertain a claim for a declaration of title to a parcel of land. See Highness L. O. Adeyemi & Ors. v. Attorney-General of Western State of Nigeria & Ors (1984) 6 S.C. 135. This court at p. 233, stated, inter alia, follows:-

“Turning to the second question for determination in this appeal, the answer is clearly in the affirmative if the issue is referred to the Boundary Commissioner by the Governor-in-Council as required by the Law. (See section 4 of the Law). There is nothing in the law specifically conferring jurisdiction on the Boundary Commissioner to adjudicate on dispute as to ownership of land and declare title. The function of the Commissioner is expressly stated to be to undertake an enquiry and determine and fix the boundary between communities or local government councils.”

The question then was that as the High Court had no jurisdiction to determine the boundary between the appellant and the 2nd respondent, the decision in the case before it could not purport to determine the boundary between the appellant and the 2nd respondent referred to the 1st respondent under the Boundaries Settlement Law. In any case, what happened was that the claim of the 2nd respondent was dismissed. In a claim for a declaration of title, the dismissal of the plaintiff's claim does not, without a counter-claim, confer title on the defendant? This is because such a judgment decrees no title to the defendant, not having sought the declaration. See Kodilinye v. Odu 2 W.A.C.A. 336; and Abisi v. Ekwealor, (1993) 6 N.W.L.R. (pt. 302) 643.

Before coming to a conclusion on this aspect of the matter one has to mention that the things which the 1st respondent is required to take into

consideration for the purpose of demarcating a boundary are not necessarily

the same as things which the High Court is to take into consideration for purpose of granting a declaration of title. A court of law like the High Court in the determination of the matters before it does not take extraneous matters, such as administrative convenience, into consideration. In certain circumstances a Commissioner may under section 6(2) of the Law take administrative convenience into consideration for the purpose of the determination of a boundary under the provisions of the Boundaries Settlement Law.

The boundary which the 1st respondent was required to determine was the boundary between the appellant and the 2nd respondent which was to be fixed under the provisions of the Boundaries Settlement Law. It was not, as contended by the appellant, "Ross Boundary". The boundary referred by the appropriate authority under the Law to the 1st respondent has not been determined. The issues in HOY/20/70 concerning a claim for declaration of title are not the same as the issues involved in the determination of the boundary referred to the 1st respondent under the Law.

The answer to the question raised under the main and only issue is in the negative. The appeal has no merit and it is hereby dismissed with N1,000.00 costs.

BELGOREJSC

When a matter is kept in litigations by constant suits in respect of the same subject-matter and between the same parties and or their privies the, Courts process of adjudicating may thereby be abused and scandalized. It is for this purpose that there must be an end to litigation. This led to the principle of res judicata. Once a matter is decided and it is final, final in the sense that all remedies of appeal have been exhausted or where no appeal is lodged, that decision is final between the parties or their privies in respect of the same subject-matter. Thus the matter is final and closed between the parties and their privies which include their successors or agents in respect of the same subject. It is a matter already judicially decided. That is what res judicata is all about (Madukolu v. Nkemdilim (1962) 1 All NLR 587). The parties, the issues and subject-matter must therefore be the same.

It must however be pointed out that many issues are still at large in this matter now before this Court. The first respondent was concerned with fixing of the boundary between communities and not to award title. Secondly the land in issue before first respondent is far larger than the one in issue in the case before the High, Court so that it can not be said to be the same subject-

matter. The appellant has a burden to identify clearly the subject-matter. The appellant also has a burden to show the subject-matter in this appeal and the one before the first respondent are the same, and this could easily have been done by comparing the composite maps or plans; the respondent swore to a strong affidavit on the fact that the land mass are not the same to which appellant never produced a counter-affidavit. This leaves up to the moment the question of whether the parties are addressing the same subject-matter very much at large or unresolved. B

The issue before the High Court is declaration of title; the one before Boundary Commissioner is to fix boundary between two communities. The two issues are not the same. Boundaries Commission was involved in fixing boundaries and that is its *raison d'être*. The court is to decide on title, rights and possession of land and matters antecedent to them. So it is not a matter of *res judicata*. (His Highness L. O. Adeyemi, Alafin of Oyo & Ors. v. Attorney-General of Western State of Nigeria & Ors. (1984) 6 S.C. 135.) of importance is the fact though the claim of second respondent in the High Court was dismissed, it conferred nothing on the appellant who merely defended the suit but never counter-claimed. Thus the appellant, simply because the second respondent lost his claim to title has nothing to rejoice over because no title has been passed over to him either on the land by the Court. (Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643). C D

For the above reasons and fuller reasons well adumbrated in the judgment of my learned brother Adio, J.S.C. which I had the opportunity of reading in advance that I also find no merit in this appeal and I dismiss it as he has done with N1,000.00 costs to each respondent. E

OGUNDAREJSC

I have had the benefit of a preview of the judgment of my learned brother, Adio JSC just delivered. I agree with his reasoning and conclusion. I too dismiss the appeal as lacking in merit. I subscribe to the order for costs made in the said judgment. F G

MOHAMMEDJSC

I have had the preview of the judgment just read by my learned brother, Adio J.S.C., and I agree with him that this appeal has no merit at all. I will also answer the single issue formulated by the appellant for the determination of this appeal in the negative. I also award N1,000.00 costs to the respondent. H

IGUHJSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Adio, J. S. C. and I agree entirely with him that
 B this appeal lacks substance and ought to be dismissed.

The main contention of the appellant is that the Court of Appeal was in error by failing to hold that estoppel per rem judicatam applies in this case.

The first point that has to be made is that a distinction must be drawn between a claim for title to a piece or parcel of land or entitlement to a statutory
 C or customary right of occupancy thereto as against a claim in respect of boundary determination between two communities. In the High Court Suit No. HOY/20/70, the Ifon Community, as plaintiffs, sued the appellants of Ilobu community claiming Declaration of title to land and perpetual injunction. The claim of Ifon community was dismissed but the court did not confer any title to
 D the land in dispute on the Ilobu community who did not counter-claim in respect thereof. This is in line with the well settled principle that where a plaintiff claims declaration of title to some land and it is dismissed, it will be wrong to grant declaration in favour of the defendant if, as in the case under consideration, he did not ask for such remedy by way of counter-claim. See Abisi v. Ekwealor
 E (1993) 6 N.W.L.R. (Part 302) 643. Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 etc.

It cannot be disputed that the issue of the boundary between two communities was at large at all material times. It is also clear that the Government of Oyo State was competent to direct the Ifon/Ilobu Boundary Commissioner to determine the boundary in issue, notwithstanding the judgment of the High
 F Court in Suit No. HOY 120/70. I entertain no doubt that the Ifon/Ilobu Boundary Commission is in no way disabled or estopped from proceeding with its assignment which is the determination of the boundary between the Ifon and Ilobu communities. It also seems to me that res judicata does not apply on the particular facts of the present case.

This appeal is completely lacking in merit and I, too, dismiss the same.
 G I abide by the order for costs made in the Lead judgment.

H