

SUPREME COURT OF NIGERIA
13TH SEPTEMBER, 1996. SC 226/1993
CORAM:- S.M.A. BELGORE, A.B. WALL, I.L. KUTIGI,
E. O. OGWUEGBU, Y. O. ADIO, JJSC.

CHIEFADEKOYAOKE OLUKOGA & 3 ORS.

(For themselves and on behalf of APPELLANTS
JEWUNOLA Family)

AND

MRS. OLUFEMI FATUNDE RESPONDENT

APPEALS - Finding of fact - Where not appealed against - Stands admitted and undisputed.

EVIDENCE - Probability - Raised under s. 46 E.A - As to possibility of acts of possession being evidence of ownership - Whether applicable in all circumstances.

EVIDENCE - Admission - Allegedly contained in some tendered exhibits - Is rendered unimportant - By the finding that res judicata is not applicable.

LAND LAW - Dismissal - Where evidence of traditional history and acts of ownership - Fail to establish that plaintiff has a better title than the defendant - Plaintiff's claim has to be dismissed.

RES JUDICATA - Subject matter - Land law - Whether the- parcel of land in issue - Is the same as in the previous suit - Merely because they bear the same name.

RES JUDICATA - Issue estoppel - Party relying thereon - Has the burden to produce admissible copy of the judgment - And copy of any appeal therein.

FACTS

The plaintiffs/appellants filed an action against the original defendants before the Lagos High Court claiming N 1,000.00 damages for trespass, and injunction in respect of the land in dispute. The parties led traditional evidence, and made allegations of acts of possession and ownership. The trial court found that appellants' traditional and other evidence alone, could not sustain their claim. He relied on some exhibits including a past judgment

in holding that appellants' claim was established, and that respondent's vendors are estopped from relitigating the same matters.

Respondent's appeal to the Court of Appeal was allowed as that court held that the doctrine of res judicata or issue estoppel was not applicable. It referred to the trial court's adverse finding against the appellants on the issue of traditional evidence, which was not appealed against. Being dissatisfied the appellants have now appealed the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

"(1) Whether Exhibit 'p5' constituted estoppel between the parties.

(2) Whether Exhibits 'p 14' and 'p15' are admissions binding on Isiba family under sections 21 (3) (a) and (b) of the Evidence Act 1990."

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

Findings of fact - Not appealed against

1. There was no appeal by the appellants to the court below in relation to the findings of the learned trial Judge set out above. The court below was, therefore, right in stating that there were no sufficient reasons warranting a reversal of the aforesaid findings. A finding of fact not appealed against stands admitted and undisputed. (p. 1545 E)

Whether parcel of land in issue is the same

2. The land in dispute in this case is 100 acres. It is, therefore, not correct or accurate to state, as was being contended by the appellants, that the parcel of land involved in Suit No. 1/84/55 and the one involved in this case were the same particularly when there was no evidence to show that the plan involved in Suit No. 1/84/55 was ever superimposed on the one involved in this case to determine their relative position and whether they were of the same size. The court below was right in not upholding the aforesaid finding of the learned trial Judge. The finding was erroneous. The fact that the parcel of land in previous litigation bears the same name with the parcel of land in later litigation does not necessarily mean that they are the same. (p. 1549 B)

Probability raised under s. 46 E.A.

3. The foregoing is not all. Section 45 (now 46) of the Evidence Act raises only a probability and not a presumption of ownership. All the circumstances of the particular case must be taken into consideration. In order that the provision of section 46 of the Evidence Act may become applicable it is not enough

that the parcels of land affected are in the same place or within (In- same locality. Circumstances may exist which make the provisions of the section inapplicable, (p. 1550 A)

Issue estoppel - Party relying thereon

4. Where a party relies on a plea of res judicata or issue estoppel the burden is on him to produce an admissible copy of the judgment for the purpose of sustaining the plea and where he, as in this case, alleges further that there was an appeal against the judgment on which he relies, he has to produce an admissible copy of the judgment of the appellate court. This is because where there is an appeal against the judgment relied upon, for the purpose of sustaining the plea of res judicata or issue estoppel, there is a possibility of the judgment being nullified if the appeal is allowed. A judgment which has been nullified cannot be relied upon for a plea of res judicata or of issue estoppel. It does not succeed and was accordingly properly rejected by the court below. (p. 1551 B)

Evidence - Admissions

5. Think that the finding, when dealing with the question whether res judicata was applicable, that the strip of land in Suit No. 1/84/55 and the parcel of land in this case were not the same completely knocked the bottom out of the issue whether the so-called admissions, if any, of Akide in Exhibit 'P14' and 'P15' bound the respondent and/or her predecessors. If the land in Suit No. 1/84/55 and the land in the present case were not the same aforesaid admission of Akide, if any, did not bind the respondent predecessors. The answer to the question raised under the second issue is in the negative. The court below was, therefore, right in holding accordingly. (pp. 1551 H)

Land law - Dismissal

6. The respective cases of the parties founded on traditional history and on acts of possession and of ownership were, on the evidence, evenly matched. If evidence of traditional history fails and evidence of acts of ownership also fails to establish that the title of a plaintiff to the land in dispute is better than that of the defendant, then the plaintiff's claim has to be dismissed. In this case, the case of the appellants based on evidence of traditional history and on acts of possession and of ownership failed. (p. 552 B)

NOTABLE POINTS OF INTEREST

ADIO JSC

1. When title is put in issue

In law, where a plaintiff claims damages for trespass and an injunction against the defendant and the defendant alleges, in his defence, that the land in dispute belongs to him, title is in issue. In order to succeed, the plaintiff has to prove not only that he was in possession at the time the alleged trespass was committed but also that his own title to the land in dispute is better than that of the defendant. (p. 1544 F)

2. Doctrine of res judicata

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, in the circumstance, the matter is said to be res judicata. The doctrine of res judicata operates or applies 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. (p. 1545 H)

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REPRESENTATION

Chief T.O.S. Benson, SAN with Mr. T. A. Molajo for the appellants.
Kehinde Sofola Esq., SAN with Chief B. Adegunle and Mr. Abubakar Idris for the respondent.

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CASES REFERRED TO

- Amakor v. Obiefuna (1974) 3 S.C. 67.
Kojo II v. Bonsie & Anor (1957) 1 W.L.R. 1223 at p. 1227
Madukolu v. Nkemdilim (1962) 2 SC NLR, 341
F Egboghonome v. The State. (1993) 11 KLR
Minister of Lands, Western Nigeria v. Dr. N. Azikiwe & Ors (1969) 1 All N.L.R. 49 at p. 51
Oyo State v. The Commissioner Ifon/Ilobu Boundary Commission (1996) 4 N.W.L.R (Pt. 442) 254; (1996) 4 KLR (Pt. 40) 690
G Adomba v. Odiase, (1990) 1 N.W.L.R. (Pt. 125) 165.
Archibong v. Ita & ors. 14 W.A.C.A. 520

STATUTE REFERRED TO

Evidence Act s. 46

H

LEAD JUDGMENT BY ADIO JSC

In the High Court of Lagos State of Nigeria, Lagos Judicial Division, the appellants, as plaintiffs, brought an action against the original defendants for the following reliefs:-

“(1) N1,000 damages for trespass to the Plaintiffs’ land at Idiroko along Lagos/Ikorodu Road from March, 1975.

(2) Injunction restraining the defendants from further trespassing unto the said land.”

Pleadings were duly filed and exchanged. It was common ground that both the appellants and the vendors of the respondent claimed that they were descendants of one woman, called Jewunola. However, the appellants contended that the radical title to the whole of the land in dispute, which they described as “*Owuto land*”, was in Jewunola and that they were members of Jewunola family. The vendors of the land in dispute to the predecessors of the respondent alleged that they belonged to Isiba family and that the land in dispute belonged to Asajon Kuyinu who was the husband of Jewunola and the father of Isiba. It was the further contention of the appellants that Kujinu’s wife was a daughter of Jewunola. He was, therefore, a son-in-law of Jewunola and not her husband.

The parties led traditional evidence and there were allegations by both parties of acts of possession and of ownership. There was also evidence that a strip of land, which used to form part of the land in dispute, was at a time acquired by the Government. The dispute between Jewunola family and Isiba family on the payment of compensation to the claimants was dealt with by the Lagos High Court on the application of the Chief Secretary to the Government (Suit No. 1/84/55). In his judgment, Exhibit “P5”, Taylor J, rejected the claim of the Isiba family and upheld that of Jewunola family. There was a direction in the judgment that wide publicity in the newspaper should be given to the judgment to enable other descendants of Jewunola to become aware so that all descendants of Jewunola, including those claiming their descent to her through Isiba might be paid the compensation. Consequently, one Akide, who was said to belong to Isiba family, filed a statement of descent, Exhibits “P14” and “P15”, tracing their (Isiba) ancestry to Jewunola. Subsequently, Taylor, J (as he then was) gave the second judgment (Exhibit “P13”) and ordered that the compensation money be paid, for the aforesaid strip of land required by the Government, to the descendants of Jewunola, including those who had traced their descent to her through Isiba.

The learned trial judge gave consideration to the evidence and the submissions of the learned counsel for the parties. He gave judgment for the appellants. He held that the traditional evidence and other evidence, led by the appellants, alone could not sustain the claim of the appellants but that when the traditional evidence was considered along with Exhibits “P14” and “P15”, which, in his view, confirmed some of the findings in the judgment

(Exhibit “P5”) of Taylor J., the appellants’ claim was established. It was on the basis of the judgment of Taylor, J (Exhibit “P5”) which he held estopped the vendors of the respondent from relitigating the same matters in the present suit which had been decided in suit No. 1/84/55 and of what he regarded as admissions, Exhibits “P14” and “P15”, that the learned trial Judge entered judgment for the appellants.

Dissatisfied with the judgment of the learned trial Judge, the respondent lodged an appeal against it to the Court of Appeal. The court below allowed the appeal. The court held that the doctrine of res judicata or issue estoppel was not applicable in this case because the parties, the subject matter and the issue involved in Suit No. 1/84/55 and the present suit were not the same. In the case of the alleged admission, the court below held that it did not, in any case, make any difference in favour of the present appellants. The court below referred to the adverse findings made by the trial Judge against the present appellants in relation to the evidence of traditional history, and alleged acts of possession and of ownership by the appellants, and stated that there were no sufficient reasons for it to warrant a reversal of the afore-said findings made by the learned trial Judge.

The present appellants were not satisfied with the judgment of the court below. They, therefore, lodged an appeal against the judgment to this court. Before dealing with the briefs filed and exchanged by the parties, it is necessary to set out certain factors which influenced the nature of the issues for determination set out in the briefs. The appellants’ claim was for N1,000 being damages for trespass committed by the original defendants. There was also a claim for injunction restraining the original defendants from further trespassing unto the land in dispute. The defence of the original defendants was that the land in dispute belonged to them (defendants). In law, where a plaintiff claims damages for trespass and an injunction against the defendant and the defendant alleges, in his defence, that the land in dispute belongs to him, title is in issue. In order to succeed, the plaintiff has to prove not only that he was in possession at the time the alleged trespass was committed but also that his own title to the land in dispute is better than that of the defendant. See *Amakor v. Obiefuna* (1974) 3 S.C. 67. In an attempt to prove their case that is, that their own title to the land in dispute was better than that of the defendant, the appellants, led evidence of traditional history and of alleged acts of possession and of ownership. The defendants too led similar evidence in defence. The impression of the learned trial judge, as stated in the judgment, was, inter alia as follows:-

It seems to me that the respective cases of the parties founded on traditional history are on the evidence evenly matched. The witnesses told

their story with confidence and one could not tell who had been correct and who had not. The proper treatment of competing evidence on traditional history is as stated by the Privy Council in Kojo II v. Bonsie & Anor (1957) 1 W.L.R. 1223 at P.1227 I have in this case made an attempt to test the correctness of the competing traditional histories by reference to facts in recent years. This also proved inconclusive B and evenly matched. Both sides have called evidence of person said to be tenants to both Jewunola and Isiba families. The land is very vast in area and it is possible for either side to have put tenants on portions of the land. When you look again and again at the facts and evidence led, there is hardly anything to go by in the form of pointer or guide to the correct- C ness of the evidence of traditional history. There is clear indication of consistency on both sides on the history told. When one looks at the judgment of Taylor, J. in Exhibit P5, one can glean from it that the parties had told the same story before Taylor, J. as they did before me.....
..... When the evidence called by the plaintiffs and the defen- D dants is put on that imaginary scale, it is even and it does not tilt in favour of either side.....

If I had to decide this case on the evidence of traditional history called by the parties alone, I would dismiss the case of the plaintiff."

There was no appeal by the appellants to the court below in E relation to the findings of the learned trial Judge set out above. The court below was, therefore, right in stating that there were no sufficient reasons warranting a reversal of the aforesaid findings. A finding of fact not appealed against stands admitted and undis- F puted. See Commerce Assurance Ltd. v. Alli, (1992) 3 NWLR (Pt 232) 710. So, what influenced the learned trial Judge in giving judgment for the appellants were Exhibits "P5", "P14" and "P15, that is, the judgment of Taylor. J. in suit No. 1/84/55 and the alleged admissions.

The five issues set down for determination in the appellants' brief were adequately covered by the two issues set down in the respondent's brief G which are sufficient for the determination of this appeal. They are:-

"(1) Whether Exhibit 'P5' constituted estoppel between the parties.

(2) Whether Exhibit 'P14" and 'P15" are admissions binding on Isiba family under section 21 (3) (a) and (b) of the Evidence Act 1990." H

The question raised under the first issue for determination is whether the judgment of Taylor, J. in Suit No. 1/84/55 constituted estoppel between the appellants and the respondent. The answer of the learned trial Judge was that res judicata was applicable. 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, in the circumstance, the matter is said to be *res judicata*. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR, 341. The doctrine of *res judicata* operates or applies 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 v. Oriuwa* (1959) SCNLR 316. In the view of the court below, the parties in Suit No.1/84/55 were not the same as the parties in the present suit. The court below stated, *inter alia*, on the point, as follows:-

C “Let me first deal with the issue whether the parties are the same. And when I take this issue I recognise the law earlier stated in this judgment that parties include their privies the law is elementary that parties in a civil proceedings are the plaintiff and the defendant. The plaintiff who commences the action and the defendant who defends or opposes the action are the parties in a civil action.....

..... In the instant case, the learned trial Judge merely dealt with the claimants Aminu Kosoko, Chief Asajon and others in suit No.1/84/55 and the respondents in this appeal. He did not consider the applicant Chief Secretary to the Government in Suit No.1/84/55 and the appellants before us. I think he ought to have considered all of them before arriving at a conclusion.”

Tobi, J.C.A. who read the leading judgment of the court below, then posed some questions on the issue whether there was any filial, genealogical or other connection or relationship between the Secretary to the Government who was the applicant in Suit No. 1/84/55 and the respondent in this appeal and on the issue whether there was any filial, genealogical or other connection or relationship between the Secretary to the Government who was the claimant in Suit No. 1/84/55 and the appellants in this appeal. His answer in each case was that there was no such connection or relationship between the Secretary to the Government, the applicant in Suit NO.1/84/55 and any of the applicants or the respondent in this case. He came to the conclusion that, from the state of the pleadings, the parties in Suit No.1/84/55 and parties in the present case were not the same.

The learned counsel for the appellants pointed out in the appellants’ brief and in his oral submissions that an examination of the judgment in Suit No.1/84/55 would show that the competing interests in Suit NO.1/84/55 were the rival claims advanced by the two sets of claimants and the first of which were represented by Aminu Kosoko and the other by Salami Agoro. After an analysis, which could not in the end be said to be supported by law, he

submitted that the parties in both suits were the same.

The submission made for the respondent was that as regards the issue of the parties, the case of *Cardoso v. Daniel* (1986) 2 N.W.L.R. (Pt.20) 1 at P.33 completely answered the question posed. It was argued that the parties in Suit No.1/84/55 were not the same as the parties in this appeal. *Esi v. Chief Secretary to Government* (1973) 11 S.C. 189 Pp. B 223-225 was also cited.

I think that there is substance in the contention or submission made for the respondent. After the acquisition of land by the Government, as it was done in the case of the land involved or concerned in Suit No. 1/84/55, what was left for those who used to have interest in it was the compensation payable for the acquisition of their interests. The right to compensation, if any, of those claiming to have interests in the land prior to the acquisition would be against the Government represented by the Chief Secretary to the Government or Minister of Lagos Affairs, as the case might be, and not against the other claimants. The foregoing was clearly the decision of this court in *Cardoso's case*, supra and no case was made out before us to warrant the departure from or modification of the established principles enunciated in the case. See *Egboghonome v. The State*, (1993) 7 N.W.L.R (pt.306) 383. C

The next question is whether the subject matter and the issues in both Suit No.1/84/55 and the present case are the same. The learned trial Judge answered the question in the affirmative. The court below held that the answer of the learned trial Judge was erroneous and reversed it. The court below held that the subject matter and issue were not the same. On this point, the court below stated, inter alia, as follows:- F

"Is the subject matter, including the issues, the same? That is the next question. In this suit, the action was two pronged claim of damages for trespass to the plaintiffs land and injunction. In Suit No.1/84/55, the action was originally an application for the determination of the persons entitled to a strip of land containing an area of approximately 18.62 acres lying between Majidun Creek and Owutu Village and forming part of the land acquired for the Lagos Ikorodu Road described in a Notice dated the 23rd August, 1952. By an amendment at the instance of the Chief Secretary line 1 of the summons read as follows: G

"The person or persons entitled to the compensation payable for a strip of land H

The question is whether an action on damages trespass and injunction (was) the same as an action for compensation? The learned trial Judge thinks so. I do not think so. The two actions deal with two different issues.

What of the areas or portions of land covered? Are they the same?.....

It is clear from the above findings that the areas or portions of the land involved in the two cases are not the same. The area or portion of land involved in Suit No.1/84/55 was less, being only a small portion of Owutu B land."

The court below then referred to the finding of the learned trial Judge that the finding of Taylor, J, in Exhibit "P5" in relation to only a small portion of Owutu land also applied to the whole of Owutu land and to the view expressed by the learned trial Judge that section 45 (now S.46) of the Evidence Act C applied in this case. The court below then pointed out that the presumption under the section was rebuttable. It stated further that before the provision becomes applicable, the land involved should be sufficiently identified and there must be evidence of exclusive possession. It also stated that the section is applicable where a defendant admits on the pleadings that the plaintiff is in D possession.

The submission made for the appellants was that possession was the crucial issue in Suit No. 1/84/55 and the present suit. Alternatively, it was submitted that even if the issues were different, ownership of the entire Owutu land was conclusive in the present action.

E In the case of the respondent, the submission made for her was that the subject-matter in Suit NO.1/84/55 was a strip of land containing an area of 18.62 acres while the subject matter in this suit was land measuring 100 acres. The issue, according to the respondent, in Suit 1/84/55 was the determination of the person or persons entitled to the F compensation payable in respect of compulsory acquisition of the afore-said strip of land. The issue in the present case was, in my view, whether the appellants' title, if any, to the land in dispute was better than that of the respondent. This court in the Minister of Lands, Western Nigeria v. Dr. N. Azikiwe & Ors (1969) 1 All N.L.R. 49 at P.51 held that a claim for compensation G for land compulsorily acquired by virtue of the Public Lands Acquisition Act was not a claim for a declaration of title, the question to be determined being primarily entitlement to compensation and not declaration of title. Prima facie, the issues involved in Suit No.1/84/55 were not the same as the issues involved in the present suit.

H The appellants contended and the learned trial Judge held, that the land in dispute in Suit No.1/84/55 was called Owutu land and since the land in dispute in this case was also said to be Owutu land, the evidence and findings made in Suit No.1/84/55 that Jewunola was the person who first settled on the strip of land was, therefore, the owner of it would be applicable to the land in

dispute in this case to enable the court to hold that Jewunola was the first person to settle on the land in dispute in this case and, therefore, the owner of it. The learned trial Judge also held that that was the conclusion to be reached by virtue of section 45 (now section 46) of the Evidence Act What was the subject-matter of the application of the Chief Secretary to the Government that was before Taylor, J. in Suit No. 1/84/55 was the determination of the person or persons entitled to receive compensation in respect of a very small strip of land which was 18.62 acres. **The land in dispute in this case is 100 acres. It is, therefore, not correct or accurate to Slate, as was being contended by the appellants, that the parcel of land involved in Suit No. 1/84/55 and the one involved in this case were the same particularly when there was no evidence to show that the plan involved in Suit No.1/84/55 was ever superimposed on the one involved in this case to determine their relative position and whether they were of the same size.** See Oyo State v. The Commissioner Ifon/Ilobu Boundary Commission, Osogbo & Anor, ex parte Adeshina (1996) 4 NWLR (Pt. 442) 254. Further, what led to some confusion in this case was that the expression “*Owutu Land*” was at times used by the predecessors of the appellants and by the learned trial Judge to describe a very large parcel of land in the area and at other times the expression was used to describe the very small strip of land involved in Suit No. 1/84/55 as if they were the same land. That was what led to the erroneous finding by the learned trial Judge in this case that the evidence necessary to support the claim of ownership in the case of the strip of land in Suit No.1/84/55 would also be sufficient to enable the applicants to claim the ownership of the large parcel of land involved in this case. The fallacy or error in the above-mentioned finding was that not all the land at the place called “*Owutu*” could properly or actually be said to be Owutu land. The farmland in dispute in the 1900 case mentioned in Suit No.I/84/55 was said to be at Owutu but Taylor, J. treated it as a separate and distinct parcel of land different from the strip of land in dispute in Suit No 1/84/55 because there was no survey plan showing the relative position of one of them to the other. There was judgment to the effect that the predecessors of the respondent were owners in possession of the aforesaid farmland in the 1900 case described as the farmland at Owutu. **The court below was right in not upholding the aforesaid finding of the learned trial Judge. The finding was erroneous. The fact that the parcel of land in previous litigation bears the same name with the parcel of land in later litigation does not necessarily mean that they are the same.** See Adomba v. Odiese. (1990) 1 NWLR (Pt 125) 165.

The foregoing is not all. Section 45 (now 46) of the Evidence Act raises only a probability and not a presumption of ownership. All the circumstances of the particular case must be taken into consideration. In order that the provision of section 46 of the Evidence Act may become applicable it is not enough that the parcels of land affected are in the same place or within the same locality. Circumstances may exist which make the provisions of the section inapplicable. See Archibong v. Ita & Ors. (1954) 14WACA 520. Section 46 of the Evidence Act provides as follows:-

“46. Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.”

The findings in this case, made by the learned trial Judge and which the court below rightly did not disturb, were very adverse and damaging to the appellant's case. Notwithstanding the judgment of Taylor, J. in Suit No. 1/84/55 in relation to the strip of land, the learned trial Judge found, in this case, that the traditional histories relied upon by the appellants and the predecessors of the respondent were evenly matched and his testing of the traditional histories by recent facts did not provide a solution. Each of the parties, the learned trial Judge found, called witnesses said to be their tenants on the land in dispute which was so vast in area that it was possible for either side to put tenants on portions of the land in dispute. It was also the view of the learned trial Judge that if the evidence led by the appellants and the evidence led by the predecessors of the respondent were put on an imaginary scale, as laid down in Mogaji v. Odofin. (1978) 4 SC. 91, they were even on the basis of the aforesaid evidence, but without Exhibits 'P14' and 'P15' (the alleged admissions), the learned trial Judge would have dismissed the appellants claim. There was no appeal against the said findings. In the circumstances stated above, and bearing in mind the situation in the case of the farmland in the 1900 case, the court below was right in holding that section 45 (now 46) of the Evidence Act was not applicable in the circumstances of this case. The conclusion, in this connection, is that the subject-matter and the issues in Suit No. 1/84/55 were not the same as the subject matter and the issues in the present case.

It is necessary, before I come to a conclusion on the question whether the principle of res judicata or issue estoppel was applicable in this case, to deal with the failure of the appellants to produce the judgment of the appellate

court to which an appeal against the judgment of the learned trial Judge in suit No. 1/84/55 was lodged. It was the appellants that led evidence which showed that there was an appeal against the judgment of the learned trial Judge in Suit No. 1/84/55. The appellants did not produce the certified copy of the judgment of the appellate court to enable the court to know the result of the appeal.

Where a party relies on a plea of res judicata or issue estoppel, the burden is on him to produce an admissible copy of the judgment for the purpose of sustaining the plea and where he, as in this case, alleges further that there was an appeal against the judgment on which he relies, he has to produce an admissible copy of the judgment to the appellate court. This is because where there is an appeal against the judgment relied upon, for the purpose of sustaining the plea of res judicata or issue estoppel, there is a possibility of the judgment being nullified if the appeal is allowed. A judgment which has been nullified cannot be relied upon for a plea of res judicata or of issue estoppel. It does not succeed and was accordingly properly rejected by the court below. The answer to the question raised under the first issues is in the negative.

I now come to the question raised under the second issue. It was whether Exhibits “P14” and “P15” were admissions binding on Isiba family under sections 21 (3) (a) and (b) of the Evidence Act 1990. The alleged admissions were the matter deposed to in the affidavits of one Akide which he filed in order to qualify for the purpose of sharing in the compensation payable to the predecessors of the appellants in respect of the acquisition of the strip of land concerned in Suit No. 1/84/55 by the Government. Dealing with this aspect of the matter, the court below stated, inter alia. as follows:

“In my view, Exhibits “P14” and “P15” is (sic) a statement of the fact confirming an existing situation and that existing situation is the purport or ambit of the decision of Taylor, J. in Suit No. 1/84/55.

Beyond that, not much use can be put or placed on it, particularly in the light of my findings that Suit No. 1/84/55 does not operate as estoppel per rem judicatam. Whether the exhibits qualify as admission or not within the meaning of section 21 of the Evidence (Act), it does not make any difference to the case in favour of the respondents as they deal specifically with compensation on a smaller portion of the land.

I do not see how the genealogical statement in Exhibits P14 and P15 assists the respondents, in the light of my findings above.”

I think that the finding, when dealing with the question whether res judicata was applicable, that the strip of land in Suit No. 1/84/55 and the

parcel of land in this case were not the same completely knocked the bottom out of the issue whether the so-called admissions, if any, of Akide in Exhibits “P14” and “P15” bound the respondent and/or her predecessors. If the land in Suit No. 1/84/55 and the land in the present case were not the same then the aforesaid admission of Akide, if any, did not bind the respondent and/or her predecessors. The answer to the question raised under the second issue is in the negative. The court below was, therefore, right in holding accordingly.

The respective cases of the parties founded on traditional history and on acts of possession and of ownership were, on the evidence, evenly matched. If evidence of traditional history fails and evidence of acts of ownership also fails to establish that the title of a plaintiff to the land in dispute is better than that of the defendant, then the plaintiffs claim has to be dismissed. See *Dibiamaka v. Osakwe*. (1989) 3 NWLR (Pt. 107) 101. In this case, the case of the appellants based on evidence of traditional history and on acts of possession and of ownership failed. The plea of *res judicata* and reliance on alleged admission by a member of Isiba family also failed. The appeal has no merit and it is accordingly dismissed with N1,000.00 costs to the respondent.

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BELGORE JSC

The issue of estoppel per *res judicata* is based on the principle of necessity to have an end to litigation in respect of the same *res* and between the parties or the privies. In the Suit No. 1/84/1955, the issue was as to the persons entitled to the compensation to be paid by the Federal Government in respect of a part of the land in dispute. The parties were the Chief Secretary of the Federation and Aminu Kosoko, Asajon of Lagos. The parties in the instant case on appeal are not the same as in case No.1/84/1955, the issues are not the same and the subject-matter in the earlier case concerned a tiny strip of the area of land now in dispute. Thus the principle of *res judicata* cannot apply to the present matter on appeal before this court. The land in case No.1/84/1955 relates to only 18.62 acres, whereas the one in this appeal concerns area of 100 acres, excluding the one in 1955 case already acquired for the construction of Lagos - Ikorodu highway. The fact that the land in issue and the one in 1955 case bear the same name, Owutu, has not made them the same land; at best the Owutu land in 1955 case concerned a little strip acquired for construction of new road. Section 46 Evidence Act raises the presumption that a person having title to a large area either adjacent or surrounding the land now in dispute is the owner of the land in dispute. It is however a rebuttable

presumption and cases are decided by the totality of the evidence before the court in reference to this presumption.

The appellants contend that there was an appeal against the judgment of 1955 i.e. No. 1/84/1955, but that is all we hear or know of the case. What was the decision of the appellate court? The appellants have not in any of the two courts below displayed the decision of the appellate court B and this is rather bizarre. In all cases where reliance is based on a decision of a court, it is not enough to mention that the decision exists, it must be brought to court after it must have been pleaded. One will normally expect the party relying on such decision of court to exhibit in court a certified copy of the decision. This was not done and there was C no application to amend the pleadings to accommodate the exhibit or to proffer additional evidence. Right up to now this court has not even been intimated of the result of the said appeal; but one thing is clear - either the appellate court upheld the decision or set it aside or modified it. The state of the case in this appeal seems to indicate that perhaps suit No.1/84/1955 is D no more the final decision for there was a decision of an appellate court covered in a mystery.

It seems therefore that as held by my learned brother Adio, J.S.C. the issue of res judicata does not apply here as the decision in No. 1/84/1955 is not the final decision; the parties are not the same, and the present parties have E not been indicated to be privies of parties in that previous case. It is my considered view that the Court of Appeal was right to have held that res judicata will not apply in this case Adomba v. Odiese (1990) 1 NWLR (Pt.125) 165; Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1,33; Esi v. Chief Secretary to the Government (1973) 11 S.C. 189, 223, 224 and 225. F

It must also be pointed out that the case No. 1/84/1955 (supra) relates to compensation on compulsory acquisition, it has nothing to do with title as in this case and the attempt to weave the matter round res judicata cannot in this case succeed. The appellants led evidence that there was an appeal against the judgment in 1955 case; I believe that from that G moment the appellant had indicated that there was a better judgment superseding suit No.1/84/1955 but which was withheld from the court by the appellants. Suit No.1/84/1955 was therefore no more relevant .On the whole this appeal has no merit and as well set out in the admirable judgment of Adio, J.S.C. I also dismiss it with N1,000.00 costs to respondents against the appellants. H

WALI JSC

I have been privileged to have a preview of the lead judgment of my

learned brother Adio, J.S.C. and I entirely agree with his reasoning and conclusion for affirming the unanimous judgment of the Court of Appeal in which it set aside the judgment of the trial court and dismissed the claims of the appellants as plaintiffs.

The issues of both *res judicata* and admissions were admirably dealt with by Tobi, J.C.A. in his lead judgment of that court. The Court of Appeal has a right to interfere with the decision of the trial court where the latter *“has drawn wrong conclusions from accepted or proved facts which those facts do not support or indeed has approached the determination of those facts in a manner which those facts cannot and do not in themselves support”* See *Okolo v. Uzoka* (1978) 4 SC 77; (1978) NSCC 261 at 267; *Fashanu v. Adekoya*; (1974) 1 All NLR (Pt.1) 35 and *Omogbe v. Edo* (1971) All NLR 282.

There is evidence that the parties, the subject matter of litigation and the relief claimed in suit No. 1/84/55, Exhibit “5” are the same as in the present D suit. *Res judicata* could not therefore apply, since the conditions precedent to its application were not satisfied. See *Ekpoke v. Usilo* (1978) 6 - 7 S.C. 187 and *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; (1962) 2 SCNLR 341.

It is for these and the more elaborate reasons contained in the lead judgment of my learned brother Adio, J.S.C., that I also hereby dismiss this E appeal with N1,000.00 costs to the respondents.

The judgment and orders of the Court of Appeal are hereby affirmed.

KUTIGI JSC

F I have had a preview of the judgment just read by my learned brother Adio, J.S.C. I agree with him that the appeal lacks merit and ought to be dismissed. It is accordingly dismissed with N1,000.00 costs against the appellants.

G OGWUEGBU JSC

I have had a preview, in draft, of the judgment just delivered by my learned brother Adio, J.S.C. and I am in complete agreement with him.

The issues whether Exhibit “P5” constituted estoppel between the parties and whether Exhibits “P14” and “P15” are admissions binding on Isiba H family under section 21(3)(a) and (b) of the Evidence Act, 1990, have been exhaustively dealt with by him and for the reasons therein stated, I would dismiss the appeal. I endorse the orders in the said judgment.

Appeal dismissed.