

SUPREME COURT OF NIGERIA
24TH JANUARY, 1997. SC. 189/1993
CORAM:- S. M. A. BELGORE, A. B. WALI, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, JJSC.

ALHAJI HARUNA USMAN APPELLANT
AND
UMARU GARBA KUSFA..... RESPONDENT

ISLAMIC LAW - Evidence found to be more pious and trustworthy - Was rightly relied upon - By trial court - In entering judgment for the respondent

RES JUDICATA - Final judgments - In three past cases - Whether they constitute a bar to the present action.

RES JUDICATA- Ingredients - Where parties and subject matters are not the same - Past judgments sought to be relied upon - Cannot ground *res judicata*.

FACTS

Before the Upper Area Court Zaria, the plaintiff/respondent sued the defendant/appellant and one Galadinia Tanko. The action was for the recovery of the farm land which respondent's late father entrusted to Tanko to keep till respondent come of age. While Tanko admitted the claim, appellant denied it and claimed that their late village head gave him the land in dispute.

At the end of the trial, the Upper Area Court found in respondent's favour. The appellant's appeal to the High Court and to the Court of Appeal were all dismissed. Appellant has further appealed to the Supreme Court raising 3 issues.

ISSUE FOR DETERMINATION

*"1. Whether the Court of Appeal properly and adequately considered one of the main complaint's of the appellant before it, which was that the 3 judgments admitted by the High Court sitting on appeal constituted *res judicata*; and if answered in the negative, what is the appropriate remedial step to take in the circumstances? Etc.,*

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

Final judgment

1. I have considered the three judgments, and even independent of the scanty facts contained in them in relation to the present case, and have come to the conclusion that they could not constitute a bar to the present action. The affidavit added nothing to the appellant's case and it cannot be a substitute for the records of proceedings in a litigation of this nature with chequered history. There may be a situation in which a final judgment of a competent court can per se constitute res judicata between the parties, but this case is certainly not one of them. (p. 186 G)

Res judicata - Ingredients

2. In the three cases as I have earlier observed, the parties are not the same, the land in dispute cannot be said with certainty to be the same nor can the three judgments be also said to have conclusively determined between the different parties in these cases and the parties in the present case, the subject matter in dispute. Issues 1 and 2 are therefore answered in the negative. (p. 187 C)

Evidence found to be more pious

3. In the present appeal, the trial Upper Area Court found the evidence of the respondent's witnesses more pious and trustworthy and entered judgment in his favour, thus following the correct procedure. See Bidaytul Muijahid Vol. 11 581 where Imam Malik expounded the law as follows:-

“decision will be based on the evidence of witnesses who are more pious and more trustworthy, without taking into consideration the number of more witnesses called by the other party.”

Issues 3 is answered in the affirmative that the trial court followed the correct procedure. (pp. 188 G & 189 B)

NOTABLE POINTS OF INTERESTS

WALI JSC

1. Res judicata - Conditions for its application

It is settled law that before the defence of res judicata applies, the judgment being pleaded, must satisfy the following conditions:-

that the parties, issues and subject matter were the same in the previous case as those in the case in which the plea is raised. See Idowu Alase & Ors v. Sanya Olori Ilu & Ors. (1965) NMLR 66. (p. 184 A)

2. Islamic procedural law in deciding a case

The position under Islamic law is that where each party is a plaintiff in-

NWLR (PT. 483) 525

his own case, each will be entitled to call witnesses to prove his case. If both produced credible witnesses the court will examine and see whose witnesses are more pious and trust worthy and give weight to their evidence. This is what is called “Tarjih” in the Islamic law of procedure. But where the witnesses of the parties are equally balanced, the judge will ignore the evidence and offer the oath of affirmation of his claim to the person in possession. If he takes it, judgment will be entered in his favour. (p. 188 D)

REPRESENTATION

J. B. Daudu SAN with J.J. Chindo for the Appellant
Chief C. A. Ekhasemohe for the Respondent

CASES REFERRED

Garba v. Wucicciri NCH/74A/75

Kasa v. Tanko KDH/12A/77

Iyaji v. eyigbe (1987) 3 NWLR (Pt. 61) 523 at 523

Hada v. Malumfashi (1993) 7 SCJN 504

Biye v. Maicitta (1961 - 1989) 1 SLRN 44 at 45

STATUTE REFERRED TO

Evidence Act ss. 49, 54

LEAD JUDGMENT BY WALI JSC

The respondent, who was the plaintiff, sued the present appellant; and Galadima Tanko before the Upper Area Court, Zaria City, for the recovery of a farm land which his late father entrusted to Galadima Tanko to keep for him until he came of age. Galadima Tanko gave out the farm in dispute to the appellant on loan.

While Galadima Tanko admitted the respondent’s claim, the appellant denied it and claimed that the late village head of Wucicciri Muhammad, gave him the land in dispute when it was a wild bush and that it was he that cleared it, built his house thereon and had been living therein for upwards of 37 years during which he had been cultivating the land as his own farm.

During the trial the respondent called 7 witnesses to prove his claim while appellant called 4 witnesses to support his own claim. At the end of the trial, the Upper Area Court found in favour of the respondent. The appellant appealed to the appellate division of the High Court of Justice Kaduna before which he lost and the judgment of the trial court was affirmed.

The appellant, not satisfied with the decision of the High Court, appealed against it to the Court of Appeal Kaduna Division. The Court of Appeal after a meticulous consideration of the appeal, dismissed it. The appellant has now further appealed to this court against the Court of Appeal decision. In compliance with the Rules of this Court learned counsel for the B appellant and the respondent filed and exchanged briefs which were orally elaborated upon by learned counsel on the day the appeal was heard.

In the appellant's brief filed by J.B. Daudu, learned Senior Advocate, the following three issues were raised for consideration and determination by this Court:-

C "1. *Whether the Court of Appeal properly and adequately considered one of the main complaints of the appellant before it, which was that the 3 judgments admitted by the High Court sitting on appeal constituted res judicata; and if answered in the negative, what is the appropriate remedial step to take in the circumstances?*

D 2. *Whether the judgments to wit: NCH/50A/74 Umaru Garba v. Sarkin Wuchichire, NCH/74A/75 Alhaji Haruna Kosa v. Galadima Tanko and KDH/12A/77 Umaru Garba Kusfa v. Alhaji Usman Kosa admitted by the High Court as additional evidence (after the refusal of the trial court to consider them along with E other judgments brought to its attention) constitute in the light of the admissions of the parties and other surrounding circumstances, res judicata so as to bar any subsequent judicial proceedings such as the one that had led to this appeal?*

F 3. *Whether the Court of Appeal, which affirmed the judgments of the High Court and Upper Area Court, applied the correct principle of Sharia (Islamic Law) to the evidence as assessed on the printed records and whether the complaint by the appellant that all the courts below (particularly the Court of Appeal) applied the wrong standard of proof/ procedure in adjudicating upon the instant dispute, is justified in law?*

G Chief C.A. Ekhasemomhe, learned counsel for the respondent formulated three issues in his brief for determination. The three issues are:-

I. *Whether or not the appellant established the plea of res judicata he raised in this matter and whether or not the plea was adequately considered by the Court of Appeal in this suit?*

H *Whether or not the three judgments, namely NCH/50A/74 Umaru Garba v. Sarki Wuciciri Mohammed, NCH/74A/75 Alhaji Kosa v. Galadima Tanko and KDH/12A/77 (Haruna) Umaru Garba v. Alhaji Usman Kosa admitted by the High Court as additional evidence satisfy the conditions for a successful plea of res judicata in respect of the sub-*

ject matter in this suit.

2. Whether or not the Court of Appeal applied the correct procedure as regards burden of proof in Islamic Law in the assessment of the evidence adduced in this suit.”

Learned Senior Advocate took Issues 1 and 2 together. His main-complaint under these issues is against the judgment of the Court of Appeal B where it upheld the decision of the High Court that the judgments in NCH/50A/74 Umaru Garba v. Sarkin Wucicciri; NCH/74A/75 Alhaji Haruna Kosa v. Galadima Tanko and KDGH/12A/77 Umaru Gara Kusfa v. Alhaji Usman Kosa, did not constitute *res judicata* against the respondent in his present action. He submitted that the Court of Appeal instead of considering the C issue on its broad perspective narrowed its consideration to the non-production of records of proceedings in the three judgments pleaded and concluded that in their absence, the judgments *per se* did not constitute *res judicata*. The learned Senior Advocate argued that for the plea of *res judicata* to succeed a judgment of a court of competent jurisdiction is sufficient D where it satisfies all the conditions attached to the defence. He cited the provisions of Sections 49 and 54 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 in support. He also said that the affidavit evidence used in the case, and not challenged at the time of its use disclosed sufficient facts of the cases relied upon and cited *Iyaji v. Eyigebe* E (1987) 3 NWLR (Pt.61) 523 in support and several other authorities.

In reply to the submissions above, learned counsel for the respondent referred to NCH/50A/74, NCH/74A/74 and KDH/12A/77 and submitted that none of them satisfied the conditions of *res judicata*. He argued that “the land in NCH/50A/74 is not the same land in dispute F between the appellant and the respondent in this suit. He also submitted that there is no evidence that it was the land in NCH/50A/74 that Sarkin Wucicciri Mohammed gave out as a gift to the appellant in the matter.”

On NCH/74A/75; Alhaji Kosa v. Galadima Tanko, learned counsel G had this to say:

“The parties in the instant case are not the same as the parties in NCH/74A/75.

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“There is no evidence that Galadima Tanko was claiming the said farm either as an entrusted farm or he was claiming same on behalf H of the respondent. The evidence is clear that Galadima Tanko was claiming the farm as his own. There is no mention of the respondent’s father. There is no evidence linking the present respondent with NCH/47 A/75.”

As regards KDH/12A/77 learned counsel submitted “it is clear

from the record that the issues in this suit have not been settled to finality."

It is settled law that before the defence of res judicata applies, the judgment being pleaded, must satisfy the following conditions:-

that the parties, issues and subject matter were the same in the previous case as those in the case in which the plea is raised. See: Idowu B Alase & Ors. v. Sanya Olori Ilu & Ors. (1965) NMLR 66.

I shall now proceed to examine the three cases one by one to see whether they have satisfied the conditions mentioned (supra).

I. NCH/50A/74: Umaru Garba v. Sarkin Wuchichire From the available facts in this judgment Umaru Garba sued Sarkin Wuchichire C Mohammed before the Upper Area Court, Zaria claiming his fathers farm from the latter which was denied by him. The plaintiff lost to the defendant in the trial court. The trial Court's decision was affirmed by the High Court in its appellate capacity. The land in dispute was affirmed to belong to the defendant. There is nothing in this judgment to show or to D suggest that the defendant was defending the case on behalf of anybody other than for himself.

So the parties in this case are not the same as in the present case.

2. NCH/74A/75; Alhaji Haruna Kosa v. Galadima Tanko In this case Galadima Tanko sued Alhaji Haruna Kosa for the recovery of a farm E land which he said he had given on loan to the defendant. The trial court decided in favour of the defendant on the basis that he had been in possession of the farm for 24 years. This decision was set aside by the Upper Area Court on appeal to it by the plaintiff and entered judgment in favour of the plaintiff on ground that the plaintiff had been in possession F of the farm for a longer period than the defendant.

The defendant appealed against the Upper Area Court decision to the High Court which reversed the decision of the Upper Area Court and restored that of the trial court on the basis that there was no evidence before the Upper Area Court that the plaintiff was in possession of the G farm for a longer period than the defendant because the statement made by the plaintiff before the Upper Area Court that he was in possession for a longer period did not constitute evidence which the Upper Area Court could take account of.

In this case also, the parties are not the same. Even the subject H matter cannot be said with certainty to be the same as in case NCH/50A/74 in which the land in dispute was decided by the High Court on appeal to belong to Sarkin Wuchichire who gave evidence in favour of the defendant that he granted the farm in dispute to the defendant 24 years ago. There was no evidence even suggesting that Sarkin Wuchichire was giv-

ing evidence on the same piece of land that was involved in NCH/50A/74. The doctrine of res judicata could not have applied since the parties and the subject matter were not the same. Nor are the parties and the subject matter the same as in the present case. The plea of res judicata is therefore not applicable.

3. KDH/12A/77: Usman Carha Kusfa v. Alhaji Usman Kosa. B

In this case, the claim by Umaru Garba Kusfa against Alhaji Usman Kosa was for recovery of his farm which he claimed to have been awarded to him by court. The case the plaintiff was referring to was NCH/50A/74: Umaru Garba v. Sarkin Wuchichire Mohammadu in which he lost.

In KDH/12A/77 the appellate High Court opined thus:- C

"It is pertinent to say at this stage that the record of the Upper Area Court, Kaduna does not in any where show that the appellant was suing the respondent for execution of a judgment which he had obtained.

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It is correct that no witnesses were called by either party in the Upper Area Court, Kaduna because the appellant's claim before the court as the record shows clearly was a claim for a farmland which Galadima Tanko gave to respondent on loan. It is on the basis of that claim that the Upper Area Court, Kaduna, decided that in Islamic Law and Procedure, the appellant has no right to sue the respondent alone since Galadima Tanko is still alive and since it was he - Galadima Tanko who allegedly gave the farm in dispute to the respondent. This is correct in Islamic law and it was correctly applied. In a situation such as this the appellant has two alternatives, either to sue Galadima Tanko alone or to sue Galadima jointly with the respondent. The appellant did neitherSuch declaration could not properly be made in the absence of evidence. We think the learned Upper Area Court Judge should have simply entered judgment in favour of the respondent only without declaring him owner of the farm." D E F

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We would add that the proceedings in the Kaduna Upper Area G Court, and in the appeal KDH/50A/74, only one farm was inspected by the trial courts, that two farms are in dispute was raised by the appellant only in the hearing of this appeal and we need say no more on this.

In the result we dismiss the appeal and affirmed the decision of the lower court but for the reason we have given we substitute for the order awarding the farm to the respondent and an order that judgment be entered for the respondent." H

The contents of the judgment did not speak of finality of a decision over the land in dispute. The respondent was not declared to be the

owner. There is also no certainty of identity as regards the land for which a declaratory judgment was entered for the respondent with the land in the present case. There is also no identity of the parties in the two cases. The plea of *res judicata* is therefore not applicable.

The decision of the High Court in its appellate jurisdiction and B against which the bulk of the arguments in the appellant's brief was directed and which declared that:

"In view of all these, we are wary to hold that the doctrine of estoppel inter parties or per rem judicatam is in applicable"

is on firm ground and unimpeachable. The Court of Appeal after considering this issue and the conditions to be satisfied before *res judicata* could apply, concluded thus:-

"The question to ask is whether these conditions have been satisfied in respect of the 3 judgments relied upon for the plea of estoppel in the instant appeal. The learned counsel to the appellant made an attempt D to satisfy these condition when he referred us to the affidavit in support of the application on pages 22-25 of the records particularly paragraphs 8,10-19 which shows that the land in dispute are the same and the parties are the same. He did not tender the records of proceedings in respect of the said judgments at the court below. This is why I said he merely made an E attempt to fulfill the conditions. I agree with the submission of the learned counsel in this regard that the affidavit referred to by learned counsel to the appellant is not a substitute for the records of proceedings of the three judgments tendered in the proceedings for purposes of satisfying the conditions for grounding a plea of estoppel per rem judicatam. In consequence, I F hold that the three judgments so tendered have not been sufficiently linked with the instant appeal to justify a plea of estoppel per rem judicatam."

I have seen nothing wrong in the above conclusion. Learned Senior Advocate made heavy weather of the Court of Appeal's observation that the records of proceedings in the judgments tendered in evidence with the leave of the High Court were not before it to enable it G relate the facts therein to the present case. He said the three judgments, plus the affidavit filed, contained sufficient facts for the Court of Appeal to relate them to the present case to enable it make a finding in favour of the appellant on the issue of *res judicata*. I do not share this view" **I have H considered the three judgments, and even independent of the scanty facts contained in them in relation to the present case, and have come to the conclusion that they could not constitute a bar to the present action. The affidavit added nothing to the appellant's case and it cannot be a substitute for the records of proceedings in a**

litigation of this nature with chequered history.

There may be a situation in which a final judgment of a competent court can per se constitute res judicata between the parties, but this case is certainly not one of them. Also S. 49 and 54 of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990 referred to and relied on by Learned Senior Advocate, particularly S.54 B thereof did not make the appellant's case any better. S. 54 quoted by learned counsel provides that a judgment is conclusive proof against the parties and their privies only when the "*fact directly in issue in the case actually decided by the court, and appearing from the judgment itself to be a ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.*" C

In the three cases as I have earlier observed, the parties are not the same, the land in dispute cannot be said with certainty to be the same nor can the three judgments be also said to have D conclusively determined between the different parties in these cases and the parties in the present case, the subject matter in dispute. The case of *Iyaji v. Eyigehe* (1987) 3 NWLR (Pt.61) 523 is more against the appellant and in favour of the respondent, because in the case, *Oputa, J.S.C.* who delivered the lead judgment of the court reproduced the principle of res judicata as follows:- E

"Simply put, the rule means that a final judgment already decided between the same parties or their privies on the same question by a legally constituted court having jurisdiction over it is conclusive in subsequent proceedings (other than an appeal or retrial) between o the same F parties or their privies of the matter actually considered."

The passage (supra) is a clear interpretation of S. 54 of the Evidence Act already referred to and considered.

Issues 1 and 2 are therefore answered in the negative. Under issue 3, it was the contention of learned Senior Advocate that both the G trial Upper Area Court and the High Court in its appellate jurisdiction failed to apply the Sharia law principles on standard and burden of proof applicable to disputes based on immovable property. He submitted that the Court of Appeal misdirected itself in law by confirming the decisions of the two courts on the issue. Learned Senior Advocate, referred to and relied on several decisions of H the Court of Appeal, the decision of this court in *Hada v. Malumfashi* (1993) 7 NWLR (Pt. 303) 1; (1993)7 SCJN 504; *Ruxtan on Maliki Law* paragraph 1663-1666 and *Fawakihud Dawani Vol. II* p. 301.

In reply, learned counsel for the respondent submitted that both

the High Court and the Court of Appeal were correct when they affirmed the decision of the trial Upper Area Court in their respective judgments. He submitted also that in the trial Upper Area Court both the appellant and the respondent called witnesses to prove their respective claims to the farm land in dispute and that the learned judge of that court after considering the evidence, found in favour of the respondent whose claim he said was proved by six credible witnesses as against four witnesses called by the appellant and whose evidence he said he found to be contradictory. Learned counsel further submitted that there was no legal basis for any oath offering and taking. He cited the cases of *S. A. Shittu v. Ibrahim Bill* (1961 -1989) 1 Sharia Law Report of Nigeria (SLRN) 39 at 42-43 and *Abdu Biye v. Dan Asebe Maicitta* (196] -1989) 1 SLRN 44 at 45 to buttress his submissions. He urged the court to dismiss the appeal.

The gravamen of the appellant's complaint in this issue is that the trial court did not apply the correct Islamic procedural law in deciding the case. His contention is that the witnesses called by the appellant are more reliable and that the worst that could happen was that the weight of evidence of both parties were balanced; and where that happened, the proper order to make was to offer oath to the person in possession to wit the appellant.

The position under Islamic Law is that where each party is a plaintiff in his own case, each will be entitled to call witnesses to prove his case. If both produced credible witnesses the court will examine and see whose witnesses are more pious and trustworthy and give weight to their evidence. This is what is called "Tarjih" in the Islamic Law of procedure. But where the witnesses of the parties are equally balanced, the judge will ignore the evidence and offer the oath of affirmation of his claim to the person in possession. If he takes it, judgment will be entered in his favour. If he turns it down, the oath will be offered to the other party. If he takes it., the court will give him judgment. If both refuse to take the oath, the property in dispute shall be shared between them proportionate to their respective claim to it. Where each party if claiming the whole property, it will be shared equally between them.

In the present appeal, the trial Upper Area Court found the evidence of the respondent's witnesses more pious and trustworthy and entered judgment in his favour, thus following the correct procedure. See: *Bidaytul Muijahid* Vol. 11 p.581 where Imam Malik expounded the law as follows:-

"decision will be based on the evidence of witnesses who are more pious and more trustworthy, without taking into consideration the number of more witnesses called by the other party."

See also Ashalul Madarik Vol. 3 p. 228 where the Law is stated thus:

If two persons are claiming ownership of a thing, and none of them has witnesses to prove his claim or the evidence they produced in terms of credibility balanced, the judge will prefer evidence of the more pious and trustworthy witnesses and base his decision on it. B

Issue 3 is answered in the affirmative that the trial court followed the correct procedure ..

The appeal fails and is accordingly dismissed. The judgment of the Upper Area Court which was affirmed by both the High Court and the Court of Appeal is hereby confirmed. N1,000.00 costs is awarded to the respondent against the appellant. C

BELGORE JSC

I agree with the lead judgment of my learned brother, Wali, J.S.C. that the procedure under Muslim Law was complied with by the trial court and the decision of the Court of Appeal upholding the judgment of trial court was right. For the reasons in that lead judgment I also find no merit in this appeal and I dismiss it with N1,000.00 costs to respondent against the appellant. D

OGWUEGBU JSC

I have had a preview in draft of the lead judgment just delivered by my learned brother Wali, J.S.C. and I am in entire agreement with his reasoning and conclusion. I too will dismiss this appeal. I abide by all the consequential orders in the lead judgment. E

ONU JSC

Having had the advantage to read in draft the judgment just delivered by my learned brother Wali, J.S.C., I am of the same view that this appeal lacks merit and must fail in its entirety. I too will dismiss it and make the same consequential orders inclusive of those for costs as set out in that judgment. F

ADIO JSC

I have had a preview of the judgment read by my learned brother, Wali, J.S.C., and I agree with him that this appeal fails. Accordingly, I too dismiss the appeal and abide by the consequential orders, including the order for costs. H