

SUPREME COURT OF NIGERIA
2ND MAY, 1997. SC. 90/1993
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, I. L. KUTIGI,
S. U. ONU, A. I. IGUH, JJSC.

AMBROSE EKENNIA PLAINTIFF/APPELLANT
(For himself and as representing
Umuewere family)
AND
BENEDICT NKPAKARA & 7 ORS DEFENDANTS/RESPONDENTS

COURTS - *Finding - By trial court - That respondents admitted possession of the disputed land by the appellants - Is perverse.*

DAMAGES - *Special damages - Where not established - The award will be set aside.*

ESTOPPEL - *Res judicata - Land dispute - Whether the previous judgment by a native court Exhibit 4 - Created an estoppel per rem judicatam.*

LAND LAW - *Ownership - Assertion of exclusive ownership by an individual - As against the community's claim to communal ownership - Onus of proof is on that individual.*

LAND LAW - *Ownership - Presumption of ownership under s. 146 Evidence Act - Whether it arose in this case - As to shift onus of proof away from the appellant.*

FACTS

Before the Owerri High court, the plaintiff/appellant in a representative capacity filed an action against the defendants/respondents also in a representative capacity. Appellant claimed the sum of N5,000.00 being special and general damages for trespass and injunction against the respondents. Both parties belong to Umuga family of Otulu Ahiara. The appellant sought to establish that the land in dispute is the exclusive property of his own Umuewere sub-family. The respondents who consist of other kindred groups of the said Umuga extended family maintained that the land is the communal property the entire Umuga family.

The trial court found in favour of the appellant as claimed. Respondents' appeal to the Court of Appeal was allowed. Being dissatisfied, appellant has now appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

“(i) On which party lies the burden of proof of communal ownership of land where land holding is on individual or family units.

(ii) Whether Exhibit 4 the Ahiara Native Court judgment in Suit No. 45/35 created an estoppel per rem judicatam to the present suit. Etc, see p. 875

HELD (Unanimously dismissing the appeal per lead judgment of IGUH JSC) **Assertion of exclusive ownership**

1. With the greatest respect to the learned trial Judge, it is a total misconception of the law to hold that the onus of proof, on the facts and circumstances of this case, is on the respondents to establish that the land in dispute is their communal property as against the appellant's claim to the exclusive ownership of the same land. This is because the authorities are clear that where an individual or a group, as in the present case, asserts exclusive ownership as against the community claim to communal ownership of a land in dispute, the onus is on the individual to establish that the land belongs to him exclusively. (p. 877 A)

Perverse finding of trial court

2. With great respect, the trial Court was in grave error when it held that the respondents in any way admitted possession of the land in dispute by the appellant. This finding is clearly perverse as neither any of the averments in the respondents' pleadings nor a word in their *viva voce* testimony before the Court bears out this strange finding of the trial Court. I am therefore in agreement with the Court below when, on this issue, it observed thus -

“With respect, I am unable to agree with the learned trial judge that the appellants admitted possession of the land in dispute by the respondent. There is also nothing in the evidence of the witnesses called by the appellants to lead to the inference of such admission. (p. 878 C)

Presumption of ownership under s. 146 E. A.

3. In the present case, it is beyond dispute that having regard to the pleadings and evidence before the court, the straight forward case of the respondents is that the land in dispute is the communal property of the parties and that both parties are jointly in possession thereof. There is no admission by the respondents of exclusive possession of the land by the appellant's sub- family

to raise the presumption of ownership under section 146 of the Evidence Act in favour of the appellant. I entirely agree with the Court of Appeal that on the particular facts of this case, the onus of proof rested on the appellant to establish his exclusive ownership of the land in dispute. It is also clear to me that the court below was right in holding that the learned trial judge misplaced the burden of proof in the case. (p. 878 H)

Estoppel - Res judicata

4. As I have already observed, the form of an action in a native tribunal must not be stressed where the issues involved are clear. The claim in Exhibit 4 from the entire proceedings as a whole was to all intents and purposes grounded in trespass. I therefore, agree with the court below that the parties, the subject matter and the issue in both the previous suit, Exhibit 4 and the present suit are the same. I cannot but fully agree with the decision of the Court of Appeal that Exhibit 4 created an estoppel per rem judicatam in the present action. (p. 885 F)

Special damages - Where not established

5. The evidence adduced by the appellant through P. W. I., Vincent Obi; P. W. 2, Ambrose Ekennia; and P.W.5, Ukanwa Chukwunyere was, in the main, contradictory and in conflict with the facts pleaded in the amended statement of claim. In the result, it seems to me that the award of special damages, based on the pleadings and the evidence before the trial court was clearly untenable and unjustifiable and the court below was right to have set aside the decision of the learned trial judge on the issue. (p. 886 F)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Burden of proving that the person in possession is not the owner

It seems to me plain that section 146 of the Evidence Act deals with the burden of proof as to ownership in respect of any thing of which one is shown to be in possession. In that regard, the onus of proving that the one in possession of the thing is not the owner thereof is on the person who affirms that he is not the owner. (p. 878 A)

2. Land dispute - When s. 146 E. A. cannot be invoked

Neither of two parties in possession of land can successfully invoke the provisions of section 146 of the Evidence Act to cast on the other the burden of proving that he is not the owner thereof. In my view, possession, the admission of which is capable of raising the presumption of ownership stipulated

in section 146 of the Evidence Act must be that which amounts to a de jure exclusive possession of a land in dispute and not mere occupation with no colour of right whatever. (p. 878 F)

3. *Special damages defined*

- B Special damages have been defined as damages of the type as the law will not infer from the nature of the act; they do not follow in the ordinary course; they are exceptional in their character, and, therefore, they must be claimed specially and proved strictly. See Stroms Bruks Bolag v. Hutchison (1905) A.C. 515. (p. 886 E)

C

PRESENTATION

C. A. Egbulefu Esq. with Mr. O. Blaize for the appellant
M. O. Nlmedim Esq for the respondents

CASES REFERRED TO

- D Eze v. Igiliege (1952) 14 W.A.C.A. 61
Adeyeye v. Adewoyin (1963) 1 ALL N.L.R. 421 (P.C.) at 426
Onobruhere v. Esegine (1986) 2 S.C. 385
Udeze v. Chidebe (1990) 1 N.W.L.R. (Part 125) 141 at 162
Adomba v. Odiese (1990) 1 N.W.L.R. (Part 125) 165 at 178
E Iyaji v. Eyigebe (1987) 2 N.W.L.R. (Part 61) 523 at 533
Oke v. Atoloye (1985) 1 N.W.L.R. (Part 15) 241 at 122
Alase v. Ilu (1965) N.M.L.R. 66
Esiaku v. Obiasogu 14 W.A.C.A. 178
Oforiata v. Agyei 14 W.A.C.A. 149
F Obi v. Njokanma (1989) 4 N.W.L.R. (Pt. 144) 161
Bolag v. Hutchison (1905) A.C. 515 at 525 - 526

STATUTE REFERRED TO

Evidence act s. 146

G

LEAD JUDGMENT BY IGUH JSC

In the Owerri Judicial Division of the High Court of the former Imo State of the Federal Republic of Nigeria, the plaintiff, who is now the appellant, for himself and as representing the Umuewere family instituted an action against the respondents, who therein were the defendants, for themselves and as representing the Umuga family of Otulu, Ahiara in Imo State, excluding

- H the Umuewere family, claiming jointly and severally as follows -

“1. N5,000.00 (Five thousand naira) being special and general

damages for trespass to the piece or parcel of land known as and called "ALA ISIAHIA EWERE" situate at Otulu ahiara in the Owerri Judicial Division which has been in the peaceable possession of the Plaintiff from time immemorial.

2. *An injunction restraining the Defendants their servants and or agents from further acts of trespass to the said land.*" B

Pleadings were ordered in the suit and were duly settled, filed and exchanged. The parties, from the said pleadings, are ad idem on the fact that they both belong to Umuga family of Otulu, Ahiara, that Umuga comprises of four kindred groups, to wit, Umuodagu, Amapu, Umuokelem and Umuno and that Umuodagu kindred is made up of two families, namely, Umuewere C and Umuwaso families. The plaintiff is from Umuewere family while the defendants consist of the other kindred groups of the said Umuga extended family.

The case of the plaintiff as the representative of members of his family is that the land in dispute is known as and called ALA ISIAHIA EWERE." As D owners of the said land from time immemorial, they, and before them, their ancestors had been exercising various exclusive acts of possession and ownership over the same without any interference from any whatever, including the defendants. He claimed that land is essentially a farm land although their shrines which comprised of "Ogwugwu" and "Ihu Amadi Ogwugwu" jujus E are located in the eastern portion of the land. The plaintiff and members of his family had always reaped their various economic trees on the land, such as oil palm trees, rafia palm trees, breadfruit trees, oil bean trees and some timber trees without any let or hindrance from the defendants. He testified that in 1935, relations of the defendants trespassed on the land in dispute but F were sued by them at the Ahiara Native Court in suit No. 192/35. Defendants' relations filed a cross-action against them in the court. He claimed that both suits terminated in their favour. It is the defendants' further trespass on the sake land in 1975 that resulted in this action.

The defendants, on the other hand, contended that the plaintiff and G themselves are the communal owners of the land in dispute which they called "Okahia Umuga". As such owners, the plaintiff and the defendants who together compromise of Umuga family exercised various acts of ownership communally on the land without any let or hindrance from any one whatever. In particular, they owned and served their Ogwugwu and Amadi Ogwugwu H Otulu shrine's on the land. The land had devolved from one generation of Umuga to the other until it devolved on the present generation which comprises of both the plaintiff and the defendants' families. They gave evidence of various acts of ownership and possession exercised by the Umuga commu-

nity over the land in dispute. These include harvesting of oil palm fruits and various other economic trees on the land and utilizing the proceeds of their sale for the goods of the community, construction of halls by different age groups on the land with the permission of Umuga community and the erection of market stalls and well for water by Umuga community on the land. They
B claimed that the plaintiff had contested ownership of the land in dispute in suit No. 45/35 at the Ahiara Native Court and lost and that they cannot now reopen the matter.

At the conclusion of hearing, the learned trial judge, Nsofor, J., as he then was, after some review of the evidence found for the plaintiff against
C the defendants and decreed as follows -

In the final analysis the plaintiffs claims succeed wholly and entirely, and the plaintiffs have judgment accordingly."

Dissatisfied with this decision of the trial court, the defendants lodged an appeal against the same to the Court of Appeal, Port Harcourt Division which in a unanimous decision allowed the appeal on the 16th day of March,
D 1992, set aside the judgment of the trial court and substituted therefor, an order dismissing the plaintiff's action.

Aggrieved by this decision of the Court of Appeal, the plaintiff has appealed to this court. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the appellant and the respondents respectively.

E Five grounds of appeal were filed by the appellant against this decision of the Court of Appeal. These grounds of appeal, without their particulars, complain as follows -

"GROUND 1: ERROR IN LAW:

*The Learned justices of the Court of Appeal erred in law in holding
F that the onus of proof in this case rested on the plaintiff/appellant.*

GROUND 2: ERROR IN LAW:

The learned justices of the Court of Appeal erred in law when they held that Exhibit 4, that is, the Ahiara Native Court judgment in Suit No. 45/35 created an estoppel per rem judicata to the present suit.

GROUND 3: ERROR IN LAW:

G *The Court of Appeal erred in law in constructing the Ahiara Native Court Suit No. 192/35 as a cross action to Suit No. 45/35 (Exhibit 4), the error consisting in the fact that a criminal action cannot be a cross action to a civil suit.*

GROUND 4: ERROR IN LAW:

H *The Court of Appeal erred in law when it reversed the finding of fact of the trial court on the issue of award of special damages.*

GROUND 5: ERROR IN LAW:

The judgment of the Court of Appeal is against the weight of evidence.”

Pursuant to the rules of this court, the parties through their respective counsel filed and exchanged their written briefs of argument. In the appellant’s brief, the following four issues are set out for the determination of this court, namely -

“(i) *On which party lies the burden of proof of communal ownership of land where land holding is on individual or family units.*

(ii) *Whether Exhibit 4 the Ahiara Native Court judgment in Suit No. 45/35 created an estoppel per rem judicatam to the present suit.*

(iii) *Having regard to Suit No. 192/35 (Exh.2) Ahiara Native Court criminal action and Ahiara Native Court civil Suit No. 45/35 (Exh.4), can it be rightly said that the former case (Exh.2) was a cross action to the latter case (Exh. 4) or vice versa.*

(iv) *On the issue of special damages, how is this proved. Can it then be said that the Appellant did not prove special damages.”*

The respondents, for their own part, submitted three issues in their brief of argument as arising in the appeal for determination. These are -

“(a) *Whether the Court of Appeal was right in holding that the learned Trial Judge misplaced the burden of proof in this case.*

(b) *Whether Exhibit 4, the Ahiara Native Court Judgment in suit No. 45/35 created an estoppel per rem judicatam.*

(c) *Was there proof, in law, of special damages claimed by the Appellants in this suit.”*

The claimed that the above issues are in addition to or in the alternative to the issues raised by the appellant.

A close study of the issues set out in the respective briefs of the parties reveals that they refer to the same questions. In my view, it does not matter which of the two sets of issues is adopted for my consideration of this appeal.

At the oral hearing of the appeal, both learned counsel for the parties adopted their respective briefs of argument and relied on the same in their entirety.

The main question raised by both parties under issue number 1 of their respective briefs of argument concerns whether the Court of Appeal was right in holding that the learned trial judge misplaced the burden of proof in this case. In this regard, both parties are agreed on the fact that the appellant and the respondents come from the Umuga family in Otulu. It is also not in dispute that the appellant’s Umuewere sub-family is a component part of the Umuga family. The appellant is from Umuewere while the respondents come from the rest of the other kindred groups of Umuga. While the appellant

averred and led evidence that the land in dispute belonged to his Umuewere sub-family exclusively, the respondents' case is that the said land is the communal property of the entire Umuga family. They claimed that the land had passed from one generation of the family to the other until it developed on the present generation comprising of the appellant and the respondents.

B Testifying on the communal ownership of the land in dispute, D. W. 3, Sylvanus Nkpakara stated thus -

"The land is called "Okohia" because no person farms it. The "Okohia is owned not by an individual. It is owned by the entire people of Umuga. We harvest the palm trees and the economic trees on the land jointly and communally for our common benefit.

Each individual person cultivates portions of the land with bambo trees. Individuals harvest their bambo trees individually for use in their farms. The boundary between the Okohia and the adjoining lands is indicated with ukpo trees.

D *There are juju shrines - the "Ogwugwu Otulu" and "Amadioha" - are on the land in dispute. The juju shrines are owned by the entire people of Otulu."*

The learned trial judge was also not oblivious of the respondents' claim to communal ownership of the land in dispute said he -

E *"It is part of the case of the defendants on oath that the land in dispute is communal owned by the entire Umuga people (i. e. the Defendants and the plaintiff together). The entire people of Umuga harvest the economic trees on the land communally or in common. Any person is at liberty to enter the land, plant some bambo trees or raffia palms and harvest them himself".*

F It cannot therefore be correct, as contended by the appellant in his brief of argument, that there is no evidence in support of the communal ownership of the land in dispute in the respondents. On the other hand, there is clear evidence from the appellant that the said land in dispute is the exclusive property of his sub-family. This is the entire basis of the appellant's claim. The real issue before the court is on whom the onus of proof lies in the establishment of the exclusive as against the communal ownership of the land in dispute.

G Resolving this issue, the learned trial judge stated as follows -

H *"But is the land in dispute communal property of both the plaintiff and the defendants? This leads me to consider and deal with the issue No. 1, supra Based on the evidence before me and which I have accepted , it is my judgment firmly that the defendants failed to discharge the onus on them"*

He consequently held that the appellant's sub-family were exercising various

acts of possession on the land “as the exclusive owners” Thereof.

With the greatest respect to the learned trial Judge, it is a total misconception of the law to hold that the onus of proof, on the facts and circumstances of this case, is on the respondents to establish that the land in dispute is their communal property as against the appellant’s claim to the exclusive ownership of the same land. This is because the authorities are clear that where an individual or a group, as in the present case, asserts exclusive ownership as against the community claim to communal ownership of a land in dispute, the onus is on the individual to establish that the land belongs to him exclusively. See Udeakpu Eze v. Samuel Igiliege (1952) 14 W.A.C.A. 61, Atuanya v. Mbajekwe (1975) 3 S.C. 161 at 167, Udeze v. Chidebe (1990) 1 S.C.N.J. 104 etc. See too Jones Adeyeye v. Adewoyin and others (1963) 1 All N.L.R. 421 (P.C.) at 426. It is clear to me that the learned trial judge slipped into a grave error of law when he cast on the respondents, the onus of proving that the land in dispute is their communal property in the face of the appellant’s claim to the exclusive ownership thereof. I also agree with the contention of the respondents that the Court below was entirely right by reversing this erroneous stance of the trial Court. In my view, the onus was on the appellant to establish his exclusive ownership of the land in dispute in answer to the respondents’ claim to communal ownership thereof.

The Court of Appeal further faulted, and quite rightly in my view, the onus of proof wrongly cast on the respondents by the trial Court to establish communal ownership of the land in dispute by virtue of the provisions of section 146 of the Evidence Act. Said the learned trial judge -

“By their pleadings and in their evidence the defendant admitted the possession of the land in dispute by the plaintiffs. They admitted the plaintiffs’ acts of such possession. By admitting the plaintiffs’ possession of the disputed land as well as their various acts of possession, the onus shifts to the defendants of proving that the plaintiffs’ possession and their acts of possession were not done in their right or their capacity, as the exclusive owners thereof; Onyekanwu v. Ekwubiri (1966) 1, All N.L.R. 32.

He thereafter considered the provisions of the said section 146 of the Evidence Act. Holding that the onus was not on the appellant to establish exclusive ownership of the land in dispute but on the respondents to prove their communal title thereof, the trial Court arrived at the conclusion that the respondents failed to discharge the onus of proof placed on them by law.

Section 146 of Evidence Act provides as follows -

“When the question is whether any person is owner of any thing of which he is shown to be in possession, the burden of proving that he is not

the owner is on the person who affirms that he is not the owner.”

It seems to me plain that section 146 of the Evidence Act deals with the burden of proof as to ownership in respect of any thing of which one is shown to be in possession. In that regard, the onus of proving that the one in possession of the thing is not the owner thereof is on the person who affirms that he is not the owner. See Onobruhere v. Esegine and Another (1986) 2. S.C. 385, Udenze and others v. Chidebe and others (1990) 1 N.W.L.R. (part 125) 141 at 162 etc. The learned trial judge having held, as above stated, that by their pleadings and in their evidence, the respondents admitted the possession of the land in dispute by the appellants, wrongly concluded that the said respondents on whom the said onus rested, had not discharged the same and must therefore fail. Consequently, he entered judgment for the appellant.

With great respect, the trial Court was in grave error when it held that the respondents in any way admitted possession of the land in dispute by the appellant. This finding is clearly perverse as neither any of the averments in the respondents’ pleadings nor a word in their viva voce testimony before the Court bears out this strange finding of the trial Court. I am therefore in agreement with the Court below when, on this issue, it observed thus -

“With respect, I am unable to agree with the learned trial judge that the appellants admitted possession of the land in dispute by the respondent. There is also nothing in the evidence of the witnesses called by the appellants to lead to the inference of such admission. At least (sic) what the appellants implicitly admitted is that they and the respondent are jointly in possession of the land in dispute.”

It seems to me crystal clear that the respondents case, both in their pleadings and their viva voce evidence, is to the effect that the land in dispute is in the joint ownership and possession of both parties. I cannot accept that such joint possession is what the law contemplates under section 146 of the Evidence Act. Neither of two parties in possession of land can successfully invoke the provisions of section 146 of the Evidence Act to cast on the other the burden of proving that he is not the owner thereof. In my view, possession, the admission of which is capable of raising the presumption of ownership stipulated in section 146 of the Evidence Act must be that which amounts to a de jure exclusive possession of a land in dispute and not mere occupation with no colour of right whatever.

In the present case, it is beyond dispute that having regard to the pleadings and evidence before the court, the straight forward case of the respondents is that the land in dispute is the communal property of the parties and that both parties are jointly in possession thereof. There

is no admission by the respondents of exclusive possession of the land by the appellant 's sub- family to raise the presumption of ownership under section 146 of the Evidence Act in favour of the appellant. I entirely agree with the Court of Appeal that on the particular facts of this case, the onus of proof rested on the appellant to establish his exclusive ownership of the land in dispute. It is also clear to me that the court below was right in holding that the learned trial judge misplaced the burden of proof in the case. B

The second issue raised by the parties poses the question whether Exhibit 4, the Ahiara Native Court judgment in suit No. 45/35 created an estoppel per rem judicatam between the parties in the present case. In this regard, I think it ought to be noted that the appellant by paragraph 9 of his amended Statement of Claim, pleaded and relied on the criminal proceeding in the Ahiara Native Court Suit No. 192/35. This was tendered as Exhibit 2 at the hearing. Although the appellant in the same paragraph 9 of his amended statement of Claim additionally made reference to a cross-action to Exhibit 2 in the same court between the parties, the suit number and parties thereto were not indicated. Paragraph 9 of the amended Statement of claim averred as follows - C D

"9 In 1935, relations of the defendants trespassed into the land in dispute by cutting some of the plaintiff's oil palm fruit and they were sued at the Ahiara Native Court Suit No. 192/35. There was also a cross action by the defendants' relations in the same court and in both cases judgment was given in plaintiff's favour Suit No. 192/35. The certified true copy of these judgments will be founded upon at the trial." E

The respondents, on the other hand, specifically pleaded the defence of estoppel per rem judicatam in their statement of Defence. In this regard they relied on the Ahiara Native Court Suit No. 45/35 which was tendered and marked as Exhibit 4 in the present proceedings. F

The learned trial Judge after a review of Exhibit 4 concluded thus -

"I am satisfied and I hold firmly that the parties in the previous suit (Exh. 4) and the parties in this present suit, where the plea of res judicata is raised, are not the same. Having failed on this ground the plea fails wholly and entirely and no further need arises considering the other two pre-conditions (supra). The plea, therefore, is rejected accordingly." G

The court below in setting aside this decision of the trial court was of the opinion that the parties, the subject matter and the issues in suit No. 192/35, Exhibit 2, are the same as those in the present suit as well as in suit No. 45/35, Exhibit 4. It therefore found that the parties, the subject matter and the issues in the present suit are the same as those in Exhibit 4. It concluded H

thus -

“In the light of the foregoing, I entirely agree with the submission of appellants’ counsel that Exhibit 4 operates as estoppel to the present suit. The appeal also succeeds on this ground.”

The question is whether the above decision of the court below is erroneous B or otherwise faultless.

The law is well settled that for a plea of estoppel per rem judicatam to succeed, it must be established that the parties or privies, the res or the subject matter of the litigation, and the claim or the issue in both the present and the previous actions relied upon are the same. It is an application of the rule of C public policy that no man shall be vexed twice for one and the same cause on the same issue. See Adomba v. Odiese (1990) 1 N.W.L.R. (part 125) 165 at 178. However the burden is on the person who sets out the defence of res judicata to establish conclusively that the parties, the subject matter and the issues were the same in the previous case as those in the action in which the plea is raised. See Iyaji v. Eyigebe (1987) 2 N.W.L.R. (part 61) 523 at 533, D Oke v. Atoloye (1985) 1 N.W.L.R. (part 15) 241 at 260, Yoye v. Olubode and others (1974) 1 All N.L.R. (part 2) 118 at 122, Idowu Alase and others v. Sanya Olori Ilu (1965) N.M.L.R. 66 etc. Once these three ingredients of res judicata are conclusively established the court cannot regard such previous judgment as mere evidence. It is conclusive and estops the plaintiff from E making any claim contrary to the decision in the previous judgment.

I have already indicated that both parties to the present action belong to the Umuga family of Otulu. Whilst the plaintiff is from the Umuewere family, the defendants consist of the remaining various other families or groups that constitute the said Umuga extended family. It must also be observed that F Exhibit 4, being a native court proceedings, has to be carefully scrutinized to ascertain precisely whom the parties really were and what the subject matter and the issues in the case were. This is because, it is not the form of an action in a native tribunal that must be stressed where the issue involved is otherwise clear. It is the substance of such a claim that is the determinant factor. To this end, it is permissible to look at the claim the evidence and the findings G in the proceeding in order to determine what the real issues were and their decisions on those issues ought not to be disturbed without very clear proof that they are wrong. See Olujinle v. Adeagbo (1988) 2 N.W.L.R. (part 75) 238 at 251 A-B, Chief Awara Osu v. Ibor Igiri (1988) 1 N.W.L.R. (part 69) 231 A-B, Ajao v. Alao (1988) 5 N.W.L.R. (part 45) 802 at 822, Chukwunta v. Chukwu 14 W.A.C.A. 341, Nwosu v. Udejaja (1990) 1 N.W.L.R. (part 125) 188, and Kwamin Akyin v. Essie Egymah 3 W.A.C.A. 65. I will now examine H Exhibit 4 against the above well established principle of law.

The parties to Exhibit 4 are described thus -

“Nnoromele of Otulu v.

1. Maduagufor

2. Wugoagwu

3. Obiawuotu

4. Akwukwegbu of Otulu”

B

The claim was stated simply as -

“Claim:- Defendants to quit Ogwugwu (Jujus) bush entered at Otulu 16 days now”

The learned trial Judge after some consideration of Exhibit 4 came to the conclusion that the plaintiff in that suit sued in his personal capacity C and that the defendants in the same suit were sued in their personal capacity. As the present suit was brought and defended in representative capacities, the learned trial Judge held that the plea of res judicata could not avail the respondents. Said he -

“In my respectful opinion, Nnoromele was suing in his personal capacity. D The defendants were sued also in their respective personal capacities, nothing less.”

He further noted, quite rightly, that the form of an action in a native tribunal should not be stressed where the issues involved are clear and that decisions on such issues must not be disturbed without very clear proof that they are E wrong and concluded thus -

“Bearing this in mind, I have scrutinized the testimony adduced on behalf of the parties in suit No. 45/35 (Exhibit 4) and for what the issue was therein. I am of the same opinion that not only are the parties in these two suits different, the issues seem different in the two suits. There is, in my F respectful view, no basis for holding that Exhibit 4 created or operated as an estoppel per rem judicatam so as to preclude the plaintiffs in this present Litigation from pursuing this action against the defendants. There is no “Action estoppel” established.”

The Court of Appeal in resolving the above issue set out paragraph G 9 (a) of the respondents’ Statement of Defence by which they pleaded Exhibit 4 as res judicata and correctly stated thus -

“From the above, the appellants are contending that the parties in Exhibit 4 are the same as the parties in the present suit; that is to say, that the plaintiff/respondent in the present case (Vincent Obi) was the defendant H in the previous suit (Exhibit 4) while the present defendants/appellants in the present suit are the privies of Nnoromele the plaintiff in Exhibit 4. The land in dispute is the same in both suits.”

It next set out paragraph 9 of the appellant’s Statement of Claim and, without

doubt, rightly commented as follows:-

“What the respondent appears to be saying in paragraph 9 of the amended statement of claim, supra, is that the parties and the subject matter in the Ahiara Native Court Suit No. 192/35 are the same as in the present suit and also in the cross action brought by the appellant's relation in the Ahiara Native court in 1935. The respondent did not state the number of that cross action but when the record of proceedings in the Ahiara Native Court suit No. 192/35 was tendered and received in evidence as exhibit 2, it became evident that the cross action referred to was suit No. 45/35 (Exhibit 4). It is said that things which are equal to one thing are equal to one another. If the parties, subject matter and issues in suit No. 192/35 (Exhibit 2) are the same as these in the present suit as well as in suit No. 45/35 (Exhibit 4), it follows logically that the parties, subject matter and issues in the present suit are the same as those in Exhibit 4. It is, therefore, manifest that by their pleadings, both parties were ad idem that the parties, subject matter and issues in both suits, that is the previous suit No. 45/35 (Exhibit 4) are the same as in the instant suit. No issues were joined by the parties on the pleadings in respect of these. Quite apart from the pleadings, it was quite manifest from the evidence of Nnoromele, the plaintiff in (Exhibit 4) of whom the present appellants are privies in title that he did not prosecute the action in his personal but in a representative capacity. In this regard it is pertinent to refer to a portion of his evidence in the previous suit.

“All defendants are my town's men. This Ogwugwu (juju) is general to all the people of our town. This bush is preserved by all, just by the command of our juju. We have a general rule that nobody should clear it. This year, all defendants entered the bush and had the same cleared. I, being the head of the Ogwugwu juju, fond them do so and then complained to the town people. The town people then paid this summons fees.” (See p. 146, lines 13 - 21)

A suit, the summons fees of which was paid by the towns people concerning a juju bush preserved by the towns people cannot by any stretch of the imagination be an action prosecuted in a personal capacity as found by the learned trial judge. It is equally clear from the evidence of the spokesman of the defendants in Exhibit 4 that the defendants therein defended the action in a representative capacity. At p.147 lines 7-20 the record reads thus:-

“Defendant No. 1 on behalf of himself and 3 others sworn states:- Our fathers are the original owners of the land on which stands the forest that has been preserved for the juju. We all four have our shares of our fathers land leading to the forest About 7 years now, we 4 defendants followed and cut our fathers bush ad joining the same forest. This year, to make straight

line at the boundary of the forest and our bush, we cut a part thereof. All the 4 portions of land in our possession now got a straight line at the boundary."

It is clear from the above that all the four defendants referred to are from the same family and that is the family of Vincent Obi (the deceased plaintiff in the present suit.) They claimed that the land in dispute originally belonged to their fathers. For the purpose of estoppel per rem judicatam; party means B not only a person named as such. If a person was content to stand by and see his battle fought by somebody else in the same interest, he is bound by the result and should not be allowed to open the case: Amancio Santos v. Okosi Industries Ltd & Anor (1942) 8 W.A.C.A. 29, Okorie Uwalaka & Ors v. Nguruliaku and Ors. (1955) 15 W.A.C.A. 63, 65. C

Since the previous proceeding Exhibit 4 was to restrain the defendants thereon (respondent in the present action) from entering the land which they referred to as their family land, any other member of the family who did not take part in the proceeding would be caught by the doctrine of standing by. The cause of action in the previous proceeding as well as in the present suit is trespass. D Contrary to the respondent's assertion, the previous suit Exhibit 4 terminated in favour of the plaintiff therein, that is, the appellants in the present suit. At p.49 lines 10 to 15 of the records, the majority judgment of the Court was that -

"the forest had been preserved by unknown ages of Otulu. All the people had not worked on the forest except 4 defendants. Defendants had E already planted yams on the part cleared. Court allows them to reap their yams and to quit the part cleared after harvest."

In the light of the foregoing, I entirely agree with the submission of appellants' counsel that Exhibit 4 operates as estoppel to the present suit. The appeal also succeeds on this ground." F

I have myself closely examined Exhibit 4 in its entirety with all the viva voce evidence that was led in the suit and it seems to me crystal clear that the Court below cannot be faulted in its treatment of the issues under consideration and findings thereupon. The plaintiff in exhibit 4, Nnoromele, in his evidence before the Native Court testified in very clear terms as to G the representative nature of the suit. According to him, the land in dispute including "Ogwugwu" juju thereon is the communal property of his entire community which included the defendants in the suit. He was the serving head of the said "Ogwugwu" juju and having found the defendants trespass on the land, he complained to the community which provided the summons H fee for the prosecution of the trespassers. This seems to me clear evidence to buttress the representative nature of the plaintiff's case in Exhibit 4.

On the issue of whether Exhibit 2, the Ahiara Native Court suit No.192/35, Vincent of Otulu v. Echetagwara and others is not a cross - action to Exhibit 4, it will be necessary to examine Exhibit 2 closely. Exhibit 2 is a

criminal charge of “stealing palm nuts valued 15 shillings at Otulu two days now” Questioned by the Courts thus :-

“If you dispute on a land with your family in Civil case No. 45/35, in JB 2/35 page 174, are these palm nuts not in the same land?” (Underlining supplied),

B the complainant answered as follows:-

“They are in the same land in dispute but I planted them there.”

Besides, part of the judgment of the said Ahiara Native Court suit, Exhibit 2 stated as follows

“Judgment: This case had been suspended for the final decision of C the civil case 45/35 in JB. 2/34 page 174. In this case, the palm nuts are in dispute. Court agrees that the land left for the Ogwugwu juju should remain for the juju”

There can be no doubt therefore that Ahiara Native Court Suit No. 192/35, Exhibit 2 is the cross - action to Ahiara Native Court suit No. 45/35, Exhibit 4.

Turning now to the capacity in respect of which the defendants in D Exhibit 4 were sued, it is quite clear to me from their evidence that they defended the action in a representative capacity. They claimed that their “fathers” were “the original owners of the land on which stood the forest that had been preserved for the juju.” It is clear throughout their evidence that they were defending the suit on behalf of and in the interest of the sub - family they E belonged to.

It cannot be disputed that the term “parties” includes not only those named on the record of proceedings but also those represented and who had an opportunity to attend and protect their interest in the proceedings. See Esiaku v. Obiasogu 14 W.A.C.A, 178, Oforiata v. Agyei and Another 14 W.A.C.A. F 149, Mabel v. Richard Akwei 14 W.A.C.A. 143. When therefore an action is instituted in a representative capacity and/or against persons in a representative capacity, that action is not only by or against the named parties; they are also by or against those the named parties represent who in the suit, are not stated nomine. See Obi Okonji and Others v. George Njokanma (1989) 4 N.W.L.R. (pt. 114) 161. In my view, a close examination of the proceeding, Exhibit G 4, clearly establishes that the plaintiff/appellant in the present case was the defendant in Exhibit 4, whilst the defendants/respondents in the instant suit are the privies of Nnoromele, the plaintiff in Exhibit 4.

Dealing further with the identity of the parties and the parties and the subject matter of the litigation in both cases, reference may be made to relevant admissions by the appellant and his people on the issue. The plaintiff, H Vincent Obi, otherwise known as Obiawuotu, in his evidence before the trial court testified under cross-examination as follows:-

"I know one Nnoromele. He was the chief priest of the Ogwugwu shrine in 1935. I know one Maduagufor. He was my elder brother. I know one Nwaugoagwu and one Akwukwuegbu. Nnoromele in 1935 instituted an action in the Ahiara Native Court against me, Maduagufor and Nwaugoagwu in respect of the land in disputes."

(Underlining is mine)

B

There is also the evidence of the appellant's witness, P.W. 5, Ukanwa Chukwunyerere who testified thus: -

"There was some time, a dispute arose in the Native Court in respect of the land in dispute. I know Nnoromele of Otulu. Nnoromele was the Ogwugwu juju priest. Nnoromele sued the plaintiff and some others of my family in respect of the land in dispute, in the Native Court. I attended the court during the case. I was by then a matured man"

(Underling is mine)

There is no dispute as to the identity of the subject matter of the action in both suits. It is plain and uncontroverted that this concerns the piece or parcel of land situate at Otulu, Ahiara which the appellant claimed to be the exclusive property of his sub-family as against the respondents' claim that the land, within which there is the "Ogwugwu" juju shrine is their communal property. It seems to me manifest from close study of the pleadings in the present case and the uncontroverted evidence led at the trial that the parties in the present suit are successors in title and privies to the parties in the Ahiara Native Court suit No. 45/35, Exhibit 4.

On whether the claim or the issue in Exhibit 4 is the same with that in the present case, it is once again clear that both proceedings dealt with trespass to the land in dispute. The claim in Exhibit 4 went thus:-

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"Defendants to quit Ogwugwu (juju) bush entered at otulu 16 days now."

As I have already observed, the form of an action in a native tribunal must not be stressed where the issues involved are clear. The claim in Exhibit 4 from the entire proceedings as a whole was to all intents and purposes grounded in trespass. I therefore, agree with the court below that the parties, the subject matter and the issue in both the previous suit, Exhibit 4 and the present suit are the same. I will now briefly dispose of the decision in Exhibit 4.

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It is plain that the issue of trespass fought by the parties in Exhibit 4 revolved on whether the land in dispute was communally owned as the present respondents claimed or whether it was the personal or exclusive property of the appellant. The suit terminated in favour of the plaintiff therein, that is, the present defendants/respondents. Concluding its judgment, the Native

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Court observed:-

“...the forest had been preserved by unknown ages of otulu. All the people had not worked on the forest except 4 Defts. Defts. had already planted yams on the part cleared. Court allows them to reap their yams and to quit the part cleared after harvest. The rest member’s further reason is that it is a rule of both the ogwugwu (juju) and the town, that the bush must not be cleared. Defts. to pay costs, and be careful of themselves.”

In the light of the above, **I cannot but fully agree with the decision of the Court of Appeal that Exhibit 4 created an estoppel per rem judicatum in the present action.**

C The third issue for determination concerns proof of special damages. The question as formulated by the appellant is whether the appellant did not prove special damages as claimed. The case for the appellant, appears to be that the respondents “admitted” the appellant’s averments in his statement of claim and oral evidence on the issue of the special damages claimed.

D The appellant’s claims in respect of special damages were averred in paragraphs 11 and 12 of the amended statement of claim. The averments in these paragraphs of the statement of claim were expressly denied in paragraphs 11 and 12 of the respondents statement of defence. Accordingly, the respondents joined issue with the appellant on those facts denied. Consequently the burden squarely rested on the appellant to prove his claims.

E A close study of the record of proceedings reveals that no admission of whatever nature was made by the respondents whether in their pleadings or viva voce evidence in respect of the special damages claimed. Special damages have been defined as damages of the type as the law will not infer from the nature of the act; they do not follow in the ordinary course; they are F exceptional in their character, and, therefore, they must be claimed specially and proved strictly. See Stroms Bruks Bolag v. Hutchison (1905) A.C. 515 at 525- 526 per lord macnagh. **The evidence adduced by the appellant through**

P. W. I., Vincent Obi; P. W. 2, Ambrose Ekennia; and P.W.5, Ukanwa Chukwunyere was, in the main, contradictory and in conflict with the facts pleaded in the amended statement of claim. In the result, it seems to me that the award of special damages, based on the pleadings and the evidence before the trial court was clearly untenable and unjustifiable and the court below was right to have set aside the decision of the learned trial judge on the issue.

H All the issues having been resolve against the appellant, this appeal fails and it is hereby dismissed. The decision of the court of Appeal is hereby affirmed. There will be costs to the respondents against the appellant which

I assess and fix at N1,000.00.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with him that this appeal lacks merit. Accordingly I adopt his reasoning as mine and I too hereby dismiss the appeal and affirm the decision of the court of Appeal with N1,000.00 costs to the Respondents.

C

BELGORE JSC

In the context of Ibo Native Law and Custom, communal ownership is presumed. The burden of displacing that presumption lies on who asserts differently. Trial Court, to my mind, misplaced the onus probandi and placed so much on the defendants that it seems unjust. The court of Appeal in arriving at its decision was therefore right on point of law to have held that the burden of proof was wrongly shifted to the defendants in matters of communal ownership.

It is therefore difficult to find fault in the decision of the Court of Appeal and as my learned brother, Iguh, J.S.C. held in the lead judgment, the appeal must fail on all issues. I also dismiss the appeal for the reasons ably adumbrated in the said lead judgment. I also award N100.00 as costs against the appellant in favour of the respondents.

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KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Iguh, JSC. I agree with his reasoning and conclusions. Accordingly the appeal is dismissed. The judgment of the Court of Appeal is hereby affirmed. Costs of one thousand naira (N1,000.00) is awarded in favour of the respondents.

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ONU JSC

Of the three issues proffered by the Defendants, Respondents herein, which as against the four submitted by the plaintiff, herein Appellant, that which my learned brother Iguh, J.S.C. has considered in this appeal, issue No.1, is to all intents and purposes the most dominant and decisive. The cardinal question it poses is whether the court of Appeal was right in holding that the trial court misplaced the burden of proof in this case.

To begin with, the action brought by the plaintiff for and on behalf of the Umuewere sub-family against the Defendants of Umuga in Otulu in the trial High Court was for trespass and injunction on the disputed land called “ALA ISI AHIA EWERE.” In denial of the plaintiff’s claim, the Defendants who thereby joined issues with him (plaintiff), pleaded that the land in dispute which is known as “OKAHIA UMUGA” was communal land. In the ensuing trial wherein the parties led evidence in proof of their respective cases, the learned trial judge Nsofor J. as he then was, held, placing the onus to prove their communal ownership, on the Defendants as follows:-

“By their pleadings and in their evidence the defendants admitted the possession of the land in dispute by the plaintiffs. They admitted the plaintiffs acts of such possession. By admitting the plaintiffs possession of the dispute land as well as their various acts of possession, the onus shifts to the defendants of proving that the plaintiffs possession and their acts of possession were not done in their right or their capacity, as the exclusive owners thereof: Onyekaonwu V. Ekwubiri (1966) 1 All N.L.R. 32.”

D Continuing, the learned trial judge held as regards the Defendants case inter alia thus:

“Based on the evidence before me and which I have accepted, it is my judgment firmly that the defendants failed to discharge the onus on them. I am satisfied on the evidence adduced and find it as a fact that the plaintiffs were in possession of the land in dispute and that they exercised the various acts of possession thereon as the exclusive “Owner.” I have used the word “Owner” reservedly. See section 1 of the land use Decree No. 6 of 1978 (now Act).”

Fortified by the above and more, the learned trial judge held that the Defendants were in trespass and in order to protect the plaintiff in his enjoyment of his rights of possession from further interference of or by the Defendants and their agents, granted them perpetual injunction as well as general damages of N500.00

G The Defendants were aggrieved by the trial courts decision, they appealed to the Court of Appeal which in a unanimous judgment allowed the appeal, set aside the judgment of the trial court and substituted therefor an order dismissing the plaintiffs action. The appeal by the plaintiff to this court is the culmination of the crucial and decisive issue I now have hand-picked to consider herein out of the many submitted at their (plaintiff’s) instance.

H In its consideration of the issue, the court below (coram: Ndoma-Egba, Omosun and Edozie , JJ.C.A.) after advertng to section 6 either way of the Amended Statement of Claim and the Statement of Defence respectively held, rightly in my view, among other things as follows:-

“With respect, I am unable to agree with the learned trial judge that the appellants admitted possession of the land in dispute by the respondent. There is also nothing in the evidence of the witnesses called by the appellants to lead to the inference of such admission. At least what the appellants implicitly submitted is that they and the respondent are jointly in possession of the respondent’s case. Besides, such joint possession is not what is contemplated by section 145 of the Evidence Act. If two parties are in possession of land, neither party can invoke the provisions of section 145 of the Evidence Act to cast on the other the burden of proving that he is not the owner. As was stated by the supreme Court per Nnaemeka-Agu, J.S.C. in Udeze v. Chidebe (supra), possession the admission of which is capable of raising a presumption of ownership of land under section 145 of the Evidence Act must be that which amounts to dejure exclusive possession not mere occupation. It is conceded that although the burden of proof lies on the plaintiff to prove his case, in certain circumstances, the burden of proof may lie on the defendant. An example is where the defendant in his pleading admits that the plaintiff was the original owner in which case the onus lies on him (defendant) to prove absolute grant to him: See Ochonma v. Unosi (1965) NMLR 321; Onobruhere v. Esegine (supra). This is not the situation in the instant case, it is a well established principle of law that where an individual or a group asserts exclusive ownership as against a community’s claim to ownership the onus is on the individual to prove exclusive ownership. See Eze v. Igiliegebe (1952) 14 W.A.C.A. 101, Ovje v. Onoriobokinle (1957) W.R.N.L.R. 169 at 170; Udeze v. Chidebe (1990) 1 SC.N.J. 104; (1990) 1 N.W.L.R. (Part 125) 141. In Adeyeye v. Adewoyin (1962) 1 All N.L.R. 411 it was decided that if the issue is whether the land in dispute is family holding or individual holding, the presumption ought to be in favour of family holding. See the privy Council case: Amodu Tijani v. Secretary of state of southern Nigeria (1921) A.C. 399. By force of the above authorities, I am of the view that the learned trial judge had slipped when he held that the onus of proof was cast on the appellants. It is trite that once the trial court, is found to have misplaced the onus of proof, the resultant judgment cannot stand. Nwosu v. Duru (1989) 4 N.W.L.R. (Part 113) 39 at 42. The appeal succeeds on this score.”

I cannot agree more. In a claim of trespass and injunction as in the case in hand, a claim of title is raised or put in issue. See Okorie v. Udom (1960) 5 F.S.C. 162 at 165; Kareem v. Ogunde & anor. (1972) 1 S.C. 182; Elias v. Chief Omobare (1982) 5 S.C. 25 at 54 & 55 and Abdul Hamid Ojo v. Primate Adejobi (1978) 3 S.C. 65. Put in another way, where a plaintiff claims for trespass and injunction, the onus is on him to prove ownership and/or exclusive possession vide Talabi v. Adeseye (1973) N.M.L.R. 8.

In customary law, especially that applicable in the south Eastern part of Nigeria from where this case emanated, the presumption is that land belongs to the community unless a claimant prove or establishes his title of individual ownership thereto to the exclusion of the whole community. See Eze v. Igiliegebe (supra). In the instant case, had the appellant in line with his pleading prove personal ownership of the land he claimed, he would under the relevant native law and custom have succeeded. See Chukwueke v. Oji Nwankwo (1985) 2 NWLR (part 6) 195. Furthermore, this Court in Otogbolu v. Okeluwa (1981) 6-7 S.C. 99 at 137 stated the law succinctly that the general principle of communal ownership as pronounced in Amodu Tijani v. Secretary southern Nigeria (supra) would not apply where it is established by evidence that the native law and custom in any particular area differs from the general principle. It is in the light of the above that I will answer this issue that the court below was right and indeed justified in holding that the trial court misplaced the burden in this case. My answer to the issue is therefore irresistibly in the affirmative.

D It is for these reasons and the fuller and well considered reasons

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