

SUPREME COURT OF NIGERIA
16TH MAY, 1997. SC. 241/1991
CORAM: S. M. A. BELGORE, I. L. KUTIGI, E. O. OGWUEGBU,
S. U. ONU, A. I. IGUH, JJSC.

FRIDAY KAMALU & 2 OTHERS APPELLANTS
AND
DANIEL NWANKUDU UKA UMUNNA
(ALIAS KAMALU) & 6 OTHERS RESPONDENTS

APPEALS - *Interference - Evaluation of evidence by trial Court - Findings not borne out of the Evidence - Court of Appeal's intervention is proper.*

COURTS - *Findings - Based on demeanour or credibility of witnesses - And those based on evaluation of evidence - Attitude of Court of Appeal thereto.*

EVIDENCE - *Admissions - Land matter - Whether there are conclusive admissions - Against the trial Court's findings - That the parties belong to separate families.*

EVIDENCE - *Issue estoppel - Whether exhibits C and E - Were properly treated as raising issue estoppel - By the court below.*

LAND LAW - *Traditional history evidence - Where competing and conflicting - The test in *Kojo II v. Bonsie* should be adopted.*

LAND LAW - *Family property - Whether the parties belong to the same family - As to make the land in dispute family property.*

FACTS

Before the Aba High Court, the plaintiffs/appellants sued the defendants/respondents claiming inter alia, that plaintiffs are the only descendants of the late Daba and title to the land in dispute. The plaintiffs sought to establish that they are of a separate family from the defendants. The defendants relied on a past decision of a native court and certain exhibits that contained admissions, in establishing that they are of the same family with the plaintiffs and that the land in dispute is the parties' communal land.

The trial court found in favour of the plaintiffs in spite of the glaring overwhelming available evidence on the record. Defendants' appeal to the Court of Appeal was allowed. Being aggrieved, plaintiffs have now appealed

to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

(i) Whether the Court of Appeal's approach to the dispute between the parties as contested in the High Court is justified.

(ii) Whether the Court of Appeal was justified in relying on Exhibits 'C' and 'E' and treating them as raising issue estoppel to set aside the judgment of the trial court.

(iii) Whether the Court of Appeal was right to rely on both Exhibits R and S to set aside the judgment of the trial court.

HELD (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)
Land law - Family property

1. From the ample oral and documentary evidence led and based upon the pleadings and Briefs filed, I take the view, firstly that the court below was justified to arrive at the conclusion it did; to wit that the Appellants and the Respondents belong to the same family known as Umuogele family of Umuocham and therefore the lands in dispute constitute family property and not that of Umudaba family exclusively. (p. 1008 E)

Findings - Based on demeanour or credibility

2. It is settled law that where the area of findings, as in the instant case, is based on the demeanour of witnesses and credibility therefore, the trial court is master and the Court of Appeal must not substitute its views for those of the trial court. However, where the issues relate to the evaluation of evidence of witnesses, oral or documentary, the Court of Appeal is in as much a favourable position as the court of trial. (p. 1011 C)

Traditional history evidence

3. Since both parties led competing and conflicting evidence of traditional history, the learned trial judge should have adopted the proper test explicit in Kojo 11 v. Bonsie (supra) and adopted in Thanni v. Saibu (1977) 2 S.C.89, 110. This unfortunately, the learned trial Judge failed to do. It is in the light of this error that the court below, rightly in my view, held as follows:-

“with utmost respect to the learned trial judge, it does not appear he adopted this approach before accepting the Respondents' traditional history. Contrary to the view held by the learned trial judge, the issue of respondents

belonging to Umuogele family (appellants' family) was in fact determined in Exhibit C in the Aba County Court of Appeal."

My answer to Issue 1 is in the affirmative. (p. 1011 H)

Issue estoppel

4. On the question posed in Issue 2 as to whether the court below was justified in relying on Exhibits C and E and treating them as raising issue estoppel to set aside the judgment of the trial court, it is sufficient to say firstly, that Exhibit C is a civil appeal from the Awo District Court. It was a judgment in favour of the 1st Respondent for declaration of title to 'Egbelu Umuogele' land and injunction against Jonathan Wakamalu -1st Appellant in the instant case, as head of the so called Umudaba family who was withdrawn after the Respondents had filed their Statement of Defence. Exhibit C being a native court Suit may operate as estoppel per rem judicatam or issue estoppel. (p. 1012 B)

Admissions - Land matter

5. Exhibit D is a letter written by Jonathan Daba to a brother, the 1st Respondent, acknowledging him as head and brother and asking for forgiveness for selling joint family property viz the Umuogele family land without his (1st Respondent's) consent. Exhibit S, on the other hand, is an admission on oath by 1st Appellant setting out his family and the land, the subject matter of the charge. The court below was therefore right when it held that the admissions contained thereon and the judgments in Exhibits C and E coupled with the evidence of D.W3 and D.W4, are conclusive against the findings of the trial court that the Appellants are a separate Daba family (as opposed to the Umuogele family) and therefore own the lands in dispute exclusively. (p. 1014 G)

Appeals - Interference

6. The intervention of the court below with the decision of the trial court in the instant case is founded on the established principle of law that evaluation of evidence is the duty of the trial court that saw the witnesses but in circumstances where the findings of fact of the trial court is not borne out of the evidence before that court, the Court of Appeal will be called upon to re-assess such evidence. The above principle was what was brought to bear by the court below in the instant case on appeal. (p. 1015 C)

NOTABLE POINT OF INTEREST

ONU JSC

I. Admissions - Attitude of court thereto

Irrespective of the fact that in law admissions do not constitute conclusive proof of the matters admitted but may operate as an estoppel. In considering the worth of such admissions the court must take into account the circumstances under which they were made and the weight to be attached to them. (p. 1014 E)

REPRESENTATION

C Chief Donald I. Udogu, with Mrs. U. F. Udogu for the Appellants
C. O. Akpamgbo, SAN, with Miss Hauwa Inuwa, for the Respondents

CASES REFERRED TO

Ehimare v. Emhonyon (1985) 1 NWLR (Part 2) 177 at 183
Federal Housing Authority v. Sommer (1986) 1 NWLR (Part 17) 533 at 541
D Omoregbe v. Lawani (1980) 3-4 S.C. 108 at 117
N.B.T.C. v. Narumal Ltd. (1986) 4 NWLR (Part 33) 117 at 126-127
Ebba v. Ogodo (1984) 4 S.C. 84
Motunwase v. Sorungbe (1988) 5 NWLR (Part 92) 90
Nzekwu v. Nzekwu (1989) 2 NWLR (Part 104) 373 at 393
E Anyaoke v. Adi (1986) 3 NWLR (Part 31) 731 at 742
Thanni v. Saibu (1977) 2 S.C. 89, 110
Ezewani v. Onwordi (1986) 4 NWLR (Part 33) 27
Nwankwo v. Nwankwo (1995) 5 KLR 1136
Efi v. Enyifu 14 W.A.C.A. 424,
F

STATUTE REFERRED TO

Evidence act ss. 20(3) (a), 227(1)

LEAD JUDGMENT BY ONU JSC

G The Plaintiffs, herein Appellants, had in a representative capacity sued the Defendants, herein Respondents, also in a representative capacity at the Imo (now Abia) State High Court sitting at Aba claiming the following reliefs:-

“(i) Declaration that the plaintiffs are the only descendants of the late Daba.

H (ii) Declaration to the customary right of occupancy in respect of ‘Egbelu Umudaba’ land and ‘Okpulo Daba’ the annual value of which is N10.00 situate at Umuocham within the Aba Judicial Division

(iii) *N400.00 being general damages for trespass.*

(iv) *Perpetual Injunction.*”

Pleadings were ordered, filed and exchanged in this case which has a tinge of family status. While the Appellants amended and further amended their Statement of Claim and the Respondents delivered their Statement of Defence, the case went to trial at which four witnesses testified for the Appellants and the same number of witnesses were called in support of the Respondents’ case. After counsel on either side had addressed the court, the learned trial judge (Njiribeako, J.) awarded to the Appellants title to the two lands in dispute while dismissing their claim for trespass and injunction.

Aggrieved by the said decision the Respondents then as Appellants C appealed to the Court Appeal, Port Harcourt Division (hereinafter in the rest of this judgment referred to as the court below) which on 11th December, 1990 allowed the appeal, set aside the judgment of the trial court and dismissed the Appellants’ claims in their entirety. The Appellants have now appealed to this Court on three original grounds of appeal which by an amendment of D the Notice of Appeal granted by this Court were increased to four.

The summary of the Appellants’ case is that they are the descendants of DABA and are of the Umudaba family while the Respondents are the descendants of OGELE and they constitute the Umuogele family. They are two distinct families. DABA and his relations went a hunting and captured E a man during the hunting expedition whom they named “OGELE”, Ogele being a metal gong used for hunting and also as a musical instrument. Daba brought Ogele home and gave him land to live on. By act of providence, his descendants who are now the Respondents, are more numerous and wealthier than the descendants of Daba who are the Appellants. F

Daba begat Enwereonye who in turn begat Kamalu. When Enwereonye died, Kamalu was so tender that he was taken to Ukaumunna, one of the ancestors of Umuogele where he was brought up. He lived there and become a wealthy and an influential Chief. It was there that he begat the Appellants and lived with them, with the advice that they should go back to their own G land. When the Appellants and their father Kamalu lived at Umuogele, they and the defendants saw themselves as brothers and were doing everything in common including the use of the land as members of one family. After the death of the influential Kamalu, the relationship became strained whereby the Appellants decided to go back to their ancestral land. H

The Respondents countered in both their pleadings and evidence that Ogele, their joint ancestor, founded the lands in dispute ‘Ohia Ihuala’ and ‘Egbelu Umuogele’ denoted in Plan No. OKE/D verged pink and tendered as Exhibit B. These lands the Respondents asserted, their (Appellants and

Respondents) kith and kin from time immemorial have enjoyed communally as a single family of Umuoge. The Respondents finally pleaded and testified that ‘Daba’ and ‘Umudaba’ never existed in Ocham Village in Ngwa. They pleaded res judicata, estoppel, standing by and acquiescence as well as the several letters the 2nd Appellant wrote to the 1st Respondent as head of Umuoge family of which he is a member. The parties subsequently exchanged briefs of argument in accordance with the rules of court.

The Appellants for their appeal have formulated three issues from their three grounds as arising for determination. The Respondents similarly submitted three identical issues for our determination. I only need to set out the Appellants’ three issues thus:

(i) Whether the Court of Appeal’s approach to the dispute between the parties as contested in the High Court is justified.

(ii) Whether the Court of Appeal was justified in relying on Exhibits ‘C’ and ‘E’ and treating them as raising issue estoppel to set aside the judgment of the trial court.

(iii) Whether the Court of Appeal was right to rely on both Exhibits R and S to set aside the judgment of the trial court.

At the hearing of this Appeal on 24th February, 1997, Learned counsel for the Appellants Chief Donald Udogu moved his motion for leave to amend the Appellants’ Notice of Appeal dated 3rd February, 1997 firstly, by deleting the name of the 1st Appellant who was said to have died and also deleting the words “and misdirected themselves” from ground one of the Grounds of Appeal contained in Exhibit A, secondly, to amend Appellants’ brief attached to the motion as Exhibit ‘B’ and thirdly, to deem Exhibit ‘A’ and ‘B’ as having been properly filed and served. Mr. Akpamgbo, learned Senior Advocate for the Respondents on signifying no opposition to the application, the same was granted as prayed. Learned counsel for the Appellants next applied to withdraw original ground four of the grounds of appeal at page 328 of the Record and to delete paragraph 5 of page 7 of their Brief of Argument. There being no objection to the prayers sought, the application was accordingly granted as prayed. Learned counsel on either side each adopted his Brief and urged us to allow and dismiss the appeal respectively.

In arguing the first issue which is related to grounds 1 and 2, learned counsel for the Appellants proffered the following arguments in their written Brief.

The Appellants and Respondents, it is contended, fought this case in the High Court on the basis of the Further Amended Statement of Claim dated the 5th day of November, 1982 and the Statement of Defence dated the 8th day of November, 1973. The learned trial judge in his enormous duty of

adjudicating over the dispute between the parties, namely that after comparing the relative strengths of their cases and in deciding same on the preponderance of evidence, the trial court proceeded to find that the two families are different by entering judgment for the Appellants on the proof of their case which was not challenged at all. We were thereafter referred to several extracts in the trial court's judgment in support of the contention. In particular, our attention was drawn to a portion of the judgment of the court below wherein after setting down Appellants' claims and the parties' respective pleadings it held as follows:-

"Going by the case raised by the parties in their respective briefs, it would appear that the main issue before the trial court was whether the land in dispute belonged to the Respondents' family alone as contended by them or to both parties jointly as contended by the Appellants (now the Respondents)."

The foregoing, it is urged with respect, the Appellants' Brief did not say, the cardinal question being, in view of the claims and the respective pleadings, who is correct as to the main issue between the parties - the trial court or the court below? The submission of the Appellants is that it is the trial court that is correct while the court below went astray when it held otherwise. This is because, it was argued, issues between the parties at the trial court are determined from their respective pleadings and not from their respective briefs of argument. In the instant case, it was maintained, relief number 1 is the declaration that they alone are the descendants of late Daba and they brought the action as Umuodaba family against the Respondents who are the Umuogele family both of Umuocham, adding that they (Appellants) pleaded their separate identity in paragraphs 1, 2, 3, 4, 6, 7 and 12 of their further Amended Statement of Claim dated 5th November, 1982. The Respondents, it was contended, denied that in paragraphs 2 and 3 of the Statement of Defence dated 8th November, 1973, the parties were then at issue as to whether the Appellants' family is separate and distinct from the Respondents' family. The cases of Ehimare v. Emhonyon (1985) 1 NWLR (Part 2) 177 at 183 and Federal Housing Authority v. Sommer (1986) 1 NWLR (Part 17) 533 at 541 were called in aid. It is the further contention of the Appellants that it follows from the claim and the pleadings that the parties in the above suit could only be said to own the lands the subject-matter of the suit jointly if they are members of one family; otherwise "No." It then goes without saying, it was maintained, that the above suit does not imply a land case simpliciter because their common or joint ownership of family land depends on their being members of one family. That was why, it was further argued, the learned trial judge held at page 104 of the records that the major issue that called for his determination was whether the Appellants and the Respondents were members

of one family or separate families. On being referred to what the learned trial judge said in resolving the issue in Appellants' favour, we are urged to hold that that is the correct approach, adding that the learned Justices of the Court below went astray when they approached the matter from a wrong angle by treating the dispute between the parties strictly as a land dispute. The dicta of B Soweimo, JSC (as he then was) in Thanni v. Saibu 2 S.C. 89 at 110 was called in aid, adding that the evidence of their separate identities led at the trial by the Appellants having not been challenged by the Respondents whatsoever; in which case, the learned trial judge had no alternative in the circumstances than to find for the Appellants. The court below, it was therefore contended, C had no justifiable reason in law to set aside such findings.

It was further argued that the parties being at issue as to their roots, the onus was on the Appellants to prove that their family is separate and distinct from the Respondents' family. The 1st Appellant who, for instance, gave evidence as to Appellants' separate identity, was not cross-examined leading in the end to the conclusion the learned trial judge arrived at. The cases of D Isaac Omoregbe v. Daniel Lawani (1980) 3-4 S.C.108 at 117. Akintola v. Solano (1986) 2 NWLR (Part 12) 598 at 611 and N.B.I.C. v. Narumal Ltd. (1986) 4 NWLR (Part 33) 117 at 126-127 were cited in support thereof. The Appellants having at the trial discharged the onus on them to prove that their family is different and distinct from the Respondents' family we were finally E urged to so hold.

From the ample oral and documentary evidence led and based upon the pleadings and Briefs filed, I take the view, firstly that the court below was justified to arrive at the conclusion it did; to wit that the Appellants and the Respondents belong to the same family known as F Umuogele family of Umuocham and therefore the lands in dispute constitute family property and not that of Umudaba family exclusively. PW1, Friday Chilaka Kamalu testifying for the Respondents, had the following to say under cross-examination:-

"A. Do you know about the High Court case in 1962 between Nwankudu Kamalu & ors. against Jonathan & ors. in respect of Egbelu land? G A. I was one of the defendants in that case also Ishmael. The action was in respect of Egbelu land. We won the case. Nwakamalu my father lived and died at Umuogele. He was buried there. We all the children of Nwakamalu lived with him at Umuogele.

Egbelu is a farmland. We now live at Egbelu. The defendants lived at Okpulo Ogele but they have now come over to Okpulo Daba to live and H this led to this action. We did not show Okpulo Ogele in our plan."

The above constitute admissions which by their tenor are fatal to the Appel-

lants' case. In law it is trite that what is admitted need no further proof. See Section 74 of the Evidence Act, Cap. 112 laws of the Federation of Nigeria, 1990. See also Okparaekwe v. Egbuonu (1941) 7 W.A.C.A. 53 at 55 and Lawal Owosho & ors. V. Adebawale Dada (1984) 7 S.C. 149 at 163-164. On these admissions the court below had this to say *inter alia*:

"In the face of all these admissions and the judgments in Exhibits C B and E and the evidence of DW3 and DW4, it is difficult indeed to uphold the finding of the learned trial judge that the parties do not belong to the same family known as Umuogele family of Umuocha. If the learned trial judge had applied the test laid down in Kojo 11 v. Bonsie & anor. (supra) and other Nigerian cases following them, he would have found that the appellants' C traditional history was preferable. I have no hesitation in setting aside that crucial finding of his"

Secondly, PW3 Issac Irobi, admitted under cross-examination thus:

"I know the land in dispute. The defendants live in part of the land."

Of the above admission among others conceded at the trial by the Appellants, D the court below observed, rightly in my view as follows:-

"I know where the defendants live. They have lived there for a very long time. Their family were living there before I was born. The Plaintiffs and defendants once lived in the same location."

Thirdly, PW4, Emmanuel Igoni Nwogu said under cross-examination E as follows:-

"I know where the defendants live. They have lived there for a long time. Their family were living there before I was born. The plaintiffs and defendants once lived in the same location."

Apart from the admissions set out above emanating from the cross-examination of Appellants' witnesses, from the testimonies of defence witnesses the following vital pieces of defence evidence become manifest to strengthen the defence case. DW2, Owuala Kamalu said in examination-in -Chief the following among other things:-

"Ogele is our ancestor. He migrated from Uratta Umuoha in Okpuala G Ngwa. He founded Umuocham. His sons were Daba and Amala. Daba had two sons called Onwunji and Agughara and Amala had many sons but two succeeded him. They were Oriaku and Echeonwu. When Ogele died, Daba succeeded him. After Daba Amala succeeded him. Oriaku succeeded Amala and Echeonwu succeeded Oriaku. When Echeonwu died Onwunji Daba H succeeded him. Onwunji was succeeded by Enerogwe Oriaku. On the death of Enereogwe Nwoko Echeonwa succeeded him. Agughara Daba succeeded Nwoko Echeonwu. Enwereonye Amala succeeded Agughara Daba. Akoma Oriaku succeeded Enwereonye Amala. My father Kamalu succeeded Akoma

Oriaku. When my father died, he was succeeded by Anyatonwu Ochionu. Chief Nwankudu Kamalu is dead and I am now the head of the Umuogele kindred. He was succeeded by J.P. Kamalu. J.P. Kamalu is dead and I am now the head of Umuogele kindred. Chief Nwankudu Kamalu and J.P. Kamalu were also sued in this case."

B DW3, Amos Esinwoko Nwamaghanna said inter alia when examined-in chief as follows:-

"Umuocham comprises the following kindred viz: Umuogele, Umu-gioku, Umu-Atako, Umu-Eneregbe. These four make up Umude. There is no other family. I knew Chief Kamalu Enwereonye. I knew when he died. He lived at Umuocham in Umuogele"

C Upon being subjected to cross-examination, this witness had this to say:

"The plaintiffs lived together with Chief Kamalu (sic) when he was alive but after his death they moved out of the late Chief's home. The plaintiffs moved to land called Egbelu Umuogele to settle. It is not true that the plaintiffs moved to Okpulo Daba."

D Through D.W.4, Ihejirika Ahuchogu the following pieces of evidence were elected in examination-Chief, to wit:-

"I know the defendants. The 1st defendant was also son of Nwakamalu Enwereonye. My family is Umuogele. We do not have Daba in our family. I know when late Nwankudu Kamalu and the plaintiffs had quarrel overland. The land dispute (sic) was Egbelu Umuogele. The one in dispute is called "ohia Ihuala." Egbe land is also in dispute. The parcels of land belong to Umuogele family."

F Further, there is the documentary evidence (Exhibit C) in respect of 'Umuogele land now in dispute; the judgment of Idigbe, J. (as he then was) in the consolidated Suits AA/16/1962 and A/57/1962 which is Exhibit E as well as Exhibits R and S. In Exhibit C, the 1st Appellant (now deceased and struck off from the case) gave evidence for then Defendant, Jonathan Wakamalu.

G Also in Exhibit E, the 1st, 2nd 3rd and Appellants in this appeal were the 1st, 2nd and 3rd Defendants. Moreover, paragraph 1 of the amended Statement of Claim in Suit AA/57/62 when compared with paragraph 1 of the Amended Statement of Defence; paragraph 1 of the statement of claim in Suit A/16/62 when compared with paragraph 1 of the Statement of Defence, the far reaching findings of fact of Idigbe, J. (as he then was) on Exhibit E show clearly that all through history and the cases fought in the Awo Customary Court, the Aba County court and the High Court, Aba, there was no mention of Umudaba family separate and distinct from Umuogele family. Further, that the words
H 'Daba' and 'Umudaba' are but words coined to make the Appellants obviate or escape the rigours of the doctrine of estoppel in pais and estoppel by standing

by at least in respect of 'Egbelu land'. The court below was therefore in my respectful view, right when it held thus:

"In the face of all these admissions and the judgments in Exhibits C and E and the evidence of D.W.3 and D.W.4, it is difficult indeed to uphold the finding of the learned trial Judge that the parties do not belong to the same Family known as Umuogele family of Umuocham. If the learned trial judge had applied the test laid down in Kojo 11 v. Bonsie (supra) and other Nigerian cases following it, he would have found that the appellants' traditional history was preferable, I have no hesitation in setting aside that crucial finding of his."

It is settled law that where the area of findings, as in the instant case, is based on the demeanour of witnesses and credibility therefore, the trial court is master and the Court of Appeal must not substitute its views for those of the trial court. See Chief Frank Ebba & ors. v. Chief Warri Ogodu & ors. (1984) 4 S.C. 84; Motunwase v. Sorungbe (1988) 5 NWLR (Part 92) 90, Akpapuna & ors. v. Obi Nzekwa 11 (1978) 11-12 S.C 129 and Nzekwu v. Nzekwu (1989) 2 NWLR (Part 104) 373 at 393. **However, where the issues relate to the evaluation of evidence of witnesses, oral or documentary, the Court of Appeal is in as much a favourable position as the court of trial.** See Fashanu v. Odofoin & ors. (1978) 4 S.C. 91 at 94 and Anyaoke v. Adi (1986) 3 NWLR (Part 31) 731 at 742.

In the light of the above I see no reason to disturb the conclusion arrived at by the court below when it said inter alia:

"Going by the case raised by the parties in their respective briefs, it would appear that the main issue before the trial court was whether the land in dispute belonged to the respondents' family alone as contended by them or to both parties jointly, as contained (sic) by the appellants."

Be it noted that the above excerpt contained in the Appellant's brief would not preclude them from a consideration of the pleadings and evidence, oral or documentary led at the trial. After all, briefs do not exist in vacuo: they are based on the pleadings, the evidence, oral or documentary, led at the trial as well as the judgment and the grounds of Appeal. Secondly, what is appealed against by the Appellants before this Court is not the trial judge's judgment as encompassed in the Appellants' Brief but that of the court below. Thirdly, the evidence of the separate identity of the Appellants led at the trial was challenged by the Respondents. Similar consideration applies to Exhibits C,E,R and S. Fourthly, **since both parties led competing and conflicting evidence of traditional history, the learned trial judge should have adopted the proper test explicit in Kojo 11 v. Bonsie (supra) and adopted in Thanni v. Saibu (1977) 2 S.C.89, 110.** This unfortunately, the learned trial Judge

failed to do. It is in the light of this error that the court below, rightly in my view, held as follows:-

“with utmost respect to the learned trial judge, it does not appear he adopted this approach before accepting the Respondents’ traditional history. Contrary to the view held by the learned trial judge, the issue of respondents belonging to Umuogele family (appellants’ family) was in fact determined in Exhibit C in the Aba County Court of Appeal.”

My answer to Issue 1 is in the affirmative.

On the question posed in Issue 2 as to whether the court below was justified in relying on Exhibits C and E and treating them as raising issue estoppel to set aside the judgment of the trial court, it is sufficient to say firstly, that Exhibit C is a civil appeal from the Awo District Court. It was a judgment in favour of the 1st Respondent for declaration of title to ‘Egbelu Umuogele’ land and injunction against Jonathan Wakamalu-1st Appellant in the instant case, as head of the so called Umudaba family who was withdrawn after the Respondents had filed their Statement of Defence. Exhibit C being a native court Suit may operate as estoppel per rem judicatam or issue estoppel. See Ezewani v. Onwordi & ors. (1986) 4 NWLR (Part 33) 27 and Bamishebi v. Faleye (1987) 2 NWLR (Part 54) 51 at 58. In the case in hand, there was no appeal against Exhibit C. From the evidence of 1st Respondent in the trial court, extracts of which are set out elsewhere in this judgment under issue 1, the 1st Appellant knew of Exhibit C and in fact in his evidence at the trial he said he actively supported 1st Appellant (sic Respondent). In law, 1st Appellant is said to be standing by whilst his eldest brother Jonathan was fighting his case and in respect of ‘Egbelu land’ now in dispute in the appeal herein. The position in law of the Appellants vis-a-vis the Respondents in relation to Exhibit C may be restated thus:

(a) Estoppel by standing by is but a specie of estoppel by conduct. It is a kind of equitable estoppel and applied where because a party omitted to intervene in a pending action affecting his interest, he is precluded by the result of the action although he was not a party thereto. See Abuakwa v. Adanso (1957) 3 All E.R. 559; Obodo v. Ogba (1987) 2 NWLR (Part 54) 1 at p. 15, Alashe Olori Ilu (1964) 1 All NLR, 390 at 396 and Joe Iga v. Ezekiel Amakiri (1976) 11 S.C.1.

(b) In interpreting the judgment of native courts the substance and not the form should be looked at vide Ikpang & Ors. v. Chief Edoho & ors. 2 L.R.N 22 and Ohene Abuaji 11 v. Oyeibu I W.A.C.A. 66.

(c) A plan is not an absolute necessity in every land Suit where, as in the instant case, both parties know precisely what piece of land is in dispute.

See Maberi v. Alade & ors. (1987) 4 S.C. 184 at 199; Garba v. Akacha (1966) N.M.L.R.62 and Awere v. Lasoja (1975) N.M.L.R. 100 at 101. Also where the parties know the quantity and quality of the land in dispute between them, a plan cases to be an absolute necessity. See Chief Sokpui v. Chief Agbozo 13 W.A.C.A. 241 and Olujinle v. Adeagbo (1988) 2 NWLR. (Part 75) 233 at 249. Adverting to the above statement of the law, there is an admission that B the 1st Appellant knew the land in dispute in the Awor Customary Court, the appeal against which is Exhibit C in respect of “Egbelu land’ now in dispute; that he supported Jonathan Daba (alias Kamalu) and as both parties and the court know it was ‘Egbelu land’ a plan was not absolutely necessary. I am therefore of the firm view that the court below was correct when it held C as follows:-

“With respect, the learned judge seemed to have gone off-tangent. Exhibit C is a native court proceedings. It has been held that the proper approach to native court proceedings is to look at the substance rather than the form - Ikpang & ors. v. Chief Edoho & anor. (1978)2 LRN 29, 35. If this D approach is adopted, it would be seen that the fact that the parties belonged to the same family was tacitly admitted; what was in dispute was whether defendant’s father in that case, as head of Umuogele family granted the defendant as much land as he claimed or that he just went on the land without the permission of the head of the family. The native court found the latter E was the case and judgment was entered against the defendant.”

To demonstrate that issue estoppel operated in the case, the court below held, rightly in my view, as follows:

“Again Exhibits C and E raise issue estoppel against the respondents in that the membership of the Umuogele family to the land in dispute has F been confirmed in these two cases by courts of competent jurisdiction and the two judgements still subsist and are binding on the respondents. Even though some of them were sued in those actions in their personal capacity, the family they now claim to represent is caught by the doctrine of standing by - Wytcherley v. Andrew (1871) L.R.2 P & M 327; Ojiako v. Ogueze (1962 G) 1 All NLR 58; Ekpoke v. Usilo (1978) 6-7 S.C. 187; Etiti v. Ogita (1976) 12 S.C.123; Ogundiani v. Araba (1978) 6-7 S.C.55.”

Finally, the court below arrived at the conclusion, which in my judgment, is justified to the effect that

“Along with Exhibits C and E are the various admissions made by H the 2nd respondent and his compatriots admitting ownership of the land in dispute to be in the Umuogele family. There are also on record abundant evidence of acts of ownership by the appellants (and on which the learned trial judge made no pronouncements). All these put together must decide this

case in favour of the appellants.”

Issue 2 is accordingly answered in the affirmative.

In relation to Issue No. 3 which queries whether the court below was right to rely on both Exhibits R and S to set aside the judgment of the trial court, it will suffice if one falls firstly on Exhibit D - a letter tendered in B Suit A/35/73 and written by the original 1st Appellant in this Suit but later withdrawn-for an answer. The 1st Appellant’s withdrawal notwithstanding, binds him the 1st Appellant in so far as this suit and appeal are concerned. Of relevance is Exhibit S which is the testimony on oath of the 1st Appellant in MA/917C/73: Police v. The Head of Umuogele family and 1st Respondent C and 7 others. The evidence of P.w.1, the 1st Appellant herein, runs thus:

“My name is Friday Chukwuka Kamalu. I live at Umuocham. I am a farmer. I know accused persons. They are natives of Umuocham and come from the same family with me.” (Underlining is mine for emphasis).

When cross examined, the 1st Appellant admitted as follows:-

“The name of the land in this charge is called ‘Umuogele land.’”

D All through these admissions, which are against interest, (for which see Aduke v. Aiyelabola (1942) 8 W.A.C.A. 43, Ajide v. Kelani (1985) 3 NWLR (Part 12) 246 at 260 and section 20(3)(a) Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990) there is no reference either by 1st Appellant (Jonathan Daba) or the 1st Respondent, that they referring to Daba as a E separate family distinct from Umuogele or that any of the lands in dispute is Umuogele Daba or Okpulo Daba. Irrespective of the fact that in law admissions do not constitute conclusive proof of the matters admitted (for which see Ojiegbe & ors. v. Okwaranya & ors. (1962) 1 All N.L.R.605; Joe Iga v. Chief Ezekiel Amakiri (supra) and Alashe v. Olori-ilu (supra) but may operate F as an estoppel. In considering the worth of such admissions the court must take into account the circumstances under which they were made and the weight to be attached to them. See Nwankwo (1995) 5 NWLR (Part 394) 153 at 171; Seismograph Service (Nig.) Ltd. v. Ejuafe (1976) 9/10 S.C.135. In Nwankwo’s Case (supra) Iguh, JSC said:-

G *“.....formal admission may also take the form of clear admissions filed or made by a party to a civil proceeding or by his counsel in the course of the trial of a civil suit See the proviso to Section 74 of the Evidence Act.”*

H **Exhibit D is a letter written by Jonathan Daba to a brother, the 1st Respondent, acknowledging him as head and brother and asking for forgiveness for selling joint family property viz the Umuogele family land without his (1st Respondent’s) consent. Exhibit S, on the other hand, is an admission on oath by 1st Appellant setting out his family and the land,**

the subject matter of the charge. The court below was therefore right when it held that the admissions contained thereon and the judgments in Exhibits C and E coupled with the evidence of D.W3 and D.W4, are conclusive against the findings of the trial court that the Appellants are a separate Daba family (as opposed to the Umuogele family) and therefore own the lands in dispute exclusively. The question is: Were Exhibits D, R, B and S to have been excluded in evidence could the trial court have arrived at a different conclusion? My answer is in the negative since it has not been demonstrated that without these pieces of evidence and the reliance on the oral testimonies of the witnesses based on oath against oath or that the conclusion arrived at by the court below would have been otherwise. See section 226(1) C (now Section 227(1)) of the Evidence Act, Cap.112 Laws of the Federation of Nigeria, 1990 and Idundun v. Okumagba (supra). The intervention of the court below with the decision of the trial court in the instant case is founded on the established principle of law that evaluation of evidence is the duty of the trial court that saw the witnesses but in circumstances D where the findings of fact of the trial court is not borne out of the evidence before that court, the Court of Appeal will be called upon to re-assess such evidence. See Mrs. Alero Jadesimi. v. Adolo Okotie-Eboh (1986) 1 NWLR. (Part 16) 264; Chief O. Fabunmiyi & anor. v. Fatumo T. Obaje & anor. (1968) NMLR.242 at 243 and Atanda v. Ajani (1989) 4 NWLR E (Part 110) 511 at 539. The above principle was what was brought to bear by the court below in the instant case on appeal, here that court, rightly in my view, did no shrink from its duty in overruling the trial court. In the alternative, if Exhibits D, R and S were wrongly admitted (which is not conceded), no miscarriage of justice was occasioned thereby. See Ike v. Ugboaja (1993) 6 NWLR (part 301) 539 at 556. The judgment of the court below on these exhibits being, in my view, impregnable and unimpeachable ought not to be disturbed.

Issue 3 is accordingly also answered in the affirmative. The result of all I have been saying is that this appeal lacks merit and it fails. I accordingly G dismiss it and award costs assessed at N1,000 in favour of the Respondents.

BELGORE JSC

It is noteworthy that Exhibit C being judgment of a Native Court against which no appeal has been lodged operates as estoppel per rem judicat-am. (Ezeam v. Onwordi & ors. (1986) 4 NWLR (Pt 33) 27, and Bamishebi v. Faleye (1987) 2 NWLR (Pt 54) 51, 58). Similarly where there are admissions by a party against his interest such admissions will be admissible against

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the person (Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 246; 260; S. 20(3) (a) Evidence Act). This is not say, however, that admission per se is conclusive proof of the entire matter in litigation, but it stands firmly on the subject of the admission against the person making it. Also it must be viewed in relation to the entire evidence before the Court to know the weight to attach to it. (Ojeigbe & Ors v. Olewaranya & Ors. (1962) 1 All NLR 605; Nwankwo v. Nwankwo (1995) 5 NWLR (Pt 394) 153, 171; Seismograph Service (Nig) Ltd. v. Eyuafe (1976) 9-10 S.C.135).

It is for the principles enunciated above and for the full reasons in the judgment of my learned brother, Onu, J.S.C., that I find no merit in this appeal and I hereby dismiss it with N1,000.00 costs in favour of the respondents.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Onu, JSC. I agree with the conclusion that this appeal fails. The Court of Appeal was right when it held that the parties to these proceedings belong to the same family and consequently the appellants' claim for a declaration of title to a customary right of occupancy over the land in dispute must fail along with the other reliefs claimed. The appeal is accordingly dismissed with costs as assessed.

OGWUEGBU JSC

I have had the advantage of a preview of the judgment just read by my learned brother Onu, J.S.C. I agree that for the reasons therein stated this appeal should be dismissed.

From the pleadings and the evidence adduced the main issue canvassed by both parties is whether the lands in dispute belonged to the appellants' family alone as they claimed or to both parties jointly as asserted by the respondents. The learned trial judge strangely found in favour of the appellants. This decision was reversed by the court below on appeal by the defendants/respondents herein.

Had the appellants realized the legal effects of Exhibits "C" and "E" in particular, I have no doubt that they would not have engaged in the present fruitless litigation. Exhibit "C" is a civil appeal from Awor District Court Grade "A" in the Customary Court of the then Eastern Nigeria. The 1st respondent herein for himself and as representing Umuoge Umuocham

family instituted an action (Suit No. 45/61) against Jonathan Wakamalu (the original 1st plaintiff in the present proceedings) claiming as follows:

“(i) The plaintiff’s claim is for a declaration of title and ownership to all that piece or parcel of land known and called “Egbelu Umuogele” situate at Umuogele Umuocham value 200 trespassed into by the Defendant since January, 1961. B

(ii) An injunction restraining the defendant, his heirs, servants and agents from further act of entry into the said land until this case is determined.”

The District Court granted the two reliefs claimed by the plaintiff. On appeal by the defendant to the Aba County Court of Appeal, the County Court of Appeal dismissed the appeal and founded as follows: C

“The plaintiff took out this action for title on (sic) a representative capacity, that is he represented the family of umuogele to which defendant is a member to claim the land to be that of Umuogele and to get it preserved for community purpose. The Defendant (sic) late father who also is the father of plaintiffs father has no personal title to the land in dispute and so no right to have allotted it to defendant permanently.Title action is awarded umuogele in which plaintiff is the present head and representative.” D
(the underlining is for emphasis).

There was no appeal against this decision.

Dealing with Exhibit “C” the learned trial judge held as follows: E

“I have carefully read the finding of the appeal court from page 3 of Exhibit C. The court unanimously held that both plaintiff and defendant (i.e. appellant and respondent) belong to Umuogele family which to my mind is using the expression in a general sense in this context. The question of roots of the parties was not at all an issue. The Court of Appeal’s statement that both sides in the case belong to Umuogele family did not in the least dispose of the present dispute about the real roots of the parties - an issue which of course, was not before the Customary Court.” F

With greatest respect, the learned trial judge was in error to have treated Exhibit “C” in the way he did. He failed to realize that in claims before G native courts, It is necessary to look at the substance rather than the form and that great latitude is given to and broad interpretation placed upon the cases decided by those courts. See Efi v. Enyifu 14 W.A.C.A. 424, Ajaguneteun & ors. v. Osho (1977)5 S.C. 89 at 103, Ikpang & Ors. v. Ugee Edoho & Ors. (1978) 6-7 S.C. 221 at 238 and Udofia v. Apia 6 W.A.C.A. 216 at 218. The H issue of the appellants belonging to Umuogele family was determined in Exhibit “C”.

In Exhibit “E” which is the judgment of Idigbe, J. (as he then was), the original 1st plaintiff and the 2nd appellant were parties in the consolidated

suits Nos. A/16/1962 and A/57/1962. Chief Wankudu Wakamalu who was the plaintiff in the Aba County Court of Appeal sued on behalf of Umuoge family. In his statement of claim in suit No. A/16/1962 he averred:

“2 The 1st defendant is a family relation of the plaintiff and is sued in his personal capacity.”

B In paragraph 2 of the statement of claim in Suit No. A/57/62 Wankudu Wakamalu averred as follows:

“2. The defendants are junior members of the plaintiffs family and are sued in their personal capacity.”

In a counter-affidavit deposed to by Ishmael Kamalu (2nd appellant C herein) who was 1st defendant in Suit No. A/57/62, he averred as follows:

“3. That the land in dispute is a communal property to the family of Umuoge Umuocham to which all the defendants belong.”

It can be seen from Exhibit “E” that the case was defended on the basis that Jonathan Kamalu (original 1st plaintiff in the present action), the 2nd appellant herein (Ishmeal Kamalu) and the other defendants in A/57/62 are members D of Umuoge family to whom the land in dispute was granted by Wakudu Wakamalu’s predecessor in office as head of Umuoge family. In Exhibits “C” and “E”, Wankudu Wakamalu claimed on behalf of Umuoge family. The defendants in both actions did not claim that the land then in dispute which is the two parcels of land now in dispute belonged to Umudaba family E or that they are members of Daba family.

Indeed, Exhibits “C” and “E” raised issue estoppel and are conclusive of the fact that the appellants and the respondents are members of Umuoge family in Umuocham.

It is for these reasons and the reasons given by my learned brother F in the lead judgment that I will dismiss the appeal and it is hereby dismissed. I abide by the order for costs.

IGUH JSC

G I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Onu, J.S.C. and I am in total agreement with him that this appeal lacks merit and ought to be dismissed.

H The narrow issue before both Courts below is whether the appellants comprise of a separate and distinct family from the Umuoge family and the exclusive owners of the Egbelu and Okpulo pieces of land in dispute or whether the said appellants belong to one and the same Umuoge family as the respondents and are together owners in common of the land in dispute.

It was the finding of the learned trial judge that the appellants has successfully established that they belonged to the Umudaba family, that they are descendants of one Daba, that they and the respondents do not come from a common ancestor, that they do not therefore belong to the same family and that there is consequently no basis for their ownership of the land in dispute in common. Accordingly he decreed title to the land in dispute in the appellants B exclusively.

The Court of Appeal, however, was of the view that in the face of ample oral and documentary evidence before the Court, it was difficult to uphold the finding of the learned trial Judge that the parties did not belong to the same Umuogele family of Umuocham. It accordingly set aside this finding C of the trial Court, holding consequently that there was no longer any justification for and award of title to the land in dispute to the appellants exclusively. The Court below further dismissed the appellants' claim for declaration of entitlement to customary right of occupancy to the land in dispute.

It is pertinent to note that the trial Court in arriving at its decision that D the parties did not have a common ancestry or belong to the same Umuogele family placed substantial reliance inter alia on the Court proceedings, Exhibits C and E. of Exhibit E, it said :-

"I have read the judgment Exhibit E and it is clear that the dispute as to the roots of the parties did not at all form part of the findings of the E Court."

And of Exhibit C, it commented :-

Exhibit C is the certified true copy of the record of proceedings at the awor District Court in May, 1961. In that suit chief Wankudu Wakamalu of Umuogele Umuocham suing on behalf of the Umuogele family against F Jonathan Wakamalu claimed for declaration of title to land called Egbelu umuogele and an injunction. The Court warded title to Umuogele family. There was an appeal. I have carefully read the finding of the appeal Court from page 3 of Exhibit C. The Court unanimously held that both plaintiff and defendant (i.e. appellant and respondent) belong to Umuogele family which G to my mind is using the expression in a general sense in this context. The question of the roots of the parties was not at all an issue."

It finally arrived at the conclusion that the parties came from different families and "do not have the same roots".

With profound respect to the learned trial judge, I am unable to H accept the view that the issue of the appellants belonging to the respondents' Umuogele family was not determined in Exhibit C. It was infact therein determined.

In the first place, Exhibit C is a native Court proceedings. It is long

settled that it is not the form of an action in a native Court that must be stressed where the issues involved are otherwise clear. Such proceedings have to be carefully scrutinized to ascertain the subject matter of the case as well as the real issues therein raised. 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 B 69) 231, Nwosu v. Udeala (1990) 1 N.W.L.R. (part 125) 188, Kwamin Akvin v. Essie Egymah 3 W.A.C.A. 65 etc. In Exhibit C, Chief Wankudu Wakamalu of Umuogele, Umuocham, for and on behalf of the Umuogele family claimed against Jonathan Wakamalu for declaration of title to Umuogele land and injunction. The plaintiff and the respondent in the said Exhibit C were the C 1st defendant and the 1st plaintiff respectively in the present action.

A close study of the proceedings, Exhibit C, clearly discloses that there was no disagreement between the parties on the fact that they belonged to the same Umuogele family. What was in dispute was whether the defendant's father in that case, as head of Umuogele family, granted the defendant as much land as he claimed or whether he just went on the land without the D permission of the head of the family. The native Court found the later to be case and accordingly entered judgment against the defendant, whereupon the defendant appealed. The Aba County Court of Appeal, in its unanimous judgment, held that both the plaintiff and the defendant in Exhibit C, that is to say, the present respondents and appellants, whom they respectively E represented, were members of one and the same Umuogele family. It stated :-

"The plaintiff took out this action for title on (sic) a representative capacity, that is he represented the family of Umuogele to which defendant is a member to claim the land to be for Community purpose. "The defendant (sic) F late father who also is the father of the plaintiffs (sic) father has no personal title to the land in dispute....." (underlining are mine)
There was no further appeal against this judgment.

There is next Exhibit E in which there are clear admissions from both parties that they are family relations, that they are members of the same family and that the land in dispute in that action is the communal property of G the Umuogele Umuocham family to which both parties belong. No where in either Exhibit C or E did the present appellants claim, no matter how remotely, that they belong Daba or Umudaba family, nor did they set up the title of that family as against the Umuogele family. I cannot, with respect, accept the finding of the learned trial judge that Exhibits C and E did not dispose of the issue that the parties were related and came from the same family or ancestor. H Both exhibits C and E clearly did and in my view raised issue estoppel against the appellants as the status of the parties and their communal ownership of

the land in dispute were confirmed in those two cases by Courts of competent jurisdiction. A judgment of a Court of competent jurisdiction remains valid and binding unless and until it is set aside by an appellate Court or by the lower Court itself where it acted without jurisdiction. See Aladegbemi v. Fasanmade (1988) 3 N.W.L.R. (Part 81) 129, Melifonwu v. Egbuji (1982) 9 S.C. 145, Rossek v. A.C.B. Ltd (1993) 8 N.W.L.R. (part 312) 382, Yonwuren B v. Modern Signs (1985) 1 N.W.L.R. (part 2) 244 etc. Exhibits C and E are still subsisting and therefore remain binding on the parties.

It ought further to be noted that when the appellants' representative, P.W. 1, was questioned under cross - examination as to why he was supporting Jonathan Wakamalu, the defendant in Exhibit C who was formerly the 1st C plaintiff in the present action, he answered as follow :-

"Yes, because he was my father's nephew."

The law is settled that where a question of fact has been tried by a judge without a jury and there is no question of any misdirection of himself, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of his having seen and heard the witnesses was insufficient to explain or justify his conclusion. So, where the area of findings involves the evaluation of the evidence of witnesses, particularly where they are founded entirely on the credibility, bearing or demeanour of E witnesses, the trial Court is, without doubt, the best judge thereof and appellate Court must not substitute its views for those of the trial Court. See Frank Ebba v. Ogodo (1984) 4 S.C. 84, but where the findings relate to inferences drawn from facts specifically found or the evaluation or interpretation of documentary evidence, the appellate Court is in as good a position as the trial Court F to arrive at its own findings. See too Okpiri v. Jonah (1961) All N.L.R. 102 at 104 - 105, Lawal v. Dawodu (1972) 8 - 9 S.C. 83 at 114 - 115, Balogun v. Agboola (1974) 10 S.C. 111 at 118 - 119, Woluchem v. Gudi (1981) 5 S.C. 291 at 295 - 296, 326 - 329, Anyoku v. Adi (1986) 3 N.W.L.R. (part 31) 731 at 742. G

In the present case, it is beyond doubt that the learned trial judge was, with respect, in gross error in the interpretation he placed on the proceedings, Exhibits C and E. It would also appear that he did not consider the various admissions made by the appellants' Jonathan Daba (alias Kamalu) of his membership of umuogele family and the evidence of 1st appellant H in Exhibits R and S wherein he referred to the respondents as his relations from the same family as himself and that Nwankudu Kamalu was head of that family. Nor did he consider the evidence of D.W. 3 and D.W.4 which favoured the respondents' case. It is thus clear to me that it is now too late

in the day for the appellants to deny belonging to the same Umuogele family as the respondents.

Dealing with this aspect of the case, the Court of Appeal observed

:-

“In the face of all these admissions and the judgments in Exhibits B C and E and the evidence of DW3 and DW4, it is difficult indeed to uphold the finding of the learned trial judge that the parties do not belong to the same family known as Umuogele family of Umuocham.I have no hesitation in setting aside that crucial finding of his.”

I am in entire agreement with the above observations of the Court C of Appeal and fully endorse them. That Court, with respect, was quite right, on the strength of the above overwhelming oral and documentary evidence, to have set aside the finding of the trial Court that the respondents are a separate family from the appellants and that the said appellants are the exclusive owners of the land in dispute.

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