

SUPREME COURT OF NIGERIA

17TH APRIL, 1998. SC. 179/1992

**CORAM:- S. M. A. BELGORE, A. B. WALL, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, JJSC.**

1. ALHAJI LAMIDI LADIMEJI	DEFENDANTS/
2. ONAOLAPO ABEGUNRIN	APPELLANTS
(For themselves and on behalf of Adukanle family)	
AND	
SUARA SALAMI & 2 OTHERS	PLAINTIFFS/
(For themselves and on behalf of	RESPONDENTS
Alagbede family)	

ACTIONS - Parties - Complaint of the defendants that the two courts below considered issues between the wrong parties lacks merit - In view of the explanation given by the 2nd defendant.

EVIDENCE - Relevant facts - Native court proceedings - While the plaintiffs in the instant case could not plead *res judicata* - They could nonetheless rely on the native court proceedings as relevant facts.

JUDGMENTS - Miscarriage of justice - Where the trial judge anchored his decision on another ground - Although the submission that plaintiffs could not plead *res judicata* is correct - There has been no miscarriage of justice.

RES JUDICATA - Plea of *res judicata* - For it to be successful - It must be shown that the parties, issues and subject matter in the previous action - Are the same as those in the present action.

RES JUDICATA - Plea of *res judicata* - Was not open to the plaintiffs - And the courts below ought not to have regarded plaintiffs' pleadings as raising *res judicata*.

FACTS

The plaintiffs/respondents instituted this action against the defendants/appellants claiming the sum of N1,000 being damages for trespass committed by the defendants on the parcel of land situate and being at Alagbede compound Gege Area Ibadan belonging to the plaintiffs family and in their effective possession; and an order of injunction. Both in their pleadings and evidence, the plaintiffs claimed that their ancestor, one Adamo Alagbede settled on a large tract of land (which includes the land in dispute) following a grant of the same to him by Iba Oluyole the overlord of all the land in the area. Adamo built on the land and on his death the land was inherited by his descendants who exercised acts of ownership on it without let or hindrance. Adamo in his lifetime lodged one Adukanle in one of the houses built on the land. After Adukanle came Ajibike (the defendant's ancestor) who hailed from Osogbo. He came to Ibadan following a chieftaincy tussle in his hometown. Ajibike stayed with Adukanle but when Adukanle was expelled from the house by Adamo, he was allowed to stay on. Adukanle and Ajibike had no blood relationship. There were previous litigations (S/309/49 and S/53/50) between the plaintiffs and the defendants over the land in dispute, which all ended in plaintiffs' favour. The defendants, on the other hand claimed ownership of the land in dispute. They claimed that Durodola Ajibike, their ancestor, came from oshogbo and settled in Ibadan. He came to Iba Oluyole who directed him to one Apena; Apena granted Ajibike the land part of which is presently in dispute.

At the conclusion of the trial, the learned trial judge found there was discrepancy in the evidence on traditional history led by the defendants. He accepted the evidence of traditional history led by the plaintiffs. On the previous litigations pleaded by the plaintiffs, the learned judge found that a court of law had held that a parcel of land which included the land now in dispute belonged to the plaintiffs' family. Judgment was thus entered in favour of the plaintiffs. Being dissatisfied, the defendants appealed unsuccessfully to the Court of Appeal which court affirmed the findings and judgment of the trial court. They have further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

"(1) Whether the learned Justices of the Court of Appeal were right to have upheld the judgment of the learned trial judge which considered issues between the plaintiffs (Respondents) family and Adukanle family as opposed to issues between the Plaintiffs (Respondents) family and the Defendants (Appellants) family.

(2) Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the plea of res judicata succeeded on the basis of the Native Courts judgment Exhibits 'P3' and 'P4'."

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

Action - Parties

1. The explanation given by the 2nd Defendant has knocked the bottom off the complaint of the Defendants in Question 1. Adukanle, the cognomen given to the Durodola Ajibike family to which the Defendants belong is not of the Adukanle who the Plaintiffs' ancestor lodged in his compound and subsequently expelled and who introduced Ajibike to live in the Plaintiffs' family compound. (p.731 D)

Plea of res judicata - For it to be successful

2. For a successful plea of res judicata therefore, it must be shown that the parties, issues and subject-matter in the previous action are the same as those in the present action - see: Ikpang v. Edoho (1978) 6-7 SC 221. The learned trial judge found all the ingredients established in this case. I think he is right. (p.732 C)

Plea of res judicata - Was not open to the plaintiffs

3. Plaintiffs raised the plea of res judicata based on the previous native court and appeal judgments. This is what the Defendants now say they (plaintiffs) could not do. I agree with the Defendants. This Court in Yoye v. Olubode (1974) ANLR 657, held that the plea of res judicata was not open to the plaintiffs. Ibekwe, JSC (as he then was) delivering the

judgment of this Court observed at pages 663-664:

"It is settled law that a successful plea of res judicata constitutes a bar to any fresh action as between the parties. Res judicata is, as a plea, a bar; as evidence; it is conclusive. We, therefore, do not see how the plea of res judicata can avail the plaintiffs/respondents in the present case.

The courts below ought not to have regarded those paragraphs of Plaintiffs' pleadings as raising res judicata. (p. 733 E/ 735 G)

C Evidence - Relevant facts

4. While the Plaintiffs in the instant case could not plead res judicata they could, non-the-less, rely on the native court proceedings as relevant facts. By virtue of section 55(2), Exhibit 'p4' is conclusive proof that the Plaintiffs, rather than the Defendants, have title to the land in dispute.(p. 735G)

Miscarriage of justice

5. Mention may be made that the trial Judge anchored his decision not only on the plea of res judicata but more importantly on his findings on traditional history. He said:

"Having regard to the evidence which I have accepted and the findings of fact which I have made , the evidence led on the traditional history by the plaintiffs is more probable. It is true and I accept it. The evidence led by the defendants on the traditional history was either untrue and/or unsatisfactory. I don't believe it and I reject it."

This conclusion is sufficient to sustain the judgment he gave. Although the submission that Plaintiffs could not plead res judicata is correct there has been no miscarriage of justice thereby. (p. 736 C)

NOTABLE POINT OF INTEREST

ONU JSC

H 1. Concurrent findings of fact -Attitude of supreme court thereto

From the totality of the evidence adduced in the trial court, the conclusion arrived at which was affirmed by the court below, I am of the firm view that both decisions constitute concurrent findings of fact. In the

absence of it being shown that a miscarriage of justice occurred thereby or that a serious violation of some principle of law or procedure was perpetrated; that the outcome of the findings of facts are perverse or furtherstill, that special circumstances are shown that such decisions ought to be disturbed, this court has by a plethora of decisions held that it will not interfere with those findings of fact. (p. 738 A) B

REPRESENTATION

J. A. Olanipekun Esq. with F. Olanitori Esq. for the Appellants.
Respondents absent. Not represented C

CASES REFERRED TO

Ikpang v. Edoho (1978) 6-7 SC 221

Yoye v. Olubode (1974) ANLR 657 D

Chiwendu v. Mbamali (1980) 3-4 SC. 31, 48

Ezewani v. Onwordi (1986) 4 NWLR 27

Ukaegbu v. Ugoji (1991) 6 NWLR (Part 183) 16 at 25-26

Are v. Ipaye E

Fatoyinbo v. Williams (1956) SCNLR 274 (1956) 1 FSC 87

Ukaegbu v. Ugoji (1991) 6 NWLR (Part 196) 127

Onwujuba v. Obienu (1991) 4 NWLR (Part 183) 16 at 25-26

The Stool of Abinabina v. Enyimadu 12 WACA 171 F

STATUTE REFERRED TO

Evidence Act, ss. 54, 55 (1) and (2)

LEAD JUDGMENT BY OGUNDARE JSC

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By paragraph 24 of their further amended statement of claim, the Plaintiffs (who are Respondents in this appeal) sued the Defendant (now Appellants) claiming-

*"(a) the sum of N1,000 being damages for trespass committed H
by the defendants on the parcel of land situate and being at Alagbede
Compound Gege Area Ibadan belonging to the plaintiffs family and in
their effective possession, when sometime in February 1980, the defen-*

dants trespassed on the said land and thereon erected a wall fence to enclose the blacksmith workshop of the plaintiff family.

(b) Injunction restraining the defendants, his servants or agents from committing further acts of trespass on the land."

B Pleadings having been filed, exchanged and, with leave of the trial High Court amended, the case proceeded to trial on the Plaintiffs' further amended statement of claim and the Defendants' amended statement of defence. At the conclusion of trial the after addresses by learned counsel
C for the parties, the learned trial Judge, in a considered judgment, found the Defendants liable and awarded to the Plaintiffs N300.00 (three hundred naira) damages for trespass and an injunction restraining the Defendants, their servants or agents from committing further trespass on the land in dispute" hatched green and marked "BLACKSMITH SHED" in
D Plan No. MAK/159/80 dated 9th August, 1980 drawn by M. A. Koiki, licensed surveyor and tendered as Exhibit 'P1' in this case."

Being dissatisfied, the Defendants appealed unsuccessfully to the Court of Appeal which Court affirmed the findings and judgment of
E the trial Court. They have further appealed to this Court on two grounds of appeal which I need not set out in this judgment.

Pursuant to the rules of this Court, written briefs of argument were filed and exchanged by the parties. At the subsequent oral hearing
F of the appeal, the Plaintiffs and their counsel were absent. The appeal, pursuant to Order 6 rule 8(6), was taken as argued on the briefs already filed.

The facts are rather simple enough. Both in their pleadings and evidence, the Plaintiffs claimed that their ancestor, one Adamo Alagbede
G settled on a large tract of land (which includes the land in dispute) following a grant of the same to him by Iba Oluyole the overlord of all the land in the area. Adamo built on the land. On Adamo's death the land granted him by Iba Oluyole was inherited by his descendants who exer-
H cised acts of ownership on it without let or hindrance. Adamo in his lifetime lodged one Adukanle in one of the houses built on the land. After Adukanle came Ajibike who hailed from Osogbo came to Ibadan following a chieftaincy tussle in his hometown. Ajibike stayed with Adukanle

but when Adukanle was expelled from the house by Adamo, Ajibike was allowed to stay on. Ajibike stayed behind and was lodged in the house of Sule, a member of the Plaintiffs' family who had died in war. Ajibike was the Defendants' ancestor. Adukanle and Ajibike had no blood relationship. Adukanle later died childless. There were previous litigations (S/ 309/49 and S/53/50) between the Plaintiffs and the Defendants over the land in dispute; both litigations ended in Plaintiffs' favour.

The Defendants, on the other hand, claimed ownership of the land in dispute. They claimed that Durodola Ajibike, their ancestor, came from Osogbo and settled in Ibadan. He came to Iba Oluyole who directed him to one Apena; Apena granted Ajibike the land of which the land in dispute formed a part. They pleaded further thus:

"8. Durodola Ajibike being a Warrior was the only person who at that time could hold the sector against the Egbas. It was in recognition of this that Iba Oluyole built Apataki C a mound) for Durodola Ajibike as a bulwalk against invaders.

9. The Plaintiffs ancestor Adamo a blacksmith came through Iba Oluyole who introduced him to Apena.

10. It was Apena who requested Durodola Ajibike to please grant land to Adamo (the blacksmith) the portion outside the area edged RED in Plan OG 190/81 filed by the defendants was granted to Adamo by Durodola Ajibike.

11. During his life time Adamo used to make bridle (Ijanu esin) for the horse of the defendants known as 'ADUKANLE' because it was completely black.

12. The area granted to the Plaintiff family by Durodola Ajibike was formerly used by him as a garden before the grant.

13. On the death of Durodola Ajibike the land granted to him by Apena was used in turn by the following heads of the family as well as other members of the family viz: Ige, Majoyegbe, Dairo, Idowu, Afolabi, Akanni, Adegbola, Abegunrin and Raji Faola.

14. Since the original grant the defendants family has been in effective occupation of the area edged RED in the Defendants plan up till today.

15. *The two buildings edged GREEN in Plan No. OG/190/81 were forcibly built on by the Plaintiffs but up till now none of the Plaintiff family have been allowed to live therein.*

B 16. *On several occasions when the Plaintiff family have used their numerical strength and influence to trespass on the Defendants' family land, people like Bale Oyewole, Oba Aleshinloye and Oba Akinyele have intervened and warned the Plaintiffs' family.*

C 17. *The Defendants aver that 'ADUKANLE' was the name of their ancestors horse.*

18. *With regards to paragraph 15, whilst the Defendants aver that the father of Akanmu was Otegboye.*

D 19. *The defendants aver that at no time has the Plaintiffs' family been declared the owner of the area EDGED RED in the plan referred to in paragraph 17 of the Plaintiffs' statement of claim.*

E 20. *With regards to paragraph 20 of the Plaintiffs statement of claim, the Defendants aver that the houses built by members of their family were built as of right without permission from anyone and with the knowledge of the Plaintiff family undisturbed.*

F 21. *With regards to paragraph 21 of the Plaintiffs' statement of claim the Defendants aver that the area now in dispute was originally made of wooden shops, which the Defendants let out and collected the rents.*

22. *The Defendants later rebuilt the shop with concrete and was undisturbed by anyone at the time of the building.*

G 23. *The Defendants aver that when Alfa Katibi wanted to build a Mosque on the site where the blacksmith was originally, he begged Abegunrin to allow the blacksmith stone on the Defendants' land until the area was needed by Defendants.*

H 24. *The Defendants aver that for years the Plaintiff family have been victim of the overflowing of the Gege river, hence their expansionist tendency towards the West.*

25. *The Defendants further aver that the area edged GREEN with the inscription of Safiu's House was the original site of Otegboye's house allocated to her grand daughter Adunola Amoke.*

26. *The area where Adegbindin built was allocated for Ajayi Ojerinmu."*

The trial Judge found there was discrepancy in the evidence on traditional history led by the Defendants. On the evidence adduced by the parties, the learned trial Judge found -

"(a) that Iba Oluyole granted land to the ancestor of the plaintiffs;

(b) that there are many houses built by members of plaintiff's family on the aforesaid land.

(c) that a structure on the aforesaid land after the grant was a blacksmith workshop;

(d) that the defendants' family demolished the blacksmith workshop, erected shops on the land on which the said blacksmith workshop used to be, and that is the cause of the present dispute.

(e) that the location of the aforesaid blacksmith workshop before its demolition is shown in Plan No. MAK/159/80 dated 9/8/80 (Exhibit 'P1') hatched green;

(f) that before its demolition the aforesaid blacksmith workshop was occupied and was being used by members of the plaintiffs' family;

(g) that the plaintiffs' ancestor approached Iba Oluyole for a grant of land to the defendants' ancestor and that Iba Oluyole made a grant of the land subsequently known as Adukanle Compound to the defendants' ancestor;

(h) that the land on which the aforesaid blacksmith workshop was erected, was within the land granted to the plaintiffs' ancestor and not within the land granted to Adukanle or to Apena."

He accepted the evidence of traditional history led by the Plaintiffs.

On the previous litigations pleaded by the Plaintiffs, the learned Judge found:

1. *"The certified copies of the proceedings in the previous case, Exhibits 'P3', 'P4', and 'P5' show that the plaintiff in that case was a member of Adukanle family and that the defendant was a member of Alagbede family each of them representing Adukanle family or Alegbede family respectively. The document also showed that the claim in the*

previous suit was for a declaration of title."

2. *That in the instant suit title was put in issue;*

3. *"As for the subject matter, even if one disregards the records of proceedings and plan which were not satisfied that is, Exhibits 'P2', 'P6' and 'P7' the 1st and the 2nd defendants themselves testified that the land on which the blacksmith workshop was built was involved in the previous suit."*

4. *That the blacksmith shed was built by Adamo Alagbede.*

5. *That the litigations ended in favour of the Plaintiff's family and that the whole land was found by those courts to belong to the Plaintiffs' family.*

6. *"The judgments (Exhibits 'P3' and 'P4') constitute the conclusive proof that the land on which the blacksmith shed was erected belonged to Alagbede family."*

The learned trial Judge found that Plaintiffs proved their case. He said:

"On the question whether the plaintiffs had discharged the burden on them, the situation is that they have. They have proved by traditional evidence that the land in dispute belonged to them. Ownership of land may be proved by traditional evidence. See Abinabina v. Enyimade, (1953) A.C. 207 at pp. 215 & 216. Alternatively and independently of the foregoing, the plaintiffs had shown that in a previous legal proceedings between their family and the defendants' family a court of law had held that a parcel of land which included the land now in dispute belonged to the plaintiffs' family."

On possession and trespass the learned Judge observed:

"With reference to the question of possession which is necessary to support the claim for damages for trespass, there was the evidence of a tenant (4th p.w.) who was on the land in dispute as a tenant of the plaintiffs' family. His shop there was demolished on a Sunday and his evidence was that the defendants' family erected shops on the land on which the blacksmith shop used to be. The evidence of the 1st and 2nd defendants which was quoted earlier in this judgment showed that the blacksmith workshop was in the area; that the defendants' family demol-

ished it; and that the defendant's family erected some shops on the land on which the blacksmith workshop used to be. Apart from the foregoing, the principle is that between two persons in disputed possession, the presumption is that the person having a right to the land is in possession, proof of ownership being *prima facie* proof of possession. See Umeobi v. Otukoya (1978) 4 SC. 33 p. 55. The plaintiffs' family was in possession of the land which was being used as a blacksmith workshop before the defendants' family without the permission of plaintiffs' family demolished the structure on it and erected shops thereon." B

It is on these findings and observations that the learned trial Judge C found for the Plaintiffs. The Court of Appeal, per Akanbi JCA (as he then was), reviewed the evidence led and had no hesitation in affirming the findings of fact made by the learned trial Judge and the conclusions reached by him on the two issues of traditional history and res judicata. D

In their written brief of argument the Plaintiffs have posed two questions for consideration by us. These are:

"(1) Whether the learned Justices of the Court of Appeal were right to have upheld the judgment of the learned trial judge which considered issues between the plaintiffs (Respondents) family and Adukanle family as opposed to issues between the Plaintiffs (Respondents) family and the Defendants (Appellants) family. E

(2) Whether the learned Justices of the Court of Appeal were right in upholding the decision of the learned trial Judge that the plea of res judicata succeeded on the basis of the Native Courts judgment Exhibits 'P3' and 'P4'." F

The two questions relate to the two issues canvassed in this case both at the trial and before the Court below. G

On Question (1), it is contended for the Defendants that the two Courts below were in error to treat them as members of Adukanle family having regard to Plaintiffs' stance that Adukanle and Ajibike were not related and that Adukanle died childless. H

In paragraph 2 of the Plaintiffs' further amended statement of claim, they pleaded thus:

"2. The defendants are members of Adukanle Family of SW4/

325 Adukanle's Compound Gege Ibadan and are sued as such."

But they also pleaded:

"8. One Adukanle from whom the defendants derived their Adukanle family name came to lodge with Baba Alagbede who gave him a room in one of his houses.

9. Late Adukanle was expelled and the room occupied by him reverted to Baba Alagbede and the ruins of Adukanle's particular house was used to erect buildings for the attendants of Baba Alagbede, namely:- Abudu, Sule, Momondu and Folorunsho.

10. Prior to the expulsion of Adukanle, one Ajibike the ancestor of the defendants had been accommodated by Adukanle who remained in the house built for Sule.

11. Ajibike was a native of Oshogbo, who came to Ibadan to fight for the title of Ataaja of Oshogbo which at that time was being conferred from Ibadan.

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16. Ajibike in turn was the father of Ige, Adukanle was not related to Ajibike and he died without an issue."

Going by the above averments one is at a loss to see how Plaintiffs would name Defendants' family ADUKANLE FAMILY. Paragraphs 8-11 and 16 would appear to be inconsistent with paragraph 2. But the puzzle would appear to be solved by paragraph 17 of the Defendants' amended Statement of defence wherein they pleaded thus:

"17. The Defendants aver that 'ADUKANLE' was the name of their ancestors horse."

And in the evidence of the 1st Defendant, Alhaji Lamidi Ladimeji, gave his address as "Adukanle Compound". He testified thus:

"the plaintiffs' family is known as Alagbede family. My own family is Adukanle family. My father came to Ibadan when he was taking part in the Adubi war. My said father was Durodola." (underlined)

It is clear from the pleadings and evidence of the parties that Durodola Ajibike was not one and the same person as Adukanle referred to in Plaintiffs' pleadings and evidence.

Why then is Defendants' family named Adukanle? The answer is provided by the 2nd Defendant, Onaolapo Abegunrin who testified thus:

"My family is known as Adukanle family because our ancestor used to be a caretaker of a horse which was completely black in colour. That was why he was called Adukanle. Our said ancestor was known as Durodola Ajibike. Durodola Ajibike came to Ibadan from Oshogbo." B

Later in his evidence, he deposed:

"Durodola Ajibike was otherwise known as Adukanle."

This witness also explained how Plaintiffs' family came to be known as "Alagbede." He said: C

"The plaintiffs belong to Alagbede family. Their family is called Alagbede family because their ancestor used to make bridle (Ijanu Esin) for horses."

The explanation given by the 2nd Defendant has knocked the bottom off the complaint of the Defendants in Question 1. Adukanle, the cognomen given to the Durodola Ajibike family to which the Defendants belong is not of the Adukanle who the Plaintiffs' ancestor lodged in his compound and subsequently expelled and who introduced Ajibike to live in the Plaintiffs' family compound. D

This disposes of Question 1.

On Question 2, it is contended by the Defendants -

(a) that res judicata is a weapon available to the defendant and not to the plaintiff; F

(b) that Adukanle against whom the judgment in the Native Court went is not related to the defendants in the present suit;

(c) that the action in the native court was a personal action between Adegbola Akanmu and Salami and can, therefore, not operate as res judicata in the present action in which the suit has been brought in a representative capacity by members of Alagbede family against members of Durodola Ajibike Family. G

It is however contended for the Plaintiffs that all the ingredients of a successful plea of res judicata are established. H

I shall take the latter submission first. The Defendants are say-

ing that the ingredients of res judicata were not established in that the parties in the previous suit are not the same as the parties in the present suit. Section 54 of the Evidence Act provides:

"54. Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

For a successful plea of res judicata therefore, it must be shown that the parties, issues and subject-matter in the previous action are the same as those in the present action - see: Ikpang v. Edoho (1978) 6-7 SC 221.

The learned trial judge found all the ingredients established in this case. I think he is right. The Defendants cannot be serious in their submissions before this Court. I say this because this was not their case at the trial. 1st Defendant in his evidence, testified thus:

"There was a dispute between the plaintiffs' family and my own family in respect of the blacksmith workshop about twenty two or twenty three years ago and my family took the matter to the court. I agree that there were series of appeals in the case. I also agree that the land, on which some shops were built, which is now the land in dispute was the land on which the said blacksmith workshop was."

2nd Defendant testified thus:

"I agree that there was litigation between my family (Adukanle) and Alagbede family (Plaintiffs' family) in relation to the land on which the present shops were built and that there were series of appeal in the case. I am aware of the judgments."

Exhibit 'P4' is the record of proceedings in the Resident's Court of Appeal in Appeal No. 2/51. It is clear from the document that the plaintiff/appellant, Adegbola Akanmu was a senior member of Adukanle family and, as admitted by the 1st and 2nd Defendants in the present proceedings, he represented that family in the case. Salami, the defendant in the suit obviously represented the Alagbede family, Akanmu lost

the case. The present Defendants readily admitted that the issues and subject-matter in that suit and in the present suit are the same.

I can see no substance in the submissions of the Defendants that the parties were not the same.

I now consider the first leg of Defendants' submission on Question 2. B

Plaintiffs pleaded thus:

"17. The plaintiffs family have been declared to be the original owners of all the land edged RED on Plan No. MAK/159/80 in appeal No. S/309/49 and the plaintiffs would be relying on this judgment as estoppel per res judicata against the defendants at the hearing of this case." C

18. The title of appeal in S/309/49 was Adegbola Akanmu v. Salami and the plaintiffs in the case was Adegbola Akanmu the grandson of Ajibike and a member of the Adukanle Family. D

19. The Plaintiffs family (will) also be relying on the judgment in appeal No. S/53/50 delivered on the 12th day of July 1952 together with the plan drawn by A. O. Oduyoye dated 29/8/50 as constituting estoppel against the defendants family at the hearing of this case." E

By these paragraphs, **plaintiffs raised the plea of res judicata based on the previous native court and appeal judgments. This is what the Defendants now say they (plaintiffs) could not do. I agree with the Defendants. This Court in Yoye v. Olubode (1974) ANLR 657, held that the plea of res judicata was not open to the plaintiffs. Ibekwe, JSC (as he then was) delivering the judgment of this Court observed at pages 663-664:** F

"It is settled law that a successful plea of res judicata constitutes a bar to any fresh action as between the parties. Res judicata is, as a plea, a bar; as evidence; it is conclusive. We, therefore, do not see how the plea of res judicata can avail the plaintiffs/respondents in the present case." G

The burden is on the party setting up the plea of res judicata to allege and establish to the satisfaction of the court that his opponent is seeking to put in controversy and relitigate some question of law, or H

issues of fact, which is the very question or issue which has already been the subject of a final decision between the same parties. This onus, in our view, the plaintiffs/respondents have failed to discharge. It is also relevant to stress that, once the plea of res judicata has been established, B the jurisdiction of the court would be ousted.

It, therefore, sounds anomalous that the same plaintiffs/respondents who had invoked the jurisdiction of the court ab initio, were also the party that thought it fit to attack the court's jurisdiction. For, that is exactly what the plea of res judicata would in the particular circumstances of this case, amount to. C

It is well-known that, before the doctrine of res judicata can operate, it must be shown that the parties, issues, and subject-matter were the same in the previous case as those in the action in which the plea of D res judicata is raised. It is also well-settled that, once the plea is made out by the party seeking to rely upon it, the claim filed by the other party would be dismissed on the ground that the court lacks jurisdiction to allow parties to re-litigate the same issues again.

The plea of res judicata therefore, robs the court of its jurisdiction; and that explains why, in practice, the plea has always been used only as a defence. It is a formidable weapon which may be pleaded in the Statement of Defence or in the plaintiff's Reply to the Statement of Defence, should the need arise. But, by its very nature, res judicata F should have no place in the Statement of Claim. It is unreasonable for the plaintiff to embody in his own claim the plea of res judicata. In our view, such a course of action would lead to an absurdity. Indeed, it is unthinkable that the very plaintiff who invokes the jurisdiction of the G court should afterwards turn round to plead that the same court has no jurisdiction to hear his claim. We would liken such plaintiff to a man who, while praying fervently for long life, yet carries in his pocket, a time-bomb which, on -explosion, would end his life."

H After distinguishing the case of Seriki v. Solaru (1965) NMLR 1 Ibekwe, JSC discussed the distinction between estoppel simpliciter and res judicata. He said at pages 664-665:

"It strikes us that, somehow, there is still the tendency on the

part of counsel to overlook the distinction between estoppel and the plea of res judicata. From time to time, attention has been drawn by this court to such distinction in a number of cases,. We think that, it is desirable that we should once more restate this aspect of the law. Estoppel is an admission, or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it, or adduce evidence to contradict it. B

Res judicata on the other hand, operates not only against the party whom it affects, but also against the jurisdiction of the court itself. The party affected is estopped per rem judicatam from bringing a fresh claim before the court. At the same time, the jurisdiction of the court to hear such claim is ousted. C

In Odadhe v. Okujani (1973) 11 SC. 343 at p. 353 this court cited with approval, the following illuminating passage from the judgment in the case of Bassil v. Honger, 14 WACA 569 at p. 593. D

'Estoppel prohibits a party from proving anything which contradicts his previous acts or declarations to the prejudice of a party, who, relying upon them, has altered his position. It shuts the mouth of a party. The plea of res judicata prohibits the Court from enquiring into a matter already adjudicated upon. It ousts the jurisdiction of the Court.' E

We think that, in the light of this passage, all that there is to be said about the distinction between estoppel and res judicata has been said." F

But see Chinwendu v. Mbamali (1980) 3-4 SC. 31, 48 as to the circumstances under which a plaintiff may raise a plea of estoppel per rem judicatam. The circumstances do not apply in this case. The courts below ought not to have regarded those paragraphs of Plaintiffs' pleadings as raising res judicata. G

While the Plaintiffs in the instant case could not plead res judicata they could, non-the-less, rely on the native court proceedings as relevant facts. Section 55 of the Evidence Act provides: H

"55(1) If a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant fact, whenever any

matter, which was, or might have been, decided in the action in which it was given, is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

(2) *Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel."*

See: Chiwendu v. Mbamali (supra)

By virtue of section 55(2), Exhibit 'p4' is conclusive proof that the Plaintiffs, rather than the Defendants, have title to the land in dispute.

Mention may be made that the trial Judge anchored his decision not only on the plea of res judicata but more importantly on his findings on traditional history. He said:

"Having regard to the evidence which I have accepted and the findings of fact which I have made, the evidence led on the traditional history by the plaintiffs is more probable. It is true and I accept it. The evidence led by the defendants on the traditional history was either untrue and/or unsatisfactory. I don't believe it and I reject it."

This conclusion is sufficient to sustain the judgment he gave. The learned Judge made it clear that his conclusion in the above passage was reached regardless of the plea of res judicata. He said

"For the avoidance of doubt, it is hereby declared that the foregoing is not based on the plea of estoppel or the plea of res judicata put forward in the further Amended Statement of Claim."

Although the submission that Plaintiffs could not plead res judicata is correct there has been no miscarriage of justice thereby.

The conclusion I finally reach, therefore, is that this appeal lacks merit and it is hereby dismissed by me. I affirm the judgment of the Court below and award N10,000.00 (ten thousand naira) costs of this appeal to the Plaintiffs/Respondents.

H

BELGORE JSC

The two Courts below, on the facts of the case found in favour of the plaintiffs. The concurrent findings of fact had not been successfully assailed for this Court to interfere in favour of the Defendants/Appellants. There has been no miscarriage of justice, or a finding not supported by evidence. I find no merit in this appeal and for the fuller reasons in the judgment of Ogundare, J.S.C., I also dismiss this appeal with N10,000.00 costs against the appellants in favour of the respondents.

C

WALI JSC

I have been privileged to read before now, the lead judgment of my learned brother Ogundare JSC, and I agree with the reasoning and conclusion for dismissing the appeal.

Having nothing more useful to contribute, I adopt the reasoning and conclusion in the lead judgment as mine and also hereby dismiss the appeal for want of merit with N10,000.00 costs.

E

ONU JSC

Having had a preview of the judgment just delivered by my learned brother Ogundare, JSC, I am in entire agreement with him that this appeal lacks substance and ought therefore to fail.

I wish to add a few words of mine in expatiation as follows:-

The plaintiffs/respondents in the case on appeal herein had established in the trial court by leading evidence of traditional history that they acquired the land in dispute (with its identity demonstrably shown beyond doubt) from one Iba Oluyole who had radical title thereto. They also led evidence of native Court Suits vide Exhibits P3, P4 and P5 in which they were the successful parties, thus creating estoppel which enures to them conclusive evidence of possession as opposed to the defence proffered by the appellants to the contrary. See Chinwendu v. Mbamali (1980) 3-4 SC 31; Ezewani v. Onwordi (1986) 4 NWLR 27 and

Odjewedje v. Echanokpe (1987) 1 NWLR (Part 52) 633 at 635. From the totality of the evidence adduced in the trial court, the conclusion arrived at which was affirmed by the court below, I am of the firm view that both decisions constitute concurrent findings of fact. In the absence of it being shown that a miscarriage of justice occurred thereby or that a serious violation of some principle of law or procedure was perpetrated; that the outcome of the findings of facts are perverse or furtherstill, that special circumstances are shown that such decisions ought to be disturbed, this court has by a plethora of decisions held that it will not interfere with those findings of fact. See Ukaegbu v. Ugoji (1991) 6 NWLR (Part 196) 127 and Onwujuba v. Obieniu (1991) 4 NWLR (Part 183) 16 at 25-26 following the landmark decision of the West African Court of Appeal in The Stool of Abinabina v. Enyimadu 12 WACA 171 where their Lordships of the Court at page 173 of the Report had this to say:-

"But the rule as to the concurrent findings is subject to certain exceptions one of which is clearly stated by Lord Thankerton at page 259 of the case cited as follow -

"In order to obviate the practice there must be some miscarriage of justice or violation of some principle of law or procedure."

Lord Thankerton after defining miscarriage of justice continued -

"The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle or procedure, whose application will have the same effect."

As in the instant appeal, I find none of the vitiating factors enumerated above in the two decisions of the courts below, I have no hesitation whatsoever in declining to interfere therewith. See the cases of Alhaji K. O. S Are v. Raji Ipaye (1990) 2 NWLR (Part 132) 298 at 317; Enang v. Adu (1981) 11-12 SC 25 at 42; Ojomu v. Ajao (1983) 9 SC 22 at 53; Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718; Akinsanya v. U.B.A (Nig) Ltd (1986) 4 NWLR (Part 35) 273 and Fatoyinbo v. Williams (1956) SCNLR 274; (1956) 1 FSC 87, to mention but a few.

For the above reasons and the more elaborate ones contained in

the leading judgment of my learned brother Ogundare, JSC I, too, dismiss this appeal and make the same consequential orders inclusive of those as to costs contained therein.

IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother Ogundare, J.S.C. and I agreed entirely that this appeal is without substance and ought to be dismissed.

I do not think there is anything more I can usefully add.

Consequently and for the same reasons as are contained in the said judgment, I too, dismiss this appeal. I abide by the order for costs therein made.

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