

SUPREME COURT OF NIGERIA
8TH MAY, 1998. SC. 42/1994
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC.

DR. OLAWALE ALAKIJA & 2 ORS. PLAINTIFFS/APPELLANTS
(Executors and Executrix of the Estate of
Olajide Alakija (Deceased))

AND

ALHAJI ABDULAI DEFENDANT/RESPONDENT

***APPEALS** - Issue - Newly raised before the Supreme Court - Is incompetent - As appeal does not lie from the High Court to the Supreme Court.*

***APPEALS** - Ground of appeal - Where its factual basis does not exist - The ground and the issue distilled from it are incompetent - As well as the arguments based on it.*

***EVIDENCE** - Comparison - Of previous and Past evidence of a witness by the judge - Towards assessing his credibility - Without drawing the attention of that witness - Is erroneous - But that was not the case here.*

***ESTOPPEL** - Pleadings - It is not necessary to plead estoppel in any particular form - So long as the matters constituting estoppel are stated in such a manner - To show that the party pleading relies upon it as a defence or answer.*

***LAND LAW** - Lis pendens - Where the appellants' predecessor - in - title bought the land in dispute during the pendency of litigation - He got no title as the vendors have nothing to sell.*

***PROPERTY LAW** - Lis pendens doctrine - The basis for its application - Is to prevent effective transfer of rights in property - Which is subject matter of an action pending in court.*

RES JUDICATA - *Estoppel per rem judicatam* - *Where the parties joined issue on the judgment in a previous suit - And the conditions precedent to the operation of the doctrine exist - The doctrine properly applies.*

FACTS

The plaintiffs/appellants as the Executors/Executrix of the estate of Olajide Alakija instituted an action in the High Court of Lagos State against the defendant/respondent claiming as follows:- a declaration that they are the owners of all that piece or parcel of land with the structures thereon situate, at Ipaja, Orile-Agege in Ikeja Division of Lagos State, in the alternative that they are the people entitled to a Certificate of Occupancy in respect of the said piece or parcel of land; general damages for act of trespass; and an order of perpetual injunction. In 1962, the Ewedairo Family sold the parcel of land in dispute to Barrister Olajide Alakija (deceased). The said transaction was evidenced by a Deed of Conveyance dated 30-7-65 and registered as No. 11 at page 11 in Volume 871 of the Land Registry, Ibadan which was then the appropriate registry. The appellants' late father put some tenants on the land. In January, 1979, the respondent together with his servants and agents commenced the erection of a fence on the land and this led to the action. The respondent's case is that he is the owner of the plot of land in dispute by virtue of a Deed registered as No. 99 at page 99 in Volume 1769 of the Lands Registry in the office at Lagos. That the said Plot of Land forms a portion of a large area of land which originally belonged to one Alhaji Abudu Gafari Olalabi Sulu by virtue of purchase at an auction sale conducted by one Mr. Abayomi in December, 1958 and the said Alhaji Abudu Gafari Olalabi Sulu was put into undisturbed possession thereof and he exercised unfettered right of possession as absolute owner. By a Power of Attorney dated 8-5-74 Alhaji Abudu Gafari Olalabi Sulu appointed Rafiu Abiola Olalabi Sulu as his lawful attorney in respect of all his lands including the large area of land in which the land in dispute forms part. The said lawful attorney conveyed the plot of land to the respondent in 1977. The latter was put into possession and he remained in undisturbed possession until early in 1979 when unidentified persons started to lay claim

to the said plot of land.

At the close of hearing, Oshodi J. in a reserved judgment dismissed the plaintiffs' claim in its entirety. The plaintiffs were aggrieved by the decision of the learned trial judge and appealed to the Court of Appeal, Lagos Division. Their appeal to that court was dismissed hence the further appeal to the Supreme Court where they raised five issues.

ISSUES FOR DETERMINATION

"1. Whether the court below was not in error when it upheld the rejection of the evidence of P.W.2 by the learned trial Judge when there was no basis in law for the total rejection of such evidence.

2. Whether the learned Justice of Appeal who wrote the lead judgment, concurred by a second Justice, was not in error when he held that the learned trial Judge was right to have compared the evidence of P.W.2 in the present suit with the evidence of the witness in an earlier suit with a view to assessing the witness's credibility.

3. Whether the court below was not in error when it upheld the trial Court that the judgment in Suit No. HK/68/60, Exhibit E, operated as estoppel so as to bar the present proceedings.

4. Whether the court below was right when it held that the judgment of the Court in Suit No. HK/68/60, Exhibit E, does not fall within the type of judgment envisaged in the decision of the Supreme Court in J. B. Daniel & Ors. v. Paul Cardoso, SC/144/74, and that the judgment puts the respondent on a better footing than the Appellants with regard to the ownership of the land in dispute and that it conclusively decided the issue of ownership and possession of the land.

5. Whether the court below was not in error in not holding that the whole trial was vitiated by procedural irregularity."

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

Issue - Newly raised before the Supreme Court

1. Since the court below did not decide and was not called upon to decide whether the learned trial judge was in error in rejecting the evidence of P.W.2 because it was at variance with the plaintiffs' pleadings, the deci-

sion of the learned trial judge on the said point remained final there being no appeal to the Court of Appeal on it. It is therefore too late in the day to raise that issue in this court as the appellants had attempted to do in ground six of their grounds of appeal and in their first issue for determination in this appeal. This court does not have the jurisdiction to hear appeals from the decisions of the High Court direct. Both ground six of the grounds of appeal and Issue (1) based on it are incompetent. They are struck out together with the arguments based on them². (p. 1147 G)

C *Comparison of evidence*

2. It is clear from the portions of the judgments reproduced above, that the learned trial judge did not compare the evidence of P.W.2 in the present proceedings with the evidence of this same witness in an earlier suit in arriving at his decision or with a view of discrediting him. The court below agreed that the learned trial judge did not reject the evidence of P.W.2 because the judge in Exhibit "E" had rejected similar evidence. Babalakin J.C.A. (as he then was) expressed his view on the law which came under severe criticism in the appellants' brief. The statement is thus:

"A fortiori a Judge can compare the evidence given by a witness in a previous suit with the evidence given by the witness before him on some issue to assess the credibility of such a witness and make comments on same and this is what the learned trial Judge did in this case.What he did was to use the previous evidence of P.W.2 to discredit his evidence in the present case before him and he is perfectly entitled to do so." (the underlining is for emphasis).

That was not what the learned trial judge did in the present proceedings and if he had done so, he would have committed a serious error of law and I agree with the view expressed by Akpata, J.C.A. (as he then was) that the learned trial judge was not competent to compare the evidence

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². See the following recent Supreme Court decisions on the raising of new issues: Adesokan v. Adetunji (1994) 10 KLR 85; Igbonigidi v. Umelo (1993) 12 KLR 70; Anatogu v. Iweka (1995) 9 KLR 1834; Okonkwo v. Ogbogu (1996) 4 KLR (pt 40) 810

given by a witness in a previous proceeding with the evidence given by the same witness before the trial judge to assess his credibility when the attention of that witness was not drawn to his alleged previous evidence. This is the correct statement of the law. See section 199 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990. As I said earlier, B and as found by the court below including Babalakin, J.C.A. who wrote the lead judgment, the learned trial judge did not reject the evidence of P.W.2 because his previous evidence was not accepted by the Judge in the previous case. I agree that the view expressed by Babalakin, J.C.A. C on the law should be treated as no more than an obiter dictum and I have so treated it. The factual basis on which the view was based was not there. His view of the law did not form the basis of the decision either of the High Court or the court below. (p. 1149 F)

D

Estoppel per rem judicatam

3. The parties joined issue on Exhibit "E". Each party relied on it and it cannot be argued that the outcome of that suit is not relevant to the present proceedings. Both from the pleadings of the parties and Exhibit E "B", the piece of land the subject matter of the present proceedings is part of the piece of land litigated upon in Suit No. HK/68/60 and the parties to the present suit are the successors-in-title of the parties in the said previous suit (Suit No. HK/68/60). The plaintiffs in Suit No. HK/68/ F 60 sued for themselves and on behalf of the Ewedairo Family. On the face of the records, the issues litigated upon in Suit No. HK/68/60 and the present suit are the same namely, declaration of title/entitlement to a certificate of occupancy, damages for trespass and injunction. From the above findings of Beckley, J. in Suit HK/68/60 (Exhibit "E"), I will agree G with the courts below that Exhibit "E" which was confirmed by this court in Exhibit "F" dismissed the plaintiffs' claim on grounds:

1. that the defendants had been in possession of different portions of "their" land evidently to the knowledge of the plaintiffs for a H considerable time;
2. that possession was nine-tenths of the law and
3. that the plaintiffs had stood by and watched the two defen-

dants therein litigate between themselves over the land in dispute.

There were other crucial findings by Beckley, J. against the plaintiffs on issues vital to their claims and he finally dismissed their claims. From all the findings, it would be impossible for the plaintiffs to contend in a subsequent suit as they have tried to do in the present proceedings, that they were the real owners of the land. I am of the clear view that the parties were in fact concluded in Exhibit "E" and it cannot be said that the adjudication decided nothing other than refusing the relief sought by the plaintiffs therein. I therefore agree with the courts below that the doctrine of estoppel per rem judicatam properly applied³. See Alase & Ors. v. Ilu & Ors. (supra) and Nwaneri & Ors. v. Oriuwa (supra). (p. 1153 G)

Estoppel - Pleadings

4. I also entertain no doubt that material facts to found estoppel were pleaded and what was to be pleaded were facts and not evidence. It is not necessary to plead estoppel in any particular form so long as the matters constituting estoppel are stated in such a manner to show that the party pleading relied upon it as a defence or answer. The respondent did so and it was the appellants who even invited him so to do from their own pleadings. See Ezewani v. Onwordi & Ors. (1986)4 N.W.L.R. (Pt. 33) 27. The court below was right when it held that Exhibit "E" did not fall within the type of judgments envisaged by this court in Suit No. SC. 144/1974: Daniels & Ors. v. Cardoso decided on 12:12:75 (unreported). (p. 1155 D)

Ground of appeal

5. From the finding of the court below which I have set out above, it is clear that the factual basis of ground 7 of the grounds of appeal upon

³. See some Supreme Court decisions where the plea of Res Judicata was upheld: Oseni v. Dawodu (1994) 7 KLR 51; Otapo v. Faleye (1995) 2 KLR 548; Adigun v. Gov. of Osun State (1995) 3 KLR 671. But see the case below where the plea was not successful. Ike v. Ugboaja (1993) 9 KLR 62.

which the fifth issue is based does not exist. The ground upon which the court below is stated in ground 7 of the grounds of appeal to have based its decision is not the ground upon which the Court of Appeal did so. The refusal of the court below to hear arguments on the issue was not based upon the ground stated in ground 7 of the grounds of appeal B that is, that the appellants failed to remind the trial judge of his earlier reasons for wanting the case transferred from his court. From what I have said above in respect of the appellants' fifth issue for determination, my conclusion is that ground 7 of the grounds of appeal is incompetent. C Issue No. (5) distilled from it is incompetent as well as all the arguments based on it. (p. 1158 D)

Land law - Lis pendens

6. Even if the appellants had succeeded in all the grounds of appeal can- D
vassed before us, the fact remained that they relied upon the title of their predecessor-in-title (late Olajide Alakija) who according to their plead-
ings and evidence bought a portion of the land in dispute in Suit No. HK/ 68/60 in 1962 from the family of P.W.2 and Exhibit "B", a deed of con- E
veyance was executed in his favour in 1965. Exhibit "E" is the judgment of Beckley, J. in Suit No. HK/68/60 and Exhibit "F" is the judgment of this court confirming the decision of Beckley, J. The appellants pleaded both judgments. Exhibit "E" was delivered on 7-6-68 and the decision of F
this court in Exhibit "F" was dated 9-4-73. Whether the land was sold to Olajide Alakija (deceased) in 1962 or 1965, what he purchased was part of the land in dispute in HK/68/60 which was then pending. The learned trial judge Oshodi, J. rightly found that:

*"a person who bought a plot of land during the pendency of G
litigation cannot claim that he never bought a litigation for himself."*

He went further and held as follows:

*"I would now reiterate again on the documents produced Exhibit H
"B" and "C", it is true that Exhibit "B" is first in time but as stated above, the vendors by virtue of Exhibits "E" and "F" have nothing to sell."*

There was no appeal against this finding of the learned trial judge on the

issue of lis pendens. That finding remained binding and conclusive (p. 1158 G)

Property Law- Lis pendens Doctrine

B 7. The doctrine of lis pendens⁴ prevents the effective transfer of rights in any property which is the subject matter of an action pending in court during the pendency of the action. The doctrine is applied to any purchaser of such property and it is not founded on the equitable doctrine of notice, actual or constructive but upon the fact that the law does not allow to litigant parties or give to them during the pendency of the litigation involving any property, rights in such property in dispute so as to prejudice any of the parties to the litigation. A purchase pendente lite though without actual notice and for valuable consideration will be set
C aside. See Ogundiani v. Araba & Ors. (1978) 6-7 S.C.55 at 78, Osagie v. Oyeyinka (1987) 3 N.W.L.R. (Pt.131 and Sorrell v. Carpenter (1928 2 p. Wins. 482. (p. 1159 E)

E **NOTABLE POINT OF INTEREST**
ONUJSC

1. Evidence of a witness taken in an earlier proceedings

The general principle of law is that evidence of a witness taken in earlier
F proceedings is not relevant in a later trial, except for the purpose of discrediting such a witness in cross-examination and for that purpose only. Where a party intends to impeach the credit of a witness by showing that what that witness has said in the present proceedings contradicts his evidence in previous proceedings, the attention of that witness must be
G specifically drawn to what he said in the previous case and must be given an opportunity of making an explanation. See Ariku v. Ajiwogbo (1962) 1 ALL NLR (part 4) 629; Alade v. Aborishade (1960) 5 FSC 167 at 171 and Ogunnaike v. Ojayemi (1987) 1 NWLR (Part 53) 160. See also
H Section 199 of the Evidence Act, Cap. 112 Laws of the Federation 1990.

⁴ See some other recent Supreme Court cases on Lis Pendens doctrine: Ajunan v. Akanni (1994) 1 KLR 129; Bangboye v. Olusogo (1996) 4 KLR (pt. 40) 655.

The question then is, in the case in hand, can it be said that the above principle was observed. I think not since the issue does not arise.
(p. 1161 G)

REPRESENTATION

B

T. A. Molajo Esq for the Appellants

Chief G.O.K. Ajayi SAN with Okunuga Esq for the Respondent

CASES REFERRED TO

C

Alase v. Ilu (1965) N.M.L.R. 66

Nwaneri v. Oriuwa (1959) 4 F.S.C. 132

Karfawa v. Nagogo (1970) N.N.L.R. 25

Chellaram v. Ollivant (1944) 10 W.A.C.A 77

Ibiyemi v. Olusoji (1957) W.R.N.L.R. 25

D

Ezewani v. Onwordi (1986) 4 N.W.L.R. (Pt. 33) 27

Ogundiani v. Araba (1978) 6-7 S.C.55 at 78,

Osagie v. Oyeyinka (1987) 3 N.W.L.R. (Pt.131)

Sorrell v. Carpenter (1928 2 p. Wins. 482.

E

Ariku v. Ajiwogbo (1962) 1 ALL NLR (part 4) 629

Akpene v. Barclays Bank Nig. Ltd (1977) 1 SC. 47

Alade v. Aborishade (1960) 5 FSC 167 at 171

Ogunnaike v. Ojayemi (1987) 1 NWLR (Part 53) 160.

F

Odiase v. Agho (1972) 1 ALL NLR 170 at 176

Foreign Finance v. LSDPC (1991) 1 N.S.C.C 520

STATUTE REFERRED TO

Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990. s. 199 G

LEAD JUDGMENT BY OGWUEGBU JSC

The appellants as plaintiffs and Executors/Executrix of the estate of Olajide Alakija instituted the action leading to this appeal in the High Court of Lagos State against the defendant who is the respondent herein claiming as follows:-

"(a) A declaration that they are the owners of all that piece or

parcel of land with the structures thereon situate and lying and being at Ipaja, Orile-Agege, in Ikeja Division of Lagos State of Nigeria which parcel of land is vested in the plaintiffs' late father, Mr. Olajide Alakija by virtue of a Deed of Conveyance dated 30th July, 1965 and registered as No. 11 at page 11 in Volume 871 of the Land Registry. Ibadan then Western State of Nigeria. IN THE ALTERNATIVE the plaintiffs claim a declaration that they are the people entitled to a Certificate of Occupancy in respect of the said piece or parcel of land mentioned in paragraph 1 above, pursuance (sic) to the provisions of Land Use Decree (1979).

(b) N20,000.00 being general damages for act of trespass committed on the said land by the Defendant.

(c) An order of perpetual injunction restraining the Defendant his privies, agents and/or servants from committing further acts of trespass on the said land."

The case was heard on the pleadings filed and exchanged by the parties following an order of the court to that effect. At the close of hearing, Oshodi, J. in a reserved judgment dismissed the plaintiffs' claim in its entirety. The plaintiffs were aggrieved by the decision of the learned trial judge and appealed to the Court of Appeal, Lagos Division. Their appeal to that court was dismissed hence the further appeal to this court.

The facts of the case in a nutshell are that in 1962, the Ewedairo Family sold the parcel of land in dispute to Barrister Olajide Alakija (deceased). The said transaction was evidenced by a Deed of Conveyance dated 30-7-65 and registered as No. 11 at page 11 in volume 871 of the Land Registry, Ibadan which was then the appropriate registry. The appellants' late father put some tenants on the land. In January, 1979, the respondent together with his servants and agents commenced the erection of a fence on the land and this led to the action leading to this appeal. The respondent's case is that he is the owner of the legal estate in his plot of land by virtue of a Deed registered as No. 99 at page 99 in volume 1769 of the Lands Registry in the office at Lagos. That the said plot of land forms a portion of a large area of land which originally belonged to one Alhaji Abudu Gafari Olalabi Sulu by virtue of purchase at an auction

sale conducted by one Mr. Abayomi in December, 1958 and the said Alhaji Abudu Gafari Olalabi Sulu was put into undisturbed possession thereof and he exercised unfettered right of possession as absolute owner. By a Power of Attorney dated 8-5-74 Alhaji Abudu Gafari Olalabi Sulu appointed Rafiu Abiola Olalabi Sulu as his lawful attorney in respect of all his lands including the large area of land of which the respondent's land forms part. The said lawful attorney conveyed the respondent's plot of land to him in 1977. The latter was put into possession and he remained in undisturbed possession until early in 1979 when unidentified person started to lay claim to the said plot of land.

As stated earlier in this judgment, the plaintiffs who were dissatisfied with the decision of the Court of Appeal appealed to this court. Briefs of argument were filed by the parties in compliance with the rules of this court and from the grounds of appeal filed, the appellants submitted the following issues for determination in the appeal.

"1. Whether the court below was not in error when it upheld the rejection of the evidence of P.W.2 by the learned trial Judge when there was no basis in law for the total rejection of such evidence.

2. Whether the learned Justice of Appeal who wrote the lead judgment, concurred by a second Justice, was not in error when he held that the learned trial Judge was right to have compared the evidence of P.W.2 in the present suit with the evidence of the witness in an earlier suit with a view to assessing the witness's credibility.

3. Whether the court below was not in error when it upheld the trial Court that the judgment in Suit No. HK/68/60, Exhibit E, operated as estoppel so as to bar the present proceedings.

4. Whether the court below was right when it held that the judgment of the Court in Suit No. HK/68/60, Exhibit E, does not fall within the type of judgment envisaged in the decision of the Supreme Court in J. B. Daniel & Ors. v. Paul Cardoso, SC/144/74, and that the judgment puts the respondent on a better footing than the Appellants with regard to the ownership of the land in dispute and that it conclusively decided the issue of ownership and possession of the land.

5. Whether the court below was not in error in not holding that

the whole trial was vitiated by procedural irregularity."

The respondent did not agree with the total formulation of ISSUES by the appellants either because the issues constitute unnecessary fragmentation of what in effect are single issues or, because some of the issues raised and argued are not open to the appellant. However, the defendant/respondent identified the following three issues as arising for determination:

"1. Whether a court can properly compare the evidence given by a witness before him with that given by him in another suit with a view to using such other evidence in assessing the credibility of the witness.

2. Whether the judgment in Suit No. HK/68/60 Exhibit E operated as estoppel so as to bar the Plaintiffs' action.

3. Whether in the circumstances of this case it was not too late to raise the issue of the irregularity arising from the delay in concluding the evidence of P.W.2."

Mr. Molajo who argued the appeal adopted and relied on the appellants' brief of argument filed by Kehinde Sofola, Esq. S.A.N. on 17-5-94. He also made oral submissions in expatiation of the arguments contained in the brief. He submitted in respect of the first issue for determination that the learned trial judge rejected the evidence of P.W.2 because it is completely at variance with the pleadings of the appellants, and also, that it was similar to his (witness's) evidence referred to in Exhibit "E" which was rejected in that exhibit. It was further submitted that the learned trial judge was of the view that the evidence of P.W.2 was completely at variance with the pleadings of the appellants without demonstrating how and in what respect it was so and that he failed to evaluate the evidence of P.W.2 as given before him as regards the traditional history of the land but merely rejected the traditional evidence because it was rejected in the earlier suit. We were urged to hold that the learned trial judge was in error and that the court below was similarly in error not to have re-evaluated the evidence of P.W. 2 in the exercise of its powers of re-hearing the appeal before it. The case of Onwuchuruba v. Onwuchuruba (1993) 5 N.W.L.R. (Pt. 292) 185 at 199-200 was cited and relied upon.

Chief Ajayi, S.A.N. for the respondent in reply to the first issue submitted that it was not open to the appellants in this court to raise or argue this point in this appeal as the proper time to do so was during their appeal to the court below against the decision of the High Court. He agreed that the appellants raised the issue in the course of their arguments in the court below and that objection was taken on the ground that they did not appeal against the decision of the High Court on that point and the objection was sustained.

It was the contention of the respondent that the appellants did not appeal against the rejection of the evidence of P.W.2 by the learned trial judge on the ground that it was at variance with the plaintiffs' pleadings and that the court below did not decide and had no need to decide on whether the evidence of P.W.2 was at variance with the plaintiffs' pleadings. It was further submitted that the appellants were trying indirectly to get this court review the determination of the High Court on the issue. We were urged to discountenance the issue and all arguments advanced on it as formulated by the appellants.

I will agree with the respondent's submission on this point based on the conclusion reached by the court below on the said point. The court below said per Babalakin, J.C.A. (as he then was):

"Finally, there is the finding of fact by the learned trial judge that the traditional evidence of the Appellants in respect of the land in dispute was at variance with their pleadings and this was one of the reasons given for the dismissal of the Appellants' case. The Appellants have not appealed against this finding and one may add that even if all their grounds of appeal succeed (which have not) the appeal will still stand dismissed".

Since the court below did not decide and was not called upon to decide whether the learned trial judge was in error in rejecting the evidence of P.W.2 because it was at variance with the plaintiffs' pleadings, the decision of the learned trial judge on the said point remained final there being no appeal to the Court of Appeal on it. It is therefore too late in the day to raise that issue in this court as the appellants had attempted to do in ground six of their grounds of

appeal and in their first issue for determination in this appeal. This court does not have the jurisdiction to hear appeals from the decisions of the High Court direct. Both ground six of the grounds of appeal and Issue (1) based on it are incompetent. They are struck out together with the arguments based on them.

The complaint in the second issue is that the court below (by a majority) held that the learned trial judge was right to have compared the evidence of P.W.2 in the present suit with the evidence of the witness in an earlier suit with a view to assessing the witness's credibility by relying on the case of Olajide v. Adeagbo (1988)4 SCNJ 1. It was submitted in the appellants' brief that the dissenting opinion of Akpata, J.C.A. (as he then was) on the point is the correct statement of the law and that the majority of the court below was in error in holding otherwise and in placing reliance on Olajide v. Adeagbo (supra) and that it would be extremely dangerous to permit a trial judge to make use of the review of the evidence of a witness given before another judge to discredit the witness.

The substance of the appellants' second issue is similar to the first issue for determination formulated by the respondent. It was argued on behalf of the respondent that the learned trial judge did not reject the evidence of P.W.2 because the judge in Exhibit "E" had rejected similar evidence and that it was evident from the judgment of Babalakin, J.C.A. (as he then was) that the learned trial judge in dealing with the evidence of P.W.2, treated it as (a) going to no issue as it was at variance with the plaintiffs' pleadings and (b) making a ridiculous claim to ownership of the whole of Agege for his family.

I will set out the passages of the judgments of the learned trial judge and those of Akpata and Babalakin, J.C.A. (as they then were) before I determine whether the appellants' complaint is justified. At page 185 of the record, the learned trial judge held as follows:

"1. Let me first deal with the traditional evidence profered by the Plaintiffs which was the evidence of the 2nd Plaintiff Witness. Following the traditional evidence given, one would find that it is completely at variance with the pleadings of the Plaintiffs. In fact he is claiming the whole of Agege for his predecessors in title. At

this stage, I am bound to refer to the evidence of the same 2nd Plaintiff Witness as given in Exhibit "E". This same story was rejected and I am of the same view that the old man is not clear of the traditional history he gave in respect of this land. I do not accept this traditional evidence."

Babalakin, J.C.A. (as he then was) who wrote the lead judgment B said:

"It is obvious that the learned trial judge did not reject the evidence of P.W.2 as to traditional history of the land in dispute on the ground that another Judge had rejected similar evidence given in a previous suit. The basis of his rejection of the evidence of this witness was that his evidence before him was at variance with the pleading of the Appellants' case." C

Akpata, J.C.A. (as he then was) in his own contribution said:

"Firstly, the learned judge did not make use of exhibit "E" to discredit P.W.2. In effect, he did not find the previous evidence of the witness inconsistent with the evidence given before him. Secondly, the learned trial judge did not assert that he disbelieved the witness because his previous evidence was not accepted by the Judge in the previous case. The trial judge was saying in effect that great minds think alike and that he was of the same mind with his learned brother before whom P.W.2 had earlier testified on the same issue. He was in no way influenced by the finding of the Judge in the previous proceedings as Mr. Sofola would like us to hold." D E F

It is clear from the portions of the judgments reproduced above, that the learned trial judge did not compare the evidence of P.W.2 in the present proceedings with the evidence of this same witness in an earlier suit in arriving at his decision or with a view of discrediting him. The court below agreed that the learned trial judge did not reject the evidence of P.W.2 because the judge in Exhibit "E" had rejected similar evidence. G

Babalakin J.C.A. (as he then was) expressed his view on H the law which came under severe criticism in the appellants' brief. The statement is thus:

"A fortiori a Judge can compare the evidence given by a wit-

ness in a previous suit with the evidence given by the witness before him on some issue to assess the credibility of such a witness and make comments on same and this is what the learned trial Judge did in this case. What he did was to use the previous evidence of P.W.2 to discredit his evidence in the present case before him and he is perfectly entitled to do so." (the underlining is for emphasis).

That was not what the learned trial judge did in the present proceedings and if he had done so, he would have committed a serious error of law and I agree with the view expressed by Akpata, J.C.A. (as he then was) that the learned trial judge was not competent to compare the evidence given by a witness in a previous proceeding with the evidence given by the same witness before the trial judge to assess his credibility when the attention of that witness was not drawn to his alleged previous evidence. This is the correct statement of the law. See section 199 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 which provides:

"199. Any witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

As I said earlier, and as found by the court below including Babalakin, J.C.A. who wrote the lead judgment, the learned trial judge did not reject the evidence of P.W.2 because his previous evidence was not accepted by the Judge in the previous case. I agree that the view expressed by Babalakin, J.C.A. on the law should be treated as no more than an obiter dictum and I have so treated it. The factual basis on which the view was based was not there. His view of the law did not form the basis of the decision either of the High Court or the court below.

As to whether the judgment in Suit No. HK/68/60 (Exhibit "E") operated as estoppel so as to bar the present proceedings, it was submit-

ted by the learned appellants' counsel that before the plea can succeed, certain conditions must exist namely, that the parties, the issues and the subject matter must be the same in the previous suit as those in the present proceedings. We were referred to the cases of Nwaneri & Ors. v. Oriuwa (1959) 4 F.S.C. 132, Idowu Alase & Ors. v. Ilu & Ors. (1965) B N.M.L.R. 66 and Karfawa v. Nagogo (1970) N.N.L.R. 25. It was also contended that estoppel must be specifically pleaded. The learned counsel referred the court to the following decided cases: Chellaram & Sons v. G.B. Ollivant Ltd. (1944)10 W.A.C.A. 77, Owonyin v. Omotosho (1961) 1 ALL N.L.R. (Pt.2) 304 and Ezewani v. Onwordi & Ors. (1986) C 4 N.W.L.R. (Pt. 33) 27. He further submitted that the respondent failed to discharge the onus on him to satisfy the trial court that either or both of the two pieces of land the subject matter of the dispute in Suit No. HK/68/60 fall completely within the land shown in the Conveyance dated 20- D 7-65 and registered as No. 11 at Page 11 in Volume 871 of the Lands Registry at Ibadan (Exhibit "B"). The case of Ibiyemi & Ors. v. Olusoji & Ors. (1957) W.R.N.L.R. 25 was also cited and relied upon.

It was submitted on behalf of the respondent that the appellants E first pleaded and made an issue of the judgment in Suit No. HK/68/60 and eventually produced and tendered it in their evidence as exhibit "E" and they further pleaded that the land in dispute formed part of a vast area of land situate and lying at Agege whose ancestor Aige hailed from Otta in F Ogun State, that the appellants also pleaded the deed of conveyance of their predecessor-in-title (Exhibit "B") and having specifically pleaded this document, the learned Senior Counsel submitted that its contents formed part of their (appellants') pleadings.

I will now consider whether the conditions precedent to the G operation of the plea of estoppel per rem judicatam exist in the present proceedings. It will be necessary to reproduce the pleadings of the parties touching on the doctrine and the findings of the courts below on it. Paragraphs 5, 7, 8 and 13 of the amended statement of claim and para- H graphs 12, 13 and 14 of the statement of defence are relevant.

Amended Statement of Claim:

5. *The Ewedairo family sold the said land to the deceased some-*

time in 1962 but the said Ewedairo family did not execute a conveyance in favour of the deceased until sometime in July, 1965.

7. On or about the 30th of July, 1965 the said Ewedairo family executed a conveyance of the land in dispute in favour of the deceased and the said conveyance was registered as No. 11 at page 11 in Volume 871 of the Lands Registry Ibadan then Western Region of Nigeria.

8. The land referred to in paragraph 5 herein forms a portion of a Vast area of land situate and lying at Agege which belongs from time immemorial to the Ewedairo family whose ancestors one Aige hailed from Otta, Ogun State.

13. The said Moses Akanbi Olubode Omotoye (otherwise known as Bode Isaac) was the 4th defendant in Suit No. AB/39/1959 intitled (sic) Bintu Ola Apena and another versus Kafaru Laleye and 3 others. He was the 4th plaintiff in Suit No. HK/68/60 intitled (sic) Kafaru Laleye and 3 others (suing for themselves and on behalf of the Ewedairo family) versus The Registered trustees of the Apostolic Church Lagos Area and A.G. Olalabi Sulu."

Statement of Defence:

"12 The said Defendant's plot of land forms portion of a large area of land which originally belonged to one Alhaji Abudu Gafari Olalabi Sulu under and by virtue of purchase at an Auction Sale conducted by one Mr. Abayomi in December, 1958.

13. The said Alhaji Abudu Gafari Olalabi Sulu was thereat put into absolute and undisturbed possession thereof and thereon exercised unfettered right of possession as absolute owner.

14. And in Suit No. HK/68/60, the predecessors-in-title of the plaintiffs (Ewedairo Family) sued the said Alhaji Abudu Gafari Olalabi Sulu for:-

(i) Declaration of title,

(ii) Damages for trespass and

(iii) Injunction and the said suit was dismissed and in Appeal No. SC/120/71. the dismissal was confirmed by the Supreme Court and the ownership of Alhaji Abudu Gafari Olalabi Sulu was therein confirmed."

Before I refer to the findings of the courts below, I will refer to the relevant portions of Exhibit "B" - the Deed of Conveyance executed by Ewedairo family in favour of the plaintiffs' predecessor-in-title (Olajide O. Alakija). Exhibit "B" reads in part:-

"This Indenture made the 30th day of July, 1965 BETWEEN I. B KAFARU LALEYE, 2. JOSEPH AJASA EWEDAIRO, 3. JOHN BAMGBOYE ODIKAN, 4. MOSES OLABODE OMOTOYE, Principal members, representatives and Head of the Wedairo (sic) family of Araromi Village Orile Agege (hereinafter called the Vendors) of the one part which C expression where the context so admits shall include their heirs, executors, administrators and assigns AND OLAJIDE O. ALAKIJA, Barrister-at-law and Solicitor of the Supreme Court of Nigeria (hereinafter called the Purchaser) of the other part, AND WHEREAS the D Ewedairo Family of whom the vendors are one were again involved in another case involving the same family land at Araromi Orile Agege entitled Suit No. HK/68/60 Kafaru Laleye & others Vs. Sulu Olalabi & others and it was agreed between the entire members of the family to dispose by sale of portion of the family land which was the subject of E Suit No. AB/39/57 Bintu Ola Omo Apena & others Versus Kafaru Laleye and 3 others who then represented the Ewedairo in the said suit in which the present vendors succeeded, which sale was to raise funds to meet the expenses of the said subsequent litigation AND WHEREAS the above F vendors being desirous of disposing the portion of the said family land have agreed with the purchaser the said OLAJIDE O. ALAKIJA for the absolute sale to him of the said hereditaments for the sum of"

The parties joined issue on Exhibit "E". Each party relied G on it and it cannot be argued that the outcome of that suit is not relevant to the present proceedings. Both from the pleadings of the parties and Exhibit "B", the piece of land the subject matter of the present proceedings is part of the piece of land litigated upon in H Suit No. HK/68/60 and the parties to the present suit are the successors-in-title of the parties in the said previous suit (Suit No. HK/68/60). The plaintiffs in Suit No. HK/68/60 sued for themselves and

on behalf of the Ewedairo Family.

On the face of the records, the issues litigated upon in Suit No. HK/68/60 and the present suit are the same namely, declaration of title/entitlement to a certificate of occupancy, damages for trespass and injunction.

In resolving the plea of estoppel per rem judicatam, the learned trial judge Oshodi, J. found as follows:

"Counsel for the Plaintiffs has urged me to discountenance Exhibits E and F because the parties in the suit before me are not the same as the parties in that Suit NO. HK/68/60. I have abundantly made it clear that the roots of title of both parties relate to the parties in suit HK/68/60 hence Exhibit E and F will apply as an estoppel against the privies of the Plaintiffs in Exhibit "E" amongst who are the Plaintiffs in this suit."

The learned trial Judge Beckley, J. in dismissing the plaintiff's claims in Suit No. HK/68/60 said:

"It cannot be doubted from the evidence that the defendants have been on different portions of their land evidently to the knowledge of the plaintiffs for a considerable time, and as it is said possession is nine tenants (sic) of the law. The plaintiffs have stood by and have been witnessing litigation going on between the two defendants in respect of this land in dispute. As I have observed above they did not then asked (sic) to be joined in the suit in order that the matter may be finally determined. Finally, I must hold on the evidence before me that the plaintiffs have not discharged the onus on them to prove that they are the legal owners of this particular land in dispute by proving act of ownership over a long time so that the court can presume that they are the real owners. The claim for the plaintiffs must fail and is dismissed in its entirety."

From the above findings of Beckley, J. in Suit HK/68/60 (Exhibit "E"), I will agree with the courts below that Exhibit "E" which was confirmed by this court in Exhibit "F" dismissed the plaintiffs' claim on grounds:

1. that the defendants had been in possession of different

portions of "their" land evidently to the knowledge of the plaintiffs for a considerable time;

2. that possession was nine-tenths of the law and

3. that the plaintiffs had stood by and watched the two defendants therein litigate between themselves over the land in dispute.

There were other crucial findings by Beckley, J. against the plaintiffs on issues vital to their claims and he finally dismissed their claims. From all the findings, it would be impossible for the plaintiffs to contend in a subsequent suit as they have tried to do in the present proceedings, that they were the real owners of the land. I am of the clear view that the parties were in fact concluded in Exhibit "E" and it cannot be said that the adjudication decided nothing other than refusing the relief sought by the plaintiffs therein. I therefore agree with the courts below that the doctrine of estoppel per rem judicatam properly applied. See Alase & Ors. v. Ilu & Ors. (supra) and Nwaneri & Ors. v. Oriuwa (supra). I also entertain no doubt that material facts to found estoppel were pleaded and what was to be pleaded were facts and not evidence. It is not necessary to plead estoppel in any particular form so long as the matters constituting estoppel are stated in such a manner to show that the party pleading relied upon it as a defence or answer. The respondent did so and it was the appellants who even invited him so to do from their own pleadings. See Ezewani v. Onwordi & Ors. (1986)4 N.W.L.R. (Pt. 33) 27. The court below was right when it held that Exhibit "E" did not fall within the type of judgments envisaged by this court in Suit No. SC. 144/1974: Daniels & Ors. v. Cardoso decided on 12:12:75 (unreported).

On the fifth and last issue for determination, whether the court below was not in error in not holding that the whole trial at the High Court was vitiated by procedural irregularity, the learned appellants' counsel gave the history of the trial. We were referred to the note made by Oshodi, J. in the record of proceedings on 16-9-82 which reads:

"The last time I heard the 2nd P.W. was on January 14th 1981

and since then there had been continuous adjournments. It is now over 20 months since I listened to the last witness. It is my view that this matter should be referred to court 1 so as to be re-assign (sic) and start de novo. Case is therefore referred to Court No. 1 for mention on the 4th October, 1982."

It was submitted that for reasons not clear on the records, the suit was mentioned not in Court No. 1 but before Adeoba, J. on 4-1-82 with a note that the case file be sent back to the Chief Judge to enable him issue an order transferring the matter to another Judge. The case for another unknown reason came before Onalaja, J. (as he then was) on 21-3-83 who adjourned it to 9-5-83. The case came before Oshodi, J. again on 25-4-83 for yet another unknown reason. The latter heard the case and delivered judgment on 28-9-84 without adverting his mind to his minutes of 16-9-82.

It was contended that P.W. 2 was the most important witness for the appellants and if on 16-9-82 Oshodi, J. thought it advisable in the interest of justice to send the case file to the Chief Judge for assignment to another Judge for trial de novo, yet after another twelve months, he found himself able to continue taking the evidence of the same P.W.2 and delivered judgment after the expiration of another twelve months.

It was also submitted that when this matter was raised in the court below that court decided that it was improperly raised in that no ground of appeal covered it and also that it was not formulated as an issue. It failed to make a decision on it and thereby erred in not permitting the appellants raise the issue in view of the peculiar facts and circumstance of this case and that this led to a miscarriage of justice. The following cases were cited by the learned appellants' counsel:

Akpor & Ors. v. Iguoriguo & Ors. (1978) 2 S.C. 115, Ekeri & Ors. v. Kimisede & Ors. (1976) 9-10 S.C. 61, Akpena v. Barclays Bank of Nigeria Ltd. (1977) 1 S.C. 47 and Din v. Attorney-General of the Federation (1988) 4 N.W.L.R. (Pt. 211) 523.

It was submitted on behalf of the respondent that this ground of appeal and the issue raised on it in this appeal are not open to the appellants because what the court below did with respect to the issue of ir-

regularity was to decide that it would not allow the appellants argue the point and in consequence upheld the objection raised by the respondent's counsel to the arguments on the issue. It was further submitted that the appellants did not appeal against the determination of the court below that the appellants could not argue the issue of irregularity because there was B no ground of appeal or issue for determination on which the argument was based.

In the court below, the learned Senior Advocate who appeared for the appellants in that court sought to argue that because of the lapse C of time which occurred between the first hearing of the evidence of P.W.2 on 4th January, 1981 and the second time he continued to take the said witness's evidence on 25th April, 1983 it could be presumed that the Judge's concern was as to how he could remember the impression this D vital witness had made on him.

The learned Senior Advocate appearing for the respondent objected to the above issue which was being argued because it was not covered by any of the grounds of appeal filed by the appellants nor was it raised as an issue for determination in that appeal. E

The learned Senior Advocate for the appellants argued before that court that the issue was covered by the appellants' omnibus ground of appeal which reads:

"The judgment of the learned trial judge cannot be supported F having regard to the weight of the evidence."

The court below upheld the objection of the learned Senior Counsel for the respondent as follows:

"With the greatest respect to the learned Senior Advocate for the G Appellants what can be argued under this ground is how the weight of evidence in the case failed to support the judgment given in favour of the respondent. The issue now sought to be argued is that the H circumstances and/or delay occasioned in obtaining part of the evidence on which the judgment was based was prejudicial to the Appellants and that in such circumstances the evidence thus obtained led to the chances of the said evidence being disbelieved. These are entirely different issues from matters covered by the ground of appeal dealing with weight of

evidence reproduced above and cannot therefore be raised under this ground of appeal."

The fifth issue for determination is covered by ground seven of the grounds of appeal. Ground (7) without its particulars reads:

B "7. *The court below was wrong in law in holding that it was too late to raise the issue of the procedural irregularity in this case on the ground that Counsel for the parties did not remind the learned trial judge of his earlier ruling and his reasons for transferring the case to another Judge.*" (underlining is for emphasis)

C The appellants' fifth issue for determination in this court is reproduced again for ease of reference.

"5. Whether the court below was not in error in holding that the whole trial at the High Court was vitiated by procedural irregularity."

D **From the finding of the court below which I have set out above, it is clear that the factual basis of ground 7 of the grounds of appeal upon which the fifth issue is based does not exist. The ground upon which the court below is stated in ground 7 of the grounds of**
 E **appeal to have based its decision is not the ground upon which the Court of Appeal did so. The refusal of the court below to hear arguments on the issue was not based upon the ground stated in ground 7 of the grounds of appeal that is, that the appellants failed**
 F **to remind the trial judge of his earlier reasons for wanting the case transferred from his court.**

G **From what I have said above in respect of the appellants' fifth issue for determination, my conclusion is that ground 7 of the grounds of appeal is incompetent. Issue No. (5) distilled from it is incompetent as well as all the arguments based on it.**

H **Even if the appellants had succeeded in all the grounds of appeal canvassed before us, the fact remained that they relied upon the title of their predecessor-in-title (late Olajide Alakija) who according to their pleadings and evidence bought a portion of the land in dispute in Suit No. HK/68/60 in 1962 from the family of P.W.2 and Exhibit "B", a deed of conveyance was executed in his favour in 1965. Exhibit "E" is the judgment of Beckley, J. in Suit No. HK/**

68/60 and Exhibit "F" is the judgment of this court confirming the decision of Beckley, J. The appellants pleaded both judgments. Exhibit "E" was delivered on 7-6-68 and the decision of this court in Exhibit "F" was dated 9-4-73. Whether the land was sold to Olajide Alakija (deceased) in 1962 or 1965, what he purchased was part of the land in dispute in HK/68/60 which was then pending. The learned trial judge Oshodi, J. rightly found that:

"a person who bought a plot of land during the pendency of litigation cannot claim that he never bought a litigation for himself." He went further and held as follows:

"I would now reiterate again on the documents produced Exhibit "B" and "C", it is true that Exhibit "B" is first in time but as stated above, the vendors by virtue of Exhibits "E" and "F" have nothing to sell."

There was no appeal against this finding of the learned trial judge on the issue of lis pendens. That finding remained binding and conclusive.

The doctrine of lis pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in court during the pendency of the action. The doctrine is applied to any purchaser of such property and it is not founded on the equitable doctrine of notice, actual or constructive but upon the fact that the law does not allow to litigant parties or give to them during the pendency of the litigation involving any property, rights in such property in dispute so as to prejudice any of the parties to the litigation. A purchase pendente lite though without actual notice and for valuable consideration will be set aside. See Ogundiani v. Araba & Ors. (1978) 6-7 S.C.55 at 78, Osagie v. Oyeyinka (1987) 3 N.W.L.R. (Pt.131 and Sorrell v. Carpenter (1928 2 p. Wins. 482.

In the result the appeal is dismissed and the judgment of the courts below are affirmed. The respondent is entitled to costs of this appeal which I fix at N10,000.00

BELGORE JSC

I read in advance the judgment of my learned brother, Ogwuegbu, JSC, with which I am in full agreement. What Beckley J. had decided is what the appellants attempted to relitigate upon before Oshodi J. Issue estoppel per rem judicatam certainly applies. This is a case of concurrent findings of facts by the two lower Courts and nothing has been shown to be perverse or improper in those findings. This appeal lacks merit and I also, for reasons well articulated by Ogwuegbu, JSC, dismiss it with N10,000.00 costs to the respondent.

KUTIGI JSC

I read in advance the judgment now delivered by my brother, Ogwuegbu, JSC. I agree with it. I too dismiss the appeal with N10,000.00 costs in favour of the defendant/respondent. The judgment of the lower courts are confirmed.

MOHAMMED JSC

I have had a preview of the opinion of my learned brother Ogwuegbu, JSC., in the draft of the judgment just read and I agree with him that this appeal ought to be dismissed. This appeal rested mainly on the facts and on the findings made by the lower courts on those facts. This court has consistently held that where there have been concurrent finding of facts by the High Court and the Court of Appeal, it will not interfere with those findings unless there are special circumstances occasioning such interference, as for instance, where the findings were perverse or where there is a substantial error apparent on the record of proceedings or where the findings could not be supported having regard to the evidence before the court. The decisions of the lower courts in this appeal do not call for such interference.

This appeal is accordingly dismissed. I affirm the judgment of the court below. N10,000.00 costs are awarded in favour of the respondent.

ONU JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Ogwuegbu, JSC. I subscribe to his reasoning and conclusion that the appeal is lacking in substance and must perforce fail. B

My learned brother has so admirably and in full details set out the facts thereof that I feel it is needless for me to embark on any further appraisal of same. It will suffice to observe that of the five and three issues the appellants and the respondent have respectively submitted as arising for our resolution, a close scrutiny reveals to me that the three questions proffered by the respondent, revolving as they do, around the evidence of P.W.2 and what role Exhibit E plays therein, better represent those that will effectively dispose of the matter in contest between the parties. The three issues are: C D

1. Whether a court can properly compare the evidence given by a witness before him with that given by him in another suit with a view to using such other evidence in assessing the credibility of the witness. E

2. Whether the judgment in Suit No. HK/68/60 Exhibit E operated as estoppel so as to bar the plaintiff's action.

3. Whether in the circumstances of this case it was not too late to raise the issue of irregularity arising from the delay in concluding the evidence of PW2. F

I will set about considering these questions in order of sequence as follows:-

ISSUE NO.1

The general principle of law is that evidence of a witness taken in earlier proceedings is not relevant in a later trial, except for the purpose of discrediting such a witness in cross-examination and for that purpose only. Where a party intends to impeach the credit of a witness by showing that what that witness has said in the present proceedings contradicts his evidence in previous proceedings, the attention of that witness must be specifically drawn to what he said in the previous case and must be given an opportunity of making an explanation. See Ariku v. Ajiwogbo G H

(1962) 1 ALL NLR (part 4) 629; Alade v. Aborishade (1960) 5 FSC 167 at 171 and Ogunnaike v. Ojayemi (1987) 1 NWLR (Part 53) 160. See also Section 199 of the Evidence Act, Cap. 112 Laws of the Federation 1990.

B The question then is, in the case in hand, can it be said that the above principle was observed. I think not since the issue does not arise. In reality, the issue is a non-issue because Ground one of the Grounds of Appeal from which the issue is distilled is itself based on an assumption which is factually false. A further and more careful look at the issue
C discloses that it complains that the learned trial Judge was in error in comparing the evidence given by the witness in a previous suit with that given in the instant case on appeal in order to use it to assess the credibility of the witness in the case in hand, and thus to reject his evidence.

D With due respect, the learned trial Judge did no such thing at the trial. He never "compared" the evidence given in the previous case with that at the trial and then use the former to discredit the latter. What indeed the learned trial Judge did at the trial may be deciphered from the
E observation of Akpata, JCA (as he then was) when the appeal in the case came before him and his brethren (Babalakin, JCA as he then was and Awogu, JCA) thus:

*"Firstly, the learned trial Judge did not make use of Exhibit 'E' to discredit P.W.2. In effect, he did not find the previous evidence of the
F witness inconsistent with the evidence before him. Secondly, the learned trial Judge did not assert that he disbelieved the witness because his previous evidence was not accepted by the Judge in the previous case. The trial Judge was saying in effect that great minds think alike and that
G he was of the same mind with his learned brother before whom P.W2 had earlier testified on the same issue. He was in no way influenced by the findings of the Judge in the previous proceedings as Mr. Sofola would like us to hold."*

H Reading the above extract in conjunction with the leading judgment of Babalakin, JCA (as he then was) it is clear from the foregoing excerpt that the learned trial Judge, in dealing with the traditional evidence given by P.W.2 treated it

(a) as going to no Issue as it was at variance with the appellants' pleading and

(b) making a ridiculous claim to ownership of the whole of Agege for his family.

The learned trial Judge then proceeded to roundly reject appellants' evidence as being at variance with their pleading and that was enough to knock out the traditional evidence they led. It was after stating this that he dismissed it as going to no issue and thereafter came to point out that the witness (PW2) had told the same story in the course of the trial in Exhibit E and the Judge in that case had also rejected the story. That notwithstanding, the view expressed by Babalakin, JCA (as he then was) on the law, the factual basis on which the same was based was just not there. The learned trial Judge certainly did not use the evidence given in Exhibit E to discredit the evidence given by PW2. It is therefore incorrect, in my view, to argue or complain that the learned trial Judge had rejected the evidence of PW2 because the Judge in Exhibit E had rejected similar evidence. Babalakin, JCA (as he then was) however leaves one in doubt by his statement in his lead judgment wherein he asserted inter alia:

"It is obvious that the learned trial Judge did not reject the evidence of P.W2 as to traditional history of the land in dispute on the ground that another Judge had rejected similar evidence given in a previous suit. The basis of his rejection of the evidence of this witness was that his evidence before him was at variance with the pleading of the Appellant's case."

Once it is known that the above view by the court below was not a confirmation of the view of the learned trial Judge, it follows that all that Babalakin, J.C.A. (as he then was) said later on concerning the use of evidence given in later proceedings to discredit earlier evidence in another suit, was at best obiter dictum; it did not represent the direct and logical confirmation of the decision of the trial court.

ISSUE NO. 2

This issue asks whether the judgment in Suit No. HK/68/60 - Exhibit E operated as estoppel so as to bar the appellants' action.

In paragraph 13 of the appellants' Statement of Claim, they

pleaded and so made an issue No. HK/68/60 - Exhibit E as follows:-

"13. The said Moses Akanbi Olubode Omotoye (otherwise known as Bode Isaac) was the 4th defendant in Suit No. AB/37/1959 entitled Bintu Ola Omo Apena and another versus Kafaru Laleye and 3 others.

B He was the 4th Plaintiff in Suit No. HK/68/60 entitled Kafaru Laleye and 3 others suing for themselves and on behalf of Ewedairo family) versus The Registered Trustees of the Apostolic Church, Lagos area and A.G. Olalabi Sulu."

C Moses Akanbi Olubode Omotoye gave evidence for the appellants in the instant case as PW2. He was the head of the Ewedairo family who sold the land in dispute to the appellants herein. He was also the 4th plaintiff in Suit No. HK/68/60 (Exhibit E) who sued for themselves and on behalf of Ewedairo family. The 2nd Defendant in Exhibit E had been the Defendant/Respondent's predecessor-in-title. Earlier on in paragraph 8 of their Amended Statement of Claim the appellants had pleaded that the land in dispute formed a portion of a vast area of land at Agege which belonged from time immemorial to the Ewedairo family of Agege whose ancestor
D
E Aige hailed from Ota in Ogun State. It is common ground that it was part of this vast area of land owned by Aige that was litigated upon in Exhibit E. The appellants also pleaded the Deed of conveyance of their predecessor-in-title in paragraph 7 of their Amended Statement of Claim as being
F registered as No. 11 at page 11 in volume 871 of the Lands Registry at Ibadan vide Exhibit B.

In his concurring judgment affirming the trial court's decision Awogu, JCA said as follows with regards to Exhibit B (ibid):

G "The Appellants have contended very seriously that Exhibit E cannot operate as estoppel against them. With respect, this cannot be right. The document of title Exhibit B upon which the Appellants relied, stated as follows in respect of the litigation in Exhibit E:

H "And whereas the Ewedairo family of which the Vendors are one were again involved in another case involving the same family at Araromi Orile Agege entitled suit No. HK/68/60 Kafaru Laleye & others v. Sulu Olalabi & ors. and it was agreed between the entire members of the family to dispose by sale of portion of the family land which was the

subject-matter in Suit No. AB/39/57 Bintu Ola Omo Apena & ors. v. Kafaru Laleye & ors. who then represented the Ewedairo family in said suit in which the Defendants, the present Vendors succeeded, which sale was to enable the family raise funds to meet the expenses of the said subsequent litigation. And whereas the above vendors being desirous of B disposing of portion of the said family land have agreed with the purchasers, the said Olaide alakija etc."

Of Exhibit E, the learned trial Judge held among other things, as follows:-

"Counsel for the Plaintiffs has urged me to discountenance Exhibits E & F because the parties in the suit before me are not the same as the parties in that suit HK/68/60. I have abundantly made it clear that the roots of title of both parties relate to the parties in Suit No. HK/68/60 hence Exhibits E and F will apply as an estoppel against the privies of the Plaintiffs in Exhibit E, amongst whom are the Plaintiffs in this "What is worse, the present Plaintiff/Appellant bought a *lis pendens* in 1965 as per Exhibit E and based his present claim on it when he sued in 1979. He thereby got no title when in 1968 Exhibit E was concluded against his predecessor-in-title." (Underlining is by me for emphasis) E

Just as the appellants pleaded Exhibit E in paragraph 13 of the Statement of Claim, the Defendant pleaded the same Exhibit E. in paragraph 14 of the Statement of Defence. In Exhibit E. the action which was for a declaration of title, damages for trespass and injunction, the appellants' F claims were dismissed. In coming to his final conclusion on the matter, the trial Judge at the end of Exhibit E. held:

"It cannot be doubted from the evidence that the Defendants have been on different portions of their land evidently to the knowledge of the Plaintiffs for a considerable time, and as it is said, possession is nine-tenths of the law. The plaintiffs have stood by and have by witnessing litigation going on between the two Defendants in respect of the land in dispute. As I have observed above, they did not even ask to be joined in the suit in order that the matter may be finally determined. Finally, I H mist hold on the evidence before me that the Plaintiffs have not discharged the onus on them to prove that they are the legal owners of this particular land in dispute by proving acts of ownership over a long time

so that the court can presume that they are the real owners. The claim for the Plaintiffs must fail and is dismissed in its entirety."

The above-quoted passage provides the clearest of answers to the appellants' submission that Exhibit E. does not fall within the type of judgment envisaged by this court's decision in Daniel v. Cardoso or that Exhibit E. did no more than to hold that the appellants' case was "not proven".

Upon the totality of the evidence led before the Judge in Exhibit E he had no alternative but to dismiss the Plaintiffs' claims in circumstances which would make it impossible for them to contend in another suit that they were the real owners of the land. It is precisely what the appellants were trying to do in the instant case on appeal through their successors-in-title. This, appellants cannot be allowed to do; hence this issue ought to be resolved against them.

D ISSUE NO.3

The third issue proffers the question whether it is not now too late to raise the issue of irregularity arising from the delay in concluding the evidence of P.W.2. Better put, this issue which is coterminous with the appellants' issue 5 asks whether the court below was not in error in not holding that the whole trial at the High court was vitiated by procedural irregularity.

It is well to commence the consideration of this issue by having recourse to the passage in the lead judgment of Babalakin, JCA (as he then was) once more, bearing on the time lag between the commencement of the evidence of PW2 and its conclusion. The passage in question shows that objection had been taken by learned counsel for the respondent to arguments on the issue before the court below because the point had neither been raised as a ground of appeal nor as an issue for determination in the appeal. The learned Justice in the leading judgment had this to say on the point as follows:-

"An attempt to raise the issues now is therefore fraught with many difficulties because as the said facts do not form a ground of appeal, no issue for determination can be formulated on them because issues for determination must be related to grounds of appeal. There are many decisions of this court and that of the Supreme Court in support of

this proposition of law. See in particular the recent Supreme Court decision in the case of Niger Progress Ltd. v. North East Line Corporation (1989) 3 NWLR (part 107) 68.

"Worse still in this case these issues sought to be raised for determination in this appeal. Therefore, looked at from whatever angle the Appellants now attempt to take the Respondent by surprise by raising the issues in the manner they did it must be borne in mind that just as parties are bound by their pleadings in cases for trial before the High Courts so are they bound by their grounds of appeal and issues for determination in the Court of Appeal. I hold that the objection is well taken and it is hereby upheld."

Ground 7 at page 354 of Record of proceedings is the ground of appeal against the decision of the court below alluded to above wherein the complaint would have been to have reminded the Judge of his earlier decision that the case ought to have been transferred because of lapse of time between the evidence of P.W.2

With utmost due respect, the ground of appeal and the issue raised thereon in this appeal are, in my opinion, not open to the appellants firstly, because what the court below did with respect to the issue of irregularity was to decide that it would not allow the appellants to argue the point and in consequence, upheld the objection raised by learned counsel for the respondent, namely:

(a) No ground of appeal upon which the argument could be predicated was filed.

(b) No issue for determination was proffered in the Appellants' Brief on the point.

Akpata and Awogu, JJ.C.A concurred in the said lead judgment.

Secondly, the refusal of the court below to hear arguments on the issue was not and could not have been based upon the ground stated in the Ground of Appeal (that the appellants had failed to remind learned trial judge of his earlier reasons for wanting the case transferred from him).

On more of the irregularities attendant to the appeal herein, the appellants further contended that when Oshodi, J came to deliver his

judgment on September 28, 1984 he failed completely to advert his mind to the issue of the likelihood of miscarriage of justice; that conscious of the strategic role the evidence of PW2 played in the case, which contributed to the learned trial Judge finding it advisable on September 16, 1982 to send the case file to the Chief Judge for assignment to another Judge for trial de novo, yet after 12 months of the case being in the limbo, he found himself able to change his mind to take PW2's evidence and to finally conclude the case. For the gap in the time before the case was concluded by the self-same Oshodi, J., the cases of Justus Uduodo Akpor & ors. v. Odhogu Iguoriguo & ors. (1978) 2 SC. 115 or (1978) 1 LRN and Ekeri & ors. v. Edo Kemisede & ors. (1976) 9-10 SC. 61 or (1976) 1 NMLR 194 were called in aid. In view of the peculiar circumstances of this case, it was further contended that the appellants ought to have been permitted to raise the issue, moreso that it was plain that no further evidence could have been adduced which would have affected the decision on it vide Akpene v. Barclays Bank Nig. Ltd (1977) 1 SC. 47; Din v. Attorney-General of the Federation (1988) 4 NWLR (Part 87) 147 and John Bankole & ors. v. Mojidi Pelu & ors (1991) 8 NWLR (Part 211) 523.

That this appeal must fail at all events rests on the point that the appellants had relied upon the title of their predecessor-in-title, late Olajide Alakija who, according to their evidence, bought the land in dispute in 1962 from PW2's family who executed a conveyance, Exhibit 'B' in his favour. Exhibit 'B' is dated and registered in 1965. Exhibit 'E' is the case pleaded by both appellants and the respondent as Suit HK/68/60 while Exhibit 'F' is the Supreme Court decision on the appeal thereon. In this respect, the learned trial Judge had held as follows:-

"Exhibit 'E' was delivered on the 7th day of June, 1968 whilst the Supreme Court decision Exhibit 'F' which confirmed the decision in Exhibit 'E' was delivered on the 9th day of April, 1973. Admittedly, Exhibit B was made in 1965 but the evidence of 2nd Plaintiff's witness is that the land was sold to Alakija in 1962, whichever we consider it is clear that land so conveyed which forms portion of the land being litigated upon in Suit No. HK/68/60 was made during the pendency of that

Suit No. HK/68/60. In fact, both 1st Plaintiffs witness and 2nd Plaintiffs witness admitted that there had been previous plans in respect of the plan attached to Exhibit 'B' whereas the Defendant on their claim through Exhibit 'C' which is the deed of lease granted to the Defendant by the Olalabi Sulu family. A person who bought a plot of land during the pendency of litigation cannot claim that he never bought a litigation for himself." B

Continuing, the learned trial Judge said:

"I would now reiterate again on the documents produced as Exhibits 'B' and 'C', it is true Exhibit 'B' is first in time but as stated above, the Vendors by virtue of Exhibit 'E' and 'F' have nothing to sell." C

The effect and result of this determination was that the appellants claim to title also failed by virtue of the doctrine of Lis Pendens. The appellants did not appeal against this determination on the issue of Lis Pendens and so the determination was binding and conclusive; such that even if they (appellants) had succeeded on other points raised in their appeal, the same would still have failed in the court below as indeed it did. See Odiase v. Agho (1972) 1 ALL NLR 170 at 176 and Foreign Finance v. LSDPC (1991) 1 NSCC 520. As Awogu, JCA as aptly put it: D E

"What is worse, the present Plaintiff/Appellant bought a Lis Pendens in 1965 as per Exhibit 'E', and based his present claim on it when he sued in 1979. He thereby got no title when in 1968 Exhibit E was concluded against his predecessor-in-title." F

The case herein being another glaring instance of concurrent findings by the two courts below which, not being perverse, I have no reason to disturb them. See Missr v. Ibrahim (1974) 5 SC. 55; Incar Nig. Ltd. v. Adegbeye (1985) 2 NWLR 455 and Abusomwan v. Mercantile Bank of Nigeria Ltd (No.2) (1987) 3 NWLR (Part 60) 196. G

For these and the fuller reasons contained in the lead judgment of my learned brother Ogwuegbu, JSC, I too dismiss the appeal. I abide by the consequential orders inclusive of those relating to costs as set out H therein.