

SUPREME COURT OF NIGERIA

17TH JULY, 1998. SC. 56/1994.

**CORAM: S. M. A. BELGORE, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH JJSC.**

CHIEF TIMOTHY AGBAKA & 3 ORS. APPELLANTS
(For themselves and on behalf of Ogbanga Family)

AND

CHIEF JEREMIAH AMADI & ANOR. RESPONDENTS
(For themselves and on behalf of members
of Amadi House of Amadi Ama, Ogoloma)

APPEALS - *Grounds of appeal - That is incompetent - Any issue for determination based on it goes to no issue - And should be struck out.*

APPEALS - *Grounds of appeal - Incompetent ground of appeal - The Court of Appeal can strike out of its own motion - An incompetent ground of appeal.*

APPEALS - *Preliminary Objection - Notice of - The purpose is to give the adversary an opportunity of reacting to the objection.*

ESTOPPEL - *Issue estoppel - Where applicable - The appellants cannot in the present suit raise those issues - Which had been conclusively determined against them.*

EVIDENCE - *Credibility of witnesses - Previous proceedings - Evidence of the appellants witnesses in the earlier Proceedings - Was considered by the trial judge under s. 199 rather than s.34(1) of the Evidence Act.*

LAND LAW - *Long Possession - Entitlement to judgment on that basis - The land where the appellants claim to have been in long possession - Is not the same as the area in dispute in the present proceedings.*

FACTS

The plaintiffs/respondents instituted an action in the High Court of Rivers State holden at Port Harcourt against the defendants/appellants seeking inter alia a declaration of title over all that piece or parcel of land known as "AMADI ARUWARI KARI" situate at AMA, damages for trespass and possession of the land in dispute. The defendants counter-claimed seeking a declaration that in all the circumstances of the case the court, should allow the defendants to remain, under native law and custom or on purely equitable grounds on the land in dispute. The case of the plaintiffs was based on traditional evidence. They traced their ancestry to one Inimibatuboni who lived and died in Ogoloma. He was survived by eight sons of which Amadi was the eldest. They were traders and fishermen . They were in need of land for expansion. They approached the family of Iro of Orogban Village in Diobu who granted the land to their family. They occupied the land and each son carved out an area of the land for himself. The land was named "AMADI AMA" (meaning Amadi's Village) after Amadi the oldest and most influential of the children.

Subsequently, one Ogbonata and Okorie who were natives of Agbaka's compound in Ogoloma approached the founders of the land and requested to be given some land to settle on. They were accompanied by one Okoronkwo the father of the 1st, 2nd and 3rd defendants. An area that was not apportioned lying at one end of the Village was given to them to settle. This area is called "OMGBANGA" "POLO" or "OMGBAMGA COMPOUND" meaning those who begged to stay. The name later changed to be "Ogbanga Compound". A foot path separated this area from the rest of Amadi's compound. The footpath leads to the sea where as a warrant Chief Amadi kept his ceremonial and war canoes. This area is called "AMADI ARUWARI KIRI" meaning the land where Amadi kept his canoes. Amadi built other houses on the land . There had been an arbitration and two court actions since 1959 when the defendants began their acts of trespass. The defendant's case is that the land which the plaintiffs called "Amadi Ama" is in fact called "MONIMA" and it is part of Ogbanga Compound in Moni Ama. They claimed ownership

of the land and that they have lived on it since 1891. The land was granted to them by the Osa family of Diobu. They have farmed on the land without disturbance from anyone. The houses of the 3rd and 4th defendants are on the land in dispute. And that there is no area called Aruwarikiri in Monima.

At the close of hearing, the learned trial judge in a reserved and well considered judgment found for the plaintiffs as claimed. The defendant's counter claim was dismissed. The defendants who were aggrieved appealed to the Court of Appeal Enugu Division. That appeal was unsuccessful hence a further appeal to the Supreme Court where they raised three issues.

ISSUES FOR DETERMINATION

"(1) Whether the learned Justice of the Court of Appeal were right in striking out grounds 3 and 10 of the grounds of appeal without considering the issues raised on them.

(2) Whether the learned Justices of the Court of Appeal were right by agreeing with the trial Judge's decision that the Appellants' witnesses are untruthful witnesses based on the statements made in the earlier proceeding.

(3) Whether the appellants have established long possession and acts of ownership as to entitle them to judgment on their counter-claim."

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

Appeals - Grounds of appeal.

1. When a ground of appeal is incompetent, any issue for determination based on the incompetent ground goes to no issue and should be struck out as incompetent. An issue for determination derives its support from the ground of appeal and cannot exist independent of the ground of appeal. It automatically collapses when the ground of appeal ceases to exist. See Fasoro & or. v. Beyioku & ors.. (1988) 1 N.S.C.C. 705 and Egbe v. Alhaji (1990)1 N.W.L.R (pt.128) 546. The issues distilled from grounds 3 and 10 of the grounds of appeal did not call for consideration by the court below because they were incompetent and the court was

right in discountenancing them. (p. 2116 B)

Incompetent ground of appeal

2. Order 3 rule 2 (4) empowers the Court of Appeal to strike out of its
 B own motion or on application by the respondent any ground of appeal
 which is vague or general in terms or which discloses no reasonable
 ground of appeal. The court below acted within its powers when it
 struck out the said grounds of appeal. Where no objection is raised by
 C the respondent, the court can even suo motu draw the attention of the
 appellants' counsel to the incompetent ground of appeal. See Anadi v.
Okoli (1977)7 S.C. 57 at 63. (p. 2117 A)

Appeals - Preliminary objection.

D 3. The purpose of giving notice of preliminary objection is to give the
 adversary an opportunity of reacting to the objection and to avoid any
 surprise. Where the objection was argued in the respondents' brief as in
 this case and the brief was served on the appellants who had opportunity
 E to react to it even when they amended their grounds of appeal and brief
 of argument and they did not do so, I think it will be stretching Order 3,
 rule 15 too far to insist on the filing of notice in this particular case.
 (p. 2118 A)

F ***Evidence - Credibility of witnesses***

4. Judging from the observation of the learned trial judge in his judgment,
 I am inclined to hold that he considered the evidence of the appellants'
 witnesses in the earlier proceedings under section 199 of the Evidence
 G Act cap. 112 Laws of the Federation of Nigeria 1990 rather than section
 34(1) of the said Act. The learned trial judge did not attach any weight to
 the earlier statements which showed some contradictions. If at all he
 did, they did not affect his ultimate findings and conclusions in any ma-
 H terial way. (p. 2119 C)

Estoppel - Issue estoppel

5. This is a clear case of issue estoppel.⁸ The parties to the present proceedings are parties or privies to the parties in Suit No. P/107/67 before Holden, C.J. sitting in the Port Harcourt Judicial Division of the High Court of Rivers State, a court of competent jurisdiction. They litigated over the same subject matter and the appellants were confronted by the respondents with the Judgment of Holden, C.J. as a relevant fact where a number of vital issues were raised and determined. The appellants cannot in the present Suit raise those issues which had been raised and conclusively determined against them. See Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228, Cardoso v. Daniel (1986) 2 N.W.L.R. (pt. 201) 1. (p. 2124 A)

Land Law - Long Possession.

6. On the question of long possession and acts of ownership which would entitle the appellants to judgment, the contentions of the appellants in their brief of argument are based on ground 3 of their grounds of appeal which was struck out by the Court of Appeal. The area in dispute in both proceedings is not the area verged purple in Exhibit "S" - Ogbanga Compound which was granted to the appellants but the portion verged orange in the said Exhibit "S" (Aruwari Kiri) where the act of trespass which led to this action took place. It is very clear that the portion of land where the appellants claim to have been in long possession is the area verged purple in Exhibit "S" which was granted to them by the respondents. That area is not in dispute in the present proceedings and the respondents are not claiming it. (p. 2125 B)

REPRESENTATION

R. A. Ogunwole, Esq. for the appellants

Prince E. T. Nsofor for the respondents

⁸ In Arubo v. Aiyeleru (1993) 2 KLR 23, Nnkwo v. Uchendu (1996) 2 KLR (pt 38) 267 and Kamalu v. Umunna (1997) 5 KLR (pt 51) 1001 the Supreme Court consider whether issue estoppel was established in those cases

CASES REFERRED TO

- Nzirim v. Nzirim (1990)3 N.W.L.R (pt.138) 285 at 297
Lauwers Import - export v. Jozebson Industries Ltd. (1988) 3 N.W.L.R. (pt 83) 429 at 431
B Atuyeye & Ors. v. Ashamu (1987)1 N.W.L.R (pt. 49) 267 at 282-283.
Fasoro & Or. v. Beyioku & Ors. (1988) 1 N.S.C.C. 705
Egbe v. Alhaji (1990)1 N.W.L.R (pt.128) 546.
Anadi v. Okoli (1977)7 S.C. 57 at 63
Nta v. Anigbo (1972)5 S.C. 156 at 164,
C Osawaru v. Ezeiruka (1978) 6-7 S.C. 135,
Okorie v. Udom (1960/ at 164,
Pfeiffer v. The Midland Rly Co. (1887) 18 Q.B.D. 143.
Alade v. .Aborishade (1960) 5 F.S.C. 167,
D Lawal v. Dawodu (1972)1 All N.L.R. (pt. 11) 270
Ariku v. Ajiwogbe (1962)1 All N.L.R. 629

STATUTE AND RULES REFERRED TO

- E Court of Appeal Rules, Order 3 rules 2 (4) and 15
Evidence Act, cap 112 Laws of the Federation of Nigeria 1990, ss. 34 (1) and 199.

LEAD JUDGMENT BY OGWUEGBU JSC

- F The plaintiffs instituted an action in the High Court of Rivers State holden at Port Harcourt against the defendants seeking the following reliefs:-

- G *"Declaration of title over all that piece or parcel of land known as and called "AMADI ARUWARI KIRI" situate at AMADI AMA which is more particularly shown and demarcated and verged ORANGE in the Plan No. OK.294 filed by the plaintiffs in this suit.*

- H *(2). N5000.00 as general damages for trespass on the said Plaintiffs' land known as and called "AMADI ARUWARI KIRI " at AMADI AMA.*

- (3) Possession of the area of the said land trespassed on by the defendants.*

(4) *Perpetual injunction restraining the Defendants by themselves or their agents from committing any further acts of trespass or in any way interfering with the plaintiffs' possession, use and enjoyment of the said land.*"

The defendants filed a counter-claim which reads:

"The Defendants for themselves and on behalf of the Ogbanga Family seek a declaration that in all the circumstances of this case the Court, in the exercise of its equitable jurisdiction, should allow the Defendants to remain, under native laws and custom or on purely equitable grounds on the land in dispute."

Pleadings were ordered, filed and exchanged. The case proceeded to trial and on 15-12-80, the learned trial judge, Dagogo Manuel, J. in a reserved and well considered judgment found for the plaintiffs as claimed in paragraph 16 of their statement of claim. The defendants' counter-claim was dismissed. The defendants who were aggrieved by the decision of the learned trial judge appealed to the Court of Appeal, Enugu Division. That appeal was unsuccessful hence a further appeal to this court.

The case of the plaintiffs in the trial court was based on traditional evidence. They traced their ancestry to one Inimbatuboni who lived and died in Ogoloma. He was survived by eight sons - Amadi, Iringi, Worianume, Olunwa, Onyekwere, Josiah, Alib and Fimie. Amadi was the eldest. They were traders and fisher-men. They were in need of land for expansion. On one of their trading visits to Diobu market they sighted a piece of land near Rainbow Town. They approached the family of Iro of Orogban Village in diobu who granted the land to their family. They made the customary donation of fish and wine before the land was granted to them. They moved in and occupied the land, each son carved out an area of the land himself. The area was named after Amadi the oldest and most influential amongst the children. This was how the land got its name "AMADI AMA" meaning Amadi's village. Some years after the founding and settlement in this village by the children of Inimbatuboni, one Ogbonata and Okorie who were natives of Agbaka's compound in Ogoloma approached the founders of the land and requested to be given

land to settle on. They were accompanied by one Okoronkwo the father of the 1st, 2nd and 3rd defendants. An unapportioned area lying at one end of the village was given to them to settle. A foot path separated this area from the rest of Amadi's compound. This footpath leads to the sea where as a warrant Chief Amadi kept his ceremonial and war canoes. This area is called "AMADI ARUWARI KIRI" meaning the land where Amadi kept his canoes. Amadi built other houses on the land. His wife Enaborafaka cultivated a portion of the land and she lived, died and was buried on the land. The area given to Ogbonata and Okorie (appellants' ancestors) is called OMGBANGA POLO" OMGBANGA COMPOUND" meaning those who begged to stay. The name later changed to be "Ogbanga Compound." Odundum trees mark the boundary of this area with the rest of Amadi Aruwari Kiri. There had been an arbitration and two court actions since 1959 when the defendants began their acts of trespass. The plaintiffs are the sons of the original founders - Amadi.

The defendants' case is that the land which the plaintiffs call "Amadi Ama " is in fact called "MONIMA" and it is part of Ogbanga Compound in Moni Ama. It lies next to the waterside. They claim ownership of the land and that they have lived on it since 1891. The 1st defendant and his family have lived on the land and was born 80 years at the time he testified. It was part of the 1st defendant's case that the land was granted to them by the Osa family of Diobu. They have farmed on the land without disturbance from any one. First defendant testified that there is no area called Aruwarikiri in Monima. The houses of the 3rd and 4th defendants who are members of Ogbanga family are on the land in dispute. The 1st defendant knew Enaborafaka but denied that she died on the land. He knew Amadi personally and described him as a wealthy and influential chief and that Amadi Ama was named after Amadi. He testified that Aruwarikiri is the name given to the place ceremonial canoes are kept but could not say if Amadi had any ceremonial canoe. He testified that it was not correct that it was the plaintiffs who granted the land to them.

Brief of argument was filed by the defendants whom I will refer to as the appellants in this judgment. The plaintiffs who are the respon-

dents herein filed no brief of argument. They were absent but represented by counsel at the hearing. He was not heard in oral argument since the respondents failed to file their brief of argument. See Order 6 rule 9 of the Supreme Court Rules.

Three questions raised from the grounds of appeal for determination by the court are-

"(1) Whether the learned Justice of the Court of Appeal were right in striking out grounds 3 and 10 of the grounds of appeal without considering the issues raised on them.

(2) Whether the learned Justices of the Court of Appeal were right by agreeing with the trial Judge's decision that the Appellants' witnesses are untruthful witnesses based on the statements made in the earlier proceeding.

(3) Whether the appellants have established long possession and acts of ownership as to entitle them to judgment on their counter-claim."

The learned counsel for the appellants submitted that the respondents' counsel raised a preliminary objection to the grounds of appeal in their brief of argument but did not file any Notice of Preliminary Objection as enjoined by Order 3, rule 15 of the Court of Appeal Rules. He submitted that the court below was in error in taking the objection without the respondent filing the notice of Preliminary Objection. He cited the case of Nzirim v. Nzirim (1990)3 N.W.L.R (pt.138) 285 at 297. It was his further contention that Order 3, rule 2(2) was complied with because the particulars were incorporated in the grounds of appeal and that there is no rule of law which says that the particulars must be stated under a separate paragraph. He cited the case of Lauwers Import - export v. Jozebson Industries Ltd. (1988) 3 N.W.L.R. (pt 83) 429 at 431 and Atuyeye & Ors. v. Ashamu (1987)1 N.W.L.R (pt.49) 267 at 282-283.

He further submitted that issues 2 and 4 raised in the appellants' brief before that court covered those grounds of appeal. His submissions continued:

"Since the grounds of appeal have been struck out, the two issues raised for determination were never considered even though the Court

of Appeal is enjoined to consider all issues for determination....."

If I understand the complaint of the appellant correctly on issue number one, they are saying that even though grounds 3 and 10 of the grounds of appeal filed by them in the court below were struck out as incompetent, the court below should have considered the issues raised from those incompetent grounds of appeal. This is not the law. **When a ground of appeal is incompetent, any issue for determination based on the incompetent ground goes to no issue and should be struck out as incompetent. An issue for determination derives its support from the ground of appeal and cannot exist independent of the ground of appeal. It automatically collapses when the ground of appeal ceases to exist. See Fasoro & Or. v. Beyioku & Ors. (1988) 1 N.S.C.C. 705 and Egbe v. Alhaji (1990)1 N.W.L.R (pt.128) 546.**

The issues distilled from grounds 3 and 10 of the grounds of appeal did not call for consideration by the court below because they were incompetent and the court was right in discountenancing them.

The learned appellants' counsel also argued in the brief that the respondents in the court below did not comply with Order 3, rule 15 of the Court of Appeal Rules, 1981 as amended in that no notice of preliminary objection was filed. He relied on Nsirim v. Nsirim (supra). In the court below, the appellants formulated four issues for the determination of that court and proceeded to argue the grounds of appeal in the brief instead of the issues. The respondents followed suit and argued the grounds of appeal and in the course of their argument objected to various grounds of appeal. Grounds 3 and 10 were among the grounds of appeal objected to. The court below upheld the objections and struck out the incompetent grounds of appeal which included grounds three and ten. I have myself examined grounds 3 and 10 of the grounds of appeal and I found that each of the two grounds was framed without the particulars and the nature of the errors in law. This is not the case where the particulars are incorporated into the body of the grounds of appeal and not set out under a separate heading of "Particulars". See Atuyeye v. Ashamu (1987)1 N.W.L.R. (pt.49) 267 at 282.

While Order 3 rule 2(2) provides that if grounds of appeal allege

misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated, **Order 3 rule 2 (4) empowers the Court of Appeal to strike out of its own motion or on application by the respondent any ground of appeal which is vague or general in terms or which discloses no reasonable ground of appeal.** **The court below acted within its powers when it struck out the said grounds of appeal. Where no objection is raised by the respondent, the court can even suo motu draw the attention of the appellants' counsel to the incompetent ground of appeal. See Anadi v. Okoli (1977)7 S.C. 57 at 63 Mba Nta & Ors. v. Anigbo & Or. (1972)5 S.C. 156 at 164, Osawaru v. Ezeiruka (1978) 6-7 S.C. 135, Okorie & Ors. v. Udom & Ors. (1960)5 FSC 162 at 164, Nsirim v. Nzirim (Supra) and Pfeiffer v. The Midland Rly Co. (1887) 18 Q.B.D. 143. In Mba Nta v. Anigbo (supra) , objection was successfully taken in limine.** **Granted that the notice of objection given in the brief does not dispense with the need to file such a notice, Order 3, rule 15 (3) gives the court power to do certain things where notice was not filed. It reads:**

"15(3) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit."

In my view, the circumstances of this case are not such that this court can say that the court below was in error in permitting the respondent to argue the appeal for the following reasons:-

(1) The respondents filed an amended brief of argument in October 1987.

(2) on 28-3-88, the appellants applied to the court below for leave:

(a) to amend both their original and additional grounds of appeal;
(b) to amend the appellants' brief of argument. The proposed amendments were marked Exhibits A and B and annexed to the affidavit supporting the application.

(c) On 2-6-88, the court below granted the orders as prayed.

(d) The appeal was argued on 10-1-98 and judgment was delivered.

ered on 15-3-89.

The purpose of giving notice of preliminary objection is to give the adversary an opportunity of reacting to the objection and to avoid any surprise. Where the objection was argued in the respondents' brief as in this case and the brief was served on the appellants who had opportunity to react to it even when they amended their grounds of appeal and brief of argument and they did not do so, I think it will be stretching Order 3, rule 15 too far to insist on the filing of notice in this particular case. I am therefore unable to find any genuine complaint in Issue 1.

I now come to the other issue in this appeal which is whether the court below was right in agreeing with the decision of the trial court that the appellants' witnesses are untruthful witnesses based on the statements they made in an earlier proceeding (Suit No. P/107/67). One Godwin Nwaeyilogu Isiodu Principal Registrar, High Court, Port Harcourt testified as P.W.1, He stated that he was on subpoena to tender a case file relating to suit No. P/107/67 between Chief Timothy Agbaka & another as plaintiffs and Edward Amadi and two others as defendants. He tendered the following documents amongst others:-

1. *Original manuscript of the evidence of John Ogbunda- Exhibit F-F4*
2. *Original manuscript of the evidence of Chief Nwokekoro Exhibit "G-G2".* Ex-
3. *Original manuscript of the evidence of Nehemiah Okora - Exhibits "H-H4"* Ex-
4. *Original Manuscript of the evidence of Lazarus Koko - Exhibits "J-J9"* Ex-
5. *Original manuscript of the evidence of Allen Nwokekoro - Exhibits "K-K4".* Ex-
6. *The rest of the oral evidence at the trial was tendered as - Exhibits "L-L79."* Ex-

The learned appellants' counsel submitted that the admission of these exhibits in evidence offended against section 34(1) of the Evidence Act because before the testimonies could be received in evidence found

dation ought to have been laid. He further submitted that the learned trial judge made positive use of the evidence of the appellants' witnesses in the earlier proceedings in a way contrary to the principles and law enunciated in Alade v. Aborishade (1960) 5 F.S.C. 167, Lawal v. Dawodu & Or. (1972) 1 All N.L.R. (pt. 11) 270 and Ariku & Or. v. Ajiwogbe (1962) 1 All N.L.R. 629 and that the court below fell into the same error by comparing the evidence given by the appellants' witnesses in the earlier proceedings with their evidence in the present proceedings when the testimonies which the court below held to be in conflict were not put to the witnesses. He cited the case of Esene v. Iskhumen (1978) 2 S.C. 87 at 92.

Judging from the observation of the learned trial judge in his judgment, I am inclined to hold that he considered the evidence of the appellants' witnesses in the earlier proceedings under section 199 of the Evidence Act cap.112 Laws of the Federation of Nigeria 1990 rather than section 34(1) of the said Act. He said:

"Some witnesses who testified for the plaintiffs in that suit also testified for them as defendants in the present suit. Their evidence in that suit does not constitute evidence before me but such statements as were made by them were admitted in these proceedings only for the purpose of the testing of their credit in the present suit. A study of these statements shows some contradiction of their evidence in the present suit with regard and to the name of the land; its meaning of the name ogbanga and Moni-Ama; the year of the arbitration; whether or not Amadi was a warrant chief; whether the land is jointly owned by the plaintiffs and defendants and the name of the grantor. It seems to me that if these witnesses were truthful, there would have been no conflict in their evidence in both suits."

The learned trial judge did not attach any weight to the earlier statements which showed some contradictions. If at all he did, they did not affect his ultimate findings and conclusions in any material way. For example, on arbitration he said:

"The parties agree that there was arbitration in 1959 but they are in conflict as to the reason for it and also its decision. Each party

*given (sic) the reason as an act of trespass committed by the other.
There are no records of the Arbitration and I find myself unable to accept
any version of the decision but it is true that there is some dispute as to
the ownership of the area claimed."*

B Rather the learned trial judge relied on the judgment of Holden,
C.J. in Suit No. P/107/67 in finding for the respondents. The learned trial
judge held that by the said judgment of holden, C.J., the appellants are
precluded from contesting the contrary of the issues distinctly put in
issue and determined in Suit No. P/107/67. The learned trial judge held
C as follows:

*"The judgment clearly decided on the question of the ownership
of the area claimed. It dismissed the claim to ownership as an entire
failure and regretted that the defendants did not file a cross action which
D would have enabled the court to decide the question of title in one suit.
..... The decision is final and binding on the parties unless
upset by a Court of superior jurisdiction. There was no appeal against it
and the present defendants, who lost the action are estopped per rem
E judicatum from reopening the issue of title in a subsequent action.
Aniemeka Emegokwe vs. James Okadigbo (1973) 11 S.C. 113. It is
contended on behalf of the defendants that the lands in the suits are not
identical but there is the evidence of the defendants and their surveyor
F that the lands in both suits are the same and this was why they have filed
no separate plan but rely on the plan in the previous suit - Exhibit "D".
..... From the plaintiffs plan marked Exhibit
"S", the area disputed in the previous suit is verged BLACK which is the
same as the area verged GREEN in Exhibits "D" and "E". This area is
G part of a layer (sic) area verged ORANGE in Exhibit "S" and referred to
as "AMADI ARUWARIKIRI"*

Holden , C.J. in his judgment in Suit No. P/107/67 found as follows:

*"The argument is about a small strip of land near the waterside
H in Amadi village, quite close to Port Harcourt.
Plaintiffs claim that they are the first to settle on this land. I am satisfied
that this is not true. I accept as fully proved the story of how the name
came to be "Obanga Kiri" being a corruption of the Okrika phrase "Ogba*

Anga" implying that the occupiers had been granted land as a concession and did not hold it as of right. This proves beyond doubt that Defendants were in occupation of the land before plaintiffs came, and disposes of the plaintiffs story of how they took it from Ozza. The next question to be decided: just what B
land was given by the Amadi Family to the Plaintiffs' predecessors. I am satisfied on the evidence that it stopped at old footpath. This could be an easily seen and well defined boundary. I am further satisfied that as a result of the arbitration in 1959 Defendants agreed to allow plaintiffs to spread a little further south. I am satisfied that at no time did Defen- C
dants ever give to plaintiffs right over the piece of land now in dispute. It was without doubt the Oruwari Kiri where the ceremonial and war D
Canoes used to be stored. There was a building put on it by one of the earlier Amadi Chiefs to protect his canoes from the elements. There was a house built their for the wife Erebulofaka, who lived and died and was buried there. Plaintiffs' claim to it is utterly false. The plaintiffs' claim fails entirely, and is dismissed." (Underlining is for emphasis).

These were the findings and conclusion of Holden, C.J. In Suit E
No. P/107/67 instituted by the predecessors of the appellants herein as plaintiffs against the predecessors of the respondents in this suit. There was no appeal on those crucial findings of fact by the appellants' predecessors. It is the same parcel of land which is in dispute in the present F
proceedings.

In Suit No. P/107/67, the appellants' predecessors claimed against the respondents' predecessors as follows in paragraph 11 of their amended statement of claim:-

"Wherefore the plaintiffs claim:- G

(1) Declaration of title to that piece or parcel of land known as Ogbanga-Kiri and situate at Moniama otherwise known as Amadi Village in Okrika within the Port Harcourt Judicial Division.

(2) #200 being damages for trespass. H

(3) A perpetual injunction to restrain the defendants their servants from interfering with the plaintiffs in their possession, occupation, use and enjoyment of the said piece or parcel of land."

In the present proceedings, the plaintiffs/respondents claim against the defendants/appellants jointly and severally as follows:

B *"(1) Declaration of title over all that piece or parcel of land known as and called Amadi ARUWARI KIRI situate at AMADI AMA which is more particularly shown and demarcated and verged ORANGE in the plan No. OK. 294 filed by the plaintiffs in this suit.*

C *(2) N5000.00 as general damages for trespass on the said Plaintiffs' land known as and called "AMADI ARUWARI KIRI" AT AMADI AMA.*

(3) Possession of the area of the said land trespassed on by the Defendants.

(4) Perpetual injunction"

D In paragraphs 13, 14 and 15 of the plaintiffs' claim in the present proceedings, they averred as follows:-

E *"13. The defendants persisted in their claim over this land and denied of the title of the plaintiffs. They therefore took out another action against the plaintiffs claiming title over this land, damages for trespass and perpetual injunction to restrain the plaintiffs. The area claimed by the Defendants in that suit was verged PALE GREEN in the plan while the area into which the plaintiffs were alleged to have trespassed upon and caused (sic) the action is verged BLACK in the plan.*

F *14. The plaintiffs successfully defended the suit and the Court found that the Defendants were in fact originally settled on the area verged purple in the plan, that they begged to stay as their name connoted; that they were granted a further extension by the plaintiffs of the area verged YELLOW IN THE plan and that the area in dispute (verged Orange) was not given to them but retained by the plaintiffs. The Defendants claim was dismissed with costs (Suit No. P/107/67 Chief Timothy Agbaka and another versus Edward Amadi and two (2) others). The record of proceedings of this suit will be founded upon.*

H *15. The Defendants were satisfied with the said judgment and accepted it. They never appealed against it."*

They appellants in their statement of defence and counter- claim averred as follows in paragraphs 1 and 3:

"1. The defendants deny paragraphs 1,2, 3,4,5,6,7,8,9,10,11,12,13,14,15, and 16 of the plaintiffs' Statement of claim and put them to the strictest proof of all the averments therein.

3. The Defendants aver that the area in dispute in Suit No. P/ 107/67 is a small piece of land and not more than 100 ft. by 50 ft. The Defendants will contend at the trial that the said suit did not fully resolve the matters in controversy between the parties."

The appellants tendered survey plan Exhibit "D" which they also tendered as Exhibit 1 in the earlier proceedings (P/107/67). The area in dispute was verged GREEN in Exhibit "D". The respondents tendered Survey plans - Exhibits "E" and "S" Exhibit "E" is the survey plan tendered in the earlier proceedings where it was admitted in evidence as Exhibit "3". The area in dispute in that case is therein verged GREEN. Exhibit "S" is the survey plan prepared by the respondents for the present proceedings. The area in dispute in the present proceedings is verged ORANGE and an area verged BLACK which is within the area verged ORANGE was the cause of action in Suit No. P/107/67. The area verged ORANGE in Exhibit "S" is south of the old footpath running from west to east which Holden C.J. adjudged to be the area in dispute in Suit No. P/ 107/67 not granted to the appellants.

The learned trial judge Dagogo Manuel, J. also found that the evidence of the appellants and their surveyor was that the land in dispute in both suits are the same and that was why they relied on the survey plan filed in the earlier proceedings - (Exhibit "D"). The 1st defendant in answer to cross-examination testified at page 45 of the record of appeal thus;

"I did not file any plan in the present suit. I filed Exhibit D in the previous Suit No. P/107/67. Ogbanga Polo land is verged Red in Exhibit D. The action was against 1st plaintiff and others who are the brothers of the 1st plaintiff. I did not file a plan in the present action because the area in dispute in both suits are the same."

D.W. 3 (Robinson Frank Uko), a licensed surveyor testified in answer to cross-examination thus:

" The area verged RED in Exhibit D is the same as the area verged RED in Exhibit E. The plans are of the same scale. The area is verged pale Green in Exhibit "S". The similarity is by and large the same."

B This is a clear case of issue estoppel. The parties to the present proceedings are parties or privies to the parties in Suit No. P/107/67 before Holden, C.J. sitting in the Port Harcourt Judicial Division of the High Court of Rivers State, a court of competent jurisdiction. They litigated over the same subject matter and the appellants were confronted by the respondents with the Judgment of Holden, C.J. as a relevant fact where a number of vital issues were raised and determined. The appellants cannot in the present Suit raise those issues which had been raised and conclusively determined against them.

See Fadiora v. Gbadebo (1978) 3 S.C. 219 at 228, Cardoso v. Daniel (1986) 2 N.W.L.R. (pt. 201)1, Arubo v. Aiyloru (1993)3 N.W.L.R. (pt. 208) 126 and Ladega & Ors. v. Durosimi & Ors. (1978)3.

E The court below in its judgment said:

" In the end the suit was dismissed entirely. The appellants lost. They did not appeal against the judgment. The parties joined issues on the ownership of land which included the one previously litigated upon. The case Ladega v. Durosimi (supra) at page 101 decided that a party is precluded from contesting the contrary of any precise point which has once been distinctly put in issue and with certainty determined.

.....
G The issue of ownership of the land, how it was derived from Oza, the place the war canoes were kept, the arbitration of 1995, the house of the wife Enaborafaka who lived, died and was buried on the land were issues raised and determined by Holden, C.J. in P/107/67. That decision on those issues are final and binding. They were never appealed against.
H The learned trial judge was right in holding that the appellant (sic) in the present action cannot reopen those issues which were decided by Holden, C.J. The parties in the suit being the same, issue estoppel is established See Carl-Zsisa-Stiptung v. Rayner & Keller Ltd. (No.2) (1966) All E.R.

536 per Lord Guest at page 565."

These were the findings of the trial court which the appellants should have attacked in the court below instead of chasing the shadow of section 34(1) of the Evidence Act which even if conceded (which is not) did not scratch the solid findings of the learned trial judge were affirmed B by the court below. The appellants should sit down and study the judgment of Holden, C.J. which they did not appeal against.

On the question of long possession and acts of ownership which would entitle the appellants to judgment, the contentions of the appellants in their brief of argument are based on ground 3 of their grounds of appeal which was struck out by the Court of Appeal. The area in dispute in both proceedings is not the area verged purple in Exhibit "S" - Ogbanga Compound which was granted to the appellants but the portion verged orange in the said Exhibit "S" (Aruwari Kiri) where the act of trespass which led to this action took place. C D

On this question of long possession and ownership which arose in the counter-claim, the learned trial judge held as follows: E

"The defendants file (sic) a counter-claim in which the (sic) to be allowed to remain on the area by reason of their long occupation of it since 1893. I do not believe they have been in occupation of that area for that length of time. They have rather been in occupation for that period of the area known as Ogbanga Compound and I am satisfied that the disputed area does not from part of the area granted to them by the plaintiffs. The counter-claim fails and is dismissed." F
(Underlining is for emphasis).

It is very clear that the portion of land where the appellants claim to have been in long possession is the area verged purple in Exhibit "S" which was granted to them by the respondents. That area is not in dispute in the present proceedings and the respondents are not claiming it. G H

In the result, the appeal fails and is hereby dismissed. I make no order as to costs.

BELGORE JSC

I read in advance the judgment of my learned brother, Ogwuegbu, JSC, with which I am in full agreement. As I have nothing to add to what he has ably adumbrated, I also dismiss this appeal as totally lacking
B in merit.

KUTIGI JSC

I read before now the judgment just delivered by my learned
C brother, Ogwuegbu, JSC. I agree with the conclusion therein that the appeal lacks merit and should be dismissed. I accordingly dismiss it and affirm the judgments of the lower courts. I make no order as to costs, the respondents having played no part in the appeal.

MOHAMMED JSC

I agree that this appeal has failed. I have had the privilege to read the judgment of my learned brother, Ogwuegbu, JSC, in draft and for those reasons given, which I adopt as mine, I will dismiss the appeal. It
E is accordingly dismissed. I abide by the order made in the lead judgment on costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just
F delivered by my learned brother, Ogwuegbu, JSC. and I am in total agreement that this appeal is without substance and should be dismissed.

Both parties pleaded and relied heavily on traditional evidence in
G proof of their title to the land in dispute. Each side relied on a grant as its root of title. Whilst the plaintiffs/respondents historically relied on a grant from Iro, the defendants/appellants founded their own claim on a grant from Oza.

The learned trial Judge fully appreciated this stand of the parties
H and in proceeding to resolve these competing claims stated, quite rightly, as follows-

"It is therefore a sufficient and convincing proof of that can justify the exercise of the courts discretion in refusing or allowing the

claim and in this regard the burden of such proof lies on the plaintiffs."

On the question of the 1959 arbitration in respect of a portion of the land in dispute, the learned trial Judge was of the opinion that in the absence of any records, he was unable to accept any of the versions of the decisions as testified to by the parties.

The trial court closely examined Exhibit M, a previous action by the present defendants/appellants, as plaintiffs, against the plaintiff/ respondents, as defendants, in respect of the same land in dispute. This action terminated in the dismissal of the defendants/appellants suit by the trial court. Commenting on this suit, the learned trial Judge stated as follows-

"It is true the judgment confessed that even though it was deciding what was placed before the court, he regretted that the decision would not fully settle the matter. My understanding of this remark is that the parties despite the decision, would still continue in endless litigation and not that the judgment had not fully decided on the issue raised in the suit. The judgment clearly decided on the question of the ownership of the area claimed. It dismissed the claim to ownership as an entire failure and regretted that the defendants did not file a cross action which would have enabled the court to decide the question of title in one suit. I have the impression that it is as a result of this omission that the plaintiffs have brought the present action."

Without doubt, the decision in Exhibit M was final and binding as between the parties until set aside. No appeal was filed against it and, on the state of the law, the present defendants/appellants who, as plaintiffs, lost their action for title to the land in dispute vis -a- vis the plaintiffs/respondents are estopped per rem judicatam from reopening the issue of title to the same land in a subsequent action. See Chief Kofi Egimah v. Jaw Sampore and Another (1948) 12 W.A.C.A. 350.

On the appellant's counter-claim, the learned trial Judge dismissed the same as follows-

"The defendants filed a counter-claim in which they seek to be allowed to remain on the area by reason of their long occupation of it since 1893. I do not believe they have been in occupation of that area

for that length of time. They have rather been in occupation for that period of the area known as Ogbanga Compound and I am satisfied that the disputed area does not form part of the area granted to them by the plaintiffs. The counter-claim therefore fails and is dismissed."

B He concluded -

"The totality of the plaintiffs' evidence of a grant satisfies me as being more cogent and credit worthy than that of the defendants which carries glaring contradiction and obvious untruth."

C The Court of Appeal in a well considered judgment affirmed the above findings of the trial court and dismissed the appellants' appeal. It found the respondents' traditional evidence as cogent, consistent and convincing and rightly remarked that such evidence alone was sufficient to support a claim for declaration of title. See Alade v. Lawrence Awo D (1975) 4 S.C. 216 at 225.

On the appellants' case, the court below observed -

"Let us look at the appellants' case. On the pleadings and evidence, their case was weak. Their case supported that of the respondents- AKINOLA V. OLOWU (supra). The traditional evidence was conflicting. It is from the appellants we know that Amadi, a teacher developed the town. The appellants also wished the land to be communally owned since it belongs to the ancestors of both parties. In my judgment the appellants have no defence to the action. The decision in P/106/67 was final and it settled the issues canvassed therein."

G I have given a most careful consideration to the forgoing findings of both courts below and find them to be fully supported by the evidence. The appellants were also unable to fault them in any way. I therefore, have no reason to disturb them. See Igweze v. Ezeugo (1992) 6 N.W.L.R. (part 249) 561 at 574, National Insurance Corporation of Nigeria V. Power and Industrial Engineering Co. Ltd (1986) 1 N.W.L.R. (part 14) 1 at 36 etc.

H It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogwuegbu, JSC, that I, too, dismiss this appeal. I abide by the consequential order including those as to costs made in the said judgment.