

**SUPREME COURT OF NIGERIA**  
7TH MAY, 1999. SC. 173/90  
**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,**  
**U. MOHAMMED, A. I. KATSINA-ALU,**  
**A. O. EJIWUNMI, JJSC**

GBAJUMO BUNYAN & 2 ORS. .... APPELLANTS  
(For themselves and on behalf of  
Kurugbene family)

4. OBA SAMUEL OLADIRAN II  
THE KALASHUWE OF APOI LAND  
(For himself and other members of Apoi Land)

AND

A. O. AKINGBOYE & 2 ORS. .... RESPONDENTS  
(For themselves and on behalf of  
Igbokoda Mahin Ilaje Community)

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***APPEALS*** - Leave to appeal - Application - For leave to appeal on questions other than law alone - The additional phrase: "on questions other than law alone" in the application - Is not necessary - But does not affect the main prayer.

***COURTS*** - Res judicata - Decree of title to land - Judgment - Of a provincial court presided over by a Resident who was not a lawyer - The court was not bound to strictly follow the rules of Pleadings.

***ESTOPPEL*** - Res judicata - Identity of the land - Failure to file the Plan tendered in the previous case - Is not fatal to the present claim - Since both parties have given sufficient Particulars of the land in dispute.

***JUDGMENTS*** - Dismissal - Counter-claim - Where the evidence adduced on the counter claim was in conflict with the pleadings - It was rightly dismissed.

***JUDGMENTS*** - Injunction - Consequential orders - Order of injunction - Granted suo motu by the court in favour of the respondents - Is proper -

*Since title to the land in dispute has been declared in their favour.*

**LAND LAW** - *Res judicata* - Title to land - Where the title to the land in dispute - Had been declared in favour of the ancestor of the respondents by a previous judgment - It is not necessary for them to prove ownership of the land.

### **FACTS**

The plaintiffs/respondents in a representative capacity in January, 1974, before the High Court of Ondo State claimed against the defendants/appellants declaration of title to the land in dispute forfeiture of the defendants' Customary tenancy and possession. The 4th defendant also in a representative capacity counterclaimed and prayed for a declaration of title as absolute owner of the land in dispute, damages for trespass and injunction. The dispute has a chequered history. A parcel of land between the Oluwa and Oreana Rivers in Okitipupa Division of Ondo State has been a source of dispute between the Ijaw-Apois and Ilaje communities. There was a previous suit filed by one Jubo, the Oba of the Ijaws (the predecessor in title of the 4th defendant in the present case) against one Omoluwole, the Amapetu of Mahin (the ancestor of the Plaintiffs in the present case). That case was heard in 1917 at Ondo Provincial Court, Presided over by a Colonial Resident who entered judgment in favour of Omoluwole, the Amapetu of Mahin..

After pleadings were filed and exchanged, the trial opened and both parties called witnesses in order to establish their respective claims. At the conclusion of the hearing the learned trial judge, in a considered judgment, dismissed the plaintiffs claim. He however found the counterclaim of the 4th defendant meritorious and entered judgment in his favour. Dissatisfied, the plaintiffs appealed to the Court of Appeal, Benin Division. The court of appeal allowed the appeal, declared title in favour of the plaintiffs and granted injunction against the defendants. The 4th defendant's counter claim was also dismissed. Aggrieved, the defendants after obtaining leave have appealed to the Supreme Court raising four issues three of which were considered in determining the appeal.

**ISSUES FOR DETERMINATION:**

2. *Whether the Court of Appeal was right when it held that the 1917 judgment Exhibit 2 estops the defendants from relitigating the ownership of the land in dispute as well as Igbokoda town.*

3. *Whether the decision of the Court of Appeal granting suo motu an Order of Injunction restraining the defendants from further putting tenants on the land or alienating any part of it was right in law.*

4. *Whether the dismissal of the 4th defendant's Counter Claim by the Court of Appeal was right".*

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

***Appeals - Leave to appeal.***

1. It is pertinent to observe that the prayer in the motion in which learned counsel raised this preliminary objection was granted by this court in the following terms:

*"The application is granted as prayed and time is extended within which to seek leave to appeal, for leave to appeal and for extension of time to appeal. Time to file Notice of Appeal extended to sixty days from today".* (Per Belgore J.S.C.)

It goes without saying that the Order of this court is binding on the parties. Learned counsel for the respondent seems to be complaining against the additional phrase in prayer 11 in the motion dated 27th May 1998, to wit; "on questions other than law alone". That phrase may not be necessary in prayer 11 but it does not affect the main prayer, that is, application for Leave to Appeal. Be that as it may, it is clear that the learned counsel is crying over split milk because this court had ignored the additional phrase, granted the prayer and extended time to the appellants to SEEK LEAVE TO APPEAL. The Preliminary Objection is therefore overruled by me. (p. 1030 C)

***Courts - Res judicata***

2. It should be noted however that 1917 case was before a Provincial

Court presided over by a Resident who was not a lawyer. The court was not bound to strictly follow the rules of pleadings. Now considering the evidence of the Plaintiff and defendant in the 1917 case it is abundantly clear that both parties raised the issue of ownership of the land in dispute before the Provincial Court. The judgment of the Provincial court, although couched in a colonial ruler's language, considered the competing claims to title by both parties and decided in favour of the Amapetu of Mahin. (p. 1031 H)

C ***Estoppel - Res judicata.***

3. I have gone through the testimonies of witnesses and examined the two plains, Exhibits 1 and 10 and I agree that the land between the Rivers of Ofara/ Oreara and Oluwa is the land the parties are now in dispute. It is the same land which was claimed by Jubo, the ancestor of the appellants against Omoluwole, The Amapetu of Mahin, the paramount chief and ancestor of the Ilajes. As a matter of fact the appellants confirmed this in paragraph 44 of their Amended Statement of Defence, wherein they pleaded thus:

E "44 The defendants aver that Oluwa River forms a natural boundary between them and their ancestors and the plaintiffs and their ancestors along Ibila village."

In both Exhibits 1 and 10 Ijaw Apoi land is shown on the eastern side of Oluwa River. It can also be observed from the two plains that all the towns and villages of the Ijaw apoi tribe are located on the eastern part of River Oluwa. Since the land in dispute which includes Kurugbene and Igbokoda is between Oreara/Ofara and Oluwa Rivers it is a logical argument that the appellants cannot lay claim on the land on the western side of the River. I therefore agree with the decision of the court below that 1917 judgment, Exhibit 2, estops the appellants from relitigating the ownership of the land in dispute. The respondents' failure to file the plain tendered in 1917 case is not fatal to their claim since both parties in this case have given sufficient particulars of the land in dispute - Abiodun v. Fasanya (1974) 11 SC 61. (p. 1033 F)

***Land Law - Res judicata***

4. Having established that the title to land in dispute had been declared by the Provincial Court in the 1917 case in favour of Omoluwole, the Amapetu of Mahin, who was the ancestor of the respondents it is not necessary for the respondents to prove ownership it is not necessary for the respondents to prove ownership of the said land. The respondents B have traced their title directly to one whose title to ownership has been established see Mosalewa Thomas v. Preston Holder (1946) 12 WACA 78 at 80. (p. 1034 D)

### ***Judgments - Injunction***

5. I do not see where the court below had violated section 33 of the Constitution in granting an injunction restraining the appellants from further putting tenants or alienating any part of the land in dispute. It is important to note that the court below had declared title to the land in dispute D in favour of the respondents. The Court of appeal Act, can make such consequential orders as it deems fit in order to avoid multiplicity of legal proceedings concerning any of those matters which any of the parties may appear to be entitled to. See Chief R. A. Okoya & Ors. v. Santili & Ors. E (1990) All NLR 250 at 280 - 281 and Katto v. Central Bank (1991) 12 SCNJ 1 at 17. Furthermore there is evidence before the trial court that the appellants have admitted putting tenants and alienating parts of the land in dispute. Since the court below had declared title in favour of the F respondents it is their right that the appellants be restrained from further alienation or putting tenants in the disputed land. (p.1035 A)

### ***Judgments - Dismissal***

6. I have looked into the pleadings and evidence adduced on the 4th G appellant's counter-claim and I agree that the evidence was in conflict with the pleadings, The confusion between the pleadings, the evidence adduced in the present suit and the testimony of Kulubo in the 1917 case clearly points to undisputed facts that the claim of the 4th appellant was H rightly dismissed by the court below. The inconsistencies are very clear. (p. 1036 C/H)

**NOTABLE POINT OF INTEREST**

**OGWUEGBU JSC**

*1. When the court of Appeal may interfere with the judgment of the trial court.*

- B A court of appeal should not substitute its views of the evidence for that of the trial judge who saw and heard the witnesses. Where the issue does not affect credibility of witnesses as in the present case, the Court of Appeal itself was in as good position as the trial court to evaluate the evidence which was given in the case. The judgment of the trial court in this case was unsound and the court below acted properly when it interfered with it. See Ebba v. Ogodo (1984) 4 S.C. 84, Odofin v. Ayoola (1984) 11 S.C. 72 at 86-87 and Fabunmi v. Agbe (1985) 1 N.W.L.R. (pt. 1) 200 at 314. (p. 1041 G)

D **REPRESENTATION**

P.O. Jimoh-Lasisi for Appellants

Prince Olu Mafo, with P. O. Akubo and J.A. Abraham, for the Respondents.

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**CASES REFERRED TO**

Atanda v. Olanrewaju (1988) 4 NWLR (Pt. 89) 394

Boldex v. Incar (1997) 7 SCNJ 194 at 199

- F Amida v. Oshoboja (1984) 7 S. C. 68 at 83

Arubo v. Aileru (1993) 3 NWLR Part 280, page 126

Orizu v. Anyaegbunam (1978) 5 SC. 21 .

Okoya v. Santili (1990) All NLR 250 at 280 - 281

Katto v. Central Bank (1991) 12 SCNJ 1 at 17

Obanor v. Obanor (1976) 2 S. C. 1 at 6

- G Olaloye v. Balogun (1990) 5 NWLR (Part 148) 24 at 40

Idundun v. Okumagba (1976) 9 & 10 S. C. 255

Abiodun v. Fasanya (1974) 11 SC 61

Mosalewa Thomas v. Preston Holder (1946) 12 WACA 78 at 80

Ebba v. Ogodo (1984) 4 S.C. 84

- H Odofin v. Ayoola (1984) 11 S.C. 72 at 86-87

Fabunmi v. Agbe (1985) 1 N.W.L.R. (Pt. 1) 200 at 314

### **STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1979, S. 33.

Court of Appeal Act, S.16.

B

### **LEAD JUDGMENT BY MOHAMMED JSC**

A parcel of land between the Oluwa and Oreana Rivers in Okitipupa Division of Ondo State has been a source of dispute between the Ijaw-Apois and Ilaje Communities. The dispute has a chequered history. The first record of the dispute is from a civil suit filed by one Jubo, the Oba of the Ijaws, against one Omoluwole, the Amapetu of Mahin. The case was heard on 19th December, 1917, at Ondo Provincial Court, presided over by R. D. N. Raikes, a colonial Resident

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D

In January, 1974, the respondents in this appeal, who were the plaintiffs before the trial High Court of Ondo State claimed against the appellants (defendants before the High Court) for the following declarations:-

E

"(i) Declaration of title according to customary law to all that piece or parcel of land situated at Kurugbene-Ipinle in Ilaje area of Okitipupa Division;

- (ii) Forfeiture of the Defendants' customary tenancy of the land;
- (iii) Possession of the land"

F

Before the trial opened, the trial court granted leave to Oba Samuel Oladiran 11, the Kalashuwe of Apoi land to be joined in the suit as the 4th defendant. He appeared for himself and on behalf of Kurugbene Community and other members of Ijaw-Apoi Community. After the joinder, the 4th defendant filed a counter-claim and prayed for the following reliefs:

G

"(a) Declaration of Title as absolute owner under Ijaw Apoi Native Law and Custom of all that piece or parcel of land situate at, lying and being at Igbanran, Kofawe and Kurugbene (with the exception of Igbokoda) up to Ibila, portion of Ijaw Apoi Landed property in Okitipupa Division, Ondo State verged BLUE in the attached plan No. WP 419 dated 22-12-75.

H

(b) *N200 being special and general damages for trespass.*

(c) *Injunction to restrain the plaintiffs their agents or servants from committing further acts of trespass on the said land."*

After pleadings were filed and exchanged, the trial opened and both parties called witnesses in order to establish their respective claims. At the conclusion of the hearing the learned trial judge, in a considered judgment, dismissed the respondents' claim. He however found the counter-claim of the 4th defendant meritorious and made the following declarations in his favour:

"(i) *That the 4th defendant's community are entitled to the customary right of occupancy to the land shown blue in Plan WP 419 dated 18th November, 1979 excluding areas assigned or alienated to a third party;*

(ii) *N150 general damages for trespass;*

(iii) *An order of perpetual injunction to restrain the plaintiffs, their servants and agents from further trespass on the said land".*

Dissatisfied with this decision, the plaintiffs, armed with 18 grounds of appeal, contested the judgment of the trial court at the Court of Appeal, Benin Division. The Court of Appeal, in a well considered judgment, allowed the appeal and declared that the plaintiffs were entitled to a customary right of occupancy to the land edged red in plan No JF06766. In addition, the Court of Appeal granted injunction restraining the defendant from further putting tenants on the disputed land or alienating any part of it. The court dismissed both the plaintiffs' claims for forfeiture and possession and the 4th defendant's counter-claim.

Aggrieved by the judgment of the Court of Appeal the defendants who hereinafter shall be referred to as the appellants, after obtaining leave from this court, filed their Notice of Appeal. Before I consider the issues raised for the determination of this appeal I will deal first with the Preliminary Objection raised by learned counsel for the respondents in the respondents brief against the hearing of this appeal. Learned counsel for the respondents submitted that this appeal is incompetent because the appellants did not seek appropriate leave of this court before filing the Notice and Grounds of Appeal against the judgment of the court below.



Learned counsel referred to an application filed by the appellants seeking for extension of time to appeal. In the application the appellants sought for the following reliefs:

"(i) *An order for the Extension of time within which to apply for leave to appeal against 27th May, 1988.*

(ii) *An order granting them Leave to Appeal against the judgment of the Court of Appeal dated 27th May, 1988 on question other than Law alone.*

(iii) *An order for extension of time to file and serve Notice of Appeal against the judgment of the Court of Appeal dated 27th May, 1988.*

(iv) *Such further order or orders as this Honourable court will deem fit to make in the circumstances".*

Learned counsel referred to prayer (ii) above and pointed out that the appellants were seeking for leave to appeal on grounds of facts or mixed law and facts. Leave to appeal is not synonymous with leave to appeal on ground counsel thereafter submitted that by a long line of authorities there are three mandatory prayers an appellant/applicant must seek before the Supreme Court in applying for leave to appeal out of time. The prayers are:

(a) Extension of time within which to seek leave;

(b) Leave to appeal;

(c) Extension of time within which to appeal.

Counsel argued that once any of these prayers are missing the application is defective. See Atanda v. Olanrewaju (1988) 4 NWLR (Pt. 89) 394; Boldex v. Incar (1997) 7 SCNJ 194 at 199. The learned counsel in addition referred to Owena Bank v. Nigerian Stock Exchange (1977) 7 SCNJ 160 at 171 - 172 and urged us to strike out and/or dismiss this appeal being lacking in competence.

In his reply to the Preliminary Objection learned counsel for the appellants, Mr. Jimoh-Lasisi, submitted that *the* contention of the respondents is misconceived in law. Learned counsel explained in the Appellant's Reply Brief that a party who wishes to appeal against questions of fact or mixed law and fact requires leave to appeal in compliance with S.213 (3) of the Constitution of the Federal Republic of Nigeria. Secondly, a party

who wishes to appeal against questions of law alone can appeal as of right. But if he is out of time i.e. he has not appealed within the statutory period of three months he must pray for extension of time to file notice of appeal containing question of law alone.

**B It is pertinent to observe that the prayer in the motion in which learned counsel raised this preliminary objection was granted by this court in the following terms:**

**C *"The application is granted as prayed and time is extended within which to seek leave to appeal, for leave to appeal and for extension of time to appeal. Time to file Notice of Appeal extended to sixty days from today". (Per Belgore J.S.C.)***

**D It goes without saying that the Order of this court is binding on the parties. Learned counsel for the respondent seems to be complaining against the additional phrase in prayer 11 in the motion dated 27th May 1998, to wit; "on questions other than law alone". That phrase may not be necessary in prayer 11 but it dose not affect the main prayer, that is, application for Leave to Appeal. Be that as it may, it is clear that the learned counsel is crying over spilt milk because**  
**E this court had ignored the additional phrase, granted the prayer and extended time to the appellants to SEEK LEAVE TO APPEAL. The Preliminary Objection is therefore overruled by me.**

**F I now go back to the main appeal. Learned Counsel for the appellants identified four issues for the determination of this appeal. The respondents have adopted the four issues formulated by the appellants. The issues are as follows:**

***"1. Did the plaintiff prove title to the land in dispute at all.***

**G *2. Whether the Court of Appeal was right when it held that the 1917 judgment Exhibit 2 estops the defendants from relitigating the ownership of the land in dispute as well as Igbokoda town.***

***3. Whether the decision of the Court of Appeal granting suo motu an Order of Injunction restraining the defendants from further putting tenants on the land or alienating any part of it was right in law.***

**H *4. Whether the dismissal of the 4th defendant's Counter Claim by the Court of Appeal was right".***

I will consider issue 2 first because if I agree that the 1917

Judgment, Exhibit 2, operates as estoppel per rem judicatam that will substantially dispose of this appeal. Learned Counsel for the appellants, in the appellant's Brief, submitted that the judgment entered in favour of Amapetu of Mahin in 1917 did not decree title to him. Therefore the Court of Appeal was in error to conclude that the land in dispute formed part of the land in dispute in the 1917 case. Learned Counsel referred to the case of Amida v. Oshoboja (1984) 7 S. C. 68 at 83 and submitted that the judgment for the defendant to a declaratory claim, as in this case where the defendant did not counter-claim, is tantamount to a dismissal of the plaintiff's claim in the 1917 suit. I have looked into the ratio decided in Amida v. Oshoboja (Supra) and with respect to the submission of the learned counsel what was decided in that case was that where a defendant did not counter-claim to a declaration of title, the dismissal of the plaintiff's claim for a declaration of title would not mean that the land belonged to the defendant. This court further held in Oshoboja's case as follows:

*"That Court of Appeal committed a serious error of law in its misconception of the effect of the operation of the plea of estoppel per rem judicatam, even if such plea were available in the circumstances of the instant case. It acted under the impression that the operation of the plea was sufficient to grant a declaration of title to the land in dispute to the respondent, and this is a misdirection in law. It is only where the issue of ownership was raised and decided in the earlier proceedings in favour of the defendant that the judgment in that suit should have settled his title to the land and rendered the operation of estoppel per rem judicatam in his favour".*

**It should be noted however that 1917 case was before a Provincial Court presided over by a Resident who was not a lawyer. The court was not bound to strictly follow the rules of pleadings.** In the suit, the plaintiff, Jubo, the Oba of Ijaw, the ancestor of the appellant, put up his claim over the land in dispute thus:

*"I now claim the whole land called Igbokoda for myself. This means all the land between the Oluwa and Oreara Rivers".*

The Amapetu of Mahin who was the ancestor and paramount ruler of the Ilaje Community, the respondents in the appeal, told the Provincial

Court that the strip of land between the Rivers Oluwa and Oreara belonged to Mahin Community. The Ijaws used to ask for permission to stay on the land and build canoes or engage in hunting. **Now considering the evidence of the Plaintiff and defendant in the 1917 case it is abundantly clear that both parties raised the issue of ownership of the land in dispute before the Provincial Court. The judgment of the Provincial court, although couched in a colonial ruler's language, considered the competing claims to title by both parties and decided in favour of the Amapetu of Mahin.**

Learned Counsel for the appellants submitted that the respondents who rely on the 1917 judgment ought to have proved the extent of the land covered in that case. Counsel further plaintiffs/respondents, in the present case, did not produce the plan tendered in the judgment of 1917 ought to have agreed with the trial High Court that the foundation of the plaintiffs'/respondents' claim had collapsed. I agree that the identity of the land in dispute was indeed a main issue before the trial High Court. However the Court of Appeal considered the issue and dealt with it exhaustively before resolving that the land in dispute was the same land claimed by Jubo, the Oba of Ijaw Apoi in the 1917 case.

In arriving at this conclusion, Ogundare JCA (as he then was) referred to the claim of the respondents in the present action wherein they averred that the land in dispute is the land edged "red" and "green" between Oluwa and Oreara of Ofara rivers in Exhibit 1 . The appellants however, pointed out that the land in dispute in 1917 case is a small piece of land edged "green" in Exhibit 10. It is relevant in ascertaining the land in dispute to refer to the claim of Jubo in 1917 case. The claim as reproduced in the judgment of 1917 trial reads:

*" To establish his (Jubo's) right to common ownership with the defendant (Omoluwole The Amapetu of Mahin ) of that land known as IGBOKODA situated between the rivers OLUWA and OREARA (OFARA) in ONDO DIVISION Land valued at #100".*

In the Court of Appeal's judgment jubo's testimony referred to the land in dispute as Igbokoda. Jubo however, during the trial claimed all the land between Oluwa and Oreara Rivers for himself alone. He said

his farms were at Kofawe where he lived before he was made a chief. His evidence was supported by Oji, the Bale of Igbotu and Kulubo, a shipwright or canoe maker. This assertion is clear in the judgment of the provincial court where Jubo claimed to have established farms in the village of Kofawe. In his judgment Ogundare JCA (as he then was) analyzed the testimonies of witnesses in the present action in regard to the identity of the land in dispute and concluded as follows:

*" Taking the evidence of these three witnesses along with the evidence of Jubo, Oji and Kulubo in the 1917 case and having regard to the position of the land in dispute to Rivers Ofara and Oluwa in Exhibits 1 & 10, there can be no doubt that the land in dispute along with the land edged 'Green' on exhibit 1 was the land in dispute and claimed by Jubo, the Oba of Ijaw Apoi in the 1917 case. Jubo lost that case and the land was adjudged to Omoluwole, the Amapetu of Mahin. In the light of this conclusion, the learned trial Judge, with respect to him, cannot be right when he held that the land in dispute in 1917 "is outside the claim of the plaintiffs and does not require any pronouncement from this Court".*

**In have gone through the testimonies of witnesses and examined the two plains, Exhibits 1 and 10 and 1 agree that the land between the Rivers of Ofara/ Oreara and oluwa is the land the parties are now in dispute. It is the same land which was claimed by Jubo, the ancestor of the appellants against Omoluwole, The Amapetu of Mahin, the paramount chief and ancestor of the Ilajes. As a matter of fact the appellants confirmed this in paragraph 44 of their Amended Statement of Defence, wherein they pleaded thus:**

*"44 The defendants aver that Oluwa River forms a natural boundary between them and their ancestors and the plaintiffs and their ancestors along Ibila village."*

**In both Exhibits 1 and 10 Ijaw Apoi land is shown on the eastern side of Oluwa River. It can also be observed from the two plains that all the towns and villages of the Ijaw apoi tribe are located on the eastern part of River Oluwa. Since the land in dispute which includes Kurugbene and Igbokoda is between Oreara/Ofara and Oluwa Rivers it is a logical argument that the appellants cannot lay claim on the land on the western side of the River. I therefore agree with**

the decision of the court below that 1917 judgment, Exhibit 2, estops the appellants from relitigating the ownership of the land in dispute. The respondents' failure to file the plain tendered in 1917 case is not fatal to their claim since both parties in this case have given sufficient particulars of the land in dispute - Abiodun v. Fasanya (1974) 11 SC 61.

Having established that the title to land in dispute had been declared by the Provincial Court in the 1917 case in favour of Omoluwole, the Amapetu of Mahin, who was the ancestor of the respondents it is not necessary for the respondents to prove ownership it is not necessary for the respondents to prove ownership of the said land. The respondents have traced their title directly to one whose title to ownership has been established see Mosalewa Thomas v. Preston Holder (1946) 12 WACA 78 at 80.

The third issue deals with the grant of injunction which the court below made without being asked to do so. Learned counsel for the appellants submitted that granting suo motu of an order of injunction in favour of the respondents is tantamount to granting an amendment of the plaintiffs/respondent' claim, thus making a new case for them after their claims for forfeiture and possession had failed. Counsel referred to the case of Arubo v. Aileru (1993) 3 NWLR Part 280, page 126 where this court held that a judge is an impartial umpire. He cannot make a new case for either party where the case brought before the court has collapsed - Orizu v. Anyaegbunam (1978) 5 SC. 21. Learned Counsel further submitted that the granting of relief of injunctions which was not claimed by the plaintiffs/respondents without hearing the claimed the defendants/appellants was a serious breach of section 33 of the Constitution of the federal Republic of Nigeria 1979.

I do not see where the court below had violated section 33 of the Constitution in granting an injunction restraining the appellants from further putting tenants or alienating any part of the land in dispute. It is important to note that the court below had declared title to the land in dispute in favour of the respondents. The Court of appeal Act, can make such consequential orders as it deems fit in order to avoid multiplicity of legal proceedings concerning any of

Bunyan v. Akingboye (1999) 5 KLR Mohammed JSC 1035  
those matters which any of the parties may appear to be entitled to.  
See Chief R. A. Okoya & Ors. v. Santili & Ors. (1990) All NLR 250  
at 280 - 281 and Katto v. Central Bank (1991) 12 SCNJ 1 at 17.

Furthermore there is evidence before the trial court that the appellants have admitted putting tenants and alienating parts of the land in dispute. Since the court below had declared title in favour of the respondents it is their right that the appellants be restrained from further alienation or putting tenants in the disputed land. B

The dismissal of the 4th appellant's counter-claim by the court below is the question raised in the 4th issue in this appeal. Learned counsel for the appellants argued that the learned trial judge, after finding that the traditional evidence adduced by the parties was inconclusive, resorted to recent acts of possession and found for the 4th defendant/appellant. Counsel pointed out that the 4th appellant, being the Kalashuwe of Apoi and therefore the overlord of Kurugbene Community, was entitled to sue for declaration of title in respect of land in Kurugbene. Counsel further argued that even if claim for title has not been proved the appellants, trespass and injunction - Obanor v. Obanor (1976) 2 S. C. 1 at 6. and Olaloye v. Balogun (1990) 5 NWLR (Part 148) 24 at 40. C D E

In reply to the above, P.A. Akubo, learned counsel for the respondents in the trial High Court where the learned the learned trial judge opined thus:

*"As I have said, the traditional evidence of both the Plaintiffs and the Defendants are not only conflicting but inconclusive".* F

Mr. Akubo submitted that the appellants failed to appeal against the finding reproduced above. Learned counsel further submitted that the trial court was in error to declare title in favour of the 4th appellant after it had found that the appellants' traditional evidence was inconclusive history had collapsed it was improper to resort to the other ways of proving ownership of land as laid down in the case of Idundun v. Okumagba (1976) 9 & 10 S. C. 255. G H

**I have looked into the pleadings and evidence adduced on the 4th appellant's counter-claim and I agree that the evidence was in conflict with the pleadings.** In paragraphs 8 & 9 of the Statement of the Amended Counter-Claim of the 4th Defendant was averred thus:

"8. That Kurugbene was settled upon about 300 years by one of the ancestors of Kurugbene Community named Apa who came from Inikorogha.

B 9. Kulubo the son of Apa and also his wife Yeye settled in Kurugbene with Apa who exercised all acts of ownership including farming the land, building houses on the land; making of canoes carved out of trees grown on the land and also fishing in the river and fish ponds made on the land and putting of tenants on the land".

C If Kulubo was the son of Apa who established Kurugbene 300 years ago he could not be alive to give evidence in the 1917 suit! The evidence of Kulubo in the Provincial court in the 1917 suit was as follows:

D *"KULUBO Sworn States:- I am shipwright living at Nikuruwa in the Ijaw Confederation. I know the land that Plaintiff is claiming. I have a village on the land called Rugbeni. It is not on the land between the Oluwa and Oreara Rivers. I have never farmed on the land but I have built canoes there. Nobody has farmed on the land but there are villages which are, composed of fishing huts. I know Kofawe. It belongs to Plaintiff".*

E **The confusion between the pleadings, the evidence adduced in the present suit and the testimony of Kulubo in the 1917 case clearly points to undisputed facts that the claim of the 4th appellant was rightly dismissed by the court below. The inconsistencies are very clear.**

F In the result this appeal has failed. It is accordingly dismissed. The judgment of the Court of Appeal delivered on the 27th of may, 1988 is hereby affirmed. I assess N10,000.00 as costs and award same to respondents.

G —

#### KARIBI-WHYTE JSC

H I have read the lead judgment in this appeal written by my learned brother Uthman Mohammed, JSC. I agree with it, and the conclusion that the appeal should be dismissed. I also will and hereby dismiss the appeal.

Appellants shall pay costs of this appeal assessed at N10,000.

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**OGWUEGBU JSC**

I had a preview of the judgment just delivered by my learned brother Mohammed, J. S. C. and I agree entirely with his reasoning and conclusions. B

The facts have been set out and considered by my learned brother and I do not intend to repeat them

On the issue whether the court below was right in holding that the 1917 judgment (Exhibit 2) estopped the defendants from relitigating the ownership of the land in dispute, it was submitted in the appellants' C brief that the judgment for the defendants to a declaratory claim as in this case where the defendant did not counter-claim amounts to a dismissal of the plaintiff's claim in that suit, that the judgment entered for the defendant in the 1917 judgment did not declare title in favour of the D defendant (the Amapetu of Mahin) whose successors are plaintiffs in the present proceedings and that it was a declaratory claim of ownership of land known as Igbokoda situate between Oluwa and Oreara rivers. The court was referred to the case of Amida v. Oshoboja (1984) 7 S. C. 68. It E was further submitted that the failure of the plaintiffs to tender the survey plan used in the 1917 case was fatal to their case based on estoppel per rem judicatam.

In their pleadings and evidence each side claimed ownership of F Kurugbene and that the other was its customary tenant. The plaintiffs in paragraph 13 of their Statement of Claim and paragraph 4 of their Amended Statement of Defence to the Counter-Claim of the 4th defendant pleaded the 1917 judgment as founding a plea of estoppel in their favour. The G plaintiffs' claim was primarily based on Suit No. 5/17 between Jubo, The Oba of Ijaw v. Omowole, the Amapetu of Mahin decided holden at Gbekebo, Ondo Province. In answer to cross-examination by Mrs. Osomo, learned counsel for the 4th defendant, the 1st plaintiff (Akinbade Ojarfusi Akingboye) stated: H

*"My claim to the land in dispute is based on the judgment of 1919."*

The judgment in the 1917 case was tendered and admitted in evidence at

the trial court as Exhibit 2. The learned trial judge found that Jubo was the predecessor-in-office of the 4th defendant in the present proceedings while the present plaintiffs are the descendants of Omowole, the Ama-petu. What is in dispute in the present proceedings is the area of land in dispute in that case. The plaintiffs in their pleadings and evidence stated that the land in dispute in the present action edged "Red" in Exhibit 1. It was defendants' contention that the land in dispute in the 1917 case was the small area verged "Green" in Exhibit 10 (defendants' survey plan tendered in 1917 one has to examine Exhibit 2 because the available in the present proceedings.

The claim in the 1917 case is as follows:

*"To establish his right to common ownership with the Defendant of that land known as Igbogoda situated between the rivers OLUWA and OREARA (OFARA) in the ONDO DIVISION Land valued #100."*

The parcel of land in litigation in 1917 was known as Igbokoda which lies between Oluwa and Oreara rivers in Ondo Division. Jubo in his evidence as plaintiff in that case stated:

*" The reason why I am claiming this land is because we have used the market in common. The land belongs to me entirely I now claim the whole land called Igbokoda for myself. This means all the land between the land between the Oluwa and Oreara Rivers. I have farms there. (Plaintiff now produces a plan which he wishes to put in evidence)."*

The court below considered the evidence of Jubo in Exhibit 2 along with evidence of his two witnesses (Oji, the Bale of Igbotu and Kulubo, a shipwright) and concluded thus:

*" From the evidence of Jubo and his two witnesses in the case, one fact stands clear and that is that Rugbeni (Kurugbeni) and Kafawe villages were on the land Jubo was claiming in the 1917 case. These two villages feature prominently in the present action and are shown on Exhibits 1 & 10 to be within the land in dispute as claimed by the appellants. Ufara or Ofara and Oluwa Rivers are also shown on the two plains, that is Exhibits 1 & 10. The land claimed by the appellants and in dispute in the present proceedings lies between the two Rivers."*

The court below compared the evidence of the 4th defendant's 1st witness

(Chief Matthew Olowotan), his 2nd witness (Chief James Mein, the Oloja of Igbekebo and 2nd defendant (Toje Biji Akintoye ) in the present proceedings with the evidence of Jubo, Oji and Kulubo in the 1917 action and came to the following conclusion:

*"Taking the evidence of these three witnesses with the evidence of Jubo, Oji and Kulubo in the 1917 case, and having regard to the position of the land now in dispute to the Rivers Ofara and Oluwa on Exhibits 1 & 10, there can be no doubt that the land in dispute along with the land in dispute and claimed by Jubo, the Oba of Ijaw Apoi in the 1917 case. Jubo lost that case and land was adjudged to Omowole the Amapetu of Mahin. In the light of this conclusion, the learned trial judge, with respect to him, cannot be right when he held that the land in dispute in 1917 is outside the claim of the plaintiffs and does not require any pronouncement from the court ..... Thus when in 1917 jubo talked of Igbokoda, and described the land he claimed, he must have meant that the whole area came under Igbokoda town ..... "*

Exhibit 18 (Intelligence Report of the Apoi Ijaw) which was tendered by the 4th defendant showed that Oluwa River is the western boundary of land belonging to the defendants. Paragraph 44 of the Amended Statement of Defence of the 1st, 2nd and 3rd Defendants (who represented Kurugbene community in the present suit) confirmed that Oluwa River is the natural boundary between the plaintiffs and the defendants. It reads:

*"44. The defendants aver that Oluwa River forms a natural boundary between them and their ancestors and the plaintiffs and their ancestors along Ibila village."*

From the overwhelming evidence that all the nine principal towns belonging to the Ijaw Apoi tribe are on the eastern side of Oluwa River whereas the land in dispute is on the western side of it, the averment in paragraph 44 of the Amended Statement of Defence of the 1st, 2nd and 3rd defendants, Exhibit 18 (the Intelligence Report), the evidence of Jubo, Oji and Kulubo in the 1917 case and the evidence of the 2nd and 4th defendants and their witnesses in the present proceedings, I am satisfied that the court below was right in its conclusion that the land in dispute along with the land edged Green on Exhibit 1 in the present action, formed part of the land in dispute in the 1917 case where judgment was entered for the

plaintiffs' predecessor, Omowole, the Amapetu of mahin by the Provincial Court. That Judgment reads:

" I regard this action as an impudent attempt to snatch land by the Ijaws. .... As witnessing the grasper (sic) nature of the Ijaws the Plaintiff firstly claimed the land in common with the Defendant and subsequently claimed it all as his own. .... Judgment for the defendant with costs."

That fact that a defendant as plaintiff in a previous suit lost his claim for title to the land in dispute does not by itself help the plaintiff in a subsequently suit upon whom lies the onus to prove his case. See Amida & ors. v. Oshoboja (supra) and Eboha & Ors. v. Anakwenze & Or. (1967) N. M. L. R. 140.

But the issue of absolute ownership of Igbogoda land was in issue in the 1917 case and it was decided as a necessary issue in favour of the defendant Omowole, the Amapetu of Mahin - (predecessor in title of the plaintiffs) by the Provincial Court. There was no appeal against that judgment. It binds them. In my view the doctrine of *res judicata* was rightly applied by the court below. See Yew Beuedu v. Evi Jiboe (1961) 1 W. L. R. 1040.

The ownership of the land was decided in favour of the plaintiffs' predecessor (as defendant in the 1917 case) and that should have settle his title to the land if he had counter-claimed. Had he done so he should have obtained a declaration of his title. Since he did not counter-claim, his successors (the plaintiffs) are forced to go over that procedural difficulty by procedural difficulty by instituting the present proceedings founded upon the judgment (Exhibit 2) which they had earlier obtained the relief which the now seek, namely, a declaration of title to the land.

I am of the view that the plaintiffs discharged the onus upon them by satisfying the court that they are entitled on the evidence brought by them to the declaration ought. On the other hand, the 4th defendant based his title on traditional evidence which the trial judge found to be inconclusive. His claim that Kurugbene was founded 300 years ago could not be true as Kurubo whose mother Apaa was said by the respondents to have established Kurugbene village was alive and gave evidence in the 1917

case. The learned trial judge should have dismissed the counter-claim of the 4th defendant after holding that the traditional history upon which he based his claim was inconclusive and there should have been no resort to other ways of proving ownership of land. See Idundun v. Okumagba (1976) 9-10 S.C. 255 and Fasoro & Ors. v. Beyioku & Ors. (1988) 19 N.S.C.C. (Pt. 1) 705. B

A court of appeal should not substitute its views of the evidence for that of the trial judge who saw and heard the witnesses. Where the issue does not affect credibility of witnesses as in the present case, the Court of Appeal itself was in as good position as the trial court to evaluate the evidence which was given in the case. The judgment of the trial court in this case was unsound and the court below acted properly when it interfered with it. See Ebba v. Ogodo (1984) 4 S.C. 84, Odofin v. Ayoola (1984) 11 S.C. 72 at 86-87 and Fabunmi v. Agbe (1985) 1 N.W.L.R. (Pt. 1) 200 at 314. C D

For these reasons and for the fuller reasons set down in the judgment of my learned brother Mohammed, J.S.C., I would also dismiss the appeal and affirm the decision of the Court of Appeal dated 27-5-88. I abide by all the orders in the said judgment of Mohammed, J.S.C. including the order as to costs. E

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### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Mohammed, JSC. I agree with it. I have very little to add. F

The Respondents who were Plaintiffs in the trial court anchored their claim to the land in dispute on the judgment of 1917 (exhibit 2). The Respondents were the Defendants in that case. The claim in that case (Exhibit 2) reads: G

*"To establish his right to common ownership with the Defendant of that land known as IGBOGODA (IGBOKODA?) situated between the Rivers OLUWA AND OREARA (OFARA) in the Ondo Division."* H

Jubo, the Plaintiff in that case expanded his claim in his evidence. He

testified thus:

*"I now claim the whole land called Igbokoda for myself. This means all the land between the Oluwa and Oreara Rivers ..... I have farms there ..... My farms are at Kofawe where I lived before I was made chief".*

Oji was Jubo's first witness. He was the Bale of Igbotu. In his evidence he said:

*"I know the land called Igbokoda. I have known it for a long time since I was born. I have lived at Igbotu all my life. Igbotu is between the Rivers Oluwa and Oreara. Igbotu is not on the land claimed. I have no farm on the land Plaintiff has a farm there. (Here Plaintiff tells the witness that the farm is at Kofawe)"*

Kulubo, who is the central character in the present case also testified for Jubo in the 1917 case.

*"I am a shipwright living at Nikuruwa in the Ijaw confederation. I know the land that plaintiff is claiming. I have a village on the land called Rugbeni. It is not on the land between the Oluwa and Oreara Rivers. I have never farmed on the land but there are villages which are, composed of fishing huts. It belongs Plaintiff to Plaintiff."*

The Provincial Court entered judgment for the Defendant Omowole, the Amapetu of Mahin. The judgment reads:

*"I regard this action as an impudent attempt to snatch land by the Ijaws ..... "As witnessing the grasper nature of the Ijaws the Plaintiff firstly claimed the land in common with the Defendant and subsequently claimed all his own ..... judgment for the defendant with costs."*

It must be point out that from the nature of the claim, the issue of ownership of Igbokoda land was in issue in the 1917 case. As I have already indicated it was decided in favour of the defendant Omowole, the Amapetu of Mahin (predecessor in title of the plaintiffs) by the Provincial Court. There was no appeal against that judgment which remains valid and binding on the parties.

The question to be resolved is what is the nexus between the 1917 case and the present one. Kurugbene and Kofawe villages were an

integral part of the land claimed by Jubo in the 1917 case. These two villages also feature prominently in the present case as shown in Exhibits 1 and 10. Kurugbene and Kofawe are shown on the land in dispute which is situated between Oluwa and Ofara Rivers. We must not lose sight of the fact that in the 1917 case Jubo claimed all the land between Oluwa and Ofara Rivers. It seems clear to me therefore that the land in the 1917 case is the same with the land in the present case.

The court below was unquestionably right when it concluded that :

*"From the evidence of Jubo and his two witnesses in the case, one fact stands clear and that is that Rugbeni (Kurugbene ) and Kurugbeni and Kofawe villages were on the land Jubo was claiming in the 1917 case. These two villages feature prominently in the present action and are shown on Exhibits 1 and 10 to be within the land in dispute as claimed by the appellants. Ofara of Ofara and Oluwa Rivers are also shown on the two plains that is Exhibits 1 and 10. The land claimed by the appellants and in dispute in the present proceedings lies between the two Rivers."*

On the facts and circumstances of this case, the court below, rightly in my view applied the doctrine of resjudicata: see Udeze v. Chidebe (1990) 1 NWLR (Part 125) 141.

For the reasons I have given and for the fuller reasons given by my learned brother, Mohammed, JSC 1 too dismiss the appeal and affirm the decision of the court below dated 27 May 1988. I also abide by the order as to costs.

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### EJIWUNMI JSC

I had the privilege of reading in advance the Judgment just delivered by my learned brother Mohammed JSC and I agree entirely with his reasoning and conclusions. The facts have been carefully set out and considered by my learned brother and I do not intend to repeat them. But for the purposes of the judgment, it is necessary to set out the issues formulated by the appellants in their brief of argument.

They are:-

(1) *Did the plaintiff prove title to the land in dispute at all?*

(2) *Whether the Court of Appeal was right when it held that the 1917 Judgment Exhibit 2 estops the defendants from relitigating the ownership of the land in dispute as well as IgboKoda town.*

B (3) *Whether the decision of the Court of Appeal granting suo motu an order of injunction restraining the defendants from further putting tenants on the land or alienating any part of it was right in law.*

(4) *Whether the dismissal of the Defendants' counter claim by the Court of Appeal was right.*

C It is with regard to whether the Court of Appeal was right when it held that the 1917 Judgment Exhibit 2 estopped the defendant from litigating the ownership of the land.

D From the argument of Counsel appearing in this Court, it is evidence that the appellant wished to have the Judgment of the Court below on the ground that the doctrine of estoppel per rem judicatam is inapplicable in the instant case. The crux of their contention being that the Court below was wrong to have held that the land in dispute was duly proved by the respondent. I have myself looked at the plains with the claim before the 1917 case and cannot but I agree the conclusion reached in the judgment E that the identity of the land in dispute was identified with the decision in the 1917 case. The Court below, considered very carefully the evidence by both parties on this issue as evidence in the following extract from the lead judgment of Ogundare JCA (as he then was) at page 199, which F reads:-

G *"From the evidence of Jubo and his two witnesses in the case, one fact stands clear and that is that Rugbeni (Kurugbene) and Kofawe Villages were on the land Jubo was claiming in the 1917 case. These two villages feature prominently in the present action and are shown on exhibits 1 & 10 to be within the land in dispute as claimed by the appellants. Ufora or Ofora and Oluwa Rivers are also shown on the two plains that is exhibits 1 & 10. The land claimed by the appellants and in dispute in the present proceedings lies between these two Rivers".*

H After his Lordship, Ogundare, JCA (as he then was), had reached that conclusion, he then reviewed the evidence of the witnesses and also the evidence of 2nd respondent, His Lordship appraised their evidence



with the evidence given in the 1917 case, as follows:-

*"Taking the evidence of these three witnesses along with the evidence of Jubo, Oji and Kulubo in the 1917 case and having regard to the position of the land now in dispute to Rivers Ofora and Oluwa on Exhibits 1 & 10, there can be no doubt that the land in dispute along with the land edged "Green" on Exhibit 1 was the land in dispute and claimed by Jubo, the Oba of Ijaw apoi in the 1917 case. Jubo lost that case and the land was adjudged to omowole, the Amapetu of Mahin. In the light of this conclusion, the learned trial Judge, with respect to him, cannot be right when he held that the land in dispute in 1917 - "is outside the claim of the plaintiffs and does not require any pronouncement from this Court."*

With the identity of the land in dispute established, and finding that the 1917 case contrary to the views of the trial court was in favour of the respondents to the appeal, the appeal was resolved in their favour.

It must also be borne in mind that where the trial court has failed to properly evaluate the evidence before it as a result of a decision which is perverse, as in this case, the Court of Appeal had a duty by way of rehearing to evaluate, as if it were the trial court, the evidence that has been adduced. See Lions Building v. Shadipe (1976) 12 SC 135; Macaulay v. Tukur 1 NLR 35; Adegoke v. Adidi (1997) 5 NWLR (Pt. 242) 410. Upon the authorities referred to above, the court below undoubtedly was right to have treated the appeal by way of rehearing. The consequent evaluation of the evidence resulting in the reversal of the Judgment of the trial court, has not been faulted by the appellants in this Court. I would therefore dismiss their appeal for the above reasons and the fuller reasons given in the lead Judgment of my brother Mohammed JSC. I also abide by the order as to costs.

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