

**SUPREME COURT OF NIGERIA**  
11TH JUNE, 1999. SC. 175/1992  
**CORAM:- S. M. BELGORE, S. U. ONU, O. ACHIKE, U. A.**  
**KALGO, E. O. AYOOLA, JJSC.**

CHIEF IBIBO OBU DOKUBO & ANOR. ... PLAINTIFFS/APPELLANTS  
(For themselves and as representing the  
Chiefs and people of Abalama Community)

AND

CHIEF J. OMONI & 9 ORS. .... DEFENDANTS/RESPONDENTS  
(For themselves and as representing  
chiefs and people of Tema Community )

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***APPEALS** - Evaluation of evidence - Findings of the trial court - The Court of Appeal was wrong to have overturned the findings - In the circumstances of the present case.*

***ESTOPPEL** - Estoppel per rem judicatam - Doctrine of - Essential ingredients - For its application.*

***EVIDENCE** -Pleadings - Admissibility of evidence - A party may not be allowed to lead evidence outside his Pleadings - But a plaintiff will be entitled to lead evidence - On any point raised in the defendant's pleading.*

***LAND LAW** - Estoppel - Plea of - Where it is not proved that the piece of land in dispute in the present suit - Is the same as that in dispute in a previous suit - The plea ought not to have been allowed.*

***LAND LAW** - Title - Claim in title - Long and adverse possession of Land - Cannot found a claim in title against the true owner.*

***LAND LAW** - Title - Settlement - Distinction between a grant and a settlement.*

### **FACTS**

In the Degama judicial Division of the High Court of Rivers State the plaintiffs/appellants commenced an action claiming against the defendants/respondents a declaration of title to the land in dispute, perpetual injunction and damages for trespass. It is the case of the plaintiffs that they settled on the land in dispute in 1882 and subsequently informed the then powerful ruler of the Kalabaris, King Amachree IV, of their settlement to ensure that no other person would be permitted to settle in the same place. The plaintiffs claimed that the defendants who had settled elsewhere, but nearby, sought and obtained from them the use of a portion of plaintiffs' land for the burial of their dead as it is against the defendants' custom to bury their dead on their soil. This portion of land forms part of the land in dispute. In exercise of their right of ownership, the plaintiffs started to cut trees on the land for purposes of building canoes. However, it was the defendants' belief that cutting trees on graves desecrated their dead. Hence, they took an action in trespass against the plaintiffs in 1934. The defendants won. On appeal to the District officer, the decision was affirmed. The defendants denied that it was the plaintiffs who made a gift of the land to them. They claimed that the land in dispute is part of a larger piece of land granted to their ancestors by the Amayanabo of Kalabari, King Amachree IV.

At the conclusion of trial, the learned trial judge found in favour of the plaintiffs and entered judgment for them. Dissatisfied, the defendants appealed to the Court of Appeal which upheld their appeal and as a result dismissed the claims of the plaintiffs. The plaintiffs have now appealed to the Supreme Court raising three issues

### **ISSUES FOR DETERMINATION**

(a) Whether the lower court was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel per rem judicatam.

(b) Whether the Court of Appeal was not in error when it held that the learned trial Judge erred in relying on the evidence that the Appellants' predecessors obtained the permission of Amachree IV to settle on the land in dispute since such evidence went to no issue as they were

(sic) not pleaded by the Appellants.

(c) Whether the Court of Appeal was right in setting aside the findings of the learned trial Judge that the Appellants had proved their ownership of the land and were therefore entitled to the declaration sought.

**HELD** (Unanimously allowing the appeal per lead judgment of **ONU JSC**)  
***Estoppel - Estoppel per ram judicatam***

1. It is settled that for the doctrine of estoppel per rem judicatam to apply, it must be shown that the parties, issues and subject matter in the previous action were the same as those in the action in which the plea is raised. See Alashe v. Olori Ilu (1964) 1 All NLR 390 at 394; Balogun v. Adejobi (1995) 2 NWLR (Part 376) 131; Ihenacho Nwaneri & Ors. v. Nnadikwe Oriuwa (1959) 4 FSC. 132 and Faleye v. Otapo (1995) 3 NWLR (Part 381) 1. Undoubtedly, the parties in the instant appeal and the parties in the native court case i.e. case No. 286/34 and the appeal thereon to the District Officer (No.4/35), are the same. The same cannot, in my respectful view, be said as to whether the issues in both cases are the same albeit that when considering the proceedings of a native court due regard must be had to the substance and not to the form of the proceedings. Thus, in the instant case, the learned Justice of Appeal who wrote the leading judgment and concurred in by the other Justices would appear to me to be in error when he said, among other things, that:-

*"It seems perfectly clear to me from the analysis of the facts of this case the Appellants have succeeded in proving all the essential ingredients of the plea".* (p. 1843 E)

***Land law - Estoppel***

2. From the foregoing, the plea of estoppel ought not to have been allowed by the court below for any reason whatsoever. This is because, the Respondents failed to prove that the piece of land in respect of which the Appellants sought a declaration of title is the same as the piece of land in respect of which Exhibit "B" was decided in the 1934 Suit. See Morinatu Oduka & Ors. v. Kasumu & Anor. (1968) NMLR 28 and Ezewani v.

Onwordi (1986) 4 NWLR (Part 33) 27. In this case, it is clear from the evidence and the judgment of the Native Court and of the District Officer's Court, that the earlier case was trespass by felling trees on a small piece of the land now in dispute. Therefore, in my respectful view, the plea of B estoppel should not have been upheld by the court below. (pp. 1847A/1848 H)

***Land law - Title***

C 3. Long and adverse possession of land cannot found a claim in title against the true owner; vide Adu v. Kuma 3 WACA 240; Ayodele v. Oluwole (1969) 1 All NLR 233; This finding ipso facto created a strong presumption by virtue of Section 46 of the Evidence Act, that the present Appel- D lants as grantors of the graveyard land to the Respondents are the owners of the land now in dispute which adjoins the grave yard and not otherwise. See Ekwere & Ors. v. Nakmakosi Iyiegbu (1972) 6 SC. 116 at 130. From the foregoing, the Court below, in my view, was clearly wrong to hold that "from the facts of the Native Court actions there was E certainly a presumption of ownership in favour of the Appellants" (now Respondents) by reason of the fact that they (Respondents) had been in long and undisturbed possession of only a portion of it, when the judgments in the Native Court suit were to the effect that they were granted F a small piece of the land for the sole purpose of burying their dead. (p. 1848 A)

***Title - Settlement***

G 4. Be it noted that there is clearly a difference between a grant and a settlement. A grant comes from a previous title holder to a subsequent one called a grantee; whereas settlement does not recognize a pervious title holder. See Adedibu & Anor v. Olofa (1968) NMLR 462. In the case H in hand with due respect, it appears that there was a misunderstanding of the case put forward by the Appellants, namely, that their ancestors settled down on land which included the piece of land in dispute, and that they only obtained the permission of Amachree IV. It was never their case that it was Amachree IV that made a grant of the land to them.

Thus, when the learned Justice of the court below held that the case of the Appellants was that of a grant from King Amachree and that they failed to prove such a grant, he was in error. (p. 1850 H)

### *Evidence - Pleadings*

5. As a matter of fact, the Respondents pleaded in paragraph 4 of their Statement of Defence that they denied that the Appellants ever settled on the land in dispute or that they traditionally informed King Amachree IV of their settlement thereon. They went on to plead that they also obtained the permission of the same Amachree IV. That being so, whether the Appellants or the Respondents or both took permission of King Amachree was clearly an issue in respect of which both parties were free to lead evidence. And this emanates from the proposition of law that a plaintiff is entitled to lead evidence on any point raised in the defendant's pleading. Thus, as this Court had occasion to decide in Amos Bamgboye & Ors. v. Raimi Olarewanju (1991) 4 NWLR (Part 184) 132 at 155, following Emegokwue v. Okadigbo (supra), although the rule is that a party may not be allowed to lead evidence outside his pleadings, a plaintiff will be entitled to lead evidence on a point raised in the defendant's pleadings. I am therefore of the firm view, that the court below was in error in allowing the appeal against the judgment of the learned trial Judge on the allegation that the evidence of settlement led before him by the Appellants was inadmissible because such evidence was not pleaded. This issue is also accordingly resolved in the Appellants' favour. (p.1852A)

### *Appeals - Evaluation of evidence*

6. With due respect to the court below, it failed to consider this aspect of the trial Judge's judgment simply because it had come to the conclusion which erroneously led it to arrive at the view that the plea of estoppel availed the Respondents and also because that court felt, wrongly in my view, that the evidence given by the Appellants was at variance with their pleadings. I therefore take the view that had the learned Justice of Appeal not fallen into the above serious error, he would have had no justification in overturning the finding of the learned trial Judge that the Appel-

lants had established their claim to a right of occupancy. A fortiori, the court below by the same token, would not have been entitled to substitute its own views of the evidence for those of the learned trial Judge. See Egri v. Uperi (1974) 1 NMLR 22; Lucy Onowan & Anor. v. Iserhien (1976) NMLR 263; As this Court has held times without number, a Court of Appeal has no right to substitute its own view of the facts for those of the trial Judge who heard and saw the witnesses perform. See Balogun & Ors. v. Alimi Agboola and Lawal v. Dawodu (1972) 1 All NLR (Part 2) 270) at 272. (p. 1853 C)

## NOTABLE POINTS OF INTEREST

### ONU JSC

*1. Distinction between an action for declaration of title and a claim in trespass*

With due respect to the learned Justice of Appeal, what is in issue in this case is not a mere matter of form but a matter of substance. Nor can it be suggested that an action in trespass is the same as an action for declaration of title to land as postulated by the Respondents. A claim in trespass is based entirely on possession of the land, not necessarily on ownership of the land. (p. 1844 D)

### F ACHIKE JSC

*2. How to construe the decision of an inferior court*

On the authorities and in principle, considerable leeway and liberal interpretation ought to be placed on the proceedings and judgments of such inferior courts in order to appreciate their conclusions on the issues adjudicated upon by them. Undoubtedly, it will occasion undue injustice if the decisions of such courts were to be construed strictly and superficially. In practice, the decisions of such inferior courts can only be properly appreciated after a pains-taking consideration is given to the entire proceedings resulting in the judgment decreed by them. Put briefly, appellate superior courts of record should not engage in re-writing of lucid judgments of inferior courts on the pretext that a broad interpretation will meet the justice of such cases. See Ajayi v Aina (1942) 16 NLR

67. (p. 1856 H)

### **KALGO JSC**

#### *3. Doctrine of Estoppel - What it connotes*

Estoppel per se is a doctrine of law which is not a cause of action, Re B Concessions Trust (1896) 2 CH. 757, and no action can be founded upon it. Low v. Bouverie (1891) 3 CH. 82. If it is pleaded in an action in court, it may, if it succeeds, affect the right of a party to proceed with the action and the jurisdiction of a court to entertain the matter pleaded against. Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in a final manner between the parties by a court or tribunal having jurisdiction, concurrent or exclusive in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. See Igwego v. Ezeugo (1992) 6 NWLR (pt 249) 561 at 587. (p. 1859 E)

### **AYOOLA JSC**

#### *4. Application of issue estoppel*

It is not quite clear from the judgment of the Court of Appeal that the distinction between cause of action estoppel and issue estoppel was borne in mind by the Court of Appeal when it relied on the principle in Henderson v. Henderson (18 & 3 ) 3 Hare 100, 144 which was a case which related to the scope of issue estoppel. If, as it would appear, the court below was more concerned with the question of issue estoppel, it came to a wrong conclusion that such estoppel was in favour of the respondents in the face of the clear finding by the District Officer in appeal case No. 4/31, relied on by the respondents, that: "The trees seen by the court were felled by the appellants (i.e. the present appellants) and are well within the area which was granted by the appellants (is the present appellants) to the respondents (i.e. the present respondents)". That case related to part of the land in dispute. The finding that it was granted to the respondents by the appellants rather than be an estoppel against the appellants in regard to title over land of which it forms parts, should operate as issue estoppel against the respondents estopping them from claiming, as they

did by their statement of defence, that "it is they who have been owners of the said land in dispute and its environs from time immemorial."  
(p. 1862 A)

**B REPRESENTATION**

Chief (Mrs.) C. J. Aremu, for the Appellants  
O. T. Kasunmu (Miss) for the Respondents

**C CASES REFERRED TO**

- Alashe v. Olori Ilu (1964) 1 All NLR 390 at 394  
Balogun v. Adejobi (1995) 2 NWLR (Part 376) 131  
Ihenacho Nwaneri v. Nnadikwe Oriuwa (1959) 4 FSC. 132  
Faleye v. Otapo (1995) 3 NWLR (Part 381) 1  
D Ayodele v. Oluwole (1969) 1 All NLR 233  
Agboola v. Abimbola (1969) 1 All NLR 287  
Adedibu v. Olofa (1968) NMLR 462

**E LEAD JUDGMENT BY ONU JSC**

The two main issues which arose for the consideration of this Court in the appeal herein are firstly, whether the Court of Appeal was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel per rem judicatam and secondly, whether the Court of Appeal was not in error when it held that the learned trial Judge erred in relying on the evidence that the Appellants' predecessors obtained the permission of King Amachree IV to settle on the land in dispute since such evidence went to no issue as it was not pleaded by them.

G The action itself was commenced by Chief Williams Seleya Big Tom, Chief Ibibo Obu Dokubo and Chief Christopher Thompson, for themselves and as representing the Chief and people of Abalama Community on March 12, 1979, in the High Court of Rivers State, Degema  
H Judicial Division, claiming against Chief Jonathan Omoni and nine others for themselves and as representing the Chiefs and people of Tema Community jointly and severally for the following reliefs:-

"(i) A declaration of Plaintiffs' Right of Occupancy over the

*piece and parcel of land known as IGA-PIRI" and the IGA CREEK situate at Abalama.*

(ii) *A perpetual injunction restraining the defendants and their servants from committing any trespass on the said land and creek and claiming compensation due on the land and creek from Guffanti Nig. B Limited, West -mirster Dredging Company Limited, or from any other company or persons; or the Degema Local Government Council; and*

*(iii) N50,000.00 general damages for trespass committed thereon."*

Pleadings were filed and exchanged. The Plaintiffs (herein Appellants) called three witnesses while the Defendants (herein Respondents) called six witnesses. In a reserved judgment delivered on October 12, 1983, the learned trial Judge (Fiberesima, J. ) held that the Appellants were entitled to a declaration of customary right of occupancy as claimed. The learned trial Judge in addition ordered the Respondents to refund to the Appellants some money collected by the Respondents in respect of the land from a company. He also made an order of perpetual injunction against the Respondents. D

Being dissatisfied with the said decision the Respondents appealed E to the Court of Appeal (hereinafter in the rest of this appeal where the context so admits, referred to as the court below). The court below upheld the Respondents' appeal and in consequence ordered a dismissal of the Appellants' claims with costs. It is against that judgment that the Appellants have lodged their appeal to this Court on five grounds contained in their Notice of Appeal dated 26th June, 1991. F

The parties formulated issues in their briefs of argument which they duly exchanged in accordance with the Rules of court. The Appellants submitted three questions as arising for our determination as follows:- G

(a) Whether the lower court was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel per rem judicatam. H

(b) Whether the Court of Appeal was not in error when it held that the learned trial Judge erred in relying on the evidence that the Appel

lants' predecessors obtained the permission of Amachree IV to settle on the land in dispute since such evidence went to no issue as they were (sic) not pleaded by the Appellants.

(c) Whether the Court of Appeal was right in setting aside the findings of the learned trial Judge that the Appellants had proved their ownership of the land and were therefore entitled to the declaration sought.

The two issues which in the Respondents' view arise for the determination of this appeal are:

(a) Whether the lower court was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel per rem judicatam

(b) Whether the Appellants were entitled to a declaration of title having regard to the state of the pleadings and the evidence led before the trial court.

Before embarking on the consideration of the three questions posed at the appellants' instance which I adopt herein for the disposal of this appeal, I deem it pertinent to state the facts of the case, albeit briefly as follows:-

That the ancestors of the Appellants settled on the land in dispute over a hundred years ago in about 1882. That the head of the Kalabaris, King Amachree, had become so powerful and dreaded that they had to seek and obtain his permission before settling there. That they met no one at the time of their settlement and having informed King Amachree of their settlement, on one else could come there to settle. The Appellants who had claimed that the Respondents settled somewhere else close by, it is their custom not to bury their dead on their soil; hence they used to cross the Appellants' land to bury their dead on another piece of land. Subsequently, the Respondents asked the Appellants for some land which request was granted. The Respondents then started burying their dead on that land; and it is that land that is now in dispute. It then transpired that the Respondents later exceeded the portion given to them by the Appellants. In exercise of their right to ownership, the Appellants started to fell trees on the land for purposes of buildings canoes. However, it was the Respondents belief that felling trees on graves

desecrated their dead. In consequence, they took an action in trespass against the Appellants in 1934. The suit terminated in favour of the Respondents. As it indeed transpired at the trial of the suit, there was evidence particularly from the son of King Amachree IV which favored the Appellants' claim and which was opposed to the Respondents' claim in the sit herein. B

The case of the Respondents on the other hand, is that the land in dispute is part of a larger piece of land granted to their ancestors by the Amayanabo of Kalabari, King Amachree IV. They claim that it was not the Appellants who made a gift of the land to them as the Appellants themselves alleged. Rather, they pleaded that the Appellants were estopped from asserting ownership of the land because they the (Appellants) had admitted that they had given the land to the Respondents for nearly 50 years. C D

Now, to the consideration of the questions raised for or resolution.

#### QUESTION 1.

The question as earlier stated, contends whether the court below was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel per rem judicatam. **It is settled that for the doctrine of estoppel per rem judicatam to apply, it must be shown that the parties, issues and subject matter in the previous action were the same as those in the action in which the plea is raised.** F  
 See Alashe v. Olori Ilu (1964) 1 All NLR 390 at 394; Balogun v. Adejobi (1995) 2 NWLR (Part 376) 131; Ihenacho Nwaneri & Ors. v. Nnadikwe Oriuwa (1959) 4 FSC. 132 and Faleye v. Otapo (1995) 3 NWLR (Part 381) 1. Undoubtedly, the parties in the instant appeal and the parties in the native court case i.e. case No. 286/34 and the appeal thereon to the District Officer (No.4/35), are the same. G  
 The same cannot, in my respectful view, be said as to whether the issues in both cases are the same albeit that when considering the proceedings of a native court due regard must be had to the substance and not to the form of the proceedings. Thus, in the instant case, the learned Justice of Appeal who wrote the H

leading judgment and concurred in by the other Justices would appear to me to be in error when he said, among other things, that:-

*"It seems perfectly clear to me from the analysis of the facts of this case the Appellants have succeeded in proving all the essential ingredients of the plea".*

The learned Justice would also appear clearly to have erred when he held that the learned trial Judge had taken too narrow a view of the 1934 Suit. He then went on to say that:-

*"In my opinion, the learned trial Judge took a very narrow view of the Native Court judgments, Exhibits B and C. It is well established that when considering native court proceedings, it is the substance and not the mere form that matters. This point was well illustrated by the West African Court of Appeal in Akkyin v. Egymah (1936) 3 WACA 65.*

With due respect to the learned Justice of Appeal, what is in issue in this case is not a mere matter of form but a matter of substance. Nor can it be suggested that an action in trespass is the same as an action for declaration of title to land as postulated by the Respondents. A claim in trespass is based entirely on possession of the land, not necessarily on ownership of the land. Thus, as was stated by this Court in Christopher Okolo v. Eunice Uzoka (1978) 4 SC.77:

*"It is the law and this court has so held times without number that trespass to the land is actionable at the suit of the person in possession of the land. The slightest possession in the plaintiff enable him to maintain trespass if the defendant cannot show a better title." See also Oluwi v. Eniola (1967) NMLR 339 and Ogunbambi v. Abowaba 13 WACA 222 at 223. "In other words, a claim in trespass is based entirely on possession of the land not necessarily on ownership of the land. See Amori v. Akande (1975) 2 WACA 143; Oyetona v. Ajani (1959-60) WNLR 213; Awooner Renner v. Annan 2 WACA 258 and Wallis v. Hands (1893) 2 Ch. 75. A person who has title to a piece of land may be liable in trespass to a person who is in possession if the former's right to recover possession has not ripened to one immediately exercisable in law." See also Adeniji v. Ogunbiyi (1965) NMLR 395 at 397-398.*

A little further down in his judgment the learned Justice of Appeal went on to say as follows:-

*"As I have earlier pointed out the issue before the Native court in Suit No. 286/34 was not merely one of trespass; both parties claimed ownership of the land in dispute and the Native Courts having established that the land belonged to the present Appellants gave judgment in their favour for damages for trespass. From the facts of the Native Court actions there was certainly a presumption of ownership in favour of the Appellants who were in long and undisturbed possession of the land in dispute. This was clearly illustrated in the findings of the Native Court."*

If by the above extract the learned Justice in effect meant that the Native Court judgments gave title to the land to the present Respondents, then he was, with utmost due respect, in error. This is because the claim of the Respondents before the Native Court in Suit No. 286/34, Exhibit "B" in this case, was for "N50 damages for trespass in its bush by interfering and cutting and felling trees." The Respondents could easily have framed their claim for a declaration of title to the land, but they were content with claiming damages for trespass. Surely, they did this to avoid having to establish their title to the land in accordance with what the law laid down for such a claim. See Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Part 341) 676; (1994) 4 SCNJ 24.

A cursory look at the findings of the Native Court in Exhibit "B" and those of the District Officer (Exhibit "C") on appeal therefrom, are illuminating in this respect. The Native Court in Exhibit "B" held inter alia as follows:-

1. *"That considering the position of the bush or land in dispute; there is no doubt that the Defendants are aware of the Plaintiffs using there as their cemetery."*
2. *That if even the Defendants' ancestors gave the land to Plaintiffs' ancestors for burial purposes for over fifty years the Plaintiffs are justified to sue Defendants for trespass on the land in cutting and felling trees on their graves. The Defendants have no more right on the land."*
3. *That according to the Plaintiffs statement, that Amachree IV*

*gave them the piece of land in dispute the Defendants must have to consult with or take permission from the Plaintiffs before any work on the land.*

4. *That the land (cemetery) in dispute should remain entirely for the Plaintiffs/Defendants long years ago. Under the above circumstances we enter judgment for the Plaintiffs."*

No doubt, it is clearly far-fetched for the learned Justice of Appeal to suggest that one can read from these findings that the Native Court decision is one which can be held to amount to a declaration of title in favour of the Respondents, then the Plaintiffs, or to hold that such findings foreclosed the Appellants, then the Defendant, from contesting the ownership of the whole piece of land which they have contested in this Suit. It is palpable from the findings that it was the Appellants herein who permitted the Respondents to make use of a piece of land as cemetery only. What the court was in effect saying is that the present Appellants should permit the Respondents to continue to use the land as cemetery. This is made all the more glaring by the judgment (Exhibit C) by the District Officer who sat over the case on appeal. Said he in Exhibit 'C':

*"The Court finds that the trees seen by the court were felled by the Appellants and are well within the area which was granted by appellants to respondents."* (Underlining is for emphasis by me.)

What all these mean is that the 1934 Native Court Suit (Exhibit 'B') was neither more nor less an action in trespass. No declaration of title was in effect in that case sought; neither could the judgment of the court of first instance (Exhibit "B") be held to have decreed such declaration. From the foregoing, it is abundantly clear that all the courts were concerned with was that the present Appellants should not disturb the Respondents from continuing to bury their dead on the portion of land previously given to them by the Appellants for that purpose. In contrast, in the case of Okiji v Adejobi (1960) 5 FSC 44, the Federal Supreme Court held that the fact that a person has acquired rights of possession over parts of a piece of land in dispute will not affect the right of any other person to seek a declaration of title to the whole piece of land.

From the foregoing, the plea of estoppel ought not to have been allowed by the court below for any reason whatsoever. This is because, the Respondents failed to prove that the piece of land in respect of which the Appellants sought a declaration of title is the same as the piece of land in respect of which Exhibit "B" was decided in the 1934 Suit. See Morinatu Oduka & Ors. v. Kasumu & Anor. (1968) NMLR 28 and Ezewani v. Onwordi (1986) 4 NWLR (Part 33) 27. B

In Bakare Ibiyemi & Ors. v. Lawan Olusoji & Anor (1957) WRNLR 25, the Plaintiffs there sued the Defendants for a declaration of title to a piece of land. The said piece of land, included another piece of land part of which had already been adjudicated upon. It was held that the plea of estoppel failed. C

It is glaring that in the land concerned in the 1934 Suit vide Exhibit "B", it is only the cemetery that was involved, whilst the subject-matter of the present Suit is a much larger piece of land on which a burrow pit far away from the cemetery and whose excavation led to a demand for the payment of compensation as depicted on the plans (Exhibits "A" and "E") and amply described in the evidence of D.W. 6 at pages 73 to 74 of the Record, is what we are here concerned. In Exhibit "B" (the 1934 Suit) the parties were only concerned with the felling of trees on the grave yard of the Respondents which they regarded as a desecration of the grave yard. The District Officer sitting as a Court of Appeal visited the locus on June 9, 1936, and made a note that he was only concerned with the land where trees were felled. He (the District Officer) emphasized that the whole matter rested on where the actual felling of trees took place. He then proceeded to hold that the felled trees were "well within the area which was granted by Appellants to Respondents." Admittedly, the grant was for a limited purpose, namely to be used as a grave yard, and could never ripen to an absolute ownership of the land adverse to the ownership of the grantor. See Alhaji B.A. Suleman & Anor v. Hannibal Johnson 13 WACA 213 at 215; Atunrase v. Sunmola (1985) 1 NWLR (Part 1) 105; Odubeko v. Fowler (1993) 7 NWLR (Part 308) 637 at 677 and Olayioye v. Oso (1969) 1 All NLR 281 at 285. D E F G H

Consequently, long and adverse possession of land cannot found a claim in title against the true owner; vide Adu v. Kuma 3 WACA 240; Ayodele v. Oluwole (1969) 1 All NLR 233; Da Costa v. Ikomi (1968) 1 All NLR 394; Olayioye v. Oso (supra) and Agboola v. Abimbola (1969) 1 All NLR 287. This finding ipso facto created a strong presumption by virtue of Section 46 of the Evidence Act, that the present Appellants as grantors of the graveyard land to the Respondents are the owners of the land now in dispute which adjoins the grave yard and not otherwise. See Ekwere & Ors. v. Nakmakosi Iyiegbu (1972) 6 SC. 116 at 130.

From the foregoing, the Court below, in my view, was clearly wrong to hold that "from the facts of the Native Court actions there was certainly a presumption of ownership in favour of the Appellants" (now Respondents) by reason of the fact that they (Respondents) had been in long and undisturbed possession of only a portion of it, when the judgments in the Native Court suit were to the effect that they were granted a small piece of the land for the sole purpose of burying their dead. It is for these reasons that I am of the firm view that the facts in Ajayi v. Aina (1942) 16 NLR 67 are clearly distinguishable from the facts of the case in hand. In that case, the claim as pleaded was for "the return of the Plaintiff's farm land." At page 71 of the Report, Francis J., held as follows:-

"As regards Lambrou's argument that the action in the Native Court being for trespass does not bar these proceedings I am unable to agree. It must be obvious that in the case of proceedings in a Native Court in which members of the legal profession as such have no audience, great latitude must be given and a broad interpretation placed on the proceedings and judgment so that in a case of this kind it is necessary in my view to look at the whole of the proceedings, that is the evidence of the parties and the judgment in order to arrive at a correct conclusion as to what the case was about."

In this case, it is clear from the evidence and the judgment of the Native Court and of the District Officer's Court, that the earlier case was trespass by felling trees on a small piece of the

**land now in dispute. Therefore, in my respectful view, the plea of estoppel should not have been upheld by the court below.** In the case of Eboha v. Anakwenze (1967) NMLR 140, a case of land dispute, the people of Akanato Ikem Nando instituted an action against the people of Degoma Ikem Nando for declaration of title to a piece of land known as Agu Ofufe, damages for trespass and an injunction to restrain the defendants from further trespass on the land. B

As pleaded in paragraph 8 of the amended statement of claim this piece of land was the subject of a court action in 1954 when the defendants in the present case, that is to say the Dagoma people sued the Akanato people (present plaintiffs) for a declaration of title. The action was dismissed. It is the same land which was in dispute in the case on appeal thereof. C

The identity of the land was not in dispute in the case. What was in dispute was the area of the land which the plaintiffs said was granted to the defendants. The plaintiffs' plan was tendered as Exhibit "D". D

The learned Judge preferred the traditional history given by the plaintiffs to that of the defendants and said that he was satisfied that the plaintiffs showed the defendants an area "in the centre" of the land to live on. He was not satisfied however that the area so given was clearly marked as the plaintiffs had tried to establish. He however awarded the plaintiffs declaration of title, 50 pounds damages for trespass and the injunction sought. The defendants appealed. E F

It was held, allowing the appeal (1) that on the evidence and the plan (Exhibit 'D'), a declaration of title could not with fairness and propriety be granted the plaintiffs; (2) the fact that the defendants (then plaintiffs) lost in their claim for title to the land in a previous suit, does not help the plaintiffs, upon whom lies the onus to prove their case; (3) The plaintiffs failed to discharge this onus and on the authority of Kodilinye v. Mbanefo Odu 2 WACA 336, the proper judgment was one of dismissal. G In other words, in that case like the one in hand, the Defendants were not able to rely on the previous judgment to estop plaintiffs from seeking a declaration of title to the land which they had to establish according to H

law.

For all I have been saying, this question is resolved against the Respondents and in the Appellants' favour.

Question 2 asks whether the court below was in error when it held that the learned trial Judge erred in relying on the evidence that the Appellants' predecessors obtained the permission of Amachree IV to settle on the land in dispute since according to the court such evidence went to no issue as it was not pleaded by the Appellants.

In answering this question, it is necessary to advert, firstly, to what the learned Justice who wrote the leading judgment of the court below said. Said he:-

*"The principle which has been restated time and time again is that evidence of a party on a point which departs from his pleading goes to no issue. In the instant case, the evidence of PW2 that the Abalama people obtained the permission of Amachree IV to settle on the land in dispute at Iga-Piri and Iga creek went to no issue the facts not having been pleaded."* After citing the cases of Emegokwue v. Okadigbo (1973) 4 SC. 113 117 and Ogunleye v. Oni (1990) 2 NWLR 745 at 767C to buttress his argument, he went on to say much later down in his judgment as follows:

*"The effect of the evidence given which goes to no issue is that although the respondents pleaded the custom by which the Amanyabo granted land to the Kalabari people, there is no averment of any grant of land to the Abalama people. There is therefore no proof of law how they came to own Iga-piri and Iga creek. The law is well settled that if a person bases his title on a grant according to a custom by a particular person, family or community, that party must go further and prove origin of that particular person, family or community unless that title has been admitted. But in the instant case, the respondents did not plead any grant to them by King Amachree upon which they led evidence."*

**Be it noted that there is clearly a difference between a grant and a settlement. A grant comes from a previous title holder to a subsequent one called a grantee; whereas settlement does not recognize a pervious title holder. See Adedibu & Anor v. Olofa (1968)**

**NMLR 462.** In the case in hand with due respect, it appears that there was a misunderstanding of the case put forward by the Appellants, namely, that their ancestors settled down on land which included the piece of land in dispute, and that they only obtained the permission of Amachree IV. It was never their case that it was Amachree IV that made a grant of the land to them. This is clear from their pleading and from the evidence of PW2 (Chief Christopher Thompson). The relevant portion of the pleading at page 15 line 19 to page 17 line 17 of the Record is as follows:

"6 (i) ..... The plaintiffs, Abalama Community, came to their present settlement in 1882 two years earlier than Buguma the acknowledged capital of Kalabari.

(ii) It is a peculiar maxim or saying that all land and sea belong to King Amachree the Head of the Kalabaris. Thus the permission for settlement at a particular point is usually sought from King Amachree.

V (a) Abalama came to their present settlement before King Amachree IV moved to the present Buguma. On arrival they met no one on the virgin forest land. They settled on one end of it and continued to farm and cut timber and .....

(e) Having settled on the and (Iga-piri) King Amachree was traditionally informed and therefore no other group will be granted right of occupancy in respect of this same land."

The above was the case as pleaded by the Appellants: a settlement followed by notification to King Amachree. **Thus, when the learned Justice of the court below held that the case of the Appellants was that of a grant from King Amachree and that they failed to prove such a grant, he was in error.** Thus, the Appellants' position in the instant case cannot be likened to what this Court decided in the case of Balogun v. Akanji (1988) 1 NWLR (Part 70) 301 at 322 wherein it was held that a defendant who having pleaded settlement and establishes a grant of land in dispute, cannot be said to have proved his title. Nor conversely, is the Appellants' case synonymous with that of a plaintiff who asserts exclusive grant to family land and who has the onus to

establish same vide Kasumu Ajeja v Ezekiel Ajayi & Anor. (1969) All NLR 72 at 75-75. The evidence given by PW2 was in no way different from this and it neither added anything to not contradicted the pleading set out above. **As a matter of fact, the Respondents pleaded in paragraph 4 of their Statement of Defence that they denied that the Appellants ever settled on the land in dispute or that they traditionally informed King Amachree IV of their settlement thereon. They went on to plead that they also obtained the permission of the same Amachree IV. That being so, whether the Appellants or the Respondents or both took permission of King Amachree was clearly an issue in respect of which both parties were free to lead evidence. And this emanates from the proposition of law that a plaintiff is entitled to lead evidence on any point raised in the defendant's pleading. Thus, as this Court had occasion to decide in Amos Bamgboye & Ors. v. Raimi Olarewanju (1991) 4 NWLR (Part 184) 132 at 155, following Emegokwue v. Okadigbo (supra), although the rule is that a party may not be allowed to lead evidence outside his pleadings, a plaintiff will be entitled to lead evidence on a point raised in the defendant's pleadings. I am therefore of the firm view, that the court below was in error in allowing the appeal against the judgment of the learned trial Judge on the allegation that the evidence of settlement led before him by the Appellants was inadmissible because such evidence was not pleaded. This issue is also accordingly resolved in the Appellants' favour.**

Finally, is the third issue which poses the question as to whether the court below was right in setting aside the finding of the learned trial Judge that the Appellants had proved their ownership of the land in dispute and were therefore entitled to the declaration sought.

In giving an answer to this question, it is pertinent to say that the learned Justice of Appeal who wrote the leading judgment having come to the erroneous conclusion that the evidence of settlement was wrongly admitted and, therefore, ought to have been excluded from consideration, was then left with practically no evidence in support of the Appellants' case of settlement. While emphasizing that the claim of the Appel-

lants at the High Court was a declaration that they were entitled to a right of occupancy over the piece of land in dispute, it is common ground that the learned trial Judge accepted the evidence of the Appellants as to their settlement on the land. Said he:

*"The story of the Abalama people that, as an act of Kindness B based on customary belief they permitted Tema people to use part of Abalama land for burial and that there was not outright grant of the area to Tema people is a very true story."*

On the other hand, the learned trial Judge came to the conclusion that "the whole defence is a fabrication, fabrication of evidence, fabrication C of Plan." **With due respect to the court below, it failed to consider this aspect of the trial Judge's judgment simply because it had come to the conclusion which erroneously led it to arrive at the view that the plea of estoppel availed the Respondents and also because that D court felt, wrongly in my view, that the evidence given by the Appellants was at variance with their pleadings.** The learned Justice of Appeal who delivered the leading judgment dealt with the matter thus:

*"In as much as the evidence adduced by the Respondents (now E Appellants) is completely at variance with the Statement of Claim reproduced above, the effect is that the Respondents have failed to prove that they were original settlers of the land in dispute. They have therefore failed to prove ownership of the land in dispute by traditional history."* F

**I therefore take the view that had the learned Justice of Appeal not fallen into the above serious error, he would have had no justification in overturning the finding of the learned trial Judge that the Appellants had established their claim to a right of occupancy. A** **fortiori**, the court below by the same token, would not have been G entitled to substitute its own views of the evidence for those of the learned trial Judge. See Egri v. Uperi (1974) 1 NMLR 22; Lucy Onowan & Anor. v. Iserhien (1976) NMLR 263; Akinloye v. Eyiola (1968) NMLR 92 and Woluchem v. Gudi (1981) 5 SC. 319 at 326. As H this Court has held times without number, a Court of Appeal has no right to substitute its own view of the facts for those of the trial Judge who heard and saw the witnesses perform. See Balogun &

**Ors. v. Alimi Agboola and Lawal v. Dawodu (1972) 1 All NLR (Part 2) 270 at 272.**

In this case, there was the evidence of settlement by the ancestors of the Appellants of a large piece of land in dispute in this area (including the burial ground). This piece of evidence the learned trial Judge believed as he was case of the Respondents was based on the fabrication of evidence and fabrication of the plan. As demonstrated, the Respondents fabricated the plan in order to be able to set up a plea of estoppel and they fabricated evidence in order to show that they were the first to settle on the land. However, nowhere in the judgment of the court below was it shown how the learned trial Judge was wrong in these findings and why.

The result is that I find the appeal meritorious and it is accordingly allowed by me with costs assessed in Appellants' favour in the sum of N10,000.00.

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#### BELGORE JSC

I agree with my learned brother, Onu, JSC., that this appeal has merit and must be allowed. The respondents' right derived from a grant by appellants to a narrow piece of land for their cemetery. This was the basis for 1934 native court suit. That narrow piece of land is very minuscule as compared with the land now in dispute. The subject-matter of 1934 dispute is therefore far from being the same with the land now in issue and estoppel per rem judicatam will not apply.

The court of Appeal erred to have interfered with the cogent findings of fact made by the trial judge. Those findings were amply supported by evidence based on the pleadings and nothing therein was perverse or unjust for the Court of Appeal to interfere with. (Ojibah v. Ojibah (1991) 5 NWLR (Part 191) 296; Bamgboye v. Olarewaju (1991) 4 NWLR (Part 184) 132; UAC of Nigeria Ltd. v. Fasheyitan (1988) 7 SCNJ 179; Bamgboye v. Olusoga (1996) 4 SCNJ 153).

I, for the above and the fuller reasons in the judgment of Onu, JSC., also allow this appeal and restore the judgment of trial court in setting aside the decision of the trial court. I award the appellants

N10,000.00 as costs in this appeal.

### ACHIKE JSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother, Onu JSC; I am in agreement with him B that the appeal has merit and the same succeeds. I wish to touch on one issue by way of emphasis.

The main kernel of this appeal seems to me to rest on Issue One - as separately submitted by the appellants and the respondents - namely, C whether the lower court was right when it held that the learned trial Judge was in error not to have upheld the plea of estoppel. It is the Native Court judgment, Exhibits B and C that the Court of Appeal relied on in holding that the plea of res judicata has been made out in favour of the defendants. The question that calls for determination is whether that D plea is sustainable having regard to all the facts and circumstance of this case.

Some factual background information will be of some assistance. Plaintiffs'/Appellants' are said to have settled on the land in dispute in E 1882 and subsequently informed the then powerful ruler of the Kalabaris, King Amachree IV, of their settlement to ensure that no other person would be permitted to settle in the same place. According to the plain- F tiffs, the defendants who had settled elsewhere, but nearby, sought and obtained from them the use of a portion of their land for the purpose of burying their dead as it was their (the defendants' custom) not to bury their dead on their soil. In fact, according to the plaintiffs, this portion of land forms part of the land in dispute. In exercise of their right of own- G ership over the portion of land shown to the defendants, the plaintiffs felled trees for building canoes and the felled trees landed on the defendants' graves; this, the defendants viewed with some considerable concern as the felled trees desecrated the graves. This prompted the defen- H dants' action in trespass against the plaintiffs in 1934, in Suit No. 286/34. The defendants won. On an appeal from the Native Court suit to the District Officer in 1936, the decision of the Native Court was affirmed. It is on these two decisions that the Court of Appeal sought to found that

the plea of res judicata ought to operate in favour of the defendants.

The plea of res -judicata was lucidly stated in the leading Judgment of the lower court (per Kolawole, JCA), following the Supreme Court dictum in Alashe v Ilu (1964) 1 All NLR. 390 at p. 394, as follows:

B *"Before the doctrine of estoppel per rem judicatam can operate, it must be shown that the parties, the subject matter and the issues were the same in the previous case as those in the action in which the plea of res judicata is raised."*

C No doubt, this is a correct statement of the law. See Nwakobi v Nzekwu (1964) 1 W.L.R 1019 at 1023, Idowu Alashe v Sanya Olori Ilu (1964) 1 All N.L.R. 390 and Nwaneri v Oriuwa (1959) 4 F.S.C. 132. However, some considerable difficulty in which many minds differ arises in the actual application of the plea. The Court of Appeal was satisfied that the  
D defendants successfully showed that all the ingredients of the plea of res judicata had been successfully established by the defendants.

Certainly, the parties in the Native Court Suit No. 286/34 and the appeal heard by the D.O (District Officer) in Suit No. 4/35 in 1934 and  
E 1936 respectively were the same. Can that also be said of the subject-matter? The claim before the Native Court, leading to the appeal to the District Officer, was for

F *" Claim \$50 damages for trespass in its bush by interfering and cutting and felling trees 9 months ago."*

Respondents' learned counsel, Professor A. B. Kasunmu SAN in his brief at p.4 submitted that 'the Native Court could not have adequately decided on the issue of the trespass without settling as well, the issue of ownership of the land in dispute.' For the appellants, Mr. Kehinde Sofola, SAN  
G submitted that "the 1934 Native Court suit was no more and no less than an action in trespass". No declaration of title was in effect sought and the judgment of the Court of first instance or on appeal could not be held to have decreed such a declaration.

H The diametrical divergent views evinced in the submissions of the two Senior Advocates for the parties stem from the fact that the trial Native Court as well as the appellate court presided by the District Officer had not the assistance of professional lawyers at their disposal. On

the authorities and in principle, considerable leeway and liberal interpretation ought to be placed on the proceedings and judgments of such inferior courts in order to appreciate their conclusions on the issues adjudicated upon by them. Undoubtedly, it will occasion undue injustice if the decisions of such courts were to be construed strictly and superficially. B In practice, the decisions of such inferior courts can only be properly appreciated after a pains-taking consideration is given to the entire proceedings resulting in the judgment decreed by them. Where, therefore, the judgments of the native tribunal are tolerably clear and accord with the claims before it, superior courts of record exercising appellate jurisdiction have no business to tinker with judgments of such inferior tribunals upon the fancied view that they are obliged to give a broad interpretation to them. That, I think, cannot be said to be the duty of an appellate court moreso when the judgments sought to be given unnecessarily broad interpretation are themselves lucid and admit of no ambiguity. Put briefly, appellate superior courts of record should not engage in re-writing of lucid judgments of inferior courts on the pretext that a broad interpretation will meet the justice of such cases. See Ajayi v Aina (1942) 16 NLR E 67.

Speaking on the same vein of taking a broad view of Native court judgments and orders, the Court of Appeal in its leading judgment, referring to the Native Court decisions of 1934 and 1936, and the treatment of the said judgments by trial High Court Judge, had this to say: F

*"In my opinion the learned trial Judge took a very narrow view of the native judgments, exhibits B and C. It is well-established that when considering native court proceedings, it is the substance and not the mere form that matters. This point was well illustrated by the West African Court of Appeal in Akyin v Egymah (1936) 3 WACA 65".* G

I regret to state that I do not share that view of the lower court, My view immediately expressed above is enough to contain and counter the above opinion of the lower court. Clearly, while I agree that when evaluating H native court proceedings it is the substance and not the mere form that should be looked at, nevertheless, the appellate court involved in such exercise should not take simplistic view of such native court proceedings

and thereby reduce same to an absurdity. And, as I had stated earlier in this judgment, where the native court proceedings, judgments etc are clear and devoid of ambiguity it will be unjust to mutilate such proceedings, judgments etc under the ruse either that the judgments are ambiguous or that the judgments etc would admit of such broad treatment.

Applying all I have said to the circumstances of this case, I am clearly of opinion that the respective judgments of the trial Native court of 1934 and of the District Officer in 1936 could not, by any stretch of the mind, have required to be further doctored in order to make them explicit. The claim and judgments, read and considered as a whole, are based on damages for trespass. I am unable to be persuaded that the judgments of the Native Court and the District Officer sought any claim for declaration of title nor was declaration made in either of these two judgments. It will therefore be unjustified to hold that the issue on the decision on Native Court in 1934 and the appeal thereon in 1936 related to a case on declaration of title to land. On the contrary, the two judgments related to claim in damages for trespass. On the other hand, the action leading to the present appeal, tracing its genesis at the Rivers State High Court, Suit No. H.C. No. DHC/5/79 was a three-pronged claim for (a) declaration, (b) Perpetual injunction and (c) N50,000 general damages for trespass. It will therefore be unconscionable for the lower court to convert a lucid case of respondents' claim for "N50 damages for trespass in its bush by interfering and cutting and felling trees" to a claim for a declaration of title to the land granted to them for a specific use, namely, for use as a cemetery.

It is undoubtedly clear that the issues that called for adjudication in the present appeal and those which arose from the 1934 Native Court Suit, and the appeal therefrom in 1936, are not the same.

I think I have said enough to show that the basis of the Court of Appeal's holding that the plea of res judicata was sustainable in favour of the respondents herein is untenable. That being so, I must turn in a negative answer to Issue One and consequently hold that the lower court (i.e. the Court of Appeal ) was wrong in holding that the learned trial Judge erred in not upholding the plea of estoppel per res judicatum.

The other issues in this appeal have been given full and adequate consideration in the leading judgment and I do not wish to expatiate further on them.

It remains to say that from the foregoing and the fuller judgment of my brother, Onu JSC, I, too, would allow the appeal. Accordingly, I set aside the judgment of the Court of Appeal and restore the judgment of the trial court. I award N10,000.00 costs in favour of the appellants.

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### KALGO JSC

I have had a preview of the judgment just delivered by my learned brother Onu JSC and I agree with him that there is merit in the appeal which ought to be allowed.

In this appeal two main issues arose for the determination of this court. They are:-

*"(i) Whether the lower court was right when it held that the learned trial judge was in error not to have upheld the plea of estoppel per rem judicatam*

*(ii) Whether the appellants were entitled to a declaration of title having regard to the state of the pleadings and evidence led before the trial court".*

Estoppel per se is a doctrine of law which is not a cause of action, Re Concessions Trust (1896) 2 CH. 757, and no action can be founded upon it. Low v. Bouverie (1891) 3 CH. 82. If it is pleaded in an action in court, it may, if it succeeds, affect the right of a party to proceed with the action and the jurisdiction of a court to entertain the matter pleaded against. Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in a final manner between the parties by a court or tribunal having jurisdiction, concurrent or exclusive in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. See Igwego v. Ezeugo (1992) 6 NWLR (pt 249) 561 at 587 Osunrinde v Ajamagun H (1992) 6 NWLR (pt 246) 156 at 183.

In the trial court, the appellants sued the respondents for, inter alia, declaration of title to a piece of land called Iga-Piri in Rivers State.

In the course of trial the respondents gave evidence of and relied upon the case before the Native Court in suit No. 286/34 in which they sued and succeeded against the appellants in connection with the land in dispute. The appellants went on appeal to the District Officer and they still lost. The proceedings before the trial court and District Officer were admitted at the trial as Exhibit 'B' and 'C' respectively.

It is very clear from Exhibit 'B' the 1934 Native court case, that the respondents sued for "#50 damages for trespass in its bush by interfering and cutting and felling trees". There was also evidence in Exhibit 'B' to show that the appellants had granted the land in dispute to the respondents to bury their dead 50 years before the action was commenced in the Native Court. The Native Court also found quite properly that since the appellants' ancestors gave the land in dispute to the respondents' ancestors for burial purposes for over fifty years, the respondents are justified to sue the appellants for trespass on the land in cutting and felling trees on their graves. The District Officer who heard the appeal from the decision of the Native Courts also visited the land in dispute and in confirming the decision of the Native Court said:-

*"The court finds that the trees seen by the court were felled by the Appellants and are well within the area which was granted by the appellants to respondents".*

This means that both the Native Court and the District Officer's court have found that the appellants have trespassed into the land in dispute.

The learned counsel for the appellant submitted in his brief that since the original claim before the Native Court was for trespass only, the claim for title or ownership of the land in dispute did not arise and could not have been determined by that court. He said under paragraph (h) on page 7 of his brief thus:-

*"It is therefore submitted that the 1934 Native court suit was no more and no less than an action in trespass. No declaration of title was in effect sought and judgment of the court of first instance or on appeal could not be held to have decreed such a declaration. It is abundantly clear that all the courts were concerned with was that the Appellants should not disturb the Respondents from continuing to bury their dead on*

*the portion of land previously given to them by the Respondents for that purpose.*

*It is submitted that from the decision of the Federal Supreme Court in Okiji v. Adejobi (1960) 5 FSC 44, the fact that a person has acquired rights of possession over parts of a piece of land in dispute will not affect the right of any other person to seek a declaration of title to the whole piece of land."*

I agree with this statement in respect of this appeal. It is true that the Native Court action was for trespass only and no more, and both the Native and District Officer's Court having found that the appellant granted the respondents the right to bury their dead on the land for over fifty years, decreed the appellants as trespassers and ordered them not to disturb the respondents any longer on the land. In my view their decisions could not be an order declaring title or ownership of the land in dispute to the respondents. The appellants could therefore properly sue the respondents and claim title or ownership of land in dispute as they did in the trial court, and the plea of estoppel per rem judicatam cannot apply in this case because trespass to land and declaration of title to the land are two separate and distinct issues. I therefore find that the Court of Appeal was wrong to say that the plea of estoppel per rem judicatam applied to this case.

On the second issue for determination; I agree entirely with my learned brother Onu JSC that the traditional evidence adduced by the appellants at the trial was in accordance with their pleadings and that it was sufficient to support their claim for title to the land in dispute as found by the learned trial judge. I do not agree with the Court of Appeal for holding otherwise.

Finally, I also allow the appeal, set aside the decision of the Court of Appeal and restored the decision of Fiberesima J. delivered on 23rd October, 1983. I award N10,000.00 costs to the appellants.

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**AYOOLA JSC**

I agree that this appeal should be allowed. The Court of Appeal was clearly in error in holding that the plea of *res judicata* should have

been upheld by the trial court. It is not quite clear from the judgment of the court of Appeal that the distinction between cause of action estoppel and issue estoppel was borne in mind by the Court of Appeal when it relied on the principle in Henderson v. Henderson (18 & 3 ) 3 Hare 100, B 144 which was a case which related to the scope of issue estoppel. If, as it would appear, the court below was more concerned with the question of issue estoppel, it came to a wrong conclusion that such estoppel was in favour of the respondents in the face of the clear finding by the District Officer in appeal case No. 4/31, relied on by the respondents, that: C "The trees seen by the court were felled by the appellants (i.e. the present appellants) and are well within the area which was granted by the appellants (is the present appellants) to the respondents (i.e. the present respondents)". That case related to part of the land in dispute. The finding D that it was granted to the respondents by the appellants rather than be an estoppel against the appellants in regard to title over land of which it forms parts, should operate as issue estoppel against the respondents estopping them from claiming, as they did by their statement of defence, E that "it is they who have been owners of the said land in dispute and its environs from time immemorial."

It being evident that the land which is the subject matter of the previous action was far smaller than that in question in the present action, it cannot be said that the subject-matters of the two actions were F the same. In the result, had the question been whether the plea of estoppel per rem judicatam was available to the respondents, or not the manifest answer should have been that it was not.

G The court below misconstrued appellants' pleadings and evidence when it approached the matter on the footing that the appellants relied on a grant whereas what was pleaded and established by evidence accepted by the trial Judge that "having settled on the land King Amachree was traditionally informed" was sufficient to support their claim.

H For these reasons and the fuller reasons in the leading judgment, I too would allow this appeal. I abide by the consequential orders made in the leading judgment.