

SUPREME COURT OF NIGERIA

24TH SEPTEMBER, 1999. SC. 162/1993

**CORAM:- A. G. KARIBI-WHYTE, S. U. ONU, U. A. KALGO,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

ANYIM MBA & 2 ORS. APPELLANTS

(For themselves and as Representatives of Amaeze
Ohafia Oduma Community in Awgu Local Government)

AND

AGBAFO AGU & 6 ORS. RESPONDENTS

***APPEALS** - Court of Appeal - Powers - Argument that the Court erroneously interfered - With the judgment of the trial court - For such argument to succeed - It must be shown that the court exceeded the powers given to it - Under S. 16 of the Court of Appeal Act, 1976.*

***APPEALS** - Ground of appeal - Particulars - Complaint given in it - Are not mere addendum - It forms part of the ground of appeal.*

***APPEALS** - Judgment - Perverse decision - An appellate Court is under a duty to interfere - And reverse the decision of a trial court - Which is perverse.*

***COURTS** - Judgment - Appeal - Native Courts Proceedings - Where a trial court failed to advert to the principle - That Native Courts are not bound by the technical rules of procedure - Which govern trials in the Courts of Record - The Court of Appeal was right to have interfered - With the judgment of the trial Court.*

***ESTOPPEL** - Res judicata - Plea of - Duties of a court - Before which a judgment is tendered in support of a plea - Of Estoppel per rem judicatam*

FACTS

At the Enugu High Court, the plaintiffs/appellants claimed against the defendants/respondents for a declaration to the Customary Right of Occupancy to a piece of land known as "Agu Ofia Amaeze" in the Awgu Local Government Area; damages for trespass and perpetual injunction. The appellants brought their action as the representatives of Amaeze Ohafia Oduma Community. They pleaded that their ancestors first settled on the land and that over the years, the land in dispute has descended in succession through their different ancestors until finally falling in the possession of the present appellants. They pleaded diverse acts of possession. They averred that on or about June, 1975, the respondents and their agents broke into the said land and committed thereon several acts of trespass. It was this that prompted the appellants to bring their action. The respondents in their Amended Statement of Defence raised a plea of estoppel per rem judicatam to the effect that there is a binding judgment of the Mburubu Native Court delivered on 24/12/56 (Exhibit C), in respect of the land in dispute and between the same parties. The appellants did not file a reply to this averment of the respondents. The respondents at the trial tendered Exhibit "C" (the judgment of Mburubu Native Court) and Exhibit "C1" (Plan of the Land).

At the close of the trial, the learned trial judge delivered a considered judgment at the conclusion of which he upheld the appellants' claim. On the plea of Estoppel per rem judicatam raised by the respondents he held that the plea was not established. He separated Exhibits C and C1; and then declared Exhibit C1 inadmissible on the grounds that it did not comply with S. 3 of the Survey Law of Eastern Nigeria 1963 not having been counter signed by the Surveyor-General. Dissatisfied, the respondents appealed to the Court of Appeal, Enugu Division which allowed the appeal. The appellants have now appealed to the Supreme Court raising three issues but the appeal was determined on two main issues.

ISSUES FOR DETERMINATION

"(i) *Whether the Court of Appeal was right in basing its decision in the appeal on an issue not raised in either the notice and Grounds of Appeal or even in the appellants Brief?*

(ii) *Whether the Court of Appeal was justified in its re-appraisal of the evidence on the crucial issue of the identity of the land in dispute, to arrive at a contrary finding of fact with that of the Trial Court?*

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

Ground of appeal - Particulars

1. The observation made by the learned justice of the Court of Appeal was, if anything, far too considerate in the observation made that rejection, wrongly of Exhibit C1 is implicit in the ground of appeal. This is because the position of the law is that the particulars of a ground of appeal form part of the ground of appeal. In other words, as the particulars of a ground of appeal are part and parcel of the ground of appeal, there can be no question that the complaint given in the particulars of the ground of appeal are to be regarded as a mere addendum, they are not. Particulars of a ground of appeal are there to support and explain further the complaint raised in the ground of appeal. It is not therefore right for learned counsel for the appellant, J.H.C. Okolo, SAN to argue against the observation of the learned justice of the Court of Appeal on the ground of appeal filed, and referred to above, as if the particulars given to the ground of appeal are separate from and distinct from the ground of appeal. It is not, as I have said above. (p. 2666 F)

Court of Appeal - Powers

2. Next, it is argued for the appellants that the court below was wrong to have interfered with the judgment of the trial court. I think it must be understood that for this argument to succeed, it must be shown that the court below exceeded the powers given to it by virtue of the provisions of S. 16 of the Court of Appeal Act 1976. It is apt to refer to the observation made in respect of the provisions of S. 16 of the Court of Appeal Act in Silas Okoye Okonkwo & Ors v Chief Agogbua Kpajie & Ors. (1992) 2 NWLR (pt.226) p.633 Nnaemeka-Agu, JSC at page 656. It reads:-

"A court of justice such as the Court of Appeal which is vested with the type of wide powers as have been vested in the Court of Appeal under S. 16 of Court of Appeal Act of 1976 would have failed in its duty to do justice to parties before it if it had closed its eyes to the pleadings and evidence before it, and thereby reached a different verdict, simply because they were not specifically raised by counsel."

As I said at the beginning of this judgment that the appellants have the burden of showing that the Court below was wrong in its evaluation and of the evidence on the printed record and that the reversal of the judgment of the trial court was not right in the circumstances. However, it is my respectful view that the appellants have failed to discharge that burden. (pp. 2667 B/2670 G)

D Estoppel - Res judicata

3. "When the judgment of a court is tendered in support of a plea of estoppel per rem judicatam, the court before which it is tendered would need to examine the judgment with a view to discovering the parties, the issues and the subject matter of the dispute in the previous case. It would need to satisfy itself that the judgment is regular on the face of it i.e. that the previous dispute was decided by a court with jurisdiction to determine that class of dispute and that the judgment of that court is final as between the parties before it. It is not part of the duties of the court before which a judgment is tendered in support of a plea of estoppel per rem judicatam to see whether evidence was wrongly or rightly received by the court that previously adjudicated. It cannot consider whether technical errors were made in the course of the previous proceedings. That is a matter for a court to which the judgments of the court that previously adjudicated are appealable. If the parties concerned choose not to appeal against such errors then the matter must lie there. Were it otherwise, no judgment of a court would enjoy respect of inviolability. Litigation will become so much uncertain and the doctrine of estoppel per rem judicatam will be destroyed. Human experience has shown that a man usually gets wiser after a misfortune. To allow a man to use his newly acquired wisdom to unsettle solemn judgments previously made is to dero-

gate from the time honoured concept founded on good sense and logic that there must be an end to litigation ("interest reipublicae ea sit finis litum")"

I agree entirely with that analysis of the position of a Trial Court when faced with a matter such as has arisen in the instant case. (p.2669E) B

Courts - Judgment

4. It is manifest that the learned trial judge fell into error not only for assuming an appellate role upon a matter which was not on appeal before him, but also because he failed to advert to the long established principle that our Native and/or Customary Courts are not bound by the technical rules of procedure which govern trials in the High Court and other Courts of Record. See Ekpa v Utong (1991) 6 NWLR (pt.197) 258 at 281. It seems to me that if the learned trial judge had adverted to this principle, his decision would have been different. It follows that the court below was right to have interfered with the judgment of trial court. (p. 2670 C) C D

Appeals - Judgment

5. In this regard it must be remembered that an appellate court is under a duty to interfere and reverse the decision of a trial court which was arrived at upon a premise that is not right in law or otherwise perverse. See Lion Building v Shadipe (1976) 12 SC 135. Having regard to the authorities above and many others not referred to in this judgment, the court below was undoubtedly right to have treated the appeal by way of re-hearing. (p. 2670 E) E F

NOTABLE POINTS OF INTEREST

ONUJSC

1. The powers of the Court of Appeal under Order 1 Rule 20 of the Court of Appeal Rules, 1981

See also order 1 Rule 20 of the court of Appeal Rules, 1981 (as amended) H which gives the said Appellate court very wide powers which enable it to exercise all the powers of the court of first instance.

Consequently, even if the point of exclusion of Exhibit C1 was not spe-

cifically raised in the respondents' grounds of appeal or not argued in the respondents' brief in the court below, the said court in the exercise of its very wide powers, was justified in considering the issue in the ultimate interest of justice. (p. 2673 H)

B

UWAIFO JSC

2. The duty of a Court in deciding the effect of Estoppel per rem judicatam

The learned trial judge also failed to appreciate his duty in regard to the said Native Court decision, which was inseparable from the exhibit C1 in question, as to its effect. The duty of the learned trial judge was simply to be bound by that decision and to apply the doctrine of estoppel per rem judicatam as depriving him of jurisdiction to make a contrary pronouncement to that decision: see Yoye v Olubode (1974) 10 SC 209 at 223-224; Adigun v Governor of Osun State (1995) 3 NWLR (PT. 385) 513 at 535. At court called upon to decide the effect of estoppel per rem judicatam of a judgment of a competent court cannot proceed to destroy it by picking on an exhibit used in that judgment as being inadmissible thereby conferring jurisdiction upon itself to decide the same matter all over. It has no such jurisdiction to examine such exhibit, nor the jurisdiction to decide contrary to that earlier judgment in that circumstance. What the learned trial judge did in this case was a grave error which led to a miscarriage of justice. (p. 2679 C)

REPRESENTATION

A. Chude Esq. for the appellants

Dr. G. C. Oguagha for the respondents

CASES REFERRED TO

Okonkwo v. Kpajie (1992) 2 NWLR (pt.226) p.633

Ekpa v Utong (1991) 6 NWLR (pt.197) 258 at 281

H Lion Building v Shadipe (1976) 12 SC 135

Macaulay v Tukur 1 NLR 35

Adegoke v Adi Adibi (1992) 5 NWLR (PT. 242) 410

Yoye v Olubode (1974) 10 SC 209 at 223-224

Adigun v Governor of Osun State (1995) 3 NWLR (PT. 385) 513 at 535

STATUTE REFERRED TO

Court of Appeal Act, 1976; S. 16.

B

LEAD JUDGMENT BY EJIWUNMI JSC

The Appellants, as plaintiffs in the trial Court commenced this action against the Respondents, who were the Defendants. In that case the appellants at the Enugu High Court claimed against the respondents for:- C

(i) *A declaration to the Customary Right of Occupancy to a piece of land known as "Agu Ofia Amaeze" in the Awgu Local Government Area of Anambra State.*

(ii) *N50,000.00 being General damages for trespass; and* D

(iii) *Perpetual Injunction restraining the defendants from committing further acts of trespass on the said piece of land.*

After pleadings were filed and exchanged, the learned trial judge, then heard the evidence for the parties to the action. For the appellants, E five witnesses gave evidence in support of their claim. The respondents also called two witnesses. Some documents were also tendered in the course of the proceedings. At the conclusion of the trial, the learned trial judge delivered a considered judgment at the conclusion of which he F upheld the appellants' claim.

The respondents who were dissatisfied with the judgment of the Court of Appeal have appealed to this Court. With the grounds of appeal properly filed, the appellants filed and served the appellants' brief. Upon G being so served, the Respondents also filed their respondents' brief.

But before I consider the issues set forth in the briefs so filed, I would set down, howbeit briefly, the rival claims of the parties to the disputed land.

The appellants brought their suit as the representatives of Amaeze H Ohafia Oduma Community. They pleaded that their ancestors first settled on the land and that over the years, the land in dispute has descended in succession through their different ancestors until finally falling in the

possession of the present appellants. The diverse acts of possession pleaded include farming on the land, installation of their juju shrine called "Ngwobe Ofia" on it, letting the land to customary tenants and granting rights to persons to fell timber therefrom. It was pleaded that on or about June, 1975, the respondents and their agents broke into the said land and committed thereon several acts of trespass. It was this that prompted the appellants to bring their action. The Respondents in their Amended Statement of Defence raised a plea of estoppel per rem judicatam. Their pleadings in this regard are in paragraphs 6,9 and 12. They read thus:-

"6. *The defendants deny that the land in dispute is correctly represented in the plaintiffs' survey plan No. MEC/16/80 of 10/1/80 and further states that it correctly (sic) shown in the defendants plan FCO/D23/80. Furthermore, the streams that nearly encircle the land in dispute are Ugene, Obe streams and Esu and Awuna rivers of which Obe stream forms the boundary between the plaintiffs land and the defendants' land just as the Esu and Awuna rivers form the boundary between the defendants' land and Uburu people's land. Obe stream has from time immemorial formed the boundary between Awgu and Nkanu.*

9. *Further on paragraph 2 of the Statement of Claim the defendants plead the defence of res judicata because by the judgment of Mburubu Native Law Court in suit No. 149/56 in Civil Suit No. 206 of 29th July, 1956 delivered on 24/12/56 the land in dispute was declared the bona fide property of Obodo Apuru Nkerefi of which the defendants are members. The action was between the people of the plaintiffs and the people of the defendants.....*

12. *The defendants deny paragraph 10 of the statement of claim in so far as it states that the land in dispute belongs to the plaintiffs. Furthermore, obe stream separates the plaintiffs land from the land in dispute and the land they occupy has no direct connection with the land in dispute."*

It is upon the facts so pleaded and the evidence led by the parties that the learned trial judge upheld the claims of the appellants. It must also be noted that the respondents by their pleadings raised the plea of estoppel

per rem judicatam to the effect that there is a binding judgment of the Mburubu Native Court Exhibit C, in respect of the land in dispute and between the same parties, the learned trial judge however decided that plea was not established by the respondents. This is despite the fact that the appellants did not file a reply to that averment of the respondents. B

Although, the respondents had raised some issues on the Respondents' brief, I will for the purposes of this appeal consider this appeal upon the basis of the issues raised in the appellant's brief.

They are as follows:-

"(i) Whether the Court of Appeal was right in basing its decision in the appeal on an issue not raised in either the notice and Grounds of Appeal or even in the appellants Brief?" C

(ii) Whether the Court of Appeal was justified in its re-appraisal of the evidence on the crucial issue of the identity of the land in dispute, to arrive at a contrary finding of fact with that of the Trial Court?" D

(iii) Whether the Court below was right on the conclusions it eventually arrived at on the evidence?"

Beginning with the first issue, the contention made for the appellants E by their learned counsel J.H.C. Okolo, SAN in the appellants' brief argued for the appellants that there was no ground of appeal or complaint regarding the wrongful rejection of evidence, namely, (Exh.C1), raised in the Notice thereof filed by the respondents before the Court below. It is F further argued for the appellants that such a complaint should have been raised specifically as a ground of appeal on its own. Such a complaint, cannot, he submitted be subsumed in the particulars supporting the ground. Therefore, it is contended for the appellants that as the respondents has G not deemed it necessary to make that complaint a specific ground, the Court below was precluded from going into it, and worse still determining the appeal on that score. A matter according to the argument of the learned Senior Advocate that was neither raised in the briefs, or in respect of which neither party has been given reasonable opportunity to H canvass. It is therefore submitted for the appellants, that the Court below should not have held that the complaint that Exhibit C1 was wrongly rejected in evidence is implicit in the ground of appeal that the plea of

estoppel per rem judicatam was wrongly rejected by the trial court. Further, it is the submission of learned counsel that an appellate court ordinarily confines itself to the grounds of appeal filed and canvassed before it. The following cases were cited in support of the several arguments of leading counsel -

- Iyaji v. Ayigebe (1987) 3 NWLR (Pt. 61) 523;
- Idika v. Erisi (1988) 2 NWLR (pt. 78) 563 at 580;
- Osinupebi v. Saibu (1982) 7 SC 104.

Also learned counsel for the appellants, submitted that as arguments on issues not covered by the ground of appeal ought to be ignored, the Court below should not have considered the complaint of the respondents in the Court below. The authorities cited for that submission are:-

- Inua v Ntah (1981) ANLR 576;
- Ejowhomu V Edok-Eter Ltd (1986) 5 NWLR (Pt. 5)
- Western Steel Works v Iron Steel Workers (1987) 1 NWLR (Pt.49) 284;

Akilu v Fawehinmi (1989) 2 NWLR (pt.102) 122 AT 161.

The other angle to the argument against the judgment of the court below on Exhibit C1, is that it was not established that Exhibit C1 was admitted at the Native Court trial. While it is admitted that reference was made in the judgment of the Native Court that Exhibit C1 was brought to its attention; yet it is the submission of learned counsel for the appellant that a close reading of the judgment of the Native Court will show that reliance was not placed on it to determine the suit between the parties. He therefore concluded his argument on this issue that the Court below was wholly wrong to have held that the respondents who were the appellants in that Court discharged the burden of establishing the plea of estoppel per rem judicatam.

In the respondents brief, learned counsel for the respondents in response to the arguments of the appellants on issue 7 agreed primarily with the contention made for the appellants that Exhibit C1 was not made a distinct ground of appeal in their Notice of Appeal to the Court below. But, he then argued that the complaint was made very clearly in the particulars given in support of one of their ground of appeal. It is next

argued for the appellant that the Court below acted properly within its powers under section 16 of the Court of Appeal Act of 1976 to re-evaluate as if it were a re-hearing the evidence on the printed record. Furthermore, as is the contention of learned counsel for the respondents that the Court below was right in its decision that the plea of estoppel per rem B
judicatam was established by the respondents. The following authorities in support of his submission were referred to:-

Woluchem v Gudi (1981) 5 SC 291 at 326

Nabham v Nabham (1967) NMLR 192.

Jadesimi v Okotie-Eboh & Ors (1986) 1 NWLR (PT.16) 264; C

Silas Okoye Okonkwo & Ors v Chief Agogbua Kpajie & Ors
(1992) 2 NWLR (PT.226) 633 at 656.

On the contention of the learned Senior Advocate, for the appellants, that the Mburubu Native Court did not in its judgment advert to, or D
found its judgment on Exhibit C1, the learned counsel for the respondents contends to the contrary.

It is his submission that the Mburubu Native Court not only saw Exhibit C1, but tied its judgment to the said plan. He further argued that E
though it is not stated that, that Exhibit was admitted in evidence by the Native Court, that alone cannot invalidate the decision of the Native Court. In support of that contention, he referred to the case of Ekpa v Utong (1991) 6 NWLR (PT.197) 258 at 281 for the view long held in a long line F
of cases that technical rules of procedure which are meant for regular courts do not apply to Native or Customary Courts.

From the arguments of learned counsel for the parties concerning whether the wrongful rejection of Exhibit C1 by the trial court was G
raised as a specific issue before the court below, it is necessary to examine the grounds of appeal filed by the respondents in the court below to ascertain the correctness or not, of the contention of the appellant.

In this regard, at page 122 of the printed record, there is found the ground of appeal to the court below and headed "Further Grounds of H
Appeal". The relevant portion of that ground of appeal reads thus:-

"(7) The learned trial judge erred in law by failing to uphold the plea of res judicata set up by the defendants.

Particulars of Error - in - Law

The learned trial judge found that the parties (and/or their privies) and issues in the High Court case were the same as in the Mburubu Native court case (Exhibit C) but held that since the plan (Exhibit C1) of the Native court was not counter signed by the Director of Survey, he had to expunge it from his record, and so he held that the defendants did not prove that the land in the Mburubu Native Court case was same land as in the High court case....."

The first complaint made on behalf of the appellants by their learned counsel is that the above ground of appeal was not sufficient for the court of Appeal to examine whether Exhibit C1 was properly rejected by the learned trial judge. In this connection, we were referred to the portion of the judgment of the Court below, where Oguntade JCA, at page 194 line 32, page 195 lines 1- 12 observed thus:-

"The defendants in this appeal have not specifically appealed against the wrongful exclusion from evidence of their plan Exhibit C. But it is also clear that this is a special case in the sense that documents that constitute one judgment have been improperly split in two. One part is in evidence while the other is not. It seems that the complaint that Exhibit C1 was wrongly rejected is implicit in the ground of appeal that the plea of estoppel per rem judicatam was wrongly rejected. This is because the plea is founded on the judgment of Mburubu Native Court. And that judgment consists of a combination of both Exhibit C and C1."

It is my respectful view that the criticism of observation of Oguntade JCA by learned counsel for the appellants is wrong. **The observation made by the learned justice of the Court of Appeal was, if anything, far too considerate in the observation made that rejection, wrongly of Exhibit C1 is implicit in the ground of appeal. This is because the position of the law is that the particulars of a ground of appeal form part of the ground of appeal. In other words, as the particulars of a ground of appeal are part and parcel of the ground of appeal, there can be no question that the complaint given in the particulars of the ground of appeal are to be regarded as a mere addendum, they are not. Particulars of a ground of appeal are there**

to support and explain further the complaint raised in the ground of appeal. It is not therefore right for learned counsel for the appellant, J.H.C. Okolo, SAN to argue against the observation of the learned justice of the Court of Appeal on the ground of appeal filed, and referred to above, as if the particulars given to the ground of appeal are separate from and distinct from the ground of appeal. It is not, as I have said above. I therefore find no merit in this aspect of the argument on that issue proffered for the appellants. B

Next, it is argued for the appellants that the court below was wrong to have interfered with the judgment of the trial court. I think it must be understood that for this argument to succeed, it must be shown that the court below exceeded the powers given to it by virtue of the provisions of S. 16 of the Court of Appeal Act 1976. Its provisions read thus:- C D

"16. The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend an defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction." E F G

It is apt to refer to the observation made in respect of the provisions of S. 16 of the Court of Appeal Act in Silas Okoye Okonkwo & Ors v Chief Agogbua Kpajie & Ors. (1992) 2 NWLR (PT.226) p.633 Nnaemeka-Agu, JSC at page 656. It reads:- H

"A court of justice such as the Court of Appeal which is vested with the type of wide powers as have been vested in the Court of Appeal under S. 16 of Court of Appeal Act of 1976 would have failed in its duty to do justice to parties before it if it had closed its eyes to the pleadings and evidence before it, and thereby reached a different verdict, simply because they were not specifically raised by counsel."

In the instant case, and as I have earlier said in this judgment, the question as to whether Exhibit C1 was wrongly rejected by the trial Court was properly raised before the Court below. It was therefore right and proper for that court to examine and re-evaluate the evidence on the printed record to determine, whether or not, Exhibit C1 was properly rejected by the trial court. The court below upon examining the printed record found that the trial court properly considered the plea of estoppel per rem judicatam raised by the respondents, as defendants before the trial court. It was also clear that the trial court in its consideration of the plea of estoppel was properly considered by the trial court. The learned trial judge at page 95 lines 1 - 19 of his judgment said thus:-

"In other words, the plaintiff in Exhibit C were the representative of the defendants in this suit. The defendants in Exhibit C were sued as representatives of Amaeze Ohafia Oduma. The plaintiffs in the present suit sued as representatives of Amaeze Ohafia Oduma. In fact, 2nd defendant in Exhibit C is the 1st plaintiff in the present suit. I am satisfied that the parties or their privies are the same as the parties or their privies in the native court suit Exhibit C.

The issue in Exhibit C was title to land and a declaration as to the boundary between the two communities. In the case before me the issue is title to land (or Customary right of Occupancy) which from the facts of the case depends on a determination of the boundary between the same Communities. I am of the view that the issue that was determined in Exhibit C is substantially the issue for determination in this suit."

Thus, the learned trial judge held that the parties and the issue are the same in Exhibit C as the suit which led to this appeal that was then before him. But with regard to Exhibit C in the trial before the Mburubu

Native Court, the learned trial judge said thus:-

"I have before me Exhibit C1 which is a plan referred to in the judgment of the Native Court. It is not clear whether the plan was tendered in the Native Court but it was referred to in the judgment."

And later at page 96 of the printed record, the learned trial judge rejected Exhibit C1 for the following reasons:-

"The Survey Act as contained in vol. IV cap. 194 laws of the Federation of Nigeria 1958 is therefore the relevant law at the time Exhibit C1 was used in the Mburubu Native Court. It was not counter-signed by the Director of Survey as required by Section 23(i) (b) (ii) of the Act which is in parimateria with Section 3 of the Survey Law of Eastern Nigeria 1963. I therefore hold that Exhibit C1 is not admissible in evidence and is here by expunged from the proceeding."

It is evident from the above passage and the argument preceding it that the learned trial judge treated the matter concerning Exhibit C1 as if he was sitting as an appellate Court over the judgment of the Native Court.

The Court below, per Oguntade, JCA, made the following observation on this point, at page 194 of the printed record. It reads:-

"When the judgment of a court is tendered in support of a plea of estoppel per rem judicatam, the court before which it is tendered would need to examine the judgment with a view to discovering the parties, the issues and the subject matter of the dispute in the previous case. It would need to satisfy itself that the judgment is regular on the face of it i.e. that the previous dispute was decided by a court with jurisdiction to determine that class of dispute and that the judgment of that court is final as between the parties before it. It is not part of the duties of the court before which a judgment is tendered in support of a plea of estoppel per rem judicatam to see whether evidence was wrongly or rightly received by the court that previously adjudicated. It cannot consider whether technical errors were made in the course of the previous proceedings. That is a matter for a court to which the judgments of the court that previously adjudicated are appealable. If the parties concerned choose not to appeal against such

errors then the matter must lie there. Were it otherwise, no judgment of a court would enjoy respect of inviolability. Litigation will become so much uncertain and the doctrine of estoppel per rem judicatam will be destroyed. Human experience has shown that a man usually gets
 B *wiser after a misfortune. To allow a man to use his newly acquired wisdom to unsettle solemn judgments previously made is to derogate from the time honoured concept founded on good sense and logic that there must be an end to litigation ("interest reipublicae ea sit finis litum")"*

C I agree entirely with that analysis of the position of a Trial Court when faced with a matter such as has arisen in the instant case. It is manifest that the learned trial judge fell into error not only for assuming an appellate role upon a matter which was not on
 D appeal before him, but also because he failed to advert to the long established principle that our Native and/or Customary Courts are not bound by the technical rules of procedure which govern trials in the High Court and other Courts of Record. See Ekpa v Utong
 E (1991) 6 NWLR (pt.197) 258 at 281. It seems to me that if the learned trial judge had adverted to this principle, his decision would have been different. It follows that the court below was right to have interfered with the judgment of trial court. In this regard it
 F must be remembered that an appellate court is under a duty to interfere and reverse the decision of a trial court which was arrived at upon a premise that is not right in law or otherwise perverse. See Lion Building v Shadipe (1976) 12 SC 135; Macaulay v Tukuru 1 NLR 35; Adegoke v Adi Adibi (1992) 5 NWLR (PT. 242) 410. Hav-
 G ing regard to the authorities above and many others not referred to in this judgment, the court below was undoubtedly right to have treated the appeal by way of re-hearing. As I said at the beginning of this judgment that the appellants have the burden of showing
 H that the Court below was wrong in its evaluation and of the evidence on the printed record and that the reversal of the judgment of the trial court was not right in the circumstances. However, it is my respectful view that the appellants have failed to discharge that

burden.

As I agree fully with the judgment of the court below that the respondents fully established their plea of estoppel per rem judicatam against the appellants based on the judgment of the Mburubu Native Court. Exhibit C & Cl, there is nothing further to consider in this appeal. In the result, this appeal is dismissed in its entirety, and I award costs in the sum of N10,000.00 in favour of the respondents.

KARIBI-WHYTE JSC

I have had the privilege of a preview of the judgment just read on behalf of my learned brother Ejwunmi JSC. I agree with his reasoning and conclusion dismissing the appeal.

I also make the same consequential orders as to costs as in the leading judgment of my learned brother Ejwunmi, JSC.

ONU JSC

The appellants in this appeal were the plaintiffs in the High Court of former Anambra (now Enugu state) sitting at Enugu, where they claimed in their writ of summons dated 21st August, 1978 against the respondents who were defendants, for:

"(i) A declaration to customary right of occupancy to a piece of land known as "Agu - ofia Amaeze" in the Awgu L.G.A. of Anambra state.

(ii) N50,000.00 being general damages for trespass and

(iii) Perpetual injunction restraining the defendants from committing further acts of trespass on the said piece of land."

After the exchange of pleadings by the parties Ubaezonu, J. (as he then was) upon listening to the evidence of five witnesses for the appellants and two for the respondents gave judgment for the appellants on 11th June, 1985 for the declaration sought, N300.00 damages for trespass and an order for injunction with N500.00 costs.

The appellants did not file a reply to the respondents' Amended

statement of Defence when they subsequently raised a plea of estoppel per rem judicatam. They, however, at the trial Viva Voce denied that they ever had a dispute with the respondents over the land in dispute.

At the hearing, the appellants who had tendered a plan - Exhibit 'A' - denied ever having litigation with the respondents were the true issue joined as regards their respective boundaries was Atamiwo Stream on the eastern part but not reflected on Exhibit "A" (appellants' plan) called by that name but on its western course is called Obe / Obovia stream. The respondents at the trial tendered Exhibit 'C' - the judgment of Mburubu Native Court and Exhibit C1 (plan of the land). Since the trial court however paid scant regard for the Mburubu Native Court judgment on Exhibit C, it gave judgment to the appellants.

Being aggrieved by the said decision, the respondents appealed to the court of Appeal, Enugu judicial Division (hereinafter referred to as the court below) which allowed the appeal. Three issues were formulated by the appellants for the determination of this court, the first of which the respondents have adopted while attacking issues 2 and 3 as emanating from two earlier grounds this court had earlier refused to be argued. Albeit, I intend to consider all three issues so as to be able to dispose of this appeal in the interest of justice. They state as follows:

(i) *Whether the court of Appeal was right in using its decision in the appeal on an issue not raised in either the Notice and Grounds of Appeal or even in the Appellants' Brief?*

(ii) *Whether the court of Appeal was justified in its re-appraisal of the evidence on the crucial issue of the identity of the land in dispute to arrive at a contrary finding of fact with that of the trial court?*

(iii) *Whether the court below was right on the conclusions it eventually arrived at on the evidence."*

In considering issue No.1 first, it cannot be gainsaid that the appellants are talking about Exhibit C1 which truly the respondents did not specifically make its exclusion a separate and distinct ground of appeal in the court of Appeal. But it is equally true, as held by the said lower court, that "this complaint that Exhibit C1 was wrongly rejected in evidence is implicit in the plea that estoppel per rem judicatam was wrongly

rejected" vide page 195, lines 4 to 7 of the Record of proceedings. In fact, the respondents specifically mentioned the exclusion of the said Exhibit C1 in the particulars of Error - in - law in Ground (f) of their further Grounds of Appeal. See page 122 of the Record. In these particulars (supra), it is clearly therein explained and conveyed that the plea of estoppel per rem judicatam was not upheld because the learned trial Judge expunged Exhibit C1. It is, therefore, not correct to contend (as the appellants have done) that the issue of the exclusion of Exhibit C1 was not raised by the respondents but by the court below suo motu.

Now, Res judicata has three principal requirements or attributes in order to succeed, viz:

- (a) Same parties (as in the previous case)
- (b) Same issues.
- (c) Same subject-matter.

The court below exercising its wide powers under section 16 of the court of Appeal Act and by going through the printed record found out if there was enough evidence in support of each of the above three requirements. The trial court had in its judgment earlier held that the parties and issues were the same but that the subject matter was not the same. In the instant case, the court below after evaluating Exhibit C1 arrived at the view that the subject-matter was the same and that the plea of res judicata succeeded. See Woluchem v. Gudi (1991) 5 SC. 291 at 326; Fashanu v Adekoya (1974) 6 SC. 83 at 91 and Nabham v. Nabham (1967) NMLR 192. None of the authorities called in aid by the appellants, in my view, is apposite here. Be it noted that Exhibits C and C1 are complementary, and, therefore, inseparable. Thus the court below quite rightly, in my view, re-evaluated the whole evidence including Exhibit C1 which was earlier placed before the trial court. Hence, the appellants cannot be heard complain. See Jadesimi v Okotie-Eboh & Ors. (1986) 1 NWLR (Part 16) 264 and Silas Okoye Okonkwo v. Kpajie & Ors. (1992) 2 NWLR (Part 226) 226, 633 at 656. See also order 1 Rule 20 of the court of Appeal Rules, 1981 (as amended) which gives the said Appellate court very wide powers which enable it to exercise all the powers of the court of first instance. It particular, order I Rule 20 (5) (ibid)

provides as follows:-

".....*may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice.....*"

See Jadesimi v Okotie-Eboh & Ors. (supra).

Consequently, even if the point of exclusion of Exhibit C1 was not specifically raised in the respondents' grounds of appeal or not argued in the respondents' brief in the court below, the said court in the exercise of its very wide powers, was justified in considering the issue in the ultimate interest of justice. Thus, it may be correct as contended by the appellants that it was nowhere stated in Exhibit C that Exhibit C1 was tendered during hearing in the Mburubu Native Court, but that does not mean that it was not tendered. The important thing was that the said Native court saw the said Exhibit C1.

(plan No. NK.112 of 5/1/56 and tied its judgment to the said plan (see page 110 lines 15 to 19). It does not matter that in Exhibit C it is not stated that the said Exhibit C1 was admitted in evidence as would normally be the case in the Magistrate or High Court proceedings. It has long been established in a long line of cases that technical rules of procedure which are meant for regular courts do not apply to native or customary courts. See Ekpa v. Utong (1991) 6 NWLR (part 197) 258 at 281 and Efi v. Enyinfil (1954) 14 WACA 424. ISSUE 2 AND 3:

In considering issues 2 and 3 together, I wish to stress that contrary to the contention of the appellants, the court below did not uphold the plea of res judicata only in consideration of Exhibit C1; that court equally considered other evidence as exemplified in the following excerpt wherein it observed as follows:-

"Now when exhibit C1 is considered along with other evidence on record in support of plea of estoppel per rem judicatam, it becomes manifest that the plea raised by the appellants ought to have succeeded".

The court below next proceeded to take notice of the persis-

tent denial by the appellants of the existence of Exhibit C and said:-

"The plaintiffs had come to court to deceive. They denied in their evidence that they ever had any litigation with the defendants....."

It is clear that the intention of the plaintiffs was to cover the existence of the judgment Exhibit C and C1 or to obliterate it."

A body of evidence therefore existed a part from Exhibit C1 (expunged by the trial judge albeit wrongly) to sustain the plea of estoppel per rem judicatam. In fact, the learned trial judge would have ignored appellants' plan Exhibit A which did not show the Obe Stream and relied on the respondents' plan Exhibit B which clearly showed the Obe Stream as the boundary between the parties. This should be so when it is clear that Exhibit B agreed with Exhibit C on the fact that the Obe Stream was the boundary between the parties. Moreover, the issue of boundary between the parties having been settled by the Mburubu Native Court in Exhibit C (supported by the respondent's plan Exhibit B) should be regarded as issue estoppel. See Iyowuawi v. Iyowuawi (1987) 4 NWLR (part 63) 61 and Salawu Yoye v. Olubode & Ors. (1974) 10 SC. 209 at 223. Besides, there was also sufficient evidence of DW1 and the Surveyor - DW2, to show that the land was the same that was litigated by the parties in Exhibit C, and that the Obe Stream was the boundary, between the parties. As the court below also rightly observed, the issue of the identity of the land in dispute and the boundary between the parties, independent of Exhibit C1, could be inferred from "certain common feature agreed by parties. This feature is the Eta Stream." The court below on its part, observed that DW1 stated, inter alia, that the Obovia Stream flows into the Eta Stream. It also did observe that the DW1 stated inter alia, that "Obe Stream flows into Eta Stream". Thus, whilst the appellants testified that it was the Obovia Stream adjoining the land in dispute that flowed into Eta Stream, the respondents contended that it was the Obe Stream adjoining the land in dispute that flows into Eta Stream. That is why the writer of the leading judgment, Oguntade, J.C.A arrived at the irresistible inference from his close examination of Exhibit A, B and C1 (expunged by the trial court)that it is the same stream both

parties were invariably referring to as Eta Stream and Obe Stream respectively, and logically concluded thus:

" It seems to me that the lower court having satisfied itself that what was in dispute between the parties was the boundary and that the true dispute was whether that boundary was Atamiwo Stream to the East of the land in dispute as depicted in Exhibit A or Obe/Obovia and shown to the West of the land in dispute in Exhibit A, B and C1, should simply have given judgment in accordance with Exhibit C and C1 which remains binding on the parties. What the trial judge had unwarily done was to allow the plaintiffs obtain by their current suit what they lost by the force of previous judgment in Exhibits C and C1."

I cannot agree more. Thus, contrary to the appellants' contention, it is not true that without Exhibit C1 the identity of the land in dispute, and the boundary therein between the parties, cannot be determined. In any case, ought the appellants be heard to challenge the plea of estoppel per rem judicatam when they themselves failed or neglected to join issue in that regard with the respondents in their pleadings?

In paragraphs 9 and 10 of their Statement of Defence dated 16th January, 1981, the respondents pleaded the Mburubu Native Court suit as constituting estoppel per rem judicatam. On 7th December, 1983, some 2 years later, the appellants filed an Amended Statement of Claim dated 5th September, 1983 but did not deem it fit to include therein a reply to counter the respondents plea of estoppel per rem judicatam. The appellants having not challenged the respondents by filing a reply to counter the said plea or estoppel per rem judicatam the evidence they led challenging the said plea goes to no issue. See Chief P.T.S. Tende & Ors. v. Attorney-General of the Federation & Ors. (1988) 1 NWLR (part 71) 506 at 517 where it was held that:-

"If a plaintiff does not agree with the averments contained in a defendant's Statement of Defence, he is duty bound to file further pleadings to deny the averments."

For the reasons I have given and the more elaborate ones contained in the judgment of my learned brother Ejiwunmi, JSC, a preview of which I had before now, I too, dismiss this appeal. I make the same

consequential orders as to costs as contained in the leading judgment.

KALGO JSC

I have had the privilege of reading in draft the judgment of my learned B brother Ejiwunmi JSC in this appeal, and I agree entirely with his reasoning and conclusions therein. I also agree that there is no merit in the appeal and I will dismiss it with costs. But before so I wish to add the following.

The main issue which was strongly contended by the parties in this C appeal and which determines whether the appeal succeeds fails, is the question concerning the rejection of the plan Exhibit C.1 by the learned trial judge.

The contention of the appellant that the wrongful rejection of Ex- D hibit C.1 by the trial court should not be entertained by the court below because it was not made a ground of appeal by the respondents, cannot in the circumstances of this case be sustained. This was because Exhibits C and C.1 were treated together by the Mburubu Native Court in the E same case between the parties to this appeal whereby it (the Native Court) determined the boundary of the lands in dispute between the parties. It is my respectful view that though Exhibit C.1 was not specifically shown to have been admitted in evidence in the Mburubu Native Court, the judg- F ment of that court made Exhibit C and C.1 inseparable-one in support of the other. To this end, I find myself in full agreement with Oguntade JCA when in his lead judgment he said on page 195 of the record that:-

"It seems that the complaint that Exhibit C1 was wrongly rejected G is implicit in the ground of appeal that the plea of estoppel per rem judicatam was wrongly rejected."

Apart from this, it is also explicit that the question of the wrongly H rejection of Exhibit C1 by the trial court was raised in ground of appeal No 7 in the court below. Therefore, to my mind, it is not altogether out of place for the Court below to consider that issue before it even though it was not specifically made a ground of appeal, more especially as S. 16 of the Court of Appeal Act 1976 empowers that court to deal with the

appeal as if it were the trial court, in order to do justice to the parties and determine the real questions in controversy in the appeal. See Okonkwo v. Kpajie (1972)2 NWLR (PT 226) 633 AT 656; Igboho v Boundary Settlement Commission (1988) NWLR (pt 69) 189, Oshoboja v Amuda B (1992) 6 NWLR (pt 250) 690 at 708. I also agree with the court below that since the judgment of the Native Court was not on appeal to the learned trial judge, it was not his duty to examine Exhibit C1 and say that it did not comply with any law or procedure and then order its rejection. C This was clearly wrong and it may not even be necessary here in my view, to invoke the principle laid down in Ekpa v Utong (1991) 6 NWLR (pt 197) 258 at 281, about non observance of technical rules of procedures in Native of Customary Courts.

For the above reasons, and the fuller reasons given in the lead judgment of my learned brother Ejiwunmi JSC, I agree entirely with the decision of the court below, reversing the decision of the trial court in this case. I am satisfied that the plea of estoppel per rem judicatam was accordingly established against the appellants. I therefore find no merit E in this appeal and I dismiss it with N10,000,00 costs in favour of the respondents.

UWAIFO JSC

F I agree with the judgment of my learned brother Ejiwunmi JSC for the reasons he has given. The learned trial judge erred in his treatment of exhibits C and C1 when he first separated the two and then declared exhibit C1 inadmissible on the grounds that it did not comply G with S. Of the survey law of Eastern Nigeria 1963 not having been countersigned by the Surveyor-General.

Exhibit C is a copy of the judgment of a Native Court which decided an earlier dispute over the same land between the same parties to H the present suit; and exhibit C1 is the survey plan of the said land. To raise the defence of res judicata meaningfully the two exhibits must be considered together.

The decision in the said Native Court case which was in favour

of the present respondents was not appealed. It was not suggested that the judgment was invalid or a nullity. Therefore as long as the litigation which gave rise to it was between the same parties, in respect of the same subject-matter and upon the same issue decided; the effect of that judgment cannot be denied when it is admitted in a later litigation between the same parties. B

The learned trial judge who purported to declare exhibit C1 inadmissible did not realize that he was not sitting on appeal over the Native Court case. The decision of that Court was final for all purposes in respect of what it decided between the parties: see Nkwo v Uchendu (1996) 3 NWLR (pt.434) 1 at 13. The learned trial judge also failed to appreciate his duty in regard to the said Native Court decision, which was inseparable from the exhibit C1 in question, as to its effect. The duty of the learned trial judge was simply to be bound by that decision and to apply the doctrine of estoppel per rem judicatam as depriving him of jurisdiction to make a contrary pronouncement to that decision: see Yoye v Olubode (1974) 10 SC 209 at 223-224; Adigun v Governor of Osun State (1995) 3 NWLR (PT. 385) 513 at 535. D E

At court called upon to decide the effect of estoppel per rem judicatam of a judgment of a competent court cannot proceed to destroy it by picking on an exhibit used in that judgment as being inadmissible thereby conferring jurisdiction upon itself to decide the same matter all over. It has no such jurisdiction to examine such exhibit, nor the jurisdiction to decide contrary to that earlier judgment in that circumstance. What the learned trial judge did in this case was a grave error which led to a miscarriage of justice. F

The court below rightly intervened to prevent such a miscarriage. I therefore find no merit in this appeal. I too dismiss it with costs of N10,000.00 in favour of the respondents. G