

SUPREME COURT OF NIGERIA
11TH FEBRUARY, 2000. SC. 6/1993
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

CHIEF SAMPSON OKON ITO & ORS. APPELLANT
AND
CHIEF OKON UDO EKPE & ORS. RESPONDENTS

PLEADINGS - Issues - Were properly joined by the pleadings - Parties are bound by their pleadings - Evidence not supported by the pleadings - Goes to no issue.

EVIDENCE - Previous judgment - Where it constitutes a fact in issue - It is a relevant fact which could be pleaded.

ESTOPPEL - Subject matter - Land dispute - The disputed land is the same - As in the previous and present suits.

ESTOPPEL - Issue estoppel - Pleadings - Materials for resting on issue estoppel were pleaded - Court of Appeal was right to determine the case - On the basis of issue estoppel.

ESTOPPEL - Courts - Public policy demands that courts should not encourage relitigation - Between same parties, same cause or same issue - As in previous and present proceedings.

FACTS

Before the High Court, the plaintiffs/respondents filed an action against the defendants/appellants, claiming that they are the radical/titular owners in possession of the land in dispute. They also claimed the sum of N10,000.00 as general damages for trespass and the further sum of N10,000.00 as special damages in respect of various acts of the defendants on the disputed land. The respondents pleaded copiously several

decisions of the Courts between the parties before the instant suit including a Supreme Court decision. Amongst other things, they also pleaded traditional history to show how they became seised of the land. Appellants on their part pleaded traditional history, acts of possession and ownership.

The learned trial judge dismissed the respondents' claim after finding that estoppel does not apply, as the relevant survey plans though identical are different. The respondents' appeal to the Court of appeal was successful as that court found that issue estoppel applied in their favour. Being aggrieved, the appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether the Court of Appeal was right in holding that the respondents proved in the lower Court the identity of the land in dispute per se or vis-a-vis the subject matter of HU/2/69.

(2) Whether the Court of Appeal adopted the correct approach in its consideration of the appeal.

(3) Whether the Court of Appeal can properly raise the doctrine of issue estoppel on behalf of the appellants in the Court of Appeal when the said appellant did not raise the same either in the High Court or in the Court of Appeal.

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

Pleadings - Issues - Were properly joined

1. It is evident, in my respectful view, that from the pleadings of the parties, issue was joined on whether the disputed land in the instant appeal was the same as that litigated in the suit No. HU/2/69. In this regard, I need to observed that parties are bound strictly by, and are not allowed to depart from their pleadings - See Ogiamen v Ogiamien (1967) NMLR 245; Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127 at 156. Hence parties can then lead evidence in support of their pleadings NIPC LTD v Thompson Organization Ltd (1969) NMLR 99. Evidence led which is not supported by the pleadings goes to no issue. Such evidence if inad-

vertently admitted, will be expunged. It ought to be also noted that pleadings must contain facts and not law. Points of law can be raised in pleadings. A party relying on estoppel must specially plead it. (p. 266 H)

Evidence - Previous judgment

2. It is obvious from the provision of section 54(1) quoted above that in any litigation where a previous judgment between the same parties or their privies constitutes a fact in issue, as in the instant appeal, such judgment is a relevant fact which could be pleaded as (i) *res judicata* or (ii) a relevant fact. (p. 267 E)

Estoppel - Subject matter

3. Now, I have previously referred to the contention made for the appellants by their learned Senior Advocate that:- (i) the learned Justice of the Court of Appeal was wrong to have reversed the judgment of the trial Court upon the principle that the doctrine of issue estoppel was available to the respondents, and (ii) that the learned trial judge was wrong to have held that the disputed land was not the same. With regard to the second of the reasons stated above, it is my respectful view that the Court below was right to have held that the disputed land in this appeal is the same as the land litigated between the parties in HU/2/69. From a careful examination of all the Survey maps tendered Exhibits 20, 23 and 24 by the parties at the trial, I find myself in agreement with the view of the Court below, that the distinction made between them by the learned trial judge amounted to a distinction without a difference. (p. 267 F)

Issue estoppel - Pleadings

4. In the instant appeal, there can be no doubt from even a mere perusal of the pleadings of the respondents in their Amended Statement of Claim that the respondents pleaded very copiously the materials they would require to rest their case on issue estoppel. It was therefore proper for the Court below to have considered the several documents so tendered and admitted during the trial to determine whether issue estoppel was established by the respondents. And where it was found established as in

the instant appeal, it became the duty of the Court below to determine the appeal on that basis. (p. 271 E)

Estoppel - Courts - Public policy

B 5. It must be remembered, as I have tried to show above, that it is a cardinal principle of public policy that the Court should not encourage the relitigation of an issue that has been decided by a competent court between the same parties in respect of the same matter, or cause or an
C issue in the course of a previous proceedings. The learned trial judge rather than dealing with this matter upon the well settled principles of law revealed by the pleadings and the evidence before him, that "issue estoppel" may well apply to the case, proceeded to hear and determine the matter without advertng to the issue raised as aforesaid. The Court of
D Appeal was therefore justified to have reversed the decision of the trial court, and to also arrived at its decision on the evidence and on the applicable law. (p. 271 G)

E NOTABLE POINT OF INTEREST
ONU JSC

1. Issue estoppel - Applies irrespective of size of the land in dispute

Besides, the decision in HU/2/69, was final as it got to the Supreme Court.
F Consequently, the appellants were in error to raise the issue of overlapping of the land involved in Exhibits 20, 23 and 24. It is trite that one of the attributes of issue estoppel is that it applies to land in dispute in subsequent proceedings between the same parties, whether it was smaller or larger than that in dispute in the earlier proceedings. Infact, estoppel per
G rem judicatam may even successfully be raised to the extent that one forms part of the other, if they are clearly and convincingly reflected in a composite plan. This is exactly what Chief Anwan, of Counsel did in Exhibits 20 and 23. (p. 279 B)

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REPRESENTATION

Chief Adetunji Fadayiro, SAN with Olekibe R. N. Esq. for the Appellants
Anthony U. Ekong Esq. for the respondents

CASES REFERRED TO

Ogiamen v Ogiamien (1967) NMLR 245	
Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127 at 156	
NIPC LTD v Thompson Organization Ltd (1969) NMLR 99	
Ifianyong vs Chief Okon Udo Ekpe	B
Aro v Fabolule (1985)1 SCNLR 58	
Bala v Bankole (1986) 3 NWLR (pt.27) 141	
Iyayi v Eyigebe (1987) NWLR (Pt. 61) 523	
Adebayo v Brown (1990) 3 NWLR (pt.141) 661 at 673A	C
Borno Holdings v Bogoco (1971) ALL NLR. 372	
Owe v. Oshinbajo (1965) 1 ALL NLR 72	
Adeosun v Babalola (1972) 5 SC 292	
Chief Registrar v. Vamus 1976 1 SC 33 at PP 40-41	
Kate Enterprises Ltd v Daewoo Ltd 1985 NSCC 11 942	D

STATUTE REFERRED TO

Evidence Act s. 54(1)

E

LEAD JUDGMENT BY EJIWUNMI JSC

This appeal is against the judgment of the court below, wherein that court upheld the appeal of the plaintiffs/respondents in respect of the judgment of the trial Court which was delivered in favour of the defendants/appellants. At the trial court the respondents claimed against the appellants for the following principal relief:-

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"A declaration that they, the plaintiffs, are the radical/titular owners in possession of all that piece or parcel of land known as and called Esuk Ikotetuong (sometimes otherwise fictitiously and popularly nicknamed Esuk Ifianyong mostly by strangers to the area) and being a piece and/or portion of Idu land generally situate in Uyo Division of the Cross River State of Nigeria which Esuk Ikot Etuong aforesaid is as set out, described and/or otherwise delineated in the Plan No. LSH 751 by H E. Ekpenyong Esqr. F.N.I.S. and licensed Surveyor and dated 2nd November, 1969 being verged pink (which is the same as the one in Ita Plan No. LSH 1048/LD by the same Surveyor and dated 20th June, 1977) and

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which came into issue in the Suit No. HU/2/69 (CI/69) between the Real Parties in the instant case but in the reverse order.

AND as ancillary reliefs, the respondent claimed the sum of N10,000.00 as general damages for trespass and the further sum of N10,000.00 as
 B *Special damages in respect of various acts of the appellants on the disputed land. Also claimed was an order of perpetual injunction restraining the appellants by themselves and/or their privies, agents, and/or servants from any further interference whatsoever/in any shape, form and/or manner with the respondents exclusion occupation, possession, use*
 C *and/or enjoyment of Esuk Ikot Etuong."*

Following the order for pleadings the parties filed and exchanged their pleadings. The respondents with the leave of the trial court filed and served an amended Statement of Claim. In the Statement of claim as
 D amended, the respondents pleaded copiously several decisions of the courts between the parties before the instant suit. Among the decisions pleaded are:- (1) The decision by the High Court in Suit No. HU/2/69 (formerly No. C/1/69); (2) Decision on appeal therefrom by the Court;
 E and (3) Decision on further appeal to the Supreme Court. The respondents also pleaded four deeds of leases (Indentures), three of which where made with various companies between 1938 and 1939.

It is also pleaded that the deeds were executed with the approval
 F of the appropriate authority. One of them was stated to have been executed with the Government of Nigeria in 1940. All the deeds pleaded were in respect of transaction affecting the disputed land. The respondents, also to further support their claim, pleaded traditional history to show how they became seised of the land. Similarly the appellants pleaded
 G their traditional history, acts of possession and ownership to challenge the claim of the respondents to the disputed land.

The learned trial judge after hearing the evidence and addresses of learned counsel, dismissed the respondents' claim. They, therefore
 H appealed to the Court below, and their appeal succeeded. It is against the judgment and orders of the court below that the appellants have now appealed to this Court.

In the brief of Argument filed on their behalf, five issues were

postulated for the determination of the appeal. These are:-

"(1) Whether the Court of Appeal was right in holding that the respondents proved in the lower Court the identity of the land in dispute per se or vis-a-vis the subject matter of HU/2/69.

(2) Whether the Court of Appeal adopted the correct approach in its consideration of the appeal.

(3) Whether the Court of Appeal can properly raise the doctrine of issue estoppel on behalf of the appellants in the Court of Appeal when the said appellant did not raise the same either in the High Court or in the Court of Appeal.

(4) Whether the learned trial judge's judgment, should not stand in view of the totality of the evidence available at the trial.

(5) Whether the Court of Appeal was right in its finding that the defendants/appellants were trespassers, thereby awarding damages and granting an injunction against them."

For the respondents their learned counsel, A.U. Ekong, Esq framed in the respondents brief the following issues for consideration in this appeal:-

"(i) Whether the various exhibits admitted in the case were properly admitted to support acts of possession, thus acts of ownership of the plaintiffs/respondents and if so, whether the judgement of the trial court should stand.

(ii) Whether the issue of identity of and boundaries of the land in dispute and acts of possession having been resolved in Suit No. HU/269, the present plaintiffs/respondents should have to take the trouble to prove them all over again in this Suit No. HU/12/77.

(iii) Whether issue estoppel was raised or at all or by any necessary implication by the plaintiffs/respondents or their counsel and whether or not, an appellate Court could take on a point of law on the face of the record even though not made a ground of appeal."

It is evident from a careful reading of the two sets of issues identified by learned counsel in the respective briefs of the parties that they are similar in terms of their formulation of the issues at stake in this appeal. This appeal would, however, be considered in accordance with

the issues identified in the appellants' brief.

The argument in support of this appeal began in the appellants' brief with the consideration of issues 1 & 3. In respect of these issues, learned Senior Counsel observed, and quite properly, that the respondents' case rested on their traditional evidence and the documents tendered and admitted at the trial. These are certified Court proceedings in Suit No. HU/2/69 between Bruno O. Etim & 2 Ors (for themselves and people of Ifianyong Vs. Chief Okon Udo Ekpe & Ors (for themselves and people Idu village). This case contained several other proceedings which are as follows:-

- (a) *Suit No. 10/33 (WACA)*
- (b) *Suit No. C/21/36 (High Court)*
- (c) *Suit No. 105/56 (Native Court)*
- (d) *Suit No. 23/55/56 (Native Court)*
- (e) *Suit No. 11/98/29 (Native Court)*

The documents, learned Senior Counsel conceded formed the basis of the plea of estoppel per rem judicatam by the respondents to defeat the claim of the appellants to the disputed land. It is, however, the submission of the learned Senior Advocate that the appellants both by their plan of the land in dispute exhibit 24, and their evidence at the trial disputed the claim of the respondents that the land in dispute in Suit HU/2/69 is the same as the land in dispute in the instant case. It is the contention of the appellants that the learned trial judge was right to have preferred the evidence of the appellants to that of the respondents. It is also the submission of learned Senior Advocate for the appellants that as the respondents failed to establish their plea of estoppel per res judicata, they were rightly held to have failed to discharge the onus of proof as plaintiffs. In support of his submissions, reference was made to the following cases. Aro v Fabolule (1985)1 SCNLR 58; Bala v Bankole (1986) 3 NWLR (pt.27) 141 and Iyayi v Eyigebe (1987) NWLR (Pt. 61) 523. It is also the submission of Chief Tunji Fadayiro, SAN that the learned trial judge specifically found that the respondents failed to establish that the issues decided in the previous cases are the same as in the present suit. And that in any event, the identity of the disputed land was

not also established by the respondents. In effect, the contention made for the appellants is that the respondents having failed to determine the extent of their land, have failed to prove with certainty the area of land in respect of which they are claiming declaration and injunction. Chief Tunji Fadaiyiro, therefore subjected to very severe criticism the reversal B of the finding of the High Court judge by the Court of Appeal per Uwaifo JCA (as he then was), who in the course of his judgment, said:-

".....the so called overlapping in two places referred to by the trial judge as the Western and Southern and also in 'the South Eastern Side occurred either as a matter of detailed accuracy by the plaintiffs or an attempt to create a distinction without a difference by the defendants or vice-versa (underlining). It may be a matter bordering purely on the perspective from which the respective Surveyors saw the description of the land in dispute (page 202 line 40 to 204 line 7 (underlining mine.)" C D

Chief Tunji Fadaiyiro, in respect of the above quoted passage from the judgment of Uwaifo JCA, (as he then was), then invited this court to regard what was said in that passage as merely speculative. It is E the submission of learned counsel that there is no evidence on record or in the submission of counsel either in the brief or in oral argument to justify that view of the evidence as pronounced by Uwaifo, JCA (as he then was). He further argued that as it is not the function of the court to F speculate on what might have been the case of a party to an action, that the judgment of the court below ought to be set aside. In support of his submissions, he made reference to the following cases - Adebayo v Brown (1990) 3 NWLR (pt.141) 661 at 673A; Borno Holdings v Bogoco (1971) G ALL NLR. 372; Owe v. Oshinbajo (1965) 1 ALL NLR 72.

While learned counsel, Chief Tunji Fadaiyiro, readily conceded that it is the correct position of the law that where one issue has been conclusively proved in one case, further proof is no longer necessary in subsequent cases, yet it does appear in his submission that the court H below should not have applied this principle in the instant appeal. In the view of learned Senior Counsel, the Court of Appeal was wrong to have held that Exhibit 20 having been admitted in evidence, the respondents

have thereby discharged the onus on them to prove the boundaries of and the identity of the land in dispute in this case. It is therefore his submissions that though Exhibit 20 was admitted in evidence, the respondents still have the onus of proving that the land in dispute in Exhibit 20 is the same as land in the case on appeal.

B I now turn to issues 2 and 4 where the complaint of the appellants is that in reversing the judgment of the trial Court, the Court below raised an issue that was neither raised by the parties in general nor the respondents specifically either at the High Court or at the Court of Appeal. The issue allegedly so raised is in connection with the application by the Court below the doctrine of "Issue estoppel" in the consideration of the questions raised in the appeal. The contention made for the appellants is that what was raised at the hearing of the appeal vide the D brief of the appellants in the Court below by their then learned counsel, Chief E.E. Anwan was the issue of "Estoppel per rem judicatam" and not "Issue Estoppel." It is therefore the submission of the learned Senior Advocate for the appellants that the Court below was wrong to have E decided the appeal against the present appellants upon an issue raised by the Court Suo motu and without hearing learned counsel for the parties upon the issue so raised. The following cases were referred to in support of that submission:- Adeosun v Babalola (1972) 5 SC 292; Chief Registrar v Vamus 1976 1 SC 33 at PP 40-41; Kate Enterprises Ltd v Daewoo Ltd 1985 NSCC 11 942. Shadipe v L 1985 2 NSCC 1102 at F 1126 - 1127.

G Having reviewed as above the submission made on behalf of the appellants in respect of issues 1,2 &3, I think I should now set down the reply of the respondents to the several contentions made for the appellants.

H In the brief filed on behalf of the respondents by their learned counsel A.U. Ekong Esq, the thrust of the submission made for the respondents is that the appeal be dismissed. To that end, learned counsel took the view that the main plank of the appellants' argument is that the respondents did not prove the identity of the land in dispute, its boundaries and the traditional history to support their claim. This is mainly

because the contention of the appellants is that the land involved in suit HU/2/69 is not same as that in Suit HU/12/77 and which has led to the instant appeal. However, the learned counsel for the respondents in the respondents' brief has, however, argued that the contention of the appellants was made in error. He then submitted that the respondents have by their pleadings averred that the land in dispute was the subject of a previous litigation between the parties in suit No. HU/2/69. It is further submitted for the respondents that the appellants in paragraph 2 of their Statement of Defence admitted the relationship between the parties as pleaded in paragraphs 1(a) (i), 1(a)(ii), 1(a)(iii), 1(a)(iv), 1(b)(i), 1(b)(ii), 1(b)(iii), and 1(b)(iv) of the appellants amended Statement of Claim. B C

I have earlier in this judgment referred to the contention made for the appellants that the court below was wrong to have held that the respondents established the identity of the land in dispute. But linked with this contention is the other contention of the appellants that the resolution of whether the identity of the disputed land was established by the respondents, the court below was wrong to have applied the principle of "Issue Estoppel" to determine the appeal in favour of respondents. This is because, as it is the contention of the appellants that neither of the parties pleaded it, nor was it raised by learned counsel who appeared for the parties at the hearing of the appeal before the court below. The learned counsel for the appellants however later agreed while addressing this court at the address stage in the trial court, learned counsel for the respondents did raise the plea of res judicata as part of their case. D E F

The question raised above must lead inexorably to the consideration of what is the meaning and effect of not only the plea of res judicata but also "issue estoppel", and the principles governing their application in our jurisprudence. To begin with, I think it ought to be noted that the doctrine is not only rooted in our jurisdiction, but it has also achieved and become part of the public policy of the Courts. It therefore follows that all courts of record are obliged to apply its principle when applicable to the cases under their consideration. The reason for the position of the court in this regard was eloquently enunciated by Aniagolu JSC, in ARO G H

v FABOLUDE 14 NSCC 43 where at pages 45, His Lordship said:-

".....public policy demands that there should be an end to litigation once a Court of competent jurisdiction has settled, by a final decision, the matters in contention between the parties. Not only must the court not encourage prolongation of a dispute, it must also discourage proliferation of litigation. And so the maxim interest reipublica ut sit finis litium has for long been accepted as one of the established principles of our law. Of equal importance in our law - That no man ought to be "twice vexed, if it is proved to the Court that it is for one and the same cause. Expressed in the terse latin maxim: *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*, the principle runs through the entire gamut of our legal approach, whether it be in civil or criminal matters. It, therefore, forms the foundation of the plea of *res judicata* in civil cases".

His Lordship then further observed at page 46, thus:-

"In civil cases, before this principle is applied, the *res* (the subject matter) in connection must be the same; the issue, and the parties the same, in the new case as in the earlier proceedings where any of the three matters is missing in the new case a plea of *res judicata* will ordinarily fail (See Odua v Nwanze (1934) 2 WACA 98 at 100 - 102."

It is however interesting to note that where the estoppel per rem judicatam pleaded is classified as estoppel by record inter partes, it has been held that there are two types of that kind of estoppel. The first is called "cause of action estoppel" and the second "issue estoppel" see Fadiora v Gbadebo (1978) 3 SC 219, 228-229, where Idigbe JSC, distinguished the two types of estoppel by record inter parts, thus:-

"Now, there are two kinds of estoppel by record inter parties or rem judicatam as it is generally known. The first is usually referred to as 'cause of action estoppel' and it occurs where the cause of action is merged in the judgment. That is, Transit in *rem judicatam* See King v Hoare (1844) 13 M&W 495 at 504. Therefore, on this principle of law (or rule of evidence) once it appears that the same cause of action was held to lie (or not to lie) in a final judgment between the same parties, or their privies, who are litigation in the same capacity (and on the same subject

matter), there is an end of the matter. They are precluded from re-litigating the same cause of action. There is however, a second kind of estoppel *inter partes* and this usually occurs where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties (or their privies); in these circumstances, "issue estoppel" arises. This is based on the principle of law that a party is not allowed to (i.e. he is precluded from) contending the contrary or opposite of any specific point which having been once distinctly put in issue, has with certainty and solemnity been determined against him. See Cutram v Morewood (1803) 3 East 346. Issue estoppel applies whether the point involved in the earlier decision is one of fact or law or One of mixed fact and law. However, for the principle to apply, in any given proceedings, all the pre-conditions to a valid plea of estoppel *inter partes* or *per rem judicatam* must apply, that, (1) the same question must be for decision in both proceedings (which means that the question for decision in the current suit must have been decided in the earlier proceeding), (2) the decision relied upon to support the plea of issue estoppel must be final (3) the parties must be the same (which means that parties involved in both proceedings must be the same) (*per se* or by their privies)."

It is pertinent to observe that the above quoted dictum that proceeded from the mouth of Idigbe JSC, was quoted with approval by Ogundare JSC in the course of his judgment in Ogbogu v Ndiribe (1992) 6 NWLR (Part 245) 40 at 61-62.

In this appeal, as I have already stated the contention made for the appellants is that the court below, per the judgment of Uwaifo, JCA (as he then was) unilaterally decided the appeal before the Court on the view that issue estoppel applied to the facts pleaded and upon which evidence was led at the trial. Before answering this question, I think it is pertinent to quote in extenso the relevant portion of his judgment in the Court below on the point. At pages 205 - 207, his Lordship said, thus:-

"In suit No. HU/2/69 in which the present defendants were the plaintiffs, the survey plan filed and tendered by them was No. EPS/97 (LD) dated 12th March, 1969 and drawn by Mr. OKon E. Eyo, Licensed

Surveyor and Architect: See paragraph 8 of the amended statement of claim at page 44 of exhibit 19. It was admitted in that case as exhibit 1; See page 51 of exhibit 19. The said plan is exhibit 16 in the present case. The survey plan filed and tendered by the present plaintiffs as defendants B in that case was No. ISH 751/LD dated 22nd November, 1969 and drawn by Mr. E. Ekpenyong, F.N.IS., Licensed Surveyor: See paragraph 3(b) of the Statement of defence at pages 19-20 of exhibit 19. It was admitted in that case as exhibit 2; see page 55 of exhibit 19. The said plan is exhibit C 20 in the present case. It is important to state these facts in view of what will follow later. Exhibit 20 is the same as exhibit 23 which the present plaintiffs filed and tendered in this case. I as said, because the learned judge did not give exhibit 20 its proper recognition, he freely cavilled at exhibit 23. The land actually put in dispute as per exhibit 20 is the same D as the land in dispute as per exhibit 23. That therefore draws the necessary correlation between the decision in suit No. HU/2/69 and the present case, suit No.HU/12/77.

"In suit No. HU/2/69 (exh.19) at page 224, the learned judge E (L.E. Ita, J.) said:-

"The defendants in their defence have superimposed their plan of plaintiffs plan and have marked out in green the southern portion of Exhibit '2' which they say is their land called Ifieyong Beach F or Esuk Ikot Etuong. It is upon this southern portion and not the whole piece of land edged yellow in plaintiffs' plan that defendants join issue with plaintiffs. For the purpose of clarity the defendants claim the land verged with a green border and lying south of defendants' plan exhibit G '2'. A remarkable feature about these two plans Exhibits '1' and '2'. I may mention here in passing that both plans are drawn to the same scale i.e. 400 feet equal one inch."

It should be noted that even though Esuk Ikot Etuong sometimes otherwise was also called Ifiayong Beach, the plaintiffs have also H asserted and claimed ownership of it. This fact will be shown later to have been lost on the trial court in the present suit in his observation following a visit to the locus in duo.

At a later stage of his judgment, Ita, J., and in suit No. HU/2/69

at page 126:

"When one considers defendants' acts of ownership upon the area of land in dispute admitted by the plaintiffs themselves then one can hardly see the wood for the trees (sic) I shall proceed to enumerate there acts of ownership of the defendants which I consider to be relevant.

Almost every features (sic) on plaintiffs plan exhibits '1' which shows acts signifying exercise of rights of ownership are done by the defendants. By their plan the plaintiffs have conceded this fact in favour of Idu people. "There is no evidence that the plaintiffs have ever let out any portion of Ada Ita land, abeit land or Obot Idim Ibet land to any stranger either for rent or tribute."

The learned judge then referred to the various exhibits tendered by the defendants in that case in support of court decisions in their favour against the plaintiffs in that case and leases granted by them, and went on at page 130 to say that:-

"There is no evidence on Exhibit 1 that the plaintiffs have ever done any acts of signifying their ownership of the three pieces of land they claim, not to mention describing those acts as positive and numerous enough to warrant the inference that any place of land in south of exhibit 1 is the property of the plaintiffs. On the contrary Exhibit 1 shows that every act of ownership to the south of plaintiffs' plan as having been done by defendants' people

From all these acts of ownership I am convinced that the plaintiffs were aware of the fact that defendants (Idu people) were suing as owners of the land and were protecting their interest in Esuk Ikot Etuong land. Defendants had been suing to eject trespassers who had wrongfully entered and/or occupied their land. Defendants had let out to occupied their land. Defendants had let out to government the Police Station and Post Office sites on their land. See Indentures of Leases Exhibits 11,12,13, and 14 and also let out portions of this land to foreign firms to the knowledge and acquiescence of plaintiff.....

The United African Company again acquired a site on the land claimed by the defendants' people and built a rest house called Idu rest houses see surveyor's reference in Exhibit 2. It will be obvious that much

of the land claimed by the defendants' people which includes "the three pieces of land claimed by the plaintiffs had been the subject of court actions by Idu people to maintain their right of ownership of the land the Idus claim to belong to them.

B I have also taken pains to pin a piece of paper on each site of the land in dispute to mark areas upon which Idu people have exercised acts of ownership."

In the end, the judge concluded at page 137:-

C "in my opinion, the two defendants on record by their defence have given evidence to support their plea of long possession and numerous acts of ownership and have defeated the plaintiffs' claim for title. I hereby give judgment for the defendants not in respect of all the lands claimed by the plaintiffs in exhibit '1' but in so far as the area verged red D in Exhibit '2' is concerned, the northern part of which is verged green. Accordingly, I dismiss the plaintiffs' claim to the said area of land against the two defendants on record with costs".

E "The true effect of the above was not to give judgment conferring title on the defendants in that suit over the area verged pink in exhibits 2 (although referred to as red in the judgment obviously owing to the colour used) but to show the delimitation in respect of the area cover F ownership. The further effect of what the trial judge did in that case was to make findings relating to who were in possession of the land in dispute. The findings were in favour of the defendant (now plaintiff) and so long as they were not reversed on appeal, they now constitute issue estoppel."

G Before that analysis of the judgment relied upon by the respondents to ground the plea of issue estoppel in favour of the respondents, the court below, had considered the view of the learned trial judge upon the evidence with regard to the disputed land in this appeal and the land H which formed the subject of the previous litigation between the parties. The learned trial judge had after comparing the survey plan tendered and accepted at the trial for the parties took the view that while the survey plans, Exhibits 20 and 23 filed for the respondents are identical, they are

however both different and distinct from survey plan No. RIM/8015 LD of 10/6/78, admitted as Exhibit 24 for the appellants. The reasons given for coming to that conclusion are (1) that although the land verged pink in Exhibits 20 and 23 overlap the land verged yellow at the Western and Southern end, there is no such overlapping in Exhibit 24; (2) that such overlapping of the land verged pink and claimed by the respondents as in Exhibits 20 and 23 is not identical with the land verged in appellant's land in Exhibit 24; (3) that the legend in the survey plan, Exhibit 23 does not identify the land actually claimed by the respondents.

The court below, after a full appraisal of the reasons so given, then held that the learned trial judge was wrong to have concluded that the disputed land in Exhibits 20 and 23 is different and distinct from that identified in Exhibit 24. I have also examined the survey plans, and cannot help but agree with the conclusion of the court below that the three survey plans portray the same land.

In this appeal learned Senior Advocate for the appellants has also argued that the court below was wrong to have placed reliance on paragraph 6(1) of the respondent's Statement of Claim, to justify the conclusion of the Court as to what transpired in an earlier case between the same parties and the subject matter of the present suit. The basis of this argument being that as pleadings cannot be substituted for evidence, the court should not have placed any reliance on the averment made in the said paragraph 6(1) of the respondents' pleadings. It is therefore necessary to refer to paragraph 6(1), and to the other averments made by the parties in their pleadings. Paragraph 6(1) of the Respondents' Statement of Claim reads:-

"A declaration that they, the plaintiffs, are the radical/titular owners in possession of all that PIECE or PARCEL of land known as and called ESUK IKOT ETUONG (sometimes otherwise fictitiously and popularly nicknamed ESUK IFIAYONG mostly by strangers to the area) and being a PIECE and/or PORTION of IDU LAND generally situate in Uyo Division of the Cross River State of Nigeria which ESUK IKOT ETUONG aforesaid is as set out, described and/or otherwise delineated in the Plan NO. LSH/751 by E. EKPENYONG Esq F.N.I.S. and Li-

censed Surveyor and dated 22nd November, 1969 being therein verged pink (which is the same as the one in the Plan No. LSH 1048/LD by the same Surveyor and dated 20th June, 1977) and which came into issue in the suit No. HU/2/69 (CI/69) between the same REAL PARTIES in the instant case but in the reverse order."

It is manifest from a careful reading of the above averment made for the respondents that the rested their case against the appellants on two survey plans No. LSH 751 dated 22nd November 1969 and LSH. 1048/LD dated 20th June, 1977. These two survey plans were not only prepared by the same Surveyor, E. Ekpenyong Esq F.N.I.S. but were also made in respect of the same land, were featured in suit No. HU/2/69.

It would appear from a careful reading of pleadings of the appellants in their Statement of Defence at the trial, that they admitted that there was such a suit known as HU/2/69 between the parties though they pleaded that they had appealed against the judgment to the Court of Appeal, they did not acknowledge that they lost in that Court. And that their further appeal to the Supreme Court was dismissed. The Judgment of Supreme Court was tendered by the respondents as Exhibit 22. They, however, denied that the 1st and 4th respondents in this appeal, and who were some of the defendants in that suit did not defend the action in a representative capacity. It was also pleaded for the appellants that as the land in dispute is not beach land as averred by the respondents in that suit, the appellants have appealed against the judgment in Suit No. HU/2/69 to the Court of Appeal. In respect of the averment made in paragraph 6(1) of the respondents' Statement of Claim, quoted above, the appellants' in paragraph 10 of their Statement of Defence, pleaded thus:-

"In answer to paragraph 6(1) - (viii) of the Statement of Claim, the defendants say that the plaintiffs are not entitled to any of the reliefs sought and that the claim is speculative and should be dismissed with substantial cost."

It is evident, in my respectful view, that from the pleadings of the parties, issue was joined on whether the disputed land in the instant appeal was the same as that litigated in the suit No. HU/2/69. In this regard, I need to observed that parties are bound strictly

by, and are not allowed to depart from their pleadings - See Ogiamen v Ogiamien (1967) NMLR 245; Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127 at 156. Hence parties can then lead evidence in support of their pleadings NIPC LTD v Thompson Organization Ltd (1969) NMLR 99. Evidence led which is not supported by the pleadings B goes to no issue. Such evidence if inadvertently admitted, will be expunged. It ought to be also noted that pleadings must contain facts and not law. Points of law can be raised in pleadings. A party relying on estoppel must specially plead it. See Owonyin v Omotosho C (1961) ALL NLR 304; (1961) SCNLR 57; Obanye v Okwunwa & Ijoma (1930) 10 NLR 8. Flowing from the authority of case law decisions, it can be said that it is well settled and there is statutory provision enabling judgment regarded as a relevant fact in an action to be pleaded. See section 54(1) of the Evidence Act which provides as follows:- D

"54(1) - if a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant facts, whenever any matter, which was, or might have been, decided in the action in which it was given, is in issue, or is deemed to be relevant to the issue in any E subsequent proceedings."

It is obvious from the provision of section 54(1) quoted above that in any litigation where a previous judgment between the same parties or their privies constitutes a fact in issue, as in the instant F appeal, such judgment is a relevant fact which could be pleaded as (i) *res judicata* or (ii) a relevant fact.

Now, I have previously referred to the contention made for the appellants by their learned Senior Advocate that:- (i) the learned G Justice of the Court of Appeal was wrong to have reversed the judgment of the trial Court upon the principle that the doctrine of issue estoppel was available to the respondents, and (ii) that the learned trial judge was wrong to have held that the disputed land was not H the same. With regard to the second of the reasons stated above, it is my respectful view that the Court below was right to have held that the disputed land in this appeal is the same as the land litigated between the parties in HU/2/69. From a careful examination

of all the Survey maps tendered Exhibits 20, 23 and 24 by the parties at the trial, I find myself in agreement with the view of the Court below, that the distinction made between them by the learned trial judge amounted to a distinction without a difference.

B It is evident from the argument present in this regard by learned counsel, that what is crucial in this appeal is whether the Court below was right to have determined this appeal in favour of the respondents on the doctrine of issue estoppel.

C I have before now referred to some of the principles that should guide a court in determining when this principle would apply. And also what a court should do when the principle has been properly pleaded by a party.

D For the determination of this question, which also fell for resolution in the Court below, reference ought to be made to some of the decisions of this court bearing on this matter. In that regard, I refer to Ezewani v Onwordi (1986) 4 NWLR (Pt. 33) 27; (1986) 6 S.C. 42. The facts of this case, that are relevant to this appeal are a follow:-

E *"The case apparently began in 1962 when both parties sued themselves over the same land in suit No. B/44/62, and B/47/62. They were subsequently consolidated for trial. In two of these suits, the Ogwashi-Ukwu people as plaintiffs claimed declaration of title, damages for trespass and perpetual injunction over the same farmland which they called*
F *Odonkwo land. But at that time, the Ibusa people as defendants did not counter-claim for they declaration of title to the land in dispute. In both their pleadings and the evidence adduced at the trial of the 1962 cases, both parties, relied heavily on their traditional histories. The trial judge*
G *therefore at the conclusion of the trial disbelieved the traditional history of the Ogwashi-Ukwu people. On the other hand, he believed the evidence led on the traditional history of the Ibusa people. In the result, the Ogwashi-Ukwu people lost their case both at the High Court; and on*
H *appeal to the Supreme Court. However, since the Ibusa people did not counter-claim for a declaration of title to the land in dispute, none was declared in their favour. Consequently in 1966, the Ibusa people as plaintiffs took out a fresh action against the Ogwashi-Ukwu people as*

defendants on the same land. In that action, the Ibusa people sought for declaration that the boundary between the "parties is located as pleaded by them; and also for a declaration of title to the piece of the disputed land. They also asked for damages for trespass and an order of injunction against the the Ogwashi-Ukwu people in respect of the dispute land. In their Amended Statement of Claim the Plaintiffs pleaded the boundaries of their land and the acts of ownership exercised thereon; but they did not specifically plead their traditional history therein. Rather, they pleaded the facts and findings of the proceedings and judgment of the 1962 cases. The Ogwashi-Ukwu people in their Amended Statement of Defence pleaded traditional history and led evidence thereon. The learned trial Judge, however, accepted the earlier findings by the High Court as constituting issue estoppel. On appeal to the Supreme Court, the argument of the appellants, (i.e. the Ogwashi-Ukwu people) was that as the respondents (Ibusa people) did not expressly plead their traditional history again, evidence accepted thereon went to no issue. It was further argued for them that before issue estoppel can be relied on, it must be specifically pleaded."

The Supreme Court in no uncertain terms held that the findings made on traditional history in favour of Ibusa people by the High Court in the previous proceedings were available to them in the case subsequently commenced by the Ibusa people. Also the Supreme Court held that it was unnecessary to plead issue estoppel expressly if the judgment in support of it had been pleaded and admitted in evidence. It is pertinent to quote the ipsit dixit of some of their Lordships of this Court on the positions they took:-

Nnamani JSC, at page 51 of his judgment said:-

"It seems to me that the traditional history put up by the respondents in the 1962 cases and which was then accepted by the learned trial judge was properly used by the trial judge in this case. I think it was sufficient that the respondents relied on Exhibit F, the record of proceedings in those cases. I do not myself see the need for them to lead evidence to prove the traditional history again."

On his part, Oputa JSC said at page 52:-

"All that the 1962 cases decided was that having regard to the traditional history of the parties and other evidence such as acts of possession etc the land in dispute did not belong to the people of Ogwashi-Uku. It is important to emphasize this point quite early in this judgment because all I want to point out is the impact and extent of the law as it relates to Issue Estoppel. Although the 1962 cases did not resolve the issue of title in favour of Ibusa people (since they claimed no title) yet it resolved that issue against Ogwashi-Uku in any future inter parties about the same piece or area of land." (Opura JSC's emphasis).

Later at page 56, the learned Justice said:-

"The 1962 cases were pleaded. It was the duty of the Court of first instance to give effect to these judgments. If the trial Court - erred at all, it erred on the side of caution. It was not necessary after pleading the 1962 cases to go all over again receiving evidence no matter and issues (like the traditional histories of the parties which had been finally decided inter parties. The Court of Appeal Benin Division was right in its mild censure of the trial court in receiving or rather allowing the parties to repeat the evidence of the traditional history decided inter parties in the 1962 cases. The Asaba High Court and the Court of Appeal Benin Division were both right in treating the 1962 cases as entirely and effectively estopping the people of Ogwashi-Uku claiming the land then in dispute, and a greater part of which is (now) in dispute as theirs." (Opura JSC's emphasis)."

I now turn to the instant appeal. The fact in this appeal certainly bear comparison with the facts disclosed in Ezeani v. Onwordi (supra). It would be recalled that in the instant appeal, there was a previous litigation between the parties in Suit No. HU/2/69 wherein the appellants were the plaintiffs and the respondents, the defendants. The appellants lost the action both in the High Court and the Supreme Court. The respondents as the defendants in that suit did not counter-claim for title, hence they commenced this action to obtain a declaration as owners of the land. In that action, to which I have adverted earlier in this judgment, they pleaded the judgment in suit HU/2/69 and the judgment of the Supreme Court in which their claims to the disputed land were upheld. Also pleaded were

various documents to prove their right of possession to the disputed land, and also led evidence thereon.

However, having regard to the principles enunciated above, in Ezeani v. Onwordi (supra), the Court below held that the findings in favour of the respondents (as defendants in Suit No. HU/2/69) of acts of possession and ownership are what would determine the party that would succeed in this appeal. I must however consider the argument made for the appellants that issue estoppel was not specifically pleaded by the respondents. This question as to whether it is sufficient to plead the facts and circumstances of a previous litigation to found issue estoppel was considered by this Court in Mogo Chiwedu v. Nwanegbo Mbamali & Another (1980) 3-4 SC 31; Idigbe JSC, observed inter alia, thus:-

"It is my view that the Court of Appeal was right in rejecting this contention of the appellants. Undoubtedly the old rule was that estoppel by record and deed must be pleaded where as here, there was opportunity to do so; under the modern practice it is not however, necessary to plead estoppel in any particular form so long as the matter constituting the estoppel are stated in such a manner (as has been done in the pleadings of the respondents in these proceedings) to show that the party pleading relied upon it as a defence or an answer."

In the instant appeal, there can be no doubt from even a mere perusal of the pleadings of the respondents in their Amended Statement of Claim that the respondents pleaded very copiously the materials they would require to rest their case on issue estoppel. It was therefore proper for the Court below to have considered the several documents so tendered and admitted during the trial to determine whether issue estoppel was established by the respondents. And where it was found established as in the instant appeal, it became the duty of the Court below to determine the appeal on that basis. It must be remembered, as I have tried to show above, that it is a cardinal principle of public policy that the Court should not encourage the relitigation of an issue that has been decided by a competent court between the same parties in respect of the same matter, or cause or an issue in the course of a previous proceed-

ings. The learned trial judge rather than dealing with this matter upon the well settled principles of law revealed by the pleadings and the evidence before him, that "issue estoppel" may well apply to the case, proceeded to hear and determine the matter without adverting to the issue raised as aforesaid. The Court of Appeal was therefore justified to have reversed the decision of the trial court, and to also arrived at its decision on the evidence and on the applicable law. See Tonazzi v. Brunetti (1953) 14 WACA 403; Lion Building v M. M. Shadipe (1976) 12 SC 135, 162; Chief Frank Ebba v. Chief Warri Ogo & Ors. (1984) 4 SC. 84, 90. As the main issue in this appeal is whether "issue estoppel" applied as found by the Court below, and as I have upheld the Court below in that regard, I do not consider it necessary to consider the other issues raised in this appeal. In the result, this appeal is dismissed by me. The respondents are entitled to their costs and they are hereby awarded the sum of N10,000.00 only.

BELGORE JSC

Trial Court must be considering its decision address all the issues before it. The issues are matters averred in the parties' pleadings on which evidence has been led. In the instant case the respondents put before trial court all the facts they relied upon in their pleading which showed clearly that issue estoppel was prominent. Learned trial judge never adverted to estoppel per rem judicatam and relied on minor skirmished in the pleadings for the Court's decision; this is a very wrong approach. The Court of Appeal was therefore right to have interfered with findings of fact by trial Court as the trial Court never adverted to the most important facts in the pleadings and evidence. It is the duty of Court of Appeal or any appellate Court to interfere with trial court's decision in such instances as this case. Court of Appeal no doubt relied on S. 16 Court of Appeal Act to arrive at the decision the trial Court ought to have arrived at had it considered all the important issues of estoppel in the pleadings and evidence.

I therefore dismiss this appeal as lacking in merit and I agree

with the further reasons adumbrated in the judgment of my learned brother, Ejiwunmi JSC. The appellant will pay N10,000.00 as costs of this appeal to the respondents.

B

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ejiwunmi, J.S.C. I agree with the conclusion that the appeal has no merit and it is accordingly dismissed with N10,000 costs to the Respondents. The judgment of the Court of Appeal is confirmed.

C

ONU JSC

I have been privileged to read in draft form the judgment of my learned brother Ejiwunmi, J.S.C. just read. I am in entire agreement with him that the appeal lacks substance and must perforce fail.

D

In adding a few words of mine in elaboration, I wish to add by saying that irrespective of the fact that Uwaifo, J.C.A. (as he then was) went into some speculation in his review of the arguments, the fact still remains that the respondents' case cannot be assailed for the following reasons:-

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The respondents relied on:-

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(a) Suit No. 10/33 - a West African Court of Appeal decision.

(b) Suit No. C/21/36 - a High Court decision

(c) Suit No. 105/56 - a Native Court decision

(d) Suit No. 23/55/56 - a Native Court decision

G

(e) Suit No. 11/98/29 - a Native Court decision

to establish or rest their case on the principle of estoppel per rem judicatam as opposed to the previously decided cases upon which the appellants relied. See pages 114 - 118 of the Record as per the address of E.E.E. Anwan Esq. of Counsel for the respondents in the trial court.

H

Much emphasis has been placed on Exhibits 20 and 23 (plans Nos. LSH 751 and LSH 1048/LD respectively) both by the appellants and the Court of Appeal in establishing the said estoppel together with Exhibit

24 - the appellants' survey plan. The appellants had pleaded and tendered the proceedings in HU/2/69, between Bruno O. Etim & 2 Others for themselves and the people of Ifiayong v. Chief Okon Udo Ekpe and Others, for themselves and the people of Idu village - a case in which these other proceedings set out above, were pleaded and evidence given on them.

As case No. HU/2/69 was decided in favour of the respondents on appeal to the then Federal Court of Appeal, it was held inter alia:

"On the contrary, he was satisfied that the Defendants/Respondents have established by various exhibits tendered that they were in possession of the land in dispute." See page 3 of Exhibit 21 in the judgment No. FCA/E/83/79 on 8th September, 1980."

At page 9 thereof, the Court of Appeal commented further that the various Exhibits enumerated above were properly admitted to prove acts of possession. The Supreme Court in Exhibit 22 in case No. SC. 62/82 of March 4, 1983, confirmed the Court of Appeal decision. Both the Court of Appeal and the Supreme Court respectively agreed and described the judgment of Ita, J. as "well considered" and detailed. The findings upheld by these courts were as to acts of possession in HU/2/69. Indeed, the identity of the land in that case as well as the boundaries and acts of possession were what the Court of Appeal and the Supreme Court from Exhibit 2 in HU/2/69 (now Exhibit 20 and 23 in the case in hand and Exhibit 1 herein reproduced as Exhibit 24).

This is where the learned trial Judge, in my respectful view, went wrong in as much as he held, among other things, that certain features appearing on the land in dispute in Exhibit 23 were not the same as those on Exhibit 24. Thus, sameness of the land in dispute should be as produced in a party's plan in the previous suit in relation to the same party's plan in the subsequent suit. While therefore Exhibit 2 and other judgments, traditional history and indentures had decided that the land in dispute did not belong to Ifiayong people, it is correct to state that that case did not resolve the issue of title in favour of Idu people since they did not counter-claim. Nonetheless, it decided the issue against Ifiayong people in any future dispute inter partes about the same piece or parcel of

land. Thus, while in Exhibit 2, Ita, J. found as acts of ownership and possession of the appellants in that case, but herein respondents, they were seen by Arikpo, J. as acts of trespass which, in my view, amounted to a serious error.

In paragraph 2 of the Statement of Defence, the appellants herein admitted paragraphs 1(a) (i); 1(a) (ii), 1 (a) (iii), 1(a) (iv), 1(b) (i), 1(b) (ii), 1(b) (iii), and 1 (b) (iv) of the Statement of Claim. Paragraph 3 of the Statement of Defence admits paragraph 2 of the Statement of Claim in part as to representation or whether the land in dispute in Exhibit 2 was a beach comprising three parcels of farm described on Plan No. EPS/97 (LD) dated 12/3/69. Paragraph 2 (d) of the Amended Statement of Claim is however "stoutly denied" vide pages 29 and 30 of the Record.

As becomes apparently clear, the appellants' denials were by implication throwing open the issue whether the respondents pleaded their traditional history in Exhibit 2, what the traditional history was and whether the Court that heard the previous suit relied on traditional history in its judgment. Thus, as Obaseki, JSC. rightly put it in Ezewani v. Onwordi (1986) 4 NWLR (part 33) 27 "having pleaded the proceedings and judgment, the need to plead the issue determined does not arise" - which leads me to state what in law the doctrine of issue estoppel connotes from the following passage in Mills v. Cooper (1967) 2 W.L.R. 1343 at 1350, (per Diplock, L.J.):-

"That doctrine, so far as it affects civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element of his cause of action or defence, if the same assertion was an essential element in his previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous proceedings to be incorrect, to the correctness or incorrectness of the assertion and would not reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.

See also Amos Ogbesusi Aro v. Salami Fabolude (1983) 2 S.C. 75 at 100 - 104; Alhaji Amida v. Taiye Oshobola (1984) 7 S.C. 68; New Brunswick

Railway Co. v. British French Trust Corporation Ltd. (1939) A.C.1, 43 (P.C.); Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb (1966) 1 Q.B. 630,640 (per Lord Denning); Y. A. Lawal v. Yakubu Dawodu & Anor. (1972) 1 All N.L.R. (part 2) 270, 282; Bala v. Bankole (1986) 3 NWLR B (part 27)141; and Fadiora & Anor. v. Gbadebo (1978) 3 S.C. 219 at 228. It is however the law that a plea of issue estoppel could not be based on the findings contained in a judgment of no-suit. See Emeka Osondu & Anor. v. Ajama Nduka & Ors. (1998) 1 S.C. 9 at 24, and Dzungwe v. Gbishe (1985) 2 NWLR (part 8) 528.

C I am of the firm view that the various Exhibits having been pleaded, admitted by the appellants in their Statement of Defence as well as in court by mutual consent, it was the duty of the trial court to give effect to them. This is because, as Oputa, J.S.C. put it in Ezewani v. D Onwordi (supra), at p. 56 a case almost on all fours with the case in hand:-

E *"It was not necessary after pleading the 1962 cases, to go all over again receiving evidence on matters and issues (like traditional histories of the parties) which had finally been decided interprets. The Court of Appeal, in Benin City was right in its mild censure of the trial court in receiving or rather allowing the parties to repeat the evidence of traditional history decided interpartes in the 1962 cases. The Asaba High Court, and the Court of Appeal, in Benin Division, were both right in treating the 1962 cases as entirely and effectively estopping the people of Ogwashi-Uku, claiming the land then in dispute, and a greater part of which is in dispute as theirs. The crux of the appellants' argument, as earlier pointed out, is that the respondents did not prove the identity of the land in dispute, the boundaries and traditional histories in the trial court. But as has been amply demonstrated, their attempt to show that the land in dispute in Exhibit 2 (HU/2/69) is not the same as that in HU/12/77, having been jettisoned, such a contention has no leg upon which H to stand.*

Thus, the Court of Appeal, in my view, was right when in its leading judgment delivered by Uwaifo, J.C.A. as he then was, and concurred in by Katsina-Alu, J.S.C. as he then was, and Oguntade, J.C.A., it

held as follows:-

"What it all then means is that the issues of the identity and boundaries of the land in dispute and acts of possession having been resolved upon the findings made in suit No. HU/2/69, the present plaintiffs did not have to take the trouble to prove them all over again in suit No. HU/12/77. They are entitled to rely on issue estoppel. I think they sufficiently raised it when they pleaded the facts of the proceedings, the judgment of the High Court, Court of Appeal and Supreme Court in paragraph 2 (b) - (f) of their amended Statement of Claim and tendered those judgments in evidence as Exhibits 19, 21 and 22. Let me also add here by way of reiteration that Exhibits 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 tendered in suit No. HU/2/69, are now Exhibits 25, 26, 27, 28, 33, 36, 35, 34, 29, 30, 31 and 32 in Suit No. HU/12/77."

On traditional history, boundaries, acts of ownership and possession as clearly put in Ezewani v. Onwordi (supra) (per Nnamani, J.S.C) at page 51:

"It seems to me too, that the traditional history put up by the Respondents in the 1962 cases and which was then accepted by the learned trial Judge was properly used by the trial Judge in this case. I think it was sufficient that the Respondents relied on Exhibit F, the Record of proceedings in those cases. I do not myself see the need for them to lead evidence to prove the traditional history again."

I cannot agree more. Indeed, in the case under consideration, having regard to paragraphs 2 (d) - 4(c) (iv) of the Amended Statement of Claim at pages 51-58 of the Record, it is unnecessary to plead a fresh traditional history, identity of land, boundaries, acts of ownership and possession since these issues had already been decided in HU/2/69, between the parties herein. They therefore, in my respectful view, constitute issue estoppel. See Aro v. Fabolude (supra); Bala v. Bankole (supra); Fadiora v. Gbadebo (supra); Iyaji v. Eyigebe (1987) 1 NWLR (part 61) 523 - principles decided therein which were applied in Ezewani v. Onwordi (supra). That issue estoppel need not be pleaded specifically was explained in Chinwendu v. Mbamali (1980) 3-4 S.C. 31 by Idigbe, J.S.C. thus:-

"Under the modern practice, it is not however, necessary to plead estoppel in any particular form so long as the matters constituting the estoppel are stated in such a manner (as has been done in the pleadings of the Respondents in these proceedings) to show that the party pleading B relies upon it is a defence or an answer."

Aniagolu, J.S.C had this to say in the same case as follows:-

"Where a party has pleaded a previous case contested between him and his opponent and called the attention of that opponent to the C traditional history which that party pleaded in that previous case and has given notice to the opponent that he will rely on that same traditional history, I cannot see that the opponent can, in all fairness, say that he has not been informed of the traditional history the pleader is going to rely on, or in those circumstances, that he has been taken by surprise.

D By specifically pleading a specific in an earlier proceedings between the same parties, that specific must be held and deemed to have been properly identified in the said pleadings."

What in effect I am saying is that the traditional history, identity of the E land, boundaries and acts of ownership and possession being specific issues that were held proved in HU/12/77, I am unable to agree with the appellants that the Respondents adduced no evidence to prove these issues or that issue estoppel was not specifically pleaded. See also Awogu, F JCA. in his book: Estoppel and the Law in Nigeria at page 63, where the learned author said at page 64:-

"Issue estoppel may be based on issues of facts, law or mixed G fact and law, arising from a previous proceeding and incidentally in issue in a subsequent proceeding between the parties and their privies. Even if not specifically pleaded, it suffices that the estoppel is contained in the facts and findings in an earlier trial, tendered as an Exhibit in the subsequent proceedings."

Since in issue estoppel, it is only necessary that:-

H (a) The parties in the present suit must be the same as in the previous proceedings.

(b) The decision relied upon to support the plea must be final, and

(c) The same question must be for decision in both proceedings (which means that the question to be decided in the current must have been decided in the earlier proceedings) all these were present in the instant case. In other words, the parties in HU/2/69, and HU/12/77 were the same - Idu on the one hand and Ifiayong on the other. B

Besides, the decision in HU/2/69, was final as it got to the Supreme Court. Consequently, the appellants were in error to raise the issue of overlapping of the land involved in Exhibits 20, 23 and 24. It is trite that one of the attributes of issue estoppel is that it applies to land in dispute in subsequent proceedings between the same parties, whether it was smaller or larger than that in dispute in the earlier proceedings. Infact, estoppel per rem judicatam may even successfully be raised to the extent that one forms part of the other, if they are clearly and convincingly reflected in a composite plan. This is exactly what Chief Anwan, of Counsel did in Exhibits 20 and 23. C D

In the face of all these, the learned trial Judge, in my view failed to see the issue estoppel raised; indeed he woefully knowingly failed to see it. Hence, he was palpably wrong in failing to give the Respondents judgment. E

Thus, while I agree that the writer of the leading judgment in the Court below delved into much speculation before reversing the decision of the trial court-acts which this court deprecates (see Fawehinmi v. N.B.A. (No. 1) (1989) 2 NWLR (part 105) 494) it cannot be seriously contended that the learned Justice descended into the arena. Rather, he saw and discussed issue estoppel succinctly in his judgment, which in my view, is unassailable. F

All five issues submitted at the instance of the Appellants which overlap the three formulated and argued by the Respondents, having been resolved against the Appellants and in favour of the Respondents, I share the views and the reasoning proffered by my learned brother Ejiwunmi, JSC. in dismissing this appeal and affirming the decision of the court below together with the order for costs made therein. G H

AYOOLA JSC

I am in entire agreement with the conclusion arrived at the judgment just delivered by my learned brother, Ejiwunmi, JSC, that this appeal should be dismissed. For the reasons he gives I too would dismiss the appeal with costs to the respondent as ordered by my learned brother. Ejiwunmi JSC.

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