

**SUPREME COURT OF NIGERIA**

2ND JUNE, 2000. SC. 180/1994

**CORAM:- A. B. OGUNDARE, A. G. KARIBI-WHYTE,  
U. MOHAMMED, A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC.**

ARCHBOLD EBBA 3 ORS.

(For themselves and on behalf of  
of Ebbah Family)

.....

PLAINTIFFS

(Substituted by Order of the  
Court of Appeal) for Original  
Deceased Plaintiff

AND

CHIEF WARRI OGODO & ANOR.

(For themselves and on behalf of  
Ogodo family)

.....

DEFENDANTS

UAC OF NIGERIA LIMITED

(Joined by Order of High Court dated 11/9/87)

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***ESTOPPEL*** - Issue estoppel - Appeal - Where the courts treated the judgment in a previous suit - As if it was on appeal before them - They are wrong in so doing - Their duty was to give effect to it.

***ESTOPPEL*** - Res judicata - Estoppel per rem judicatam and issue estoppel - How to differentiate them.

***EVIDENCE*** - Issue estoppel - Ingredients - That must be present for issue estoppel to apply.

***JUDGMENTS*** - Issue estoppel - Reliance on - Where issue was joined in a previous suit between the parties on the same question - And the trial judge in the previous suit decided the question - The reliance on issue estoppel in the present case ought to succeed.

***WORDS & PHRASES*** - Estoppel - It's meaning and purport.

### **FACTS**

In the Sapele High Court, the plaintiffs/appellants for themselves and on behalf of Ebbah family sued the 1st and 2nd defendants/respondents, for themselves and on behalf of Ogodo family, and the African Timber and Plywood (Nig.) Ltd as 3rd defendant. The U.A.C. of Nig Ltd was later by order of the High Court joined as 3rd defendant in place of the African Timber and Plywood (Nig.) Ltd. The claims of the plaintiffs/appellants against the defendants/respondents are for: an order apportioning the rent payable by the 3rd defendant between the plaintiffs and the 1st and 2nd defendants; an order that 1st and 2nd defendants do render a true account of all rents received by them from the 3rd defendant since the judgment in Suit No. S/23/74 and payment over to the Plaintiffs of their share of the said rent, and an order of injunction. The appellants relied on the Supreme Court judgment in Suit No. SC/79/82. Following this judgment, the appellants demanded from the respondents their own share of the rent being paid by the 3rd defendant to the respondents in respect of the lease (Exhibit D) but the respondents refused to pay. Hence the appellants sued the respondents claiming as aforesaid. The appellants rested their case on the findings in suit No. S/23/74.

The respondents denied the appellants claims, and averred that the appellants are not entitled to any share in the rents and funds paid by A.T. & P. The respondents claim that the rents paid in respect of the leased property have always been paid to Chief Ogodo who enjoyed it exclusively and which was later enjoyed by his descendants to the exclusion of relations. Though the respondents admitted that they instituted suit No S/23/74, against the appellants, they however claimed that the exclusive ownership of Ugbunurhie land now occupied by A.T. & P was not an issue in the trial. The 3rd defendant, beyond pleading that it is a tenant on the land, did not take any part in the proceedings. It stated that, it would comply with all orders made by the Court with regard to payment of rents, not already paid. At the conclusion of the trial, the learned trial judge dismissed the appellants' claims. The appellants, appealed unsuccessfully to the Court of Appeal (Benin Division). They have now further appealed to the Supreme Court raising five issues but the appeal was determined

on a single issue.

**ISSUE FOR DETERMINATION**

*Whether issue estoppel as claimed by the Appellants arose, and was decided in Suit No. S/23/74 so as to entitle the Appellants to judgment in the present case.*

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

***Words & Phrases - Estoppel***

1. In Duchess of Kingston's Case (1776) 2 Smith's Leading Cases (12th edition) 754, the following note appeared:

"An estoppel, therefore, is an admission; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature - so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it."

This passage was cited with approval by the Federal Supreme Court (as this Court was formerly known) in Ihenacho Nwaneri & Ors. v. Nnadikwe Oriuwa & Ors (1959) 4 FSC 132. (p. 2042 F)

***Issue estoppel - Ingredients***

2. It is clear from all the authorities I have cited above and many that for issue estoppel to apply the following ingredients must be present -

1. the parties must be the same in the previous and present actions;

2. the same question that was decided in the previous action must arise in the present action in respect of the same subject matter and

3. that question must be a final decision of a competent court.  
(p. 2049 B)

***Issue estoppel - Reliance on***

3. The Court below, as well as the trial Court found that issue was joined in Suit S/23/74 between the parties as to whether chief Ogodo executed Exhibit D on his behalf or in a representative capacity. Having so found and having found also that the trial judge in that case found that Chief

Ogodo executed Exhibit D in a representative capacity and that the Appellants were among those represented by Chief Ogodo, both Courts ought to have found for the Appellants on their claims. The trial Court should not have allowed the Respondents to prove the contrary - See S.D. Ojo v. B Jean Abadie (supra). (p. 2051 H)

***Issue estoppel - Appeal***

4. Unfortunately, both Courts treated Exhibit C as if it was on appeal before them. They are wrong in so doing. Whatever their views on it, it was not their duty to depart from it. Their duty was to give effect to it, moreso that it is a final decision. (p. 2052 B)

***Estoppel - Estoppel per rem judicata***

D 5. True enough, the interpretation of Exhibit D was not a specific claim in Suit No. S/23/74. But Appellants are not relying on cause of action estoppel but on issue estoppel. In a cause of action there may arise separate issues between the parties as there are conditions to be fulfilled by the E plaintiff in order to establish his cause of action. Such was the case in Suit S/23/74 where the Respondents claimed a declaration of title to a piece of land that included the Mclver land. Respondents relied in that case in Exhibit D in proof of their ownership. The capacity in which Exhibit D F was executed became a separate issue in the case. The decision on the cause of action would raise between the parties estoppel per rem judicatam. But the decision on the capacity in which Exhibit D was executed would raise between them issue estoppel: (p. 2055 C)

G **NOTABLE POINTS OF INTEREST**  
**EJIWUNMI JSC**

*1. Improper approach to the determination of whether issue estoppel was raised by a previous judgment*

H The trial court considered whether issue estoppel was available to the appellants as pleaded. While the trial court found rightly that the parties are the same and that the land upon which they litigate in the instant case is part of the land that was the subject matter in Suit No. S/23/74, that

court however felt compelled to hold that as the trial court in S/23/74, was not called upon to interpret the lease agreement tendered to the court in that case by respondents in the instance case, the learned trial judge had no business interpreting the said case. Hence the trial court refused to uphold the plea of issue estoppel in favour of the appellants. The trial court obviously fell into error in that it considered the judgment of Ogbobine J. in Suit No. S/23/74, as if that judgment was on appeal before it. It does also appear to me, having regard to the excerpt from the judgment of the court below, which has been quoted above, that the court below also fell into the same error. This is because in its approach to the determination of whether issue estoppel was raised by the judgment in Suit No. S/23/74, the court below apparently considered that judgment as if it was on appeal before the court. With due respect, that approach is patently wrong and should not be encouraged. It must be taken that the court below apparently recognised that the judgment was specifically pleaded in the case that led to the instant appeal solely to determine whether any of the matters heard and determined in that appeal raised "issue estoppel". If the above reason for pleading suit No. S/23/74 was so recognised and borne in mind, then it would not have been necessary for the court below to have criticized and berated the learned judge who tried the suit No. S/23/74 for the manner in which the judgment was written, and the conclusion reached by the learned judge upon the matters pleaded before him. (p. 2069 C)

## *2. The scope of the plea of estoppel*

It is clearly the rule that the plea of estoppel applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. See Ijale v. A.G. Leventis & co. Ltd (1965) All NLR 176 at 180. (p. 2070 D)

**REPRESENTATION**

T. J. O. OKPOKO, SAN with A. O. Deworitshe & A. O. Aburu for the Appellants.

H. A. Ororho, for the Respondents.

B

**CASES REFERRED TO**

Standard Bank of Nigeria Ltd. v. Ikomi (1972) 1 SC 164 at 177-179

Ogwe v. Ekpezu SC. 231/1970 delivered on 29/10/71

Hoystead v. Commissioner of Taxation (1926) A.C. 155 at page 170

C

Fadiora v. Gbadebo (1978) 3 SC 219, 228-9

King v. Hoare (1844) 13 M & W 495 at 5041

Fadiora v. Gbadebo (1978) 3 SC

Ogbogu v. Ndiribe (1992) 6 NWLR (pt. 245) 40

D

Osunrinde v. Ajamogun (1992) 6 NWLR (pt. 246) 156

Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126

**LEAD JUDGMENT BY OGUNDARE JSC**

E

The plaintiffs, who are appellants in this appeal, for themselves and on behalf of EBBAH FAMILY had on 8/6/87 sued Chief Warri Ogodo and Warder Samuel Ogodo, for themselves and on behalf of OGODO FAMILY AND The African Timber & Plywood (Nig.) Ltd. as 3rd Defendant claiming:-

F

(1) An order apportioning the rent payable by the 3rd Defendant between the plaintiffs and the 1st and 2nd Defendants.

G

(2) An order that 1st and 2nd Defendants do render a true account of all rents received by them from the 3rd Defendant since the judgment in suit No. S/23/74 and payment over to plaintiffs of their share of the said rent.

H

(3) An order of injunction restraining the 1st and 2nd Defendants from receiving the aforesaid rent to the exclusion of the plaintiffs and 3rd Defendant from paying over to the 1st and 2nd Defendants to the exclusion of the plaintiffs the aforesaid rent.

Following separate applications made by the UAC of Nigeria Ltd. and the plaintiffs the African Timber and Plywood (Nig.) Ltd. was struck

off the suit and the UAC of Nigeria Ltd was subsequently joined as the 3rd Defendant in the action.

Pleadings were filed and exchanged and subsequently, by leave of court, amended. By their amended statement of claim the plaintiffs pleaded, inter alia, as follows:

8. Whilst Ogodo and Mivayegbedia were at Ugbunurhie in Sapele, various European traders came to what is now Sapele to seek new trading posts. As these alien traders required land by the River, they approached Mivayegbedia and asked for land at Ugbunurhie. Being a woman of advanced age at the time, she mandated Chief Ogodo to negotiate with the European on her behalf. He did so and the result was the Deed of Lease dated 6th August, 1902 as pleaded in paragraph 3 of this Amended Statement of Claim. The money paid by the Grantee and the rent for the land was enjoyed by the plaintiffs' grand mother and late Chief Ogodo in their life time.

9. Whilst Chief Ogodo and plaintiffs' grant mother were at Ugbunurhie, plaintiffs' father ebbah left Ugbunurhie and founded his own land on which he built his village now popularly called Ugbeyiyi.

10. By Okpe Native Laws and Customs, the property of a deceased mother pass to her children upon death and in this way Ebbah succeeded to her late mother's right to the rents and money due under the lease of Ugbunurhie land - the present site of the A.T.P. granted to McIver and Company Limited by the Lease pleaded in paragraph 3 of this Amended Statement of Claim.

11. For some years after the death of plaintiffs' father, about 1956, members of Ogodo family collected the rents due under the lease and at the time when Itoto Ogodo was head of Ogodo family, he did everything to ensure a harmonious relationship between members of plaintiffs' family and Ogodo family.

12. After the death of Chief Itoto Ogodo members of the Ogodo family became aggressive and greedy and attempted to exclude plaintiffs not only from taking a share in the rents from 3rd Defendant but totally from being natives of Sapele.

13. The matters came to a head when Ogodo family instituted suit

No. S/23/74 against the Ebba Family and others claiming ownership not only of A.T. & P premises but of Ugbeyiyi Village itself. Plaintiffs joined issues with the Ogodo family on their said claim and on the question as to whether late chief Ogodo acted for himself beneficially or for himself and others including late Ebbah when he signed the lease to Mclver and Company Limited in 1902. Plaintiffs will found on the pleadings and judgment in the said No. S/23/74.

14. The issue raised on the capacity in which late Chief Ogodo signed the said lease was resolved in favour of the plaintiffs when the trial judge held:-

"The 2nd and 3rd Defendants are no customary tenants on Ogodo Quarter, and there was no doubt that late Chief Ogodo had these people in mind when in conveying land to Messrs. M.B. Mclver & Co. Limited, through their agent, Mr. John Grady, 1902, it was recited through their Ogodo was conveying ..... 'for himself on behalf of his heirs and successors lawful possession, Title and interest and all of the above-named District whose consent is in accordance with the law and custom prevailing in Southern Nigeria, West Africa.

The District in the recital was Ogodo's Town, Sapele, in Southern Nigeria. It is obvious that the conveyance by late chief Ogodo to Mclver company Limited was on behalf of the people who have any proprietary interests in Ogodo Town and not only for Ogodo family or children. The evidence which I have accepted is that 2nd and 3rd Defendants and Kekeke family have such interests in Ogodo Land. Plaintiffs may found on the said judgment and the judgment of the Supreme Court in suit No. SC/79/82 confirming the said judgment of the Sapele High Court.

15. In spite of the said judgment and in spite of repeated demands, the Defendants have treated the sums of money due under the 1902 lease as if Ogodo Family are solely and beneficially the owners of the land lease in complete disregard of the plaintiffs' rights and have refused to accept the plaintiffs as being entitled to any interest in the said lease.

16. Plaintiffs by their solicitors' letter Ref. No. TJO/187/GC/85/EF (a) wrote to the 3rd Defendant (copying 1st and 2nd Defendants) demanding particulars of outstanding rents or moneys due in respect of the

land and suspension of all payments due under the lease. 3rd Defendant by their Solicitor K.O. Longe & Co., wrote a letter dated 16/7/85 in reply but it has since done nothing to meet plaintiffs' demands.

WHEREFORE plaintiffs claim against the defendants jointly and severally as follows:-

(1) An Order apportioning the rent payable by the 3rd Defendant between the plaintiffs and the 1st and 2nd Defendants.

(2) An Order that 1st and 2nd Defendants do render a true account of all rents received by them from the 3rd Defendant since the judgment in suit No. S/23/74 payment over to plaintiffs of their share of the said rent.

(3) An Order of injunction restraining the 1st and 2nd Defendants from receiving the aforesaid rent to the exclusion of the plaintiffs and 3rd Defendant from paying over to the 1st and 2nd Defendants to the exclusion of the plaintiffs the aforesaid rent."

The 1st and 2nd Defendants, for their part, pleaded, inter alia in their amended statement of defence thus:-

8. By Okpe Native Laws and Custom of Ogodo Family of Okuogodo Okpe, the first person to clear an area of its virgin forest and settled there with his family automatically acquires title to such an area which has come under his possession. After the death of such a founder, title to the land passes over to his descendants, that is, the children of such a founder and later to his descendants to the exclusion of his paternal or maternal relations who live with the founder except such a relation or relations are given a gift intervivos of a defined part of the land. The rents paid by the A.T.& P, Sapele to the Ogodo Family in respect of the area leased which is the subject matter in controversy in this suit, that is, the McIver parcel of land has always been enjoyed exclusively by Ogodo and later his descendants to the exclusion of relations. xxxxxxxxxxxxxx

15. The Defendants admit that they instituted suit No. S/23/74 against the Plaintiffs challenging dealings with the Defendants' land at Ugbeyiyi which the Defendants averred was part of their land. The defendants exclusive ownership of the area now occupied by A.T. & P. from McIver was not an issue in the trial. The Defendants in S/23/74 did not

file a counter claim. The Defendants will at the trial found on the pleadings filed by both parties and the judgment both in the Court of trial and in the Supreme Court.

B 16. The Defendants deny paragraph 14 of the Statement of Claim and will put the Plaintiffs to the strictest proof of the averments in this paragraph.

C 17. The Defendants admit leasing the land in dispute in this suit to McIver from whom A.T. & P. acquired their interest as stated in paragraphs 15 & 16 of the Statement of Claim and maintain that the property in question was the exclusive property of Ogodo family who inherited the interest of the original Ogodo who founded the area when it was a virgin forest and settled there with his family and that at no time did the Plaintiff's grandmother Mivayegbedia live with Ogodo in the area in dispute, that is, D the area leased to McIver now acquired by the 3rd Defendant.

E 18. In further support of the 1st - 2nd Defendants contention that the area in question was founded by chief Ogodo occupied by chief Ogodo and his family living in his house built on the land before it was leased to McIver and that after the lease, the rents for the land and compensation for his houses were enjoyed exclusively by Ogodo and later his direct children, the Defendants will rely on the judgment of the West African Court of Appeal in Appeal No. W/37/1941 between (1) Chief Ayomano, (2) Chief F Asan Edwin Omarin on behalf of themselves and the Chiefs and people of Okpe Clan as Plaintiffs/Respondents and Ginuwa 11, His Highness the Olu of Itsekiri for himself and as representing the Itsekiri people of Sapele as Defendants/Appellants in relation to the ownership of the area in dispute in the present suit.

G 19. The scholarship awarded by the 3rd Defendant to Ogodo family was enjoyed exclusively by the grand children of Chief Ogodo only and not the children of Chief Ogodo's relations. The letters from the 3rd Defendant awarding or renewing the scholarship to Ogodo family will be H founded upon at the trial."

The 3rd Defendant's position is shown by paragraph 7 of their statement of defence where they pleaded that -

"7. The 3rd Defendant avers that it is a tenant and stakeholder

only and will comply with the Order of the Court when any apportionment is made in respect of rents not already paid."

They took no part in this appeal.

This case is essentially between the present Appellants and the 1st set of Defendants. The Plaintiffs and the 1st set of Defendants shall hereinafter be referred to simply as Appellants and Respondents respectively. B

The case proceeded to trial at which evidence was led on both sides. In a considered judgment, the learned trial Judge found -

1. That in Suit No. S/23/74 issues were joined between the Appellants and the Respondents herein as to the founder of the area known as McIver now A.T. & P. and also as to who leased the land to McIver. C

2. "From the portion of judgment quoted the Hon. Judge no doubt interpreted the lease agreement Exhibit 'D' to mean that the conveyance by late Chief Ogodo to McIver was not on behalf of the Ogodo family or children alone but on behalf of the people who have any proprietary interests in Ogodo town. He went further to say that the 2nd Defendant (the Ebbah family) 3rd Defendant (Emagun family) and Kekeke family have such interest in Ogodo land" D E

3. That there was no where in the pleadings of the present Appellants and the Respondents in suit S/23/74 where issues were joined as to what capacity Chief Ogodo leased the land to McIver. "The issue as to what capacity Chief Ogodo leased the land to McIver is therefore incidental to the main issue as to who founded the land. F

4. That although "the parties in the present suit are the same as in suit No. S/23/74 both representing their respective families," "the interpretation of Exhibit D by the Hon. Judge in that suit should not be regarded as final judgment ..... On the issues joined." G

The Appellants' case was dismissed.

Dissatisfied with this judgment, the Appellants appealed unsuccessfully to the Court of Appeal (Benin Division). With leave of the Court below, the Appellants have further appealed to this Court upon 8 grounds of appeal. H

Pursuant to the rules of this Court, the parties filed and exchanged

their respective written briefs of argument. In the Appellants' brief the following issues are set down as calling for determination in this appeal, to wit:

1. Were the learned Justices right in their view that the pro-  
B nouncement of Ogbobine J or his interpretation of the 1902 lease Exhibit D - in the previous Suit Exhibit C did not amount to a decision.

2. Were the learned Justices right in law in their view that the  
C question raised on the Mclver lease and resolved in Suit No. S/23/74 is not the same as the question raised in the current suit.

3. Were the learned Justices right in affirming the decision of the  
trial Court on the basis that the principle of issue estoppel did not apply in this case.

4. Were the learned Justices right in raising and deciding a matter  
D not arising from any of the grounds of appeal.

5. Were the learned Justices entitled in law to treat the judgment  
in Suit No. S/23/74 as confirmed by Exhibit 'E' - as if it was on appeal before it,"

E The Respondents, for their part, rely on the following two issues they formulated in their brief, that is to say-

(a) Whether a decision or remark made by the trial Court not  
F based upon the issues raised in the pleadings can constitute an issue estoppel on which a new action can be founded.

(b) Whether the interpretation of Exhibit 'D' by the learned trial  
Judge in S/23/74 outside the content of Exhibit 'D' which went to no issue can establish an issue estoppel as claimed by the Appellants in this appeal.

G The Appellants rested their case on issue estoppel based on the findings by Ogbobine J in Suit S/23/74 that Ogoto in executing the lease agreement with Messrs. Mclver (Exhibit D) acted not on behalf of himself alone but also on behalf of other that included the Appellants. Hence those  
H others were entitled to a share in the rents accruing under the lease agreement. In my respectful view, therefore, the issue arising in this appeal is whether issue estoppel as claimed by the Appellants arose, and was decided in Suit No. S/23/74 so as to entitle the Appellants to judgment in the present case.

Mr. Okpoko, SAN, learned leading counsel for the Appellants has argued both in his brief and in oral arguments that issue estoppel arose. Referring to relevant paragraphs of the pleadings of the parties, learned Senior Advocate submitted that the parties joined issue in S/23/74 as to who were the beneficial lessors in the 1902 lease to Mclver (Exhibit D) B and that the issue was decided in favour of the Appellants by Ogbobine J in that suit. Counsel criticised several passages in the judgments of the two Courts below leading them to decide otherwise. I shall touch on some of these passages in the course of this judgment. He submitted that as the parties, issues and subject-matter are the same in S/23/74 and the instant C action and as the issue of the capacity in which Ogodo executed the lease agreement with Mclver (exhibit D) had been decided in S/23/74 by Ogbobine J. and affirmed by this Court, the two Courts below were in error to allow the Respondents to contest that issue all over again in the D instant case. Learned Senior Advocate finally submitted that the Courts below were in error to treat the judgment in Suit S/23/74 (Exhibit C) as if it was an appeal before them, rather than give effect to it. He urged us to interfere with the concurrent findings of the two Courts below, set aside E their judgments and enter judgment for the Appellants in terms of their claims.

Learned counsel for the Respondents, Mr. Ororho on the other hand argued, both in Respondents' brief and in oral argument, in favour of F the judgments of the two Courts below. He submitted that issue estoppel did not arise in this case in that the capacity in which Ogodo executed Exhibit D did not arise on the pleadings in Suit S/23/74 and the interpretation given to Exhibit D by Ogbobine J in Exhibit C was not based on any G issue arising in the case. Counsel further submitted that as Appellants' case in the instant action was based on a purported issue estoppel which failed, their action was misconceived and was rightly dismissed by the trial High Court which decision, he contended, was rightly affirmed by the H Court below. He observed that Appellants have not urged in this appeal anything new to the arguments they advanced in the two Courts below. He urged us to dismiss the appeal and affirm the judgment of the Court below.

Both learned counsel advanced a number of authorities in their written and oral arguments, a number of which I shall consider in this judgment.

Perhaps I may at this stage give a resume of the facts as given by the Appellants leading to the institution of the Suit leading to this appeal. Late Chief Ogodo, the ancestor of the respondents was nephew of one Madam Mivayegbedia, Appellants' grandmother and who they claimed lived at Ugbunurhie village. Mivayegbedia was said to be a sister of the half blood of Erukayemre, the mother of late Chief Ogodo. Chief Ogodo had some misfortunes at Okuepete in Amukpe where he was living. As a result of this, his aunt Mivayegbedia brought him to live with her. The area given to him to live at has now developed into what is today known as Okuogodo, that is Ogodo village.

Sometime at the beginning of the last century some Europeans came to Sapele to establish trading business. One of them was Mclver who approached Madam Mivayegbedia for land at Ugbunurhie by the River. Being of old age she mandated Chief Ogodo to negotiate with Mclver on her behalf. Chief Ogodo did so and the result was the deed of lease he executed with Mclver, Exhibit D, dated 6th August 1902. Both Mivayegbedia and Chief Ogodo enjoyed the rents accruing from the lease in their life time.

Ebba was a child of Mivayegbedia and father of the Appellants. He moved away from Ugbunurhie where his mother had settled and founded his own village known and called UGBEYIYI. On the death of Mivayegbedia, Ebba succeeded to her right over Ugbunurhie and he too continued to enjoy the rents accruing from the Mclver lease.

Ebba and Chief Ogodo died and their families continued to live in harmony, particularly when Itoto Ogodo was head of the Ogodo family and the two families continued to share the rents on the Mclver lease among themselves. I may mention that the interests of the Mclver & Co. Ltd. had passed to African Timber & Plywood Ltd which later became a Division of the UAC Nigeria Ltd. (the 3rd Defendant in these proceedings). On the death of Itoto Ogodo, however, members of the Ogodo family denied the Ebba family of a share in the rents and matters came to a head when in

1974 the Ogodo family sued the Ebba family, among others claiming:-

"(1) As against all the Defendants . A Declaration that the plaintiffs and members of their family are according to Native Law and Custom, the owners in possession and in absolute title to all that piece or parcel of land called OGOBOBARE situated at Sapele within the jurisdiction of this Honourable Court the area, extent and limit of the said land is more particularly shown on the survey plan No. TJM 1783 and accordingly hatched GREEN in the said survey plan filed with this statement of claim. B

(2) As against the second and third Defendants only An order for the payment over to the plaintiffs of the amount of money found to have been paid as compensation by the Western Region Government/Midwestern State Government to the second and third Defendants in error and or as a result of the false representation made to it by the second and third Defendants. C D

(3) As against the second and third Defendants only An order for the payment over to the plaintiff of the amount of N1,200.00 (One thousand two hundred Naira) received as ten years rent by the second and third Defendants from Koloko Importers and Exporters Limited by falsely representing themselves as owners of part of Ogobobare land in Sapele. E

(4) As against the second and third Defendants only An order of forfeiture in respect of the area occupied by them because of the grave misconduct on part of the said Defendants in challenging the plaintiffs' title to the land and dispossessing the plaintiffs of portions of the said land. F

(5) A perpetual injunction restraining the defendants, their agents, servants/prives from entering the said plaintiff's land known as OGOBOBARE edged GREEN on the survey plan No. TJM 1783 filed with this Statement of Claim." G

The land originally leased to Melver & Co. Ltd, and now known as A. T.& P. Land is within the land claimed by the Ogodo family in this action. See Exhibit N. H

By the pleadings of the parties in the said action, particularly paragraphs 11 & 12 of the Respondents' statement of claim and paragraph 11 of the Appellants' statement of defence the issues as to who founded the A.

T. & P land and who leased it originally to McIver & Co. Ltd. were put in issue, among other issues arising in the case. At the end of the trial in that case, the learned trial Judge, Ogbobine J, in a 56 - page judgment, found:

"While the fact that John Afejuku's father lived in Ugbeyiyi village with his family was not denied by the 2nd defendant, the contention of 2nd defendant that it was his father who gave late Afejuku authority to settle in the village could not be true. My belief is that Afejuku went to Chief Ogoto to obtain permission because Chief Ogoto was the head of a large family organisation known as Ogoto family who owned the entire area of land known as Ogoto family land. This family organisation included the descendants of Emagun Kekeke, Ebba, and that of Ibono (grand-mother of Andrew Esiso Eghrujakpor, 8th P.W.) and it was as a result of the acceptance of this family set up under the name of Ogoto quarter that it became possible for chief Godwin Asakosomi Kekeke (5th P.W.) to represent Ogoto quarter, both in the body known as landlords representatives of Sapele Okpe Community, and in the Okpe Communal Land Trust which was established by law. It was also the acceptance of 2nd defendant as a member of the said Ogoto family for land owning purposes that he was also a Trustee of the Okpe Trust at a certain time. It was never suggested to chief Kekeke (5th P.W.) and 2nd Defendant that their membership of the Sapele Okpe Communal Land Trust derived its strength from other sources."

2. "The land was described as Ogoto land in early times, not in the sense that it belonged to late Chief Ogoto personally or his immediate children, but that it was the property of Chief Ogoto and all his relations who had settled with him at Ajogodo originally, and who, for various reasons, had to extend their settlements to other parts of the land which is today described as Ogoto quarter."

3. "I accept the evidence that Ogoto village itself was founded by late chief Ogoto, but reject plaintiffs' case that he personally founded the settlement now known as Ugbeyiyi, and that the name, Akukpamara was invented purposely for this case."

4. "I am satisfied that when Ebba settled with his children at Ugbeyiyi, he did so as of right and that he obtained no permission from

Chief Ogodo. In fact, it is my finding that it was Ebba's possession of Ugbeyiyi land that clothed it with being part of Ogodo quarter as there was no evidence, and there could be none to show that when Chief Ogodo moved from Mclver area of Ajodogo village he was able to map out the entire area of land he had acquired. There is no doubt that what we knew as Ogodo quarter or ward today came into existence as a result of out-spreads by Ogodo relations who previously lived as Ajogodo. The out-spreads were accomplished through farming and establishment of camps and villages by different persons, on the land."

5. "I accept and believe the evidence that Ebba family is one of such minor families in Sapele; although Ogodo family is the principal family in the quarter to which both families belonged. To this extent, I am convinced that members of Ebba family are the owners of the land in their possession."

6. "I find as a fact that Ebba family are the owners of the entire area of land verged Red in their plan, Exhibit h"

7. "The 2nd and 3rd defendants are no customary tenants on Ogodo quarter, and there was no doubt that late chief Ogodo had these people in mind when in conveying land to Messrs. M.B. Mclver & Co. Ltd; through their agents, Mr. John Grady, 1902, it was recited; that chief Ogodo was conveying ..... " For himself on behalf of his heir and successors lawful possession, Title and interest and all of the above-named District whose consent is in accordance with the law and custom prevailing in Southern Nigeria, West Africa." The District in the recital was Ogodo's Town, Sapele, in southern Nigeria. It is obvious that the conveyance by late Chief Ogodo to Mclver Company Ltd. was on behalf of the people who have any proprietary interests in Ogodo town and not only for Ogodo family or children. The evidence which I have accepted is that 2nd and 3rd defendants and Kekeke family have such interests in Ogodo land and except there are proven acts of misconduct recognised by okpe native law and custom they cannot be ejected from the land nor can their holdings be forfeited. There is no such evidence in this case and the claim is entirely misconceived."

The learned Judge concluded thus:

"In conclusion, I am of the opinion that this is a case which should not have come to court, at least, in the form of the reliefs claimed, as the entire case is without any merit, and it is wholly dismissed against all the defendants with costs."

B Respondents' appeal to the Court of Appeal was successful. But on further appeal to this Court by the Appellants, the judgment of the Court of Appeal was set aside and that of Ogbobine J. was restored. It would appear from the judgment of this Court that finding (7) above was not questioned by the Respondents either in the Court of Appeal nor in this Court as it did not feature at all in the lead judgment of Eso, JSC.

C Following the judgment of this Court restoring the judgment of Ogbobine J. the Appellants demanded from the Respondents their own share of the rent being paid by the 3rd Defendant to the Respondents in respect of the lease, Exhibit D but the Respondents would not pay. Hence the present action leading to this appeal.

D It is clear from the claims in this case that the judgment Exhibit C is the plank on which the Appellants premised their case. In effect, they are saying that as the court found in S/23/74 that they are entitled to a share in the rents accruing from Exhibit D and as the Respondents have denied them of it, they are entitled to succeed in their claims. They thus rely on issue estoppel, that is that the issue of their entitlement to a share in the rents having been decided in Suit S/23/74, the Respondents are estopped from averring to the contrary. What then is issue estoppel? And does it apply in this case to the benefit of the Appellants?

F In Duchess of Kingston's Case (1776) 2 Smith's Leading Cases (12th edition) 754, the following note appeared:

G "*An estoppel, therefore, is an admission; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature - so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it.*"

H This passage was cited with approval by the Federal Supreme Court (as this Court was formerly known) in Ihenacho Nwaneri & Ors. v. Nnadikwe Oriuwa & Ors (1959) 4 FSC 132. In Standard Bank of Ni-

geria Ltd. v. Chief Festus Ikomi (1972) 1 SC 164 at 177-179 where the issue of estoppel was raised to preclude a defendant raising once again the validity of certain document that had been held in a previous action to be invalid, this Court, per Madarikan JSC, observed:

"We consider that Mr. Bentley's contention is well founded. Indeed, if such a rule does not prevail, litigation would be interminable. Support for this view is to be found in the recent decision of this Court in O. Ogwe & others v. Chief Kanu Ekpezu & Ors. SC. 231/1970 delivered on 29/10/71 in which we said:

*The effect of what Mr. Ogwe claimed he could do was to ignore the decision of three courts including the then highest possible appellate court (the Privy Council) and to take a point that could (and indeed should as lack of jurisdiction ought to be pleaded though it may otherwise be raised at the hearing) have been taken. We do not think that in such circumstances, notwithstanding the provisions of section 52 of the Evidence Act, that it was in any way an error of the learned trial judge to hold that this was an abuse of the process of the court ..... we therefore refused to allow Mr. Ogwe to argue on the merits that the learned trial judge was wrong to come to the conclusion that he did that the order transferring the suit to the Aba High Court was in fact validly made as we did not think he was entitled to raise the issue.'*

That decision is in accord with the following observations of Wigram V-C in Henderson v. Henderson (1843) 3 Hare 114 reported in 67 E.R. 313 at page 319.

*I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court require the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form*

*an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'*

This passage was quoted with approval by the privy council  
 B Hoystead and Others v. Commissioner of Taxation (1926) A.C. 155 at page 170 and was therein described as settled law on the subject; and also by the High Court of Lagos in A.G. Ijele v. A.G. Leventis & Co. Ltd. (1961) ANLR 762 at page 769.

C We must therefore come to the conclusion that having unsuccessfully contested the validity of Exhibits A and B in suit No. W/50/60, it was not competent for the respondent to contend in any subsequent proceedings between the parties that the documents were void. It follows, in our view, that the learned trial judge was in error in entertaining the de-  
 D fence of the respondent that the documents were void and grounding his judgment upon it."

Issue estoppel was again considered by this court in Fadiora v. Gbadebo (1978) 3 SC 219, 228-9 where this Court, per Idigbe JSC, explained:

E "Now, there are two kinds of estoppel by record inter partes or per 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 5041. Therefore, on this principle of law  
 F (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 litigating in the same capacity (and on the same subject matter), there is an end of the matter. They are precluded from  
 G relitigating 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 proceed-  
 H ings between the same parties (or their privies); in these circumstances, 'issue estoppel' arise. 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 Qutram 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 of 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 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)." B C

See also: S. D. Ojo v. Jean Abadie, 15 W.A.C.A. 54, at 55 where it was held: D

"It is hardly necessary to add that when once it is made clear that the self-same question is substantially in issue in two suits, the precise form in which either suit is brought, or the fact that the plaintiff in the one case was the defendant in the other is immaterial, the estoppel subsists between the parties." E

and Onyeama Ezenwa v. Mazeli & Ors, 15 WACA 67.

The issue was again revisited by this Court in Ezenwani v. Onwordi (1986) 4 NWLR 27. This Court approved the above passage of Idigbe JSC and Kazeem JSC, at p. 43 said: F

"..... I entirely agree with both the learned trial judge and the Court of Appeal that the issue of traditional history having been previously decided in the 1962 cases between both parties in this appeal, and on the same land in dispute, against the appellants, it has become an 'issue estoppel'. Hence the appellants were estopped from relitigating the issue in this case." G

See also the dicta of Obaseki, Aniagolu and Oputa JJSC in the case.

Another case I need refer to is Aro v. Fabolude (1983) 2 SC 75. In a previous action in the Customary Court between the same parties over the same land, that court had held that the previous owner died without a son. In a subsequent action between the parties plaintiff sought to prove

that the previous owner died leaving behind a son. It was held by this Court that he was precluded from so proving as he was caught by the rule of issue estoppel. Aniagolu JSC observed at pp 98 - 99:

"The basis for the plaintiff's claim was therefore thrown over-board in that judgment of 1972. The said basis was that he was the son of Aro Orija and that Aro Orija was the owner of the land in dispute and that the land descended to him as direct son of the said Aro Orija. Since the court held that Aro Orija never had a son, having died without an issue, the substratum of the plaintiff's claim had gone and any claim made by him on the basis that he was the son of Aro Orija must necessarily fail. That issue having been settled in 1972 in a decision of a court of competent jurisdiction, the plaintiff could not be allowed to re-open the issue."

And at pp.100-101 he said:

"As part of the principle that society must discourage prolongation of litigation, the doctrine has been developed that a party to civil proceedings is not allowed to make an assertion against the other party, whether of facts or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence, in a previous suit between the same parties or their predecessors in title, and was determined by a court of competent jurisdiction, unless further material be found which was not available, and could not, by reasonable diligence, have been available, in the previous proceedings. (See Mills v. Cooper [supra] at page 104."

The learned Justice of the Supreme Court cited with approval two passages in Fidelitas Shipping Co. Ltd. v. V/O Exportchled (1966) 1 QB 630, 640 where Lord Denning M.R. explained:

"That issue having been decided by the court, can it be reopened before the umpire? I think not. It is a case of 'issue estoppel' as distinct from 'cause of action estoppel' and 'fact estoppel', a distinction which was well explained by Diplock L.J. in Thoday v. Thoday. The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause.

Transit in rem judicatum: See King v. Hoare. But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to right that issue all over again. B The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see Badar Bee v. Habib Merican Noordin, per Lord Macnaghten. And within one issue, there may be several points available which go to aid one party or the C other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertance, or even accident (which D would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances." E

and at p. 642 where Diplock LJ said:-

"In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provisions enabling one or more questions (whether of fact or law) F in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit G advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will H only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due dili-

gence."

Diplock LJ had earlier in Thoday v. Thoday (1964) P.181 at 197-198 explained the law on estoppel thus:

"The particular type of estoppel relied upon by the husband is  
 B estoppel per rem judicatam. This is a generic term which in modern law  
 includes two species. The first species, which I will call 'cause of action  
 estoppel' is that which prevents a party to an action from asserting or deny-  
 ing, as against the other party, the existence of a particular cause of  
 C action, the non-existence of which has been determined by a court of com-  
 petent jurisdiction in previous litigation between the same parties. If the  
 cause of action was determined to exist, i.e., judgment was given upon it, it  
 is said to merge in the judgment, or, for those who prefer Latin, transit in  
rem judicatam. If it was determined not to exist, the unsuccessful plaintiff  
 D can no longer assert that it does, he is estopped per rem judicatam. This is  
 simply an application of the rule of public policy expressed in the Latin  
 maxim, 'Nemo debet bis vexari' 'pro una et eadem causa'. In this applica-  
 tion of the maxim 'causa' bears its literal Latin meaning. The second spe-  
 E cies, which I will call 'issue estoppel,' is an extension of the same rule of  
 public policy. There are many causes of action which can only be estab-  
 lished by proving that two or more different conditions are fulfilled. Such  
 causes of action involve as many separate issues between the parties as  
 F there are conditions to be fulfilled by the plaintiff in order to establish his  
 cause of action; and there may be cases where the fulfilment of an identical  
 condition is a requirement common to two or more different causes of  
 action which can only be established by proving that two or more different  
 conditions are fulfilled. Such causes of action involve as many separate  
 G issues between the parties as there are conditions to be fulfilled by the  
 plaintiff in order to establish his cause of action; and there may be cases  
 where the fulfilment of an identical condition is a requirement common to  
 two or more different causes of action. If in litigation upon one such cause  
 H of action any of such separate issues as to whether a particular condition  
 has been fulfilled is determined by a court of competent jurisdiction, either  
 upon evidence or upon admission by a party to the litigation, neither party  
 can, in subsequent litigation between one another upon any cause of ac-

tion which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

**It is clear from all the authorities I have cited above and many that for issue estoppel to apply the following ingredients must be present -**

**1. the parties must be the same in the previous and present actions;**

**2. the same question that was decided in the previous action must arise in the present action in respect of the same subject matter and**

**3. that question must be a final decision of a competent court.**

I now turn attention to the instant case. There is no doubt, and this is not disputed by the Respondents, that the parties in the instant case were parties in Suit S/23/74. And that both actions relate to the same piece of land. In paragraphs 10, 11 and 12 of their statement of claim in suit S/23/74, the Respondents as part of the traditional history in support of that claim for ownership of the land in dispute, pleaded thus:

10. Ogodó and his father acquired more lands in the area and on the death of his father Okubor, the control and management of the land fell on the plaintiffs Ancestor, Chief Ogodó. Chief Ogodó built a farm hut on the land close to ORHIRHOGBON CREEK on when it became necessary that the earliest settlers should quit the area as a result of the facts pleaded in paragraphs 7 and 8 above, chief Ogodó moved into his farm hut and lived there with his children. The plaintiffs like their forebears exercised and still continue to exercise maximum acts of ownership over the land as it was a virgin forest when Chief Ogodó founded it. Chief Ogodó in 1902 leased the area to Mclver limited as family land and this area is shown on the Survey plan filed with this statement of claim. Plaintiffs will at the hearing of this action rely on the said Deed of Lease.

11. Prior to the lease referred to at paragraph 10 above, late chief Ogodó had founded more lands where he, his children and slaves farmed extensively, without any let or hindrance. Chief Ogodó had many children

and amongst them was one OGOBOBARE so named after one of his lands. The area was so named because of the abundance of red plantain fruits in the area. He named the other OGOTIEN. The two parcels of land OGOBOBARE and OGOTIEN are separated today by the Sapele/Warri Road. The area directly affected by this action is OGOBOBARE and hatched GREEN as aforesaid on the survey plan filed with this Statement of Claim while OGOTIEN represents the area shown as land of Ogodo family on the Western and North-western side of the said survey plan.

12. Chief Ogodo founded a village on the Ogotien side, while he kept his slaves busy at Ogobobare. His children also farmed there as aforesaid. Chief Ogodo made the grant of the lease to Mclver which later became A.T. and P. Sapele, the rent of which plaintiffs' family enjoy exclusively."

The Appellants replied to the above paragraphs in their statement of defence thus:

10. Second defendant denies paragraphs 10, 11 and 12 of the Statement of Claim and avers that Ogodo was born in OGIRHIBO in AMUKPE after it was founded. After the death of his father, OGODO lived with his mother's brother, ANUNU who later handed him over to ODJEGBA when he (OGODO) became unruly. MIVAYEGBEDIA did not like her sister's son living in the same compound with her as servant of her husband's brother. She therefore pleaded for and secured the release of OGODO by ODJEGBA. After his release, OGODO went to Sapele and settled in EGBORODE QUARTERS - a spot near the present day MAJOR BOWEN AVENUE EXTENSION. He later left OGBORODE QUARTERS and settled at OKUEPETE with late OVA - the father of ESIRI who he met already living in the camp.

11. In further answer to paragraphs 10, 11, and 12, of the Statement of claim, second Defendant avers that after the death of ADAGWORITSE, MIVAYIGBEDIA came to Sapele to meet her late husband's brothers, EVWIDIA, ABUKE and ERAWARE who gave her a spot at UGBUNURHIE (the present site of African Timber and Plywood) A.T. & P) to settle on with her children. With the help of her late husband's

brothers, MIVAYEGBDIA built a house near UGBUNURHIE and settled there with her children. She and her children occupied the adjoining area and farmed extensively there. Later MIVAYEGBEDIA brought OGODO from OKUEPETE to her new place at UGBENURHIE when at UGBENURHIE when he suffered series of misfortunes at OKUEPETE and he lost many wives and children. The spot where OGODO lived when MIVAYEGBEDIA brought him from OKUEPETE became known as OGODO village. Later when Mclver asked her for land, she mandated OGODO to act for her as her brother and agent as OGODO was then a popular figure within the family.

In respect of the issue raised in these pleadings the learned Judge found -

*"The 2nd and 3rd defendants are no customary tenants on Ogodo quarter, and there was no doubt that late Chief Ogodo had these people in mind when in conveying land to Messrs. M.B. Mclver & Co. Ltd. through their agent, Mr. John Grady, 1902, it was recited; that Chief Ogodo was conveying ..... For himself on behalf of his heirs and successors lawful possession, Title and interest and all of the above-named District whose consent is in accordance with the law and custom prevailing in Southern Nigeria, West Africa." The District in the recital was Ogodo's Town Sapele, in Southern Nigeria. It is obvious that the conveyance by late chief Ogodo to Mclver Company Ltd was on behalf of the people who have any proprietary interests in Ogodo town and not only for Ogodo family or children. The evidence which I have accepted is that 2nd and 3rd defendants and Kekeke family have such interest in Ogodo land and except there are proven acts of misconduct recognised by Okpe native law and custom they cannot be ejected from the land nor can their holdings be forfeited. There is no such evidence in this case and the claim is entirely misconceived."*

This finding was not disturbed on appeal. It is, therefore, final between the parties. It follows that all the ingredients constituting issue estoppel are present here.

**The Court below, as well as the trial Court found that issue was joined in Suit S/23/74 between the parties as to whether chief Ogodo executed Exhibit D on his behalf or in a representative capac-**

ity. Having so found and having found also that the trial judge in that case found that Chief Ogodo executed Exhibit D in a representative capacity and that the Appellants were among those represented by Chief Ogodo, both Courts ought to have found for the Appellants on their claims. The trial Court should not have allowed the Respondents to prove the contrary - See S.D. Ojo v. Jean Abadie (supra). Unfortunately, both Courts treated Exhibit C as if it was on appeal before them. They are wrong in so doing. Whatever their views on it, it was not their duty to depart from it. Their duty was to give effect to it, moreso that it is a final decision.

In conclusion, I am aware that the learned trial Judge, with respect, tried to resile from her previous finding that in S/23/74 "issues were joined as to the founder or the area known as Mclver now A. & T. P and also as to who leased the land to Mclver." In the course of her judgment the learned Judge remarked:

"The issue in the instant case is not the mere interpretation of the lease agreement. The question is whether the interpretation made is an issue resolved finally."

After setting out relevant paragraphs of the pleadings of the parties S/23/74 from Exhibits A & B, she observed:

"The 2nd Defendant now the plaintiffs at pages 9 to 10 of Exhibit 'B' in their Statement of defence paragraph 11 vehemently refuted the averment in paragraph 12 Exhibit 'A'. The learned Senior Advocate submitted that the issue joined in Suit No. S/23/74 were as to what capacity Chief Ogodo leased the land to Mclver. He argued that this issue was resolved in favour of the plaintiffs here. With respect I disagree. Paragraphs 10, 11 and 12 of Exhibit 'A' joined issues with paragraph 11 of the Statement of Defence of the 2nd Defendant at pages 9 to 10 of Exhibit 'B'. There is nowhere in any of these paragraphs where issues were joined as to what capacity chief Ogodo leased the land to Mclver. The issue as to what capacity Chief Ogodo leased the land to Mclver is therefore incidental to the main issue as to who founded the land.

Proceeding further, she concluded:

"..... can we hold here that the interpretation of Exhibit 'D' by

the Hon. Judge in that suit should be regarded as final judgment on the issue? My answer to this is 'No'. The issues joined on the Mclver land now A.T. & P land are who founded the Mclver land and who leased out the land. The main issue here is who founded or owned the land that was leased out. The leased agreement flows from the ownership of the land. B There was no finding as to who founded or owned the land. The interpretation of the lease agreement cannot therefore be regarded as a final decision on the issues joined. .... I refuse to accept that the interpretation of Exhibit 'D' in Exhibit 'C' which was not canvassed for any of the parties in C suit No. S/23/74 should be taken as issue estoppel. The issues canvassed for by both parties were who founded the Mclver area and who leased the area to Mclver. I hold that the issues were not resolved in Exhibit 'C'.

Of course, her final conclusion is at variance with her earlier finding that in S/23/74 "issues were joined as to the founder of the area known D as Mclver now A. T. & P and also as to who leased the land to Mclver." which finding is in accord with the pleadings in S/23/74. her final conclusion on the issue is, with respect, erroneous. The question as to who leased E land to Mclver arose in S/23/74 and was resolved in that case by the trial court whose decision was affirmed by this Court in Exhibit E. It is not open to the learned trial Judge in this case to question the finality of that decision.

Unfortunately, the Court below fell into the same error. That Court F correctly identified the issue arising in the instant action when Akpabio JCA in his lead judgment said:

"From the above arguments it becomes clear that there is only one question for determination in this appeal, namely whether the doctrine or G principle of 'issue estoppel' was properly raised in this case, and should have been allowed by the learned trial judge."

After reviewing the law on issue estoppel and the argument of learned counsel for the parties, Akpabio JCA, however, observed:

"Having all the above principles in mind, I have carefully read H through the pleadings of all the parties filed in this case, as well as the judgment of Ogbobine, J. and must say that the principle of issue estoppel cannot apply in the circumstances of this case. It is a fact that a pro-

nouncement was made by the learned trial judge in Suit No. S/23/74 about the capacity in which Ogodo signed the Deed of Lease between himself and McIver and Co. in 1902; but it is not every and any pronouncement made by a judge in a case that qualifies to be treated as a B 'ratio decidendi'."

He went on -

"..... I have looked at the claim of the Respondents as they appear at paragraph 38(1) - (5) of their statement of claim, Exhibit 'A' and C can find no head of claim that require the learned trial judge to interpret any Deed or Lease or document of title in the case."

The learned Justice of Appeal again said:

*"One may then ask, if the plaintiffs did not claim for the interpretation of any document, why then was the Lease Exhibit 'D' tendered? D The answer is clearly that the said Deed of Lease was tendered as proof of 'acts of ownership' of land which was adjacent to land in dispute, as pleaded at paragraph 10 of their statement of claim....."*

He went on to observe -

E "It is true that the 2nd defendant disputed that assertion and contended that Ogodo signed the Lease in question as agent of their grandmother NIVAYEGEDIA."

Then, rather strangely, the learned Justice of Appeal found:

F *"From the foregoing one will say that the parties certainly joined issues on whether Ogodo signed the lease Exhibit 'D' as his own or as agent to Mivayegbedia. But it is not every and any paragraph of the pleadings on which issues are joined, that a Judge should give a ruling on. The learned trial judge could merely have said that he believed or G did not believe that plaintiffs owned the land adjacent to the land in dispute, without going to interpret the lease, as that was a purely collateral issue. Even then, learned trial judge had no business interpreting a document which was supposed to speak for itself."*

H With profound respect to the learned Justice of Appeal I find it difficult to reconcile the various pronouncements made by him in the passages above. The learned Justice seemed to have confused himself when he equated a ratio decidendi of a decision with a finding on an issue joined by the par-

ties in their pleadings. Having found - and correctly in my humble view - that on the pleadings of the parties in S/23/74 "the parties certainly joined issues on whether Ogodo signed the lease Exhibit D as his own or as agent to Nivayegbedia" and that "it is a fact that a pronouncement was made by the learned trial judge in Suit No. S/23/74 about the capacity in which Ogodo signed the Deed of Lease between himself and Mclver and co. in 1902," the learned Justice ought to have also found that the plea of issue estoppel relied on by the Appellants was sustained.

**True enough, the interpretation of Exhibit D was not a specific claim in Suit No. S/23/74. But Appellants are not relying on cause of action estoppel but on issue estoppel. In a cause of action there may arise separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action. Such was the case in Suit S/23/74 where the Respondents claimed a declaration of title to a piece of land that included the Mclver land. Respondents relied in that case in Exhibit D in proof of their ownership. The capacity in which Exhibit D was executed became a separate issue in the case. The decision on the cause of action would raise between the parties estoppel per rem judicatam. But the decision on the capacity in which Exhibit D was executed would raise between them issue estoppel:**

To say that the learned Judge in Suit S/23/74 had no business interpreting Exhibit D is a rather uncharitable criticism. I do not see how that learned Judge could have resolved the issue placed before him by the parties as to the capacity in which Ogodo executed the Mclver lease without his looking into and construing Exhibit D. I think it is the learned Judge rather than their Lordships of the Court below, that did the correct thing.

Still on the findings of the Court below, Akpabio JCA in his lead judgment with which Ogebe and Ige JJCA agreed went into issues not canvassed by either party either in the court of trial or before their Lordships of the Court of Appeal, all with a view to finding for the Respondents. For instance, on the course of his judgment, he said:

"Lastly, I must say that even if I am held to be wrong, i.e, just in

case a higher court says that the principle of Issue Estoppel could apply in this case, I will go further and say that the appellant would still not be successful in the present claim, as the same defences which were available against the Respondents in Suit No. S/23/74, would also become available against the present appellants namely that laches and acquiescence will operate against them. Why was this suit not instituted since 1902, when the lease was made? From 1902 to 1987 when this suit No S/23/74 was instituted is 85 years. In suit No. S/23/74 the learned trial judge held that plaintiffs had delayed for 15 years before instituting their action, and this was upheld by the Supreme Court, It is my firm view therefore that 85 years delay will equally be too late."

Again the learned Justice of Appeal said:

"It must also be observed that the mere pronouncement by the learned trial Judge in S/23/74, that Chief Ogodo signed the lease Exhibit 'D' in 1902, for himself and other members of Ogodo family, which included the Appellants herein, could not, and did not automatically confer on the appellants the right to share from rents without establishing how their interest arose. That is because in order to be entitled to share of rents, the party must have been a joint or common owner of the property from which the rents are derived. In the instant case the Appellants have not proved precisely what area of McIver land belonged to them, and therefore, the proportion of the rents payable to them."

This latter gratuitous observation was, with respect, obviously based on a complete lack of understanding of the case of the parties in Suit S/23/74.

The learned Justice again observed:

"One must also observe that the claim of the appellants in the instant suit appears to be clearly at variance with the pleadings in their Statement of defence filed in Suit No. S/23/74."

Clearly all these issues were neither pleaded nor canvassed before the Court below nor even at the trial Court. One is tempted to think that their Lordships of the Court below unwittingly descended into the arena and were content to canvass and decide, on behalf of the Respondents, all and every possible issue not raised by the latter. They seemed to forget that there was no cross-appeal by the Respondents before them.

I think the two Courts below proceeded on wrong principles. Their judgments, therefore, cannot be allowed to stand. This appeal has merit and it is hereby allowed. The judgments of the two Courts below are hereby set aside. I enter judgment in favour of the Appellants on their claims (2) and (3), I however, remit claim (1) to the High Court of Delta State, Sapele Judicial Division for the apportioning of the rents to be made between the parties and a copy of the order made is to be forwarded to this Court. B

The Appellants are entitled to their costs which I assess at N750.00 in the trial High Court, N1,000.00 in the Court Appeal and N10,000.00 in this Court. C

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**KARIBI-WHYTE JSC**

I have read the leading judgment of my learned brother Ogundare, JSC in this appeal. I agree with his reasoning and conclusion, allowing the appeal, entering judgment for the Appellants in respect of claims (2) and (3) and remitting claim (1) to the High Court of Delta State, Sapele Judicial Division for the apportioning of the rents between the parties to be made and for a copy of the order made to be forwarded to this Court. Appellants are entitled to their costs assessed as follows - N750; in the trial High Court; N1,000 in the Court below and N10,000 in this Court. D E F

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**MOHAMMED JSC**

I agree that the trial High Court was in error to dismiss the appellants claim and the court below is wrong to affirm that decision. I have gone through the draft judgment of my learned brother, Ogundare, JSC, in the judgment just read and I agree that this appeal ought to be allowed. It is accordingly allowed. The judgments of the two courts below are set aside. I abide by the consequential orders made in the lead judgment including the assessment on costs. G H

**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Ogundare, JSC in this appeal. I agree with it and for the reasons which he has given, I, too, would allow this appeal. I also abide by the order for costs.

**EJIWUNMI JSC**

I was privileged to have read in advance the judgment just delivered by my learned brother Ogundare JSC. In the course of that judgment, the appeal was allowed following a very careful review of the facts and the issues raised thereon.

The action commenced when the plaintiffs, appellants in this appeal for themselves and on behalf of Ebbah family sued Chief Warri Ogodo and warder Samuel Ogodo, for themselves and on behalf of Ogodo family and the African Timber and Plywood (Nig) Ltd. as 3rd defendant. The U.A.C. of Nigeria was later by order of High Court dated 11/9/87 joined as 3rd defendant in place of the African Timber & Plywood (Nig) Ltd.

The claims of the appellants against the defendants, now respondents read thus:-

(1) *An order apportioning the rent payable by the 3rd defendant between the plaintiffs and the 1st & 2nd Defendants.*

(2) *An order that 1st and 2nd Defendants do render a true account of all rents received by them from the 3rd defendant since the judgment in suit No. S/23/74 and payment over to plaintiffs of their share of the said rent.*

(3) *An order of injunction restraining the 1st and 2nd Defendants from receiving the aforesaid rent to the exclusion of the plaintiffs and 3rd defendant from paying over to the 1st and 2nd Defendants to the exclusion of the plaintiffs the aforesaid rent."*

Following the order for pleadings, the parties filed and exchanged their pleadings, and further amended same with the leave of Court.

It is manifest from the pleading so filed that the dispute between the parties arose from the refusal of the present respondents to share with

the appellants, the rents and money due under the lease of Ugbunurhie land. In this regard, it is relevant to set out paragraphs 8, 10, 11, 12, 13 and 14 of the appellant's Amended Statement of Claim, where they pleaded thus:-

"(8) Whilst Ogodo and Mivayegbedia were at Ugbunurhie in Sapele, various European traders came to what is now Sapele to seek new trading posts. As these alien traders required land by the River, they approached Mivayegbedia and asked for land at Ugbunurhie. Being a woman of advanced age at the time, she mandated Chief Ogodo to negotiate with the European on her behalf. He did so and the result was the Deed of Lease dated 6th August, 1902 as pleaded in paragraph 3 of this Amended Statement of Claim. The money paid by the Grantee and the rent for the land was enjoyed by the plaintiffs' grand mother and late Chief Ogodo in their life time.

(10) By Okpe Native Laws and Customs, the property of a deceased mother pass to her children upon death and in this way Ebbah succeeded to her late mother's right to the rents and money due under the lease of Ugbunurhie land - the present site of the A.T.P granted to Mclver and Company Limited by the Lease pleaded in paragraph 3 of this Amended Statement of Claim.

(11) For some years after the death of plaintiff's father, about 1956, members of Ogodo family collected the rents due under the lease and at the time when Itoto Ogodo was head of Ogodo family, he did everything to ensure a harmonious relationship between members of plaintiffs' family and Ogodo family.

(12) After the death of Chief Itoto Ogodo members of the Ogodo family became aggressive and greedy and attempted to exclude plaintiffs not only from taking a share in the rents from 3rd Defendant but totally from being natives of Sapele.

(13) The matters came to a head when Ogodo family instituted suit No. S/23/74 against the Ebbah family and others claiming ownership not only of A.T. & P premises but of Ugbeyiyi village itself. Plaintiffs joined issues with the Ogodo family on their said claim and on the question as to whether late Chief Ogodo acted for himself beneficially or for

himself and others including late Ebbah when he signed the Lease to Mclver and Company Limited in 1902. Plaintiffs will found on the pleadings and judgment in the said suit No. S/23/74.

(14) The issue raised on the capacity in which late Chief Ogoto signed the said lease was resolved in favour of the plaintiffs when the trial Judge held:-

*"The 2nd and 3rd defendants are no customary tenants on Ogoto Quarters, and there was no doubt that late Chief Ogoto had these people in mind when in conveying land to Messrs M.B. Mclver & co. Limited, through their agent, Mr. John Grady, 1902, it was recited through their Ogoto was conveying' .... ' for himself on behalf of his heirs and successors lawful possession, Title and interest and all of the above-named District whose consent is in accordance with the law and custom prevailing in Southern Nigeria, West Africa.*

*"The District in the recital was Ogoto's Town, Sapele, in Southern Nigeria. It is obvious that the conveyance by late Chief Ogoto to Mclver Company Limited was on behalf of the people who have any proprietary interests in Ogoto Town and not only for Ogoto family or children. The evidence which I have accepted is that 2nd and 3rd Defendants and Kekeke family have such interests in Ogoto land. Plaintiffs may found on the said judgment and the judgment of the Supreme Court in Suit No. SC/79/82 confirming the said judgment of the Sapele High Court."*

The position therefore of the appellants', upon their pleadings, would appear to be that being descendants of Mivayegbedia who mandated Chief Ogoto to negotiate with the Europeans on her behalf to grant lease hold interests over Ugbunurhie land to Mclver and Company, (Premises of A.T.& P), they are joint beneficiaries with the Respondents of the rents and money accruing from the said lease. That their right to the said rents and money received further support from the judgment in Suit No. S/H 23/74 instituted by the Ogoto family and others. In that suit, the Ogoto family claimed the ownership not only of A.T.& P, premises, but of Ugbeyiyi village itself. Significantly the appellants also joined issues with the Ogoto family on their said claim and on the question as to whether Late Chief

Ogodo acted for himself beneficially or for himself and others including late Ebba when he signed the lease to Messrs McIver and Company Limited in 1902. After a full trial, the court in that case considered the conveyance with which the land was conveyed to the said Company, before it held, inter alia, that the Late Chief Ogodo conveyed the land to Messrs McIver Company Limited for and on behalf of the people who have any proprietary interests in Ogodo town, and not only for Ogodo family or children. That judgment was confirmed by the Supreme Court in suit No. SC/79/82.

The respondents, resisting the appellants' claims, pleaded inter alia, that the appellants are not entitled to any share in the rents and funds paid by A.T.& P. It is however, their claim that the rents paid in respect of the leased property have always been paid to Chief Ogodo who enjoyed it exclusively and which was later enjoyed by his descendants to the exclusion of relations. Though the respondents admitted that they instituted suit No. S/23/74, against the appellants, they however claimed that the exclusive ownership of Ugbunurhie land now occupied by A.T.& P was not an issue in the trial.

The 3rd respondent, beyond pleading that it is a tenant on the land, did not take any part in the proceedings. Upon that premise, it would comply with all orders made by the Court with regard to the payment of rents, not already paid.

After hearing the evidence led at the trial, and the addresses of counsel, the learned trial judge dismissed the appellants' claim. The appellants, not satisfied with that judgment, appealed unsuccessfully to the Court of Appeal (Benin Division). And they have now further appealed to this Court upon eight (8) grounds of appeal. Pursuant to the rules of this court, the parties filed and exchanged their respective briefs of argument. The appellants in their own brief identified the following issues for determination in this appeal; viz:-

*"(1) Were the learned Justices right in their view that the pronouncement of Ogbobine J or his interpretation of the 1902 lease Exhibit D in the previous suit Exhibit C did not amount to a decision.*

*(2) Were the learned Justices right in law in their view that the*

*question raised on the Mclver lease and resolved in Suit No. S/23/74 is not the same as the question raised in the current suit.*

(3) *Were the learned Justices right in affirming the decision of the trial court on the basis that the principle of issue estoppel did not apply in this case.*

"(4) *Were the learned Justice right in raising and deciding a matter not arising from any of the grounds of appeal.*

(5) *Were the learned Justices entitled in law to treat the Judgment in Suit No. S/23/74 as confirmed by Exhibit "E" as if it was on appeal before it."*

For the respondents, their learned counsel formulated the issues hereunder, for the determination of the appeal:-

"(a) *whether a decision or remarks made by the trial court not based upon the issues raised in the pleadings can constitute an issue estoppel on which a new action can be founded.*

(b) *Whether the interpretation of exhibit 'D' by the learned trial judge in S/23/74 outside the consent of Exhibit 'D' which went to no issue can establish an issue estoppel as claimed by the Appellants in this appeal."*

For the appellants, MR. OKPOKO SAN, their learned counsel argued both in his brief and in oral arguments that issues estoppel arose. For that contention, learned Senior advocate referred to the pleadings filed by the parties and submitted that issue estoppel was duly raised as the parties joined issues thereon. It is his further submission that it was the court below and trial court that totally failed to properly understand the issue as pleaded. It was the failure of the trial court to appreciate the meaning and effect of the pleadings that led to conclusion reached by the trial court that issue estoppel was not raised to sustain the claim of the appellants, that conclusion was affirmed by the court below.

The learned counsel for the respondents, Chief Ororho, being of the same view as the court below, and the trial court made submissions to that effect in the respondents' brief and his oral arguments before us.

I have before now referred to the pleadings of the parties. Paragraphs relevant thereto would be referred to again later in this judgment as

deemed necessary not to refer to them again at this stage. However, my starting point for the consideration of whether issue estoppel was raised would begin with the judgment of the trial court. It is clear that the learned trial judge recognised, after listening to the submission of learned counsel that the case before the judge is centered on the judgment in suit No. S/ 23/74, as the court said at page 136 of the record:-

*"from the submission of both learned counsel there is no doubt that the reliefs sought by the plaintiffs is based completely on the judgment in suit No. S/23/74 between Ogodo family and the Ebba family, who were 2nd defendants in that suit."*

The learned trial judge thereafter referred to certain paragraphs of the pleadings of the parties in suit No. S/23/74 Exhibit 'A'). The respondents who were the plaintiffs in that suit averred thus in paragraphs:-

*"10. Ogodo and his father acquired more lands in the area and on the death of his father Okubor, the control and management of the land fell on the plaintiffs' ancestor, chief Ogodo. Chief Ogodo built a farm but on the land close to ORHIRHOGBON CREEK so when it became necessary that the earliest settlers should quit the area as a result of the facts pleaded in paragraph 7 and 8 above, Chief Ogodo moved into his farm hut and lived there with his children. The plaintiffs like their forebears exercised and still continue to exercise maximum acts of ownership over the land as it was a virgin forest when Chief Ogodo founded it. Chief Ogodo in 1902 leased the area to Mclver Limited as family land and this area is shown on the Survey plan file with this statement of claim. Plaintiffs will at the hearing of this action rely on the said Deed of Lease."*

*11. Prior to the lease referred to at paragraph 10 above, late Chief Ogodo had founded more lands where he, his children and slaves farmed extensively, without any let or hindrance. Chief Ogodo had many children and amongst them was one OGOBOBARE so named after one of his lands. The area was so named because of the abundance of red plantain fruits in the area. He named the other OGOTIEN. The two parcels of land OGOBOBARE and OGOTIEN are separated today by the Sapele/Warri Road. The area directly affected by this action is*

*OGOBOBARE and hatched GREEN as aforesaid on the Survey plan filed with this statement of claim while "OGOTIEN" represents the area shown as land of Ogodo family on the Western and north-Western side of the said survey plan.*

B 12. Chief Ogodo founded a village on the Ogotien side, while he kept his slaves busy at Ogobobare. His children also farmed there as aforesaid. Chief Ogodo made the grant of the lease to MacIver which later became A.T. & P. Sapele, the rent of which plaintiffs' family enjoy exclusively."

C And the appellants, who in Suit No. S/23/74, were the 2nd defendant, averred by paragraph 11 of their pleadings (Exh. B) as follows:

"11. In further answer to paragraphs 10, 11 and 12 of the Statement of Claim, second Defendant avers that after the death of D ADAGWORITSE, MIVAYIGBEDIA came to Sapele to meet her late husband's brothers, EVWIDIA, ABEKE and ERAWARE who gave her a spot at UGBUNURHIE (the present site of African Timber and Plywood) A.T. & P) to settle on with her children. With the held of her late husband's E brother, MIVAYEGBEDIA built a house near UGBUNURHIE and settled there with her children. She and her children occupied the adjoining area and farmed extensively there.

Later MIVAYEGBEDIA brought OGODO from OKUEPETE to her new place at UGBUNURHIE when he suffered series of mis-fourtunes at F OKUEPETE and he lost many wives and children. The spot where OGODO lived when MIVAYEGBEDIA brought him from OKUEPETE became known as OGODO village. Later when MACLVER asked her for land, she mandated OGODO to act for her as her brother and agent as G OGODO was then a popular figure within the family."

It is remarkable to note that the learned trial judge then observed, and, quite rightly, that "The extracts from Exhibits "A" and "B" above clearly shows that issues were joined as to the founder of the areas known H as MCLVER now A.T. & P and also as to who leased the land to Mclver."

The learned trial judge then referred to how those issues were resolved by the trial judge, Ogbobine J. in suit No. S/23/74. In the course of his judgment, exhibit C, the earned trial judge had to consider exhibit D, the lease

agreement with which concerned the disputed land in that suit, and which included the land now occupied by the A.T & P., the subject matter of this appeal. At pages 53-54 of exhibit C., the learned trial judge, Ogbobine J said of Exh. D as follows:-

*"The 2nd and 3rd Defendants are no customary tenants on Ogodo quarter, and there was no doubt that late Chief Ogodo had these people in mind when in conveying land to Messrs. M.B. Mclver Co. Ltd; through their agent, Mr. John Grady, 1902, it was recited; that Chief Ogodo was conveying."....." For himself on behalf of his heirs and successors lawful possession, Title and interest and all of the above named District whose consent is in accordance with the law and custom prevailing in southern Nigeria, West Africa." The District in the recital was Ogodo's Town, Sapele, in Southern Nigeria. It is obvious that the conveyance by late Chief Ogodo to Mclver Company Ltd was on behalf of the people who have any proprietary interests in Ogodo Town and not only for Ogodo family or Children. The evidence which I have accepted is that 2nd and 3rd Defendants and Kekeke family have such interests in Ogodo land and except there are proven acts of misconduct recognised by Okpe native law and custom they cannot be ejected from the land nor can their holdings be forfeited."*

Reverting to the instant appeal, the learned trial judge, Okungbowa J, after observing that, "It should be noted from Exhibit "C" that the A.T. & P area only relates to a fraction of the total land claimed in suit No. S/23/74." then considered the arguments presented to the Court and the authorities cited by counsel, which included Ezeani & Ors. v. Onwordi & Ors (1986) 4 NWLR (Pt. 33) 27 at 42 before reaching the following conclusion. In the first place, the learned judge refused to uphold the submission that the interpretation of Exhibit "D" by Ogbobine J. suit No. S/23/74, should be regarded as final judgment on that issue. The learned trial judge, Okungbowa J. then went on to hold in respect of the judgment of Ogbobine J, at page 143 of the printed record, that:

*"The main issue here is who founded or owned the land that was leased out. The lease flows from the ownership of the land. There was no finding as to who founded or owned the land. The interpretation of the*

*lease agreement cannot therefore be regarded as a final decision on the issue joined."*

From what I have above, it is no doubt clear that though the learned trial judge recognised that issue estoppel was raised from the pleadings of the parties, yet the learned judge was unable to uphold that plea in favour of the appellants. It is also evident that the learned trial judge was not able to do so because she fell into error with regard to the true purport of the judgment of Ogbobine J. in suit No. S/23/74. In spite of that lack of understanding of the judgment of Ogbobine J., it must be observed that the judgment of Ogbobine J. has since been affirmed by this Court.

On appeal to the Court below, the appellants questioned whether the learned trial judge was right in holding that the principle of issue estoppel and applied by the Supreme Court in Ezeani & Ors v. Onwordi & Ors. (supra) is inapplicable to the case in hand. And whether the learned trial judge was right in holding that the parties in Suit No. S/23/74 did not join issues as to the capacity in which Chief Ogoto granted Exhibit "D" to McIver.

The Court below, per the leading judgment of Akpabio JCA (with which Ogebe and Ige (JJCA) concurred, having considered the arguments presented to that Court, appeared to have recognised the principles that are required to raise effectively the doctrine of issue estoppel in favour of a party in a suit. In that context, reference was made to a number of cases including Ezeani v. Onwordi (supra), Odje & Wedje v. Echanokpe (supra), Thoday v. Thoday (1964) P. 181 at 197 - 198; Samuel Fadiora Anor. v. Festus Gbadebo & Anor (1978) 3 SC; Ogbogu v. Ndiribe (1992) 6 NWLR (pt. 245) 40; Osunrinde v. Ajamogun (1992) 6 NWLR (pt. 246) 156 and Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126.

With those principles variously stated in the above authorities and others on when a court may apply the doctrine of *resjudicata* and issue estoppel to determine a matter before it. His lordship Akpabio JCA, then said, at pages 241 to 242 of the printed record thus:-

*"Having all the above principles in mind, I have carefully read through the pleadings of all the parties filed in this case, as well as the*

*judgment of Ogbobine J, and must say that the principle of issue estoppel cannot apply in the circumstances of this case. It is a fact a pronouncement was made by the learned trial judge in suit No. S/23/74 about the capacity in which Ogodo signed the Deed of Lease between himself and McIver and Co. in 1902; but it is not every and any pronouncement made by a judge in a case that qualifies to be treated as a "ratio decidendi."* B

It is evident from the above quotation from the judgement of the learned Justice of the Court of Appeal, that he accepted the submission of the respondent that the pronouncement made as to the capacity in Which Chief Ogodo signed the 1902 Lease was a mere obiter dictum. C This view was further emphasised when His lordship went on to say that:-

*"From the foregoing one will say that the parties certainly joined issue on whether, Ogodo signed the lease Exhibit "D" as his own or as agent to Mivayegbedia. But it is not every and any paragraph of the pleadings on which issues are joined, that a judge should give a ruling on. The learned trial judge could merely have said that he believed or did not believe that plaintiffs owned the land adjacent to the land in dispute, without going to interpret the lease, as that was a purely collateral issue. Even then, learned trial judge had no business interpreting a document which was supposed to speak for itself."* D E

The above observation of the learned Justice of the Court of Appeal, must in my view, be regarded as the pivot upon which the conclusion reached by the court below, that is - the appellants did not establish issue estoppel "in their favour. Hence their appeal was dismissed. The question that must now be considered is whether the decision of the court below was in accord with the settled principles on the doctrine of issue estoppel and when it applies to determine a suit. F G

In Ezewani v. Onwordi (1986) 4 NWLR (pt. 33) Obaseki JSC, quoted with approval the dictum of Lord Denning MR. in Fidelitas shipping Co. Ltd v. V/O Exportchled (1966) 1 Q.B. 630 at 640 which reads H thus:-

*"The issue having been decided by the court can it be re-opened before the Umpire? I think not. It is a case of "Issue estoppel" as distinct*

from "cause of action estoppel" or "fact estoppel," a distinction which was well explained by Diplock, L. J. in Thoday v. Thoday. The law as I understand it is this: If one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule that he cannot bring another action the same party for the same cause. Trans-  
 B sit in rem judicatam: See King v. Hoare. But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised  
 C and distinctly determined between the parties, then as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances. See Badar Bee v. Habib  
Merican Noordin, per Lord Macnaghten. And within one issue, there  
 D may be several points available which go to aid one party or the other in his effort to secure a determination of the issue in his favour. The rule is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular  
 E point from negligence, inadvertence or even accident (which would or might have decided in his favour) he may find himself shut out from raising the point again, at any rate, in any case where the self same issue arises in the same or subsequent proceedings. But this again is not an  
 F inflexible rule. It can departed from in special circumstances;"

This Court also cited the above dictum with approval in Amos Ogbesusi Aro v. Salami Fabolude (1983) NSCC 43 at page 51. And also in the same case this court made the following observation on the scope  
 G of this principle when Aniagolu JSC at page 46 of his judgment said:-

"In civil cases, before this principle is applied, the res the subject matter) in contention 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 resjudicata will ordi-  
 H narily fail (see Odua v. Nwanze (1934) 2 WACA 98 at 100 - 102). I say ordinarily" because the principle has been applied, in the public interest of the desirability of seeing an end to litigation, to an accommodation of a wider spectrum, "not only to points upon which the court was actually

*required by the parties to form an opinion and pronounce a judgment, but to every point which properly belong to the subject matter litigation and which the parties exercising reasonable diligence might have brought at the time (underlining mine). See Henderson v. Henderson (1943) 67 ER 313 at 319 cited with approval in Fabunmi v. Delekan (1965) NMLR B 369 at 373."*

I now return to the instant case. It is manifest from what I have said above that the appellant duly pleaded the judgment in S/23/74, and that the respondents by their own pleadings also joined issues with the appellants in the pleaded facts. C

The trial court considered whether issue estoppel was available to the appellants as pleaded. While the trial court found rightly that the parties are the same and that the land upon which they litigate in the instant case is part of the land that was the subject matter in Suit No. S/ 23/74, that court however felt compelled to hold that as the trial court in S/23/74, was not called upon to interpret the lease agreement tendered to the court in that case by respondents in the instance case, the learned trial judge had no business interpreting the said case. Hence the trial court E refused to uphold the plea of issue estoppel in favour of the appellants. The trial court obviously fell into error in that it considered the judgment of Ogbobine J. in Suit No. S/23/74, as if that judgment was on appeal before it. It does also appear to me, having regard to the excerpt from F the judgment of the court below, which has been quoted above, that the court below also fell into the same error. This is because in its approach to the determination of whether issue estoppel was raised by the judgment in Suit No. S/23/74, the court below apparently considered that G judgment as if it was on appeal before the court. With due respect, that approach is patently wrong and should not be encouraged. It must be taken that the court below apparently recognised that the judgment was specifically pleaded in the case that led to the instant appeal solely to determine whether any of the matters heard and determined in that appeal H raised "issue estoppel". If the above reason for pleading suit No. S/23/74 was so recognised and borne in mind, then it would not have been necessary for the court below to have criticized and berated the learned judge

who tried the suit No. S/23/74 for the manner in which the judgment was written, and the conclusion reached by the learned judge upon the matters pleaded before him.

It is pertinent to be reminded that it was the respondents who in B suit No. S/23/74 tendered the lease agreement Exh. "D" in the course of the trial and it was duly admitted. The trial Court then pronounced upon it as it deemed fit. That pronouncement has not been reversed. Support is found for that view by Section 54 of the Evidence Act Cap 112 of the C Laws of the Federation of Nigeria 1990 which reads:-

*"Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based unless evidence was admitted in the action in which the judgment D was delivered which is excluded in the action in which that judgment is intended to be proved."*

It is clearly the rule that the plea of estoppel applies, except in special cases, not only to points upon which the court was actually re- E quired by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. See Ijale v. A.G. Leventis & co. Ltd (1965) All NLR 176 at F 180.

From what I have said above, it is my view that the court below was wrong to have upheld the judgment of the trial court. Though, it is settled law that an appellate court would not easily interfere with the judgment of the court below, yet where the judgment of the court below was G reached either upon erroneous inference drawn from findings of facts or that its application of the law to properly found facts is perverse and/or erroneous, then the appellate court has a duty to intervene to correct the injustice so caused. See - Fatoyinbo v. Williams (1956) 1 FSC 87; (1956) H SCNLR 274; Sarakatu J. Amida v. Oshoboja (1984) 7 SC. 68; Finnih v. Imade (1992) 1 NWLR (pt. 219) 511.

I will therefore for the reasons given above, and the fuller reasons given in the leading judgment of my learned brother Ogundare JSC allow

this appeal, I also abide with the other consequential orders made in the said judgment including the order made as to costs to the appellants.

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