

SUPREME COURT OF NIGERIA

14TH JULY, 2000. SC. 53/1995

**CORAM:- A. B. WALI, E. O. OGWUEGBU, A. I. IGUH,
O. ACHIKE, A. O. EJIWUNMI, JJSC**

1. DR. RASAKI OSHODI

(Substituted for Alhaji K. D. Oshodi & Family DEFENDANTS/

2. CHIEF G. F. A INASA THOMAS APPELLANTS

(For himself and on behalf of Oshodi/Arota

Ologun family of Lagos

3. CHIEF MUSA ESUGBAYI OSHODI

(Substituted for R. D. OSHODI

for themselves and on behalf of Oshodi family)

AND

1. YISA OSENI EYIFUNMI

2. LAMINA ENIYANTAN PLAINTIFFS/RESPONDENTS

(For themselves and on behalf of the

Odujaguda family, otherwise known as Akinowo family)

***APPEALS** - Judgment - Decision of a trial court - If it is not challenged in an appeal to the court of Appeal - Such a decision must not be disturbed.*

***COURTS** - Fair hearing - Raising a point suo motu - A court should not raise a point suo motu - And proceed to resolve it without hearing the parties*

***COURTS** - Pleading - Issue not placed before the court - That court has no business to deal with such an issue.*

***ESTOPPEL** - Cause of action estoppel - What it means*

***ESTOPPEL** - Estoppel per rem judicatam - Plea of - For the plea to succeed - What the party relying on it must establish*

ESTOPPEL - Estoppel per rem judicatam - Pleading - It must be specifically pleaded to avail the party invoking it - Function of pleadings - Is to avoid any surprise at the hearing

ESTOPPEL - Issue estoppel - Distinct findings in a previous suit - Which are binding on the parties and their privies - May not be relitigated any longer as between them.

ESTOPPEL - Issue estoppel - What it means.

ESTOPPEL - Res judicata - Defence of - Burden of proof - The burden is on the party who sets up the defence - To establish the preconditions conclusively.

ESTOPPEL - Res judicata - Plea of - Application of - The plea operates not only against the parties - But also against the jurisdiction of the court itself.

ESTOPPEL - Res judicata - Public policy rule - Requires that no one be vexed twice - And that there should be an end to litigation

ESTOPPEL - Transit in rem judicatam - What it means

EVIDENCE - Pleading - Issues - Proof - Evidence must be directed and confined to the proof or disproof - Of the issues as settled by the pleadings.

JUDGMENTS - Estoppel per rem judicatam - What the court is to consider - In determining whether the issues - The subject matter of the two actions - And the parties are the same

LAND LAW - Evidence - Survey plan - Where a land in dispute is known to both parties - The non production in evidence of the survey plan of

such land - Does not disentitle the plaintiff from successfully maintaining an action over such land

PLEADINGS - Allegation of fact - Denial of - Every allegation of fact if not denied specifically or by necessary implication - Shall be taken as established at the hearing.

PLEADINGS - Reply - Further pleadings - When it is necessary to file a reply to the statement of defence

PLEADINGS - Reply - What it means

FACTS

In the Ikeja judicial division, of the then High Court of Justice of the former Western Nigeria (now Lagos State), the plaintiffs/respondents for themselves and on behalf of the Odujaguda family, otherwise known also as the Akinowo family, instituted an action against the defendants/appellants claiming: as against the 1st defendant forfeiture of his customary tenancy on ground of his conduct by denying plaintiffs' title to the said land and possession of the said land. As against the 2nd defendant N100 damages for trespass and injunction restraining the 2nd defendant from future trespass on the said land. The action was initially filed against the 1st, 2nd and 3rd defendants respectively. On their own application the 4th and 5th defendants were by an order of court joined in the action. The defendants defended the suit for themselves and on behalf of the Oshodi Chieftaincy family and the Oshodi Arota Ologun branch of the said Oshodi Chieftaincy family. The plaintiffs' case is that their ancestor, Olushi Onigbesa, acquired a vast piece or parcel of land of which the land in dispute formed a part by first settlement from time immemorial in accordance with Yoruba customary law. They claimed that the 1st defendant was a tenant of the Olushi Onigbesa family in respect of an area of the land in dispute which falls within the portion allotted to the plaintiffs' Odujaguda branch of the Olushi Onigbesa family following the partition of their Olushi Onigbesa communal land by the two branches of

that family. The 1st defendant was said to be the tenant of one Sunmonu Agedugudu of the Agedugudu branch of the said Olushi Onigbesa family.

The plaintiffs claimed that as a result of an intra-family dispute between them and the Agedugudu branch of their common Olushi Onigbesa family in 1949, Suit No. AB/110/57 (Exhibit A) was filed by them against the said Agedugudu branch of their family. Both branches of the Olushi Onigbesa family subsequently partitioned the land and a consent judgment dated the 12th April 1961, was entered in the suit in terms of this voluntary partition. The plaintiffs asserted that the 1st defendant was challenging their title to the portion of the land in dispute granted to him, hence the claim for the forfeiture of his tenancy. They further testified that the 2nd defendant encroached on the land in dispute and erected a building thereon without their lease or licence. They therefore claimed damages for trespass and perpetual injunction against him. No relief was claimed against the 3rd defendant who was joined in the suit on his own application to defend the action on behalf of the Oshodi family. They claimed that all the defendants were denying their title to the land in dispute and asserting ownership thereof. The 1st and 3rd defendants denied that they were ever customary tenants of the plaintiffs. They maintained that the land in dispute formed a portion of the parcel of land granted to Chief Oshodi Tapa absolutely about 200 years ago by the Awori people who were the first settlers on the land. This grant was made as compensation for the military assistance which Chief Oshodi Tapa and his Arotas gave to them to ward off and defeat slave raiders who were menacing their domain at the time. Chief Oshodi settled his Arotas on the land and both himself and his Arotas had since been in exclusive possession of the land in dispute as owner thereof until this day. They had paid no rent or tribute to any one. The 1st and 3rd defendants said they were members of the Oshodi and Arota communities residing at Oshodi and they relied on the title of the said communities to the land in dispute. They denied any knowledge of suit No. AB/110/57 (Exhibit A) or any intra-family dispute between the two branches of the Olushi Onigbesa family as alleged by the plaintiffs. They specifically pleaded the proceedings and judgment of the Ikeja High Court in Suit No.

AB/16/57 and the decision of the Federal Supreme Court on appeal therefrom in Appeal No. FSC413/61 Exhibits O, O1 - O2. In that suit the plaintiffs' predecessors-in-title unsuccessfully tried to assert their title to the land in dispute against the representatives-in-interest of the 1st and 3rd defendants. They claimed that the present plaintiffs were aware of and took active interest in the prosecution of the case on the side of plaintiff in that case but lost their claims both in the High Court and in the Federal Supreme Court. They contended that the proceedings Exhibits O, O1 - O2, operated as estoppel against the plaintiffs who could no more assert ownership of the land in dispute as against the defendants. They stressed that the plaintiffs did not partition any land until after the judgment in Exhibit O had been delivered.

Also the land allegedly partitioned by the plaintiffs was the same land over which judgment in Suit No. AB/16/57 was delivered by a Court of competent jurisdiction against them. They urged the court to uphold their plea of *res judicata*. The 2nd defendant/appellant jointly filed an amended Statement of defence with the 5th defendant. Their traditional history was similar to that of the 1st and 3rd defendants. They also pleaded the proceedings and judgment in Suit No. AB/16/57. The plaintiffs in their reply denied knowledge of anything about suit No. AB/16/57. The learned trial judge after a review of the evidence found for the plaintiffs and held that although the parties and the issue in the previous suit No. AB/16/57 and the present case were the same, the defendants had failed to establish that the land in dispute in the present case fell within the land adjudged to belong to them in the said suit No. AB/16/57. The defence of estoppel *per rem judicatam* was accordingly rejected. Dissatisfied, the defendants lodged appeals to the Court of Appeal, Lagos Division, which court in a unanimous decision affirmed the decision of the trial court and dismissed their appeals. The defendants have further appealed to the Supreme Court. From the issues raised the court identified three main issues for the determination of the appeal.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that the plea of estoppel per rem judicatam did not avail the defendants by reason of

the alleged failure of the defendants to establish that the res, the subject matter of the suit NO. AB/16/57 was the same as that in the present suit.

2. Whether the decisions in suits No. AB/16/57 and FSC. 413/61 do not create issue estoppel to bar the plaintiffs from relitigating the B issues therein decided

3. If the answers to issues 1 and 2 above are in the affirmative, whether the plaintiffs established their ownership and the other reliefs claimed against the defendants before the trial court.

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

Estoppel - Transit in rem judicatam

D 1. Where a cause of action in a present suit has been determined in a previous action between the same parties, that cause of action becomes merged in the judgment: transit in rem judicatam. (p. 2673 B)

Res judicata - Public policy rule

E 2. It is against the rule of public policy that no one shall be vexed twice on the same ground or for one and the same cause of action and on the same issues. See Adomba v. Odiese (1990) 1 N.W.L.R. (part 125) 165 at 178. It is also an application of the rule of public policy that it is for the common good that there should be an end to litigation, that is to say, F interest rei publicae ut sit finis litium. See John Omokhawe v. Esekhome (1993) 8 N.W.L.R. 58. (p. 2673 C)

Res judicata - Plea of

G 3. The plea of res judicata operates not only against the parties but also against the jurisdiction of the court itself and robs the court of its jurisdiction to entertain the same cause of action on the same issues previously determined by a court of competent jurisdiction between the same H parties. The parties affected are estopped per rem judicatam from bringing a fresh action before any court on the same cause and on the same issues already pronounced upon by the court in a previous action. (p. 2673 E)

Estoppel - Cause of action estoppel

4. There is the "cause of action estoppel" which effectively precludes a party to an action or his agents or privies from disputing, as against the other party in any subsequent proceedings, matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary and involving the same issues. (p. 2673 G)

Estoppel - Issue estoppel

5. There is the second class of estoppel which is issue estoppel: within a cause of action, several issues may come into question which are necessary for the determination of the whole case. The rule is that once one or more of such issues have been distinctly raised in a cause of action and appropriately resolved or determined between the same parties in a court of competent jurisdiction, as a general rule, neither party or his servant, agent or privy is allowed to reopen or relitigate that or those decided issues all over again in another action between the same parties or their agents or privies on the same issues. (p. 2674 A)

Estoppel per rem judicatam - Plea of

6. For the plea of estoppel per rem judicatam to succeed, the party relying on it must establish that -

(i) the parties or their privies are the same, that is to say, that the parties involved in both the previous and present proceedings are the same;

(ii) the claim or the issue in dispute in both the previous and present actions are the same;

(iii) the res, that is to say, the subject matter of the litigation in the two cases is the same;

(iv) the decision relied upon to support the plea of estoppel per rem judicatam must be valid, subsisting and final and

(v) the court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction.

Unless the above pre-conditions are established the plea of estoppel per rem judicatam cannot be sustained. (p. 2674 D)

Res judicata - Defence of

7. The burden is on the party who sets up the defence of res judicata to establish the above pre-conditions conclusively. Once they are established, such previous judgment is conclusive and estops the plaintiff from making any claim contrary to the decision in the previous judgment.
(p. 2674 H)

Judgments - Estoppel per rem judicatam

8. In determining whether the plea of estoppel per rem judicatam or whether the issues, the subject matter of the two actions and the parties are the same, the court is permitted to study the pleadings, the proceedings and the judgment in the previous proceedings. The court may also examine the reasons for the judgment and other relevant facts to discover what was in issue in the previous case. See Fadiora v. Gbadebo (supra). It is therefore a question of fact whether the parties and their privies, the facts in issue and the subject matter of the claim are the same in both the previous and the present cases. (p. 2675 B)

Estoppel per rem judicatam - Pleading

9. Another important issue on the plea of estoppel per rem judicatam is that it must be specifically pleaded to avail the party invoking it. See Omeazu Chukwurah v. Ofochebe (1972) 12 S.C. 189 at 195. The main function of pleadings is to ascertain with as much certainty as possible the various matters that are actually in dispute and those in which there are agreement between the parties and thus to appraise the opposing party in the action of the case the pleader is making so as to avoid any surprise at the hearing and to ascertain the issue or issues in controversy between the parties. In this regard, the parties will be enabled to settle before hand the evidence it shall adduce at the hearing. Pleadings are closed when parties come to issue. (p. 2675 D)

Reply - When necessary

10. If both the Statement of Claim and the Statement of Defence do not

bring the parties to issue on all the claims, the plaintiff shall file a reply. Where no counter claim, as in the present action, is filed, further pleadings by way of a Reply to the Statement of Defence is generally unnecessary if the sole purpose is to deny the averments contained in the defendants' Statement of Defence. However, a Reply may be filed to plead relevant additional facts which will make any particular defence pleaded in the Statement of Defence untenable or negate the application of such defence. I think it may also be said that as a general rule, where because of the defence filed, the plaintiff proposes to lead evidence in rebuttal or to raise issues of fact not arising out of the two previous pleadings, he shall in such circumstances file a Reply as he may not lead evidence of any material facts he had failed to aver in his pleadings. See Bakare and Another v. Ibrahim (1973) 6 S.C. 205 (p. 2675 H/2676 C)

Reply - What it means

11. A Reply is the defence of the plaintiff to the counter-claim of the defendant or to the new facts raised by the defendant in his defence to the plaintiff's Statement of Claim and shall therefore be filed to answer the defendant's averments in his counter-claim or to such new facts that have been raised in the Statement of Defence. (p. 2676 B)

Appeals - Judgment

12. If a finding or decision of a trial court, whether on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision, rightly or wrongly, must not be disturbed for the purposes of the appeal in question. See Nwabueze v. Okoye (1988) 4 N.W.L.R. (part 91) 664. Both parties to the litigation having accepted and/or acknowledged the finding of the trial court that the issue in the previous suit. No. AB/16/57 is the same as that in the present suit and there being no appeal against that crucial finding, the Court of Appeal, with respect, was in error to have disturbed that finding and to have held the issues in the two cases could not be said to be the same. A finding or decision of a trial court can only be set aside by an appellate court on a proper appeal challenging the same and not otherwise. I think the court below in the

present case was bound by the finding of the learned trial Judge to the effect that the issues in the previous and the present suits are the same. (p. 2683 C)

Courts - Fair hearing

- B 13. The Court of Appeal should have called on the parties, particularly the appellants who were prejudiced by its finding to address it on the question of the identity of the issues in both cases before setting aside suo motu, the decision made in their favour by the trial court. This is
- C because the law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties. If it does so, as it did in the present case, it will be in breach of the party's right to fair
- D hearing. (p. 2683 H)

Evidence - Survey plan

- E 14. Where a piece or parcel of land in dispute is known to both parties or it is clearly ascertainable, whether from the averments in the pleadings or otherwise, and its area, exact location and precise boundaries on the ground are either unmistakably and appropriately pleaded or are admitted or acknowledged by the defendant, the non-production in evidence of
- F the survey plan of such land cannot be a matter of great moment and does not disentitle the plaintiff from successfully maintaining an action in respect of title, trespass or injunction over such land. (p. 2686 C)

Pleadings - Issues

- G 15. It is trite law that evidence must be directed and confined to the proof or disproof of the issues as settled by the pleadings. See Eso Petroleum Co. Ltd. v. Sourthport Corporation (1956) A.C. 218. (p. 2690 H)

H Pleadings - Allegation of fact

16. A denial of a material allegation of fact must not be general or evasive but specific. Every allegation of fact, if not denied specifically or by necessary implication shall be taken as established at the hearing. It seems

to me plain that from the state of the pleadings of the parties, it was not in issue that the land in dispute in the present case is part and parcel of the land the subject matter of the dispute in suit AB/16/57. (p. 2690 H)

Courts - Pleadings

17. When an issue is not placed before the court, having regard to the state of the pleadings, that court has not business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56 - 57. It is my view that the averment in the defendants' pleadings that the land in dispute in this case is part or parcel of the land litigated upon in suit No. AB/16/57 not having been specifically traversed by the plaintiffs in their Reply must, in the circumstances, be deemed to be established and needed not be subjected to any further proof. Both courts below were therefore in error to have dismissed the defendants' plea of res judicata on the ground that they did not establish that the subject matter of the previous suit No. AB/16/57 was the same as the land in dispute in the present action as no issue was joined by the parties in their pleadings in that regard. (p. 2691 B)

Issue estoppel - Distinct findings in a previous suit

18. The position, as I see it, is that suit No. AB/16/57 resolved against the plaintiffs the point that the defendants' ancestor, Oshodi Tapa, were a tribute paying customary tenant of Onigbesa. In the finding of the court, the grant of the land in dispute to the defendants' family was an absolute grant and the defendants and their ancestors had occupied the land in dispute for well over one hundred years and exercised acts of possession and ownership over the land without payment of any tributes. These distinct findings are binding on the parties and their privies and may not be relitigated any longer as between them. In the circumstances, the plaintiffs' claims for forfeiture which is founded on the alleged customary tenancy and damages for trespass which is based on their ownership and possession of the said land are caught by the issue estoppel pleaded by the defendants in the present proceedings. See Aro v. Fagboluade (1983) ALL N.L.R. 67 at 78. (p. 2697 F)

REPRESENTATION

Mahmoud Gafar Esq. for the 1st and 3rd defendants/appellants.

Lateef Fagbemi Esq., S.A.N., with G. Oyewole Esq. for the 2nd and 5th
B defendants/appellants
T. O. E. Kuye (Miss) for the plaintiffs/respondents

CASES REFERRED TO

Ajibade v. Mayowa (1978) 9 and 10 S.C. 1 at 6
C Odume v. Nnachi (1964) 1 ALL N.L.R. 329
Adomba v. Odiese (1990) 1 N.W.L.R. (part 125) 165 at 178
Omokhafe v. Esekhome (1993) 8 N.W.L.R. 58
Lawal v. Dowodu (1972) 1 ALL N.L.R. (part 2) 270 at 272
D Oke v. Atoloye (1985) 1 N.W.L.R. (part 15) 241 at 260
Chukwurah v. Ofochebe (1972) 12 S.C. 189 at 195
Uge v. Obiekwe (1989) 1 N.W.L.R. (part 99) 566 at 581
Oje v. Babalola (1995) 4 N.W.L.R. (part 185) 267 at 280
E Ibuluya v. Dikibo (1976) 6 S.C. 97 at 107
Aziz v. Lasisi (1989) 3 N.W.L.R. (part 108) 164 at 172
Bakare v. Ibrahim (1973) 6 S.C. 205
Nwabueze v. Okoye (1988) 4 N.W.L.R. (part 91) 664
F Opute v. Ishida (1993) 3 N.W.L.R. (part 279) 34 at 50 -51
Ikoku v. Ekenkwu (1995) 7 N.W.L.R. (part 410) 637 at 654
Olumolu v. Islamic Trust of Nigeria (1996) 2 N.W.L.R. (part 430) 253 at
266

G **LEAD JUDGMENT BY IGUH JSC**

The proceedings leading to this appeal has had a long and chequered history. It was first initiated in the Ikeja Judicial division of the then High Court of Justice of the former Western Nigeria some thirty-
H five years ago, precisely on the 10th day of March, 1965. For reasons not apparent from the record of proceedings, the case sojourned through not less than twelve courts presided over by various Judges beginning with Somolu, J., as he then was, until it finally found itself before

Oguntade, J., as he then was, on the 16th day of November, 1982.

Apparently concerned with the protracted nature and very old age of the dispute, the learned trial Judge after criticizing justifiably the seeming prevailing poor litigation machinery if the time immediately commenced the actual hearing of the case the following day, the 17th November, 1982. I think this type of attitude to work is clearly commendable and distinctly worthy of emulation. B

Adverting to the action itself, the respondents, as plaintiffs, duly substituted by the order of the High Court in place of the three original plaintiffs, now deceased, had for themselves and on behalf of the Odujaguda family, otherwise also known as the Akinowo family, instituted this proceeding against the appellants, therein defendants, claiming, as subsequently amended, as follows - C

"Whereupon the plaintiffs claim as against the 1st defendant: D

(i) forfeiture of his customary tenancy on ground of his conduct by denying plaintiffs' title to the said land and

(ii) possession of the said land.

As against the 2nd defendant, the plaintiffs claim: E

(i) N100 damages for trespass and

(ii) Injunction restraining the 2nd defendant from future trespassing on the said land."

The action was initially filed against Alhaji K. D. Oshodi, G.F.A. Inasa Thomas and Y. A. Ajenifuga as the 1st, 2nd and 3rd defendants respectively. However, by an order of court made on the 23rd March, 1967, Alhaji R. D. Oshodi and Chief Fasasi Odebisi were, on their own application, joined in the action as the 4th and 5th defendants. It would appear from the pleadings that the defendants in the action had defended the suit for themselves and on behalf of the Oshodi chieftaincy family and the Oshodi Arota Ologun branch of the said Oshodi chieftaincy family. G

At a stage in the course of proceedings, the 3rd defendant, Y. A. Ajenifuja was reported dead. The action accordingly proceeded against the four remaining defendants, to wit, Alhaji K. D. Oshodi, G. F. A. Inasa Thomas, R. D. Oshodi and Chief Fasasi Odebisi. The surviving defendant and the persons substituted in place of the deceased defendants are H

now the appellants in this appeal.

There are two sets of appellants in the appeal. The 1st and 3rd appellants who are represented by mahmoud 'Gafar Esq. and the 2nd appellant whose leading counsel is Lateef Fagbemi Esq., S.A.N. The 1st and 3rd appellants would appear to have defended the suit for themselves and on behalf of the Oshodi family whilst the 2nd appellant defended for himself and on behalf of the Oshodi/Arota Ologun family of Lagos.

I think it ought to be pointed out that the plaintiffs' Odujaguda family, otherwise also known as the Akinowo family, is one of the two branches of the Olushi Onigbesa family. The other section is the Agedegudu branch. Both branches comprise of the Olushi Onigbesa family.

Pleadings were ordered in the suit and were duly settled, filed and exchanged, with the same amended by various orders of court.

The plaintiffs' case as pleaded and testified to is that their ancestor, Olushi Onigbesa, acquired a vast piece or parcel of land of which the land in dispute formed a part by first settlement from time immemorial in accordance with Yoruba customary law. They claimed that the 1st defendant was a tenant of the Olushi Onigbesa family in respect of an area of the land in dispute which falls within the portion allotted to the plaintiffs' Odujaguda branch of the Olushi Onigbesa family following the partition of their Olushi Onigbesa communal land by the two branches of that family. The 1st defendant was said to be the tenant of one sunmonu Agedegudu of the Agedegudu branch of the said Olushi Onigbesa family. The plaintiffs claimed that as a result of an intra-family dispute between them and the Agedegudu branch of their common Olushi Onigbesa family in 1949, suit No. AB/110/57 was filed by them against the said Agedegudu branch of their family. This case is Jimo Odunlami and others of the plaintiffs' family v. Sunmonu Agedegudu and others of the Agedegudu family, Exhibit A. According to the plaintiffs, both branches of the Olushi Onigbesa family subsequently partitioned the land and a consent judgment dated the 12th April, 1961 was entered in the suit in terms of this voluntary partition.

The plaintiffs asserted that the 1st defendant was challenging

their title to the portion of the land in dispute granted to him hence the claim for the forfeiture of his tenancy. They further testified that the 2nd defendant encroached on the land in dispute and erected a building thereon without their leave or licence. They therefore claimed damages for trespass and perpetual injunction against him. No relief was claimed against the 3rd defendant who was joined in the suit on his own application to defend the action on behalf of the Oshodi family. The plaintiffs claimed that all the defendants were denying their title to the land in dispute and asserting ownership thereof. They denied knowledge of anything about suit No. AB/16/57 in which the said Sunmonu Agedegudu, for himself and on behalf of the Olushi Onigbesa family, claimed a declaration of title, forfeiture and possession of the land in dispute against Sanni Ajenifuja and others, for and on behalf of the defendants' Oshodi family. They asserted that they never went to court during the hearing of the suit and that they knew nothing about any appeal on the case to this court.

The 1st and 3rd defendants in their amended Statement of Defence denied that they were ever customary tenants of the plaintiffs. They maintained that the land in dispute formed a portion of the parcel of land granted to Chief Oshodi Tapa absolutely about 200 years ago by the Awori people who were the first settlers on the land. This grant was made as compensation for the military assistance which Chief Oshodi Tapa and his Arotas gave to them to ward off and defeat slave raiders who were menacing their domain at the time. Chief Oshodi settled his Arotas on the land and both himself and his Arotas had since been in exclusive possession of the land in dispute as owners thereof until this day. They had paid no rent or tribute to any one. The 1st and 3rd defendants said they were members of the Oshodi and Arota communities residing at Oshodi and they relied on the title of the said communities to the land in dispute in this action. They denied any knowledge of suit No. AB/110/57, Exhibit a or any intra-family dispute between the two branches of the Olushi Onigbesa family as alleged by the plaintiffs which was said to have culminated in the said consent judgment, Exhibit A. In particular the 1st and 3rd defendants/appellants specifically pleaded the proceedings and judgment of the Ikeja High Court in suit No. AB/16/57

and the decision of this court on appeal therefrom in Appeal No. FSC.413/61, Exhibits 0, 01-02. In that suit, the plaintiffs' predecessors-in-title unsuccessfully tried to assert their title to the land in dispute against the representatives-in-interest of the 1st and 3rd defendants. They explained
B that the present plaintiffs were aware of and took active interest in the prosecution of the case on the side of plaintiff in that case but lost their claims both in the High Court and in the Federal supreme Court. It is their contention that the proceedings, Exhibits 0, 01-02, operated as estoppel against the plaintiffs who could no more assert ownership of the
C land in dispute as against the defendants. They stressed, at all events, that on the face of the proceedings, Exhibit A, the plaintiffs did not partition any land until after the judgment in Exhibit 0 had been delivered. On the evidence of the 1st and 3rd defendants, also, the land allegedly
D partitioned by them was the same land over which judgment in suit No. AB/16/57 was delivered by a court of competent jurisdiction against the plaintiffs. They urged the court to uphold their plea of res judicata.

The 2nd defendant/appellant jointly filed an amended Statement
E of Defence with the 5th defendant, Chief Fasasi Odebisi, now deceased. In it, they averred that the piece or parcel of land in dispute is only a portion of a large expanse of land which jointly belonged to the defendants' ancestors from time immemorial. The land was granted absolutely to the 2nd and 5th defendants' ancestors by Oba Onigbesa of Igbesa
F in recognition of the military assistance which the defendants' said ancestors to wit, the Oshodi family and the Arotas rendered the then Oba Onigbesa. They claimed that their ancestors had lived on the land from time immemorial and exercised diverse acts of ownership and possession thereon without any disturbance whatever. They, too, pleaded the
G proceedings and judgment in suit No. AB/16/57 in which sunmonu Agedegudu for himself and on behalf of the Olushi Onigbesa family used the defendant's Oshodi family and their representatives-in-interest for
H title, forfeiture and possession of the land in dispute but lost as well as the appeal decision therefrom and averred that the plaintiffs were estopped from bringing this action against them or asserting ownership of the land in dispute.

At the subsequent trial, the parties testified on their own behalf in line with the averments in their respective pleadings and called witnesses. The defence put up by the two sets of appellants, as defendants before the trial court, was substantially the same. Both pleaded estoppel per rem judicatam which was founded on the judgment of the Ikeja High Court in suit No. AB/16/57 and the appeal decision therefrom by this court, Exhibits 0, 01-02. Having regard to the state of the pleadings, the learned trial Judge, quite rightly in my view, decided to resolve the preliminary issue of res judicata pleaded by the defendants first. This would determine whether the plaintiffs were bound by the judgment in the said suit NO. AB/16/57 and were in consequence thereof estopped from asserting their ownership of the land in dispute or relitigating issues which had been decided between the parties by a court of competent jurisdiction. The plea, if it succeeded, would naturally spell doom for the plaintiffs' claims. The trial court was prepared, in the event of a failure of the plea, to consider the mass of other evidence led by the parties in respect of their respective claims to ownership of the land in dispute.

The learned trial Judge after a review of the evidence on the 7th day of July, 1988 found for the plaintiffs and held that although the parties and the issues in the previous suit No. AB/16/57 and the present case were the same, the defendants had failed to establish that the land in dispute in the present case fell within the land adjudged to belong to them in the said suit No. AB/16/57. The defence of estoppel per rem judicatam was accordingly rejected.

The learned trial Judge next proceeded to evaluate the rest of the evidence adduced before the court and found that -

(1) the land in dispute fell within the area of land originally settled upon by Olushi Onigbesa many years ago.

(2) the 1st defendant/appellant and his predecessors were in possession of the land in dispute as customary tenants of the Olushi Onigbesa family;

(3) the Olushi Onigbesa family land was partitioned into two between the Agedegudu and Odujaguda Akinowo family and that the land in dispute fell within the area of land granted to the plaintiffs' Odujaguda/

Akinowo branch following the consent judgment in suit AB/110/57 and the said 1st defendant, having disputed the plaintiffs' title to the land, was liable to forfeiture of his tenancy.

As regards the 2nd defendant/appellant, the learned trial Judge found him liable in trespass and awarded N100.00 damages to the plaintiffs against the said 2nd defendant. An order of injunction was issued against the 2nd defendant, his servants and agents, restraining them from further acts of trespass on the land in dispute. The order of injunction, however, was not to come into force until the 2nd October, 1986 to enable the 2nd defendant arrange the evacuation of his personal property from the residential house he erected on the land in dispute. The trial court made no finding nor order against the 3rd defendant/appellant.

Being dissatisfied with this judgment of the trial court, all three defendants lodged appeals to the Court of Appeal, Lagos Division, which court in a unanimous decision on the 5th day of December, 1994 affirmed the decision of the trial court and dismissed their appeals.

Aggrieved by this decision of the Court of Appeal, the defendants have further appealed to this court.

Altogether eleven grounds of appeal were filed by the 1st and 3rd defendants against this decision of the Court of Appeal. The 2nd defendant, for his own part, filed twelve grounds of appeal against the same decision of the Court of Appeal. It is unnecessary to reproduce all these grounds of appeal in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The three issues identified on behalf of the 1st and 3rd defendants/appellants for the determination of this appeal are as follows -

- "1. Whether the Court of Appeal was right in holding that the issues in suit NO. AB/16/57 are not the same with those in the present suit.
2. Whether the decisions in AB/16/57 and FSC/413/61 do not create issue estoppel to bar the respondents from re-litigating the issues decided therein.
3. Whether Court of Appeal was right in holding that estoppel

per rem judicatam was not established by reason of the failure of the appellants to prove that the subject matter in suit No. AB/16/57 is the same with that of the present suit."

For the 2nd defendant/appellant, four issues were distilled from his grounds of appeal for the determination of this appeal. These are as follows -

"1. Whether on the pleadings, it was disputed that the land, subject matter of this suit, had been a subject of previous decision in suit No. AB/16/57 between the Appellant and the Plaintiffs/Respondents - Grounds 1, 2, 3, and 4.

2. Whether the 2nd Appellant in the court below who is Appellant herein, made a claim in the High Court - Ground 9.

3. Whether, in any event, the plea of estoppel is well made?; - Grounds 5,6,7,8,9,10,11 and

4. Whether the principles in *Kojo and Bonsie & Anor. (1957) 1 W.L.R.* page 1223 apply to this case to make the case of the Plaintiffs/Respondents preferable to that of the Appellant - Ground 12."

The plaintiffs, in their respondents' briefs of argument, adopted the two sets of issues formulated on behalf of the defendants /appellants for the determination of this appeal.

Essentially three main issues covered by the defendants' grounds of appeal and identified in their respective briefs of argument relate to -

1. Whether the Court of Appeal was right in holding that the plea of estoppel per rem judicatam did not avail the defendants by reason of the alleged failure of the defendants to establish that the res, the subject matter of the suit NO. AB/16/57 was the same as that in the present suit.

2. Whether the decisions in suits No. AB/16/57 and FSC. 413/61 do not create issue estoppel to bar the plaintiffs from relitigating the issues therein decided

3. If the answers to issues 1 and 2 above are in the affirmative, whether the plaintiffs established their ownership and the other reliefs claimed against the defendants before the trial court.

I propose in this judgment to consider issues 1 and 2 together. If this becomes necessary, issue 3 will next be considered.

At the oral hearing of the appeal, learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

The main contention of learned counsel for the 1st and 3rd defendants, Mr. Mahmoud 'Gafar with regard to issues 1 and 2 is that there was sufficient evidence on record to establish that the land in dispute in the present case is the same as the land, the subject matter of the previous action in suit No. AB/16/57. He criticized the finding of both courts below to the effect that once the survey plan of land previously in dispute is not tendered in evidence, the party setting up the plea of res judicate based on such previous dispute is bound to fail. Learned counsel placed reliance on the decision of this court in Gbajumo Bunyan and others v. Akingboye and others (1999) 7 N.W.L.R. (part 609) 31 and submitted that once a piece or parcel of land in dispute is sufficiently well known to the parties, the production of a survey plan in proof of its identity can hardly arise. He made reference to various evidence on record by both the plaintiffs and defendants in the present case and submitted that the parties are ad idem on the issue that the land in dispute in suit No. AB/16/57 is the same with the one claimed in the present action. He therefore argued that notwithstanding the fact that the survey plan in suit NO. AB/16/57 was not tendered in evidence in the present case, it was open to the defendants to establish by other evidence that it was the same piece of land that was the subject matter of the dispute in both the previous suit No. AB/16/57 and the present action. Learned counsel made reference to the pleadings of the parties and contended that they contain admissions that the land in dispute in both actions is the same. He called in aid the decisions of this court in Adedayo v. Babalola (1995) 7 N.W.L.R. (pat 408) 383, and Aro v. Fabouade (1983) ALL N.L.R. (Reprint) 67 and submitted in the alternative that issue estoppel was established in favour of the defendants to bar the plaintiffs from re-litigating the issue of the alleged customary tenancy granted Oshodi Tapa as aforementioned. He also submitted that the court below was in error to have held that the issues in the two cases were different. He urged the court to allow the appeal.

Learned leading counsel for the 2nd defendant, Mr Lateef Fagbemi, S.A.N. in his own submissions stressed that there is no dispute on the face of the pleadings of the parties on the question of the identity of the land in dispute in suit No. AB/16/57 and its being one and the same with the land in dispute in the present action. He argued that this being B so, there would be no need to tender any plans of the land in dispute in suit No. AB/16/57. Learned counsel referred to the amended Statement of Defence of the 2nd and 5th defendants. In it, the said defendants specifically and expressly averred that the land in dispute in both suit No. C AB/16/57 and the present case was the same. He drew attention to the plaintiffs' amended Reply thereto and stressed that this material averment on the identity of the land in dispute in both cases was in no way traversed. He submitted that in-as-much-as no issue was joined on the pleadings on the question of the identity of the land in dispute in both D cases being the same, there was no need on the part of the defendants to tender any survey plans. He pointed out that the only issue the plaintiffs raised with regard to suit No. AB/16/57 was that the parties were not the same and no more. He submitted in the alternative, that if his contention E with regard to the state of the pleadings is erroneous, the court must consider the evidence to ascertain whether the plea of res judicata can be sustained. In this regard he relied on the decision of this court in Yaya Adigun v. Governor of Osun State and others (1995) 3 N.W.L.R. (part F 385) 513 at 534 and submitted that the court below was in error by affirming the stance of the trial court and refusing to examine the record with a view to determining whether, on the pleadings and evidence, it was not established that the land in dispute in both cases was the same. He urged the court to uphold the plea of res judicata raised by the defendants as the issue, the res and parties in both the previous and the present G actions are the same.

Learned counsel for the respondents, T. O. E. Kuye (Miss) in her reply made reference to the amended Statement of Claim filed in the H cause and submitted that the plaintiffs tried to show therein that the land in dispute in suit No. AB/16/57 and in the present action are not the same. In particular she referred to paragraphs 2(d) and 4(a) - 4(d) of the plain-

tiffs' Statement of Claim and to the plaintiffs' Reply to the defendants' Statements of Defence and submitted that the land in dispute in suit No. AB/16/57 and in the present case are not the same. Learned counsel drew the attention of the court to page 261 of the printed record of B proceedings, lines 5-10 where the 1st defendant testified as follows -

"I approached the Agedegudu family before I started the erection of my own house. I got permission to build my house from both my family (i.e. the Oshodi family) and the Agedegudu family. I did not pay any money to Agedegudu family". (Words in brackets supplied for clarity) she submitted that this is admission by the 1st defendant that he got C permission from the Agedegudu family before he erected his house. She recalled that the defendants tendered the proceedings and judgments in suit AB/16/57 and the appeal therefrom but failed to tender the plan of the D land then in dispute. She referred to the decision of this court in Elias v. Sulaiman and others (1973) 12 S.C. 114 and contended that the onus is on he who asserts the existence of a particular fact to establish the same by evidence. In her view, failure to produce the said plan invoked a E presumption that the land in dispute in both actions could not be the same. Learned counsel considered that the observation of the Court of Appeal on the question of whether the issues in both suit NO. AB/16/57 and in the present case were the same were taken out of context. She F stressed that the court below agreed entirely with all the findings of the learned trial Judge which it described as "faultless". She submitted that there was no question of the court below interfering with any of the findings of the trial court and that it strictly adhered to the principle enunciated in Woluchem v. Gudi (1981) 5 S.C. 291 at 226. It was her further G contention that the doctrine of issue estoppel was of no avail to the defendants. She called in aid the decisions in Joe Nwaru v. Commissioner of Police (1994) 5 N.W.L.R. (part 347) 722 at 723 and Bajodeen v. Ironwaninu (1995) 7 N.W.L.R. (part 410) 655 at 671 and submitted that H as the res in the two cases are not the same, the doctrine of estoppel per rem judicatam cannot avail the defendants. She urged the court to dismiss this appeal.

Issues 1 and 2 are inter-related and it will be convenient to treat

them together. These deal essentially with whether the Court of Appeal was right in holding that the doctrine of estoppel per rem judicatam pleaded by the defendants in the case did not avail them by reason of their alleged failure to establish that the land in dispute in suit No. AN/16/57 is the same as that in dispute in the present case. There is also the question of whether the decision in suit No. AB/16/57 and the appeal judgment therefrom in Appeal No. FSC 413/61 do not create issue estoppel to bar the plaintiffs from relitigating the issues therein decided.

In this regard, it cannot be disputed that **where a cause of action in a present suit has been determined in a previous action between the same parties, that cause of action becomes merged in the judgment: transit in rem judicatam. It is against the rule of public policy that no one shall be vexed twice on the same ground or for one and the same cause of action and on the same issues. See Adomba v. Odiese (1990) 1 N.W.L.R. (part 125) 165 at 178. It is also an application of the rule of public policy that it is for the common good that there should be an end to litigation, that is to say, interest rei publicae ut sit finis litium. See John Omokhafa v. Esekhome (1993) 8 N.W.L.R. 58. The plea of res judicata operates not only against the parties but also against the jurisdiction of the court itself and robs the court of its jurisdiction to entertain the same cause of action on the same issues previously determined by a court of competent jurisdiction between the same parties. The parties affected are estopped per rem judicatam from bringing a fresh action before any court on the same cause and on the same issues already pronounced upon by the court in a previous action. See Oyelakin Balogun v. Adedosu Adejoki (1995) 2 N.W.L.R. (part 376) 131.**

This type of estoppel are of two kinds. There is the "cause of action estoppel" which effectively precludes a party to an action or his agents or privies from disputing, as against the other party in any subsequent proceedings, matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary and involving the same issues.

There is the second class of estoppel which is issue estoppel: within a cause of action, several issues may come into question which are necessary for the determination of the whole case. The rule is that once one or more of such issues have been distinctly raised in a cause of action and appropriately resolved or determined between the same parties in a court of competent jurisdiction, as a general rule, neither party or his servant, agent or privy is allowed to reopen or relitigate that or those decided issues all over again in another action between the same parties or their agents or privies on the same issues. See Lawal v. Yakubu Dowodu (1972) 1 ALL N.L.R. (part 2) 270 at 272, Olu Ezewani v. Nkali Onworli and others (1986) 4 N.W.L.R. (part 33) 27 at 42 - 43, Samuel Fadiora and Another v. Festus Gbadebo and Another (1978) 3 S.C. 219 at 228 -229 etc. Both classes of estoppel have been raised for consideration in this appeal.

It ought to be stressed, however, that for the plea of estoppel per rem judicatam to succeed, the party relying on it must establish that -

(i) the parties or their privies are the same, that is to say, that the parties involved in both the previous and present proceedings are the same;

(ii) the claim or the issue in dispute in both the previous and present actions are the same;

(iii) the res, that is to say, the subject matter of the litigation in the two cases is the same;

(iv) the decision relied upon to support the plea of estoppel per rem judicatam must be valid, subsisting and final and

(v) the court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction.

Unless the above pre-conditions are established the plea of estoppel per rem judicatam cannot be sustained. See generally Oke v. Atoloye (1985) 1 N.W.L.R. (part 15) 241 at 260, Yoye v. Olabode and others (1974) 1 ALL N.L.R. (part 2) 188 at 122, Idowu Alasa and others v. Sanya Olori Ilu (1965) N.M.L.R. 66, Fadiora v. Gbadebo (1978) 3 S.C. 219 at 229. The burden is on the party who sets up the defence

of res judicata to establish the above pre-conditions conclusively. Once they are established, such previous judgment is conclusive and estops the plaintiff from making any claim contrary to the decision in the previous judgment.

In determining whether the plea of estoppel per rem judi- B
catam

or whether the issues, the subject matter of the two actions and the parties are the same, the court is permitted to study the pleadings, the proceedings and the judgment in the previous proceedings. The court may also examine the reasons for the judgment and other C
relevant facts to discover what was in issue in the previous case. See Fadiora v. Gbadebo (supra). It is therefore a question of fact whether the parties and their privies, the facts in issue and the subject matter of the claim are the same in both the previous and D
the present cases.

Another important issue on the plea of estoppel per rem judicatum is that it must be specifically pleaded to avail the party invoking it. See Omeazu Chukwurah v. Ofochebe (1972) 12 S.C. E
189 at 195 and Omidokun Owoniyi v. Omotosho (1961) ALL N.L.R. 304. I think it is now convenient to examine briefly some of the more important general principles governing pleadings which I consider relevant to the issues under consideration in this appeal.

The main function of pleadings is to ascertain with as much F
certainty as possible the various matters that are actually in dispute and those in which there are agreement between the parties and thus to appraise the opposing party in the action of the case the pleader is making so as to avoid any surprise at the hearing and to G
ascertain the issue or issues in controversy between the parties. In this regard, the parties will be enabled to settle before hand the evidence it shall adduce at the hearing. Pleadings are closed when parties come to issue. If both the Statement of Claim and the H
Statement of Defence do not bring the parties to issue on all the claims, the plaintiff shall file a reply. Where no counter claim, as in the present action, is filed, further pleadings by way of a Reply to

the Statement of Defence is generally unnecessary if the sole purpose is to deny the averments contained in the defendants' Statement of Defence. See Aziz Akeregolu and others v. Lasisi Akinremi and others (1989) 3 N.W.L.R. (part 108) 164 at 172. However, a Reply may be filed to plead relevant additional facts which will make any particular defence pleaded in the Statement of Defence untenable or negate the application of such defence.

A Reply is the defence of the plaintiff to the counter-claim of the defendant or to the new facts raised by the defendant in his defence to the plaintiff's Statement of Claim and shall therefore be filed to answer the defendant's averments in his counter-claim or to such new facts that have been raised in the Statement of Defence. I think it may also be said that as a general rule, where because of the defence filed, the plaintiff proposes to lead evidence in rebuttal or to raise issues of fact not arising out of the two previous pleadings, he shall in such circumstances file a Reply as he may not lead evidence of any material facts he had failed to aver in his pleadings. See Bakare and Another v. Ibrahim (1973) 6 S.C. 205

The plaintiffs in their amended Statement of Claim copiously pleaded their versions of traditional history, traceable to their ancestor Olushi Onigbesa through whom they claimed ownership of the land in dispute. They also pleaded alleged various acts of ownership and possession of the land in dispute. Suit No. 134/30 in which they claimed they were paid compensation by the Government in respect of the Oshodi Railway Station was pleaded by them. Also pleaded was suit No. AB/110/57 which was said to be an intra-family dispute between members of the Olushi Onigbesa family. In the latter case, consent judgment was entered in accordance with the terms of alleged settlement filed in court and sanctioning the alleged partition of the Onigbesa family land. It is crystal clear from the entire averments in the plaintiffs' 20 paragraph amended Statement of Claim that no reference whatsoever was made, no matter how remotely, with regard to suit No. AB/16/57 raised by the defendants as constituting estoppel per rem judicatam against the plain-

tiffs.

It is patently clear that there was absolutely nothing wrong or strange with this failure by the plaintiffs to plead the said suit No. AB/16/57, particularly when from their Reply to the defendants' Statement of Defence, they had averred that they knew nothing about that case, that they never went to court as the proceedings were going on and that they did not know anything about the appeal to this court from the decision of the trial High Court in that case. I will now turn to the Statement of Defence of the two sets of defendants in this case.

The 1st and 3rd defendants per paragraphs 10, 11, 12, 13 and 14 of their amended Statement of Defence averred as follows -

"10. The Defendants further aver that when the Agedegudu Family of the Olushi Onigbesa sued S. Ajenifuja and others and their family in Suit No. AB/16/57 in this court, claiming ownership etc. of a portion of the land granted to them at Oshodi aforesaid, the then defendants set out the defences in paragraphs 8 and 9 above, and the court dismissed the claims. The said Agedegudu Family appealed to the Federal Supreme Court in FSC. 413/61 but they also lost when the High Court judgment was upheld. During the years that the case lasted, no issue about Suit No. 134/30 was raised or pleaded in support of their claim.

11. The present Plaintiffs were aware of that case Suit No. AB/16/57 and were present in court throughout, taking active part in it all along with members of their Agedegudu Family. It was after they lost the said case pleaded in paragraph 10 above that they (Agedegudu Family) purported to partition some lands among themselves so as to be able to bring up this action or others similar to it.

12. The defendants specifically plead the proceedings and judgment in the said case pleaded in paragraph 10 above, as also those in Suit No. IK/212/62, as estoppel per rem judicatam in this case, in that the land now in dispute as shown in the plan attached to the Statement of Claim is part of the land granted to Chief Oshodi Tapa as pleaded in paragraphs 8 and 9 above and to which the two cases related.

13. The defendants will seek to contend that this action is speculative and an abuse of the process of the court, and they will also contend

that the proceedings in Suit No. 134/1930 are not now relevant as between the plaintiffs' and defendants' families in respect of land at Oshodi granted to the Defendant's predecessors-in-title.

14. *The averment in paragraph 16 of the amended statement of claim cannot bind the defendants in this case. (Settled judgment not a judgment in vain). The defendants did not know of the action nor are they parties to the actions."*

There is also the amended Statement of Defence of the 2nd and 4th defendants wherein it was pleaded in paragraphs 6, 7, 8, 9, 10 and 11 as follows -

"6. The Defendant states that the title of the 2nd and 5th Defendants ancestors has been repeatedly confirmed by many High Court and Supreme Court judgments, namely:-

(a) *Suit No. AB/16/57 - Sunmonu Agedegudu & ors. v. Sanni Ajenifuja & ors.*

(b) *Suit No. F.S.C. 413/1961.*

(c) *suit No. HK/85/60 - Sunmonu Agedegudu v. James Odubela.*

(d) *Suit No. HK/88/60 - Sunmonu Agedegudu v. Agbe Davies.*

7. *The 2nd Defendant states that when the Onigbesa family sued S. Ajenifuja and others and their family in Suit No. AB/16/57 mentioned above claiming ownership of a portion of the land granted to the Defendants at Oshodi aforesaid the then Defendants set out the Defence in paragraphs 2, 3 and 4 above and the Court dismissed the Claims.*

8. *The said Onigbesa family by their head sunmonu Agedegudu appealed to the Federal supreme Court in F.S.C. 413/61 but they also lost when the High Court judgment was upheld.*

9. *The 2nd Defendant further states that the plaintiffs were aware of that case Suit No. AB/16/57 and were present in Court throughout, taking active part in it all along with members of their Agedegudu Onigbesa family. It was after they lost the said case pleaded in paragraphs 6 and 7 above that they, the Onigbesa family purported to partition some lands among themselves so as to be able to bring up this action or others similar to it.*

10. *The second Defendant specifically pleads the proceedings*

and judgment in the said case pleaded in paragraph 6 (AB/16/57 and F.S.C. 413/1961) as estoppel per rem judicatam in this case, in that the land now in dispute as shown on the Plan attached to the Statement of Claim is part of the land litigated upon in AB/16/57 and it is also part of the land granted absolutely to the Oshodis and Arotas by the Oba Onigbesa of Igbesa. B

11. The 2nd Defendant states that consequent upon the judgments in AB/1657 Sunmonu Agedegudu v. Sanni Ajenifuja and others and that of F.S.C. 43/61, the Defendants issued many public Warning Notices to inform the general public of their title and right of ownership to all that parcel of land situate at Oshodi Township from Orile Oshodi to the Railway Station, otherwise known as Onigbesa land, as the property of the Oshodi Chieftaincy and Arotas descendants' family. C
The 2nd Defendant will rely on the following Notice at the hearing of this matter:- D

(a) Warning Notice dated 10th May, 1975.

(b) Public Warning Notice dated 6th March, 1961.

(c) Notice dated 24th day of April, 1963." E

In view of the plea of res judicata specifically pleaded by all the defendants, relying on the said Ikeja High Court suit NO. AB/16/57 and the averments that the land now in dispute is firstly, part or portion of the land litigated upon by the parties in suit No. AB/16/57 and, secondly, that the said land is also part of the land granted absolutely to the oshodis and arotas by the Oba Onigbesa of Igbesa, the plaintiffs, quite rightly, filed their Reply to the two sets of Statements of Defence filed in the action. F

In so far as the defendants' respective pleas of estoppel per rem judicatam based on suit No. AB/16/57 are concerned, the plaintiffs in paragraphs 4, 7 and 10 of their amended Reply averred as follows - G

"4. The plaintiffs aver that they were never aware of Suit No. AB/16/57 and plead that they too were in Court against the plaintiffs in that action in respect of their own portion of the landed property. H

5.

6.

7. With reference to paragraph 12 of the Amended Statement of

Defence of the 1st and 4th Defendants, the Plaintiffs plead that they are not parties to this Suit and are not bound by the judgment.

8.

9.

B 10. *With reference to paragraphs 10 and 11 of the Statement of Defence of the 2nd - 5th Defendants, the Plaintiffs aver that they have consistently informed the whole world that they were never a party to suit No. AB/16/57 and will rely on warning notices issued by them especially warning notices dated 12th October, 1959 and also public warning dated*
C *17th day of July 1964. Sunmonu Agedegudu was never the head of their family and therefore has no mandate to sue or be sued on their behalf."*

It is on the above state of the pleadings that I will now proceed to consider whether or not the Court of Appeal was right in holding that the plea
D of estoppel per rem judicatam did not avail the defendants by reason of their alleged failure to establish that the subject matter of the dispute in suit No. AB/16/57 is the same as the land in dispute in the present case. It is convenient at this stage to examine briefly the merits of this plea of
E res judicata set up by the defendants.

On the first question which concerns the identity of the parties or their privies, the learned trial Judge after a thorough consideration of the matter, quite rightly, in my view, concluded thus -

F *"There can be no doubt that the proceedings and judgment in suit No. AB/16/57 show that Sunmonu Agedegudu who was plaintiff brought the action for and on behalf of Onigbesa family. The plaintiffs in this case are members of that family. In AB/16/57 the 4th and 5th*
G *defendants therein were joined by an order of court to enable them defend the action (for and on behalf of the descendants of Oshodi Family). Judgment was given in the case at the High Court on 19/4/60 and at the Supreme Court on 5/3/63.*

In suit NO. AB/110/57 which appears to be an intra-family dispute between the members of Onigbesa family, the High Court on 12th April, 1961 gave judgment in accordance with the terms of settlement filed sanctioning the partition of the Onigbesa Family land.
H

The judgment in AB/110/57 could not in my view derogate from

that in AB/16/57. What was put on the line in AB/16/57 in relation to the land in dispute was the title of Onigbesa family as a whole and not the titles vested in the branches of the same family. In any case the title in the branches of Onigbesa family could only have been derived from the title in the main Onigbesa family. The assertions of 2nd plaintiff - Yisa B Oseni Eyifomi when he said -

"Sunmonu Agedegudu was not the head of my own branch of the family. He was the head of Ogundamija" after he had previously said:

"After Onigbesa's death, his land was partitioned into two under the principle of Idi-Igi as he had two wives. The two were Akinowo and Ogundamija" would seem to be beside the point and irrelevant. The defendants' contention is that the Onigbesa had granted the land in dispute absolutely to Oshodi Tapa and his Arotas. The defendants never said that akinowo or Ogundamija granted land absolutely to Oshodi tapa and the Arotas. It is therefore clear that a finding that the Onigbesa had granted land to Oshodi Tapa and his Arotas would bind the branches - Akinowo and Ogundamija. In his evidence in AB/16/57 given on 1st E February 1960 at Page 12 of Exhibit O Sunmonu Agedegudu said:

"I have brought this action on behalf of the Onigbesa family. I am the present head of the family. Olushi Onigbesa founded the area in dispute about 300 years ago and that Olushi was the owner of the land and he had no other name besides Onigbesa".

Sunmonu never said that he brought the action on behalf of either Akinowo or Ogundamija branches of Olushi family. The plaintiffs in this case have traced their title to the same Olushi Onigbesa family. The conclusion I have come to is that the parties in the present case and those in AB/16/57 are the same vis-a-vis family succession."

I think it is important to observe at this stage that this material finding of fact was not appealed against by either of the parties to the litigation. The court below had no reason to fault it either and the issue must therefore be regarded as finally settled between the parties.

The learned trial Judge next proceeded to consider the second question of the claims or the issues in dispute between the parties in the

two cases and once again, correctly in my view, made a specific finding of fact on the subject. Said the learned trial Judge -

"The next thing to consider is the issue in dispute in the two cases. IN AB/16/57 the plaintiff Sunmonu Agedegudu had sued for:

B (i) *A declaration that they are the owners under Native Law and Custom of the land the subject of the action;*

(ii) *A declaration that the defendants have forfeited their rights as Customary Tenants.*

C (iii) *Possession of the land".* (See Exhibit 02).

In this case the plaintiffs are claiming "as against the 1st defendant, forfeiture of his Customary tenancy on the ground of his conduct by denying plaintiffs' title, N100 damages for trespass and injunction restraining the 2nd defendant from further trespassing (sic) on the said D land". A claim for forfeiture founded on customary tenancy pre-supposes that the claimant is the owner of the land. The plaintiffs have in this action asked for forfeiture against the 1st defendant because the 1st defendant denied plaintiffs' title. Ownership of the land is therefore the E main issue. As against the 2nd defendant the plaintiffs claimed for damages arising from trespass and injunction. Ordinarily, a claim for trespass is an injury against possession and ownership is not directly in issue. But where, as in this case, the 2nd defendant raises the issue of F ownership as a basis for his coming upon the land in dispute, the Court has to decide in consequence the issue of title. See Amakor vs. Obiefuna (1978) 3 S.C. 67. The conclusion then is that the current case has at its core the issue of ownership as did the previous case AB/16/57. In my finding therefore, the issues in the two cases are the same."

G The above, again, is another crucial finding of fact which is amply supported by the evidence before the trial court. There was no appeal against this specific finding of the learned trial Judge which would have invested the court below with the necessary jurisdiction to review H it. None-the-less, the Court of Appeal, apparently suo motu was obliged to observe with regard to this finding as follows -

"In the absence of proof of the subject-matter of the action in suit AB/16/57, it cannot strictly be said that the issues in the two actions

are identical even though they both raised issue of ownership of land. However, notwithstanding the inexact reference to identity of issues, the learned trial Judge rightly rejected the plea of res judicata for the reasons which he gave."

It is plain to me that the suggestion from the foregoing observation is that the trial court could not be right to have held that the issues in the previous and the present suits are the same.

In this regard, it has to be emphasized that the appellate jurisdiction of the Court of Appeal is to hear and determined appeals from the High Courts. **If a finding or decision of a trial court, whether on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision, rightly or wrongly, must not be disturbed for the purposes of the appeal in question. See Nwabueze v. Okoye (1988) 4 N.W.L.R. (part 91) 664. Both parties to the litigation having accepted and/or acknowledged the finding of the trial court that the issue in the previous suit. No. AB/16/57 is the same as that in the present suit and there being no appeal against that crucial finding, the Court of Appeal, with respect, was in error to have disturbed that finding and to have held the issues in the two cases could not be said to be the same. A finding or decision of a trial court can only be set aside by an appellate court on a proper appeal challenging the same and not otherwise. I think the court below in the present case was bound by the finding of the learned trial Judge to the effect that the issues in the previous and the present suits are the same. See Oputeh v. Ishida (1993) 3 N.W.L.R. (part 279) 34 at 50 -51, Eriro v. Obi (1993) 9 N.W.L.R. (part 315) 60 at 75.**

Perhaps I should also add that when an issue is not placed before an appellate court, it has no business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56 - 57. Besides, **the Court of Appeal should have called on the parties, particularly the appellants who were prejudiced by its finding to address it on the question of the identity of the issues in both cases before setting aside suo motu, the decision made in their favour by**

the trial court. See Ikoku v. Ekenkwu (1995) 7 N.W.L.R. (part 410) 637 at 654, Olumolu v. Islamic Trust of Nigeria (1996) 2 N.W.L.R. (part 430) 253 at 266. This is because the law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties. See Uge v. Obiekwe (1989) 1 N.W.L.R. (part 99) 566 at 581. If it does so, as it did in the present case, it will be in breach of the party's right to fair hearing. See Oje v. Babalola (1991) 4 N.W.L.R. (part 185) 267 at 280.

It does appear, at all events, that learned counsel for the plaintiffs in her respondents' brief of argument stoutly defended the position of the court below in issue and contended that the issue had been misconstrued by the defendants/appellants. She submitted thus -

"With regard to this issue, it seems as if the Words of the Court of Appeal have been taken out of context. The Court of Appeal in its judgment agreed in toto to all the facts and reasoning of the learned trial Judge. The appeal court had not rejected any finding of facts or of law relied on by the learned trial Judge neither has it embarked on a fresh appraisal of any evidence given at the trial. It has only emphasized a point in one of the issues. It has not interfered with findings of fact of the trial court, in fact it has described the learned trial Judge as faultless in his reasoning and judgment."

I have carefully studied the observation of the Court of Appeal under attack by the defendants/appellants and find it difficult to accept that it did not challenge the finding of the trial court on the point in issue. However, the plaintiffs have not in this appeal conceded any interference by the court below with this finding of the trial court that the issues in both the previous and the present suits are the same. Their submission is that the Court of Appeal, on the contrary, affirmed the finding of the trial court on the issue. I must confess that I have not been persuaded to accept this contention as well founded. I need only reiterate that having regard to all that I have stated above, it is clear to me that the Court of Appeal had no jurisdiction to reverse a material and fundamental decision which was not challenged by either of the parties to the appeal before it.

In the circumstance, there can be no reason to fault this decision or finding of the trial court that the issues in the two cases are the same, a finding amply supported by evidence and ought not therefore to be interfered with.

The learned trial Judge having correctly held that the parties and the issues in the previous and the present suits were the same, quite rightly, observed thus -

"Had I been able to find that the defendants satisfactorily showed that the Res or subject-matter in the two cases was the same, I would have upheld the plea of estoppel per Rem Judicatam raised by the defendants and proceeded to dismiss plaintiffs' action."

He gave the issue of the identity of the res, that is to say, the land in dispute in both cases considerable attention and arrived at the conclusion that the land now in dispute was not established to be part of the land litigated upon in suit No. AB/16/57. Said the learned trial Judge -

"On the evidence available, the only conclusion I can come to is that the defendants who raised the plea of Estoppel per rem judicatam have failed to prove that the Res - the subject matter of the dispute in this case is the same as the one in dispute in AB/16/57."

The above finding was endorsed by the court below when, inter alia, it commented thus -

"Reading the entire proceedings of suit AB/16/57 would not be a substitute for producing the plan of the land in dispute tendered in evidence in suit AB/16/57 to discern a similarity of facts relied on by the plaintiffs in that case, the respondents in this case, provide such substitute."

It is really surprising that resort was had to non-existent circumstantial evidence to prove a fact which would have easily been directly proved by producing the plan put in evidence in suit AB/16/57 and marked Exh. 1 or satisfactorily explaining its absence in such a way as to make secondary evidence of its contents admissible. In the absence of proof of the subject-matter of the action in suit AB/16/57, it cannot strictly be said that the issues in the two actions are identical even though they both raised issue of ownership of land."

It cannot be disputed that the central point on this issue of res judicata has to do with the alleged failure of the defendants/appellants to establish by evidence that the subject matter of the present suit is covered by the land in dispute in suit AB/16/57. The main ground upon which both courts below based their decisions is that the survey plan of the land in dispute in suit No. AB/16/57 was not tendered in evidence in the present proceedings and that the failure to tender the said plan was fatal to the plea of estoppel per rem judicatam raised by the defendants.

With the greatest respect to both courts below, it cannot be over-emphasized that it is not in all cases that a survey plan of the piece or parcel of land in dispute is either an absolute necessity or is so mandatory that unless it is produced and tendered in evidence, the court would have no option but to dismiss the plaintiff's claim. **Where a piece or parcel of land in dispute is known to both parties or it is clearly ascertainable, whether from the averments in the pleadings or otherwise, and its area, exact location and precise boundaries on the ground are either unmistakably and appropriately pleaded or are admitted or acknowledged by the defendant, the non-production in evidence of the survey plan of such land cannot be a matter of great moment and does not disentitle the plaintiff from successfully maintaining an action in respect of title, trespass or injunction over such land.** See Chief Daniel Allison Ibuluya and others v. Tom Dikibo (1976) 6 S.C. 97 at 107, Chief Sokpui v. Chief Ogbozo (1951) 13 or A.C.A. 241 at 242, Bajoden v. Iroruwanimu (1995) 7 N.W.L.R. (part 410) 655 at 671. See too Abiodun v. Fasanya (1994) 1 ALL N.L.R. 765 at 782. I will now examine the pleadings filed by the parties to ascertain whether or not issue was joined by the parties on the question of whether the land, the subject matter of the present action was the subject of a previous decision in Suit No. AB/16/57 between the plaintiffs and the defendants.

I have earlier on in this judgment set out the relevant paragraphs of the pleadings of the parties in issue. It suffices to re-emphasize, as I have already stated, that no where in the plaintiffs' amended Statement of Claim was Suit No. AB/16/57 either pleaded or any reference in connec-

tion therewith made. This notwithstanding, it was the submission of learned counsel for the respondents, Miss Kuye that the plaintiffs' Statement of Claim "categorically proved" that the land in dispute in the present case is not the same as the land in dispute in Suit No. AB/16/57. In this regard she placed reliance on paragraphs 2(d) and 14(a) - 14(d) of the plaintiffs' Statement of Claim. B

With profound respect to learned plaintiffs' counsel, I must confess that she had been totally unable to persuade me that her contention in the above regard is well founded. Paragraph 2(d) of the amended Statement of Claim simply avers - C

"The land tenanted by the ancestors of the 2nd and 3rd defendants is outside the land now in dispute."

In the first place, I can see no connection whatsoever between the averment in paragraph 2(d) of the plaintiffs' amended Statement of Claim and the land in dispute in Suit No. AB/16/57. it is only if it was pleaded that the ancestors of the 2nd and 3rd defendants are tenants of the plaintiffs in respect of the land in dispute in suit No. AB/16/57 and that the said land is outside the land now in dispute that it can be said that the land in dispute in the said suit No. AB/16/57 is different from the land in dispute in the present action. This however is not what the plaintiffs pleaded in the said paragraph 2(d) of their amended Statement of Claim. D E

In the second place both the 2nd and 3rd defendants stoutly denied that they or their ancestors were ever the tenants of the plaintiffs in respect of the land in dispute in suit No. AB/16/57 or, indeed, in respect of any land outside the land in dispute as alleged in paragraph 2(d) of the amended Statement of Claim. This defence of the 2nd and 3rd defendants would appear to have been accepted by the trial court. In respect of the 2nd defendant, the learned trial Judge found him to be a trespasser and not a tenant of the plaintiffs in respect of the land in dispute. Said he - F G

"Since the issue joined before me is ownership of land and since the 2nd defendant raised the issue of his long possession only in proof of his ownership, and in the light of my finding that the plaintiffs are the owners of the land, it must follow that the 2nd defendant's entry on H

plaintiffs' land was an act of trespass. The 2nd defendant himself has admitted that he came on the land in dispute in 1962. The issue of long possession cannot therefore be raised to defeat the title which the plaintiffs have established. I find as a fact that the 2nd defendant did enter upon plaintiffs' land in 1962 and erected a building thereon without plaintiffs' consent or permission. The 2nd defendant in my finding is liable to plaintiffs in trespass."

And in respect of the 3rd defendant who also claimed ownership of the land in dispute, the learned trial Judge made no finding whatsoever against him. In other words, the plaintiffs' averment that the 2nd and 3rd defendants who defended the action for themselves and on behalf of the Oshodi family were their tenants outside the land in dispute was not accepted by the trial court. What, however, seems to me of vital importance with regard to Miss Kuye's submission in connection with paragraph 2(d) of the plaintiffs' amended Statement of Claim is not that of proof of the averment therein but its complete irrelevance and apparent lack of nexus, no matter how remotely, with suit NO. AB/16/57 or the land in dispute in that case. That being the position, I cannot see my way clear how it can be suggested with any degree of seriousness that the said averment "categorically proved" that the land in dispute in the present case is not the same with the land in dispute in the said suit. No. AB/16/57.

There are finally the averments in paragraphs 14(a) - 14(d) of the plaintiffs' amended Statement of Claim. These concern alleged acquisitions by Government in respect of Oshodi Railway Station, Oshodi Wireless Station etc and they were not pleaded whether directly or indirectly as concerning suit No. AB/16/57. There was also no averment in any of those paragraphs of the plaintiffs' amended Statement of Claim that the land in dispute in the said suit No. AB/16/57 and that involved in the present action are not one and the same land. I must therefore dismiss the plaintiffs' submission that paragraphs 2(d) and 14(a) - 14(d) establish that the land in dispute in the present case is different from that in dispute in the previous suit No. AB/16/57 as misconceived and totally unacceptable.

This however is not the end of the matter as learned counsel

placed further reliance on the reply filed by the plaintiffs in answer to the defendants' Statements of Defence to buttress her contention that the land in dispute in the previous and the present suits are not the same. I will now at the risk of repetition turn to the pleadings once again with a view to resolving whether it was in issue between the parties that the land in dispute in the present case is the same as that in dispute in suit No. AB/16/57 and therefore covered by the judgment in Exhibits 0- 02. B

Reference was made earlier on in this judgment to the averments in paragraphs 10 - 13 of the 1st and 3rd defendants' Statement of Defence and paragraphs 6 - 11 of the 2nd defendant's Statement of Defence and I need not repeat them again. It suffices to state that both Statements of Defence in most unequivocal and the clearest possible terms averred that title of the defendants' ancestors to the land in dispute had been repeatedly confirmed by the High Court and the Supreme Court in various suits. In particular, suit No. AB/16/57 Sunmonu Agedegudu and others for and on behalf of the Olushi Onigbesa family v. Sani Ajenifuja and others for themselves and on behalf of the defendants Oshodi family and the appeal decision therein in suit No. FSC.413/1961 were specifically pleaded by the defendants as constituting estoppel per rem judicatam in that C D E

"the land now in dispute as shown on the plan attached to the Statement of Claim is part of the land litigated upon in AB/16/57 and it is also part of the land granted absolutely to the Oshodis and Arotas by the Oba Onigbesa of Igbesa". F

The defendants further pleaded that in the said suit No. AB/16/57, the Olushi Onigbesa family sued Sani Ajenifuja and others of Oshodi family claiming ownership of a parcel of land granted absolutely to the Oshodi and Arotas and of which the land now in dispute formed a part but lost both in the trial High Court and on appeal before this court. They averred that the present plaintiffs being part and parcel of the Olushi Onigbesa family were at all material times aware of the said suit No. AB/16/57 and that they were present in court throughout the trial and took active part in it along with members of the Agedegudu Onigbesa family. They pleaded that it was after the plaintiffs lost the said case that the G H

Olushi Onigbesa family purported to partition some land among themselves so as to be able to institute the present action. I will now examine the Reply of the plaintiffs to the above very material and weighty averments of the defendants.

B I have already set out the averments in paragraphs 7 and 10 of the plaintiffs' Reply to the Statements of Defence of the defendants and will not repeat them all over again. It suffices to state that the plaintiffs in their Reply to the defendants' averments in respect of suit No. AB/16/57 stated -

C (i) that they were not a party to the said suit No. AB/16/57;
(ii) that they were not aware of the said suit;
(iii) that they did not therefore attend court during the trial and
(iv) that Sunmonu Agedegudu had no mandate to sue on their
D behalf.

The above, in essence are the only areas the plaintiffs joined issues with the defendants in connection with the plea of estoppel per rem judicatam raised by the defendants in this suit

E The learned trial Judge, quite rightly, in my view, was unable to accept the four defences set up by the plaintiffs in answer to the defendants' plea of res judicata based on suit No. AB/16/57. It was precisely for this reason that he concluded that had he been able to find that the
F defendants satisfactory showed that the res or the subject matter in the two cases was the same, he would have upheld the plea of estoppel per rem judicatam raised by them and dismiss the plaintiffs' action.

G It is crystal clear that the plaintiffs in their Reply did not deny that the land litigated upon in suit No. AB/16/57 is the same as the one in dispute in the present action. As I stated earlier on in this judgment, the main function of pleadings is to ascertain with as much certainty as possible the various matters that are in dispute between the parties and those in which there is agreement or in which no issues have been joined. In
H this regard **it is trite law that evidence must be directed and confined to the proof or disproof of the issues as settled by the pleadings. See Esso Petroleum Co. Ltd. v. Sourthport Corporation (1956) A.C. 218. A denial of a material allegation of fact must not be general or**

evasive but specific. Every allegation of fact, if not denied specifically or by necessary implication shall be taken as established at the hearing. See Samson Ajibade v. Mayowa and Another (1978) 9 and 10 S.C. 1 at 6, Eko Odume v. Ume Nnachi and others (1964) 1 ALL N.L.R. 329. It seems to me plain that from the state of the pleadings of the parties, it was not in issue that the land in dispute in the present case is part and parcel of the land the subject matter of the dispute in suit AB/16/57.

I think it ought to be stressed that **when an issue is not placed before the court, having regard to the state of the pleadings, that court has not business whatsoever to deal with it.** See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56 - 57. It is my view that the averment in the defendants' pleadings that the land in dispute in this case is part or parcel of the land litigated upon in suit No. AB/16/57 not having been specifically traversed by the plaintiffs in their Reply must, in the circumstances, be deemed to be established and needed not be subjected to any further proof. Both courts below were therefore in error to have dismissed the defendants' plea of res judicata on the ground that they did not establish that the subject matter of the previous suit No. AB/16/57 was the same as the land in dispute in the present action as no issue was joined by the parties in their pleadings in that regard.

At all events, it does not seem to me that the state of the pleadings apart, it can be seriously argued that there was no evidence, as found by the court below, that the subject matter of the previous suit No. AB/16/57 was the same as the land in dispute the present action. The apparent error the Court of Appeal, with profound respect, fell into was its failure to scrutinize the evidence on record and the decision in suit No. AB/16/57 with a view to establishing or discerning a similarity or otherwise of the subject matter of the dispute in both the previous and the present actions. In this regard, the Court of Appeal, as I have already pointed out observed as follows -

"Reading the entire proceedings of suit AB/16/57 would not be a substitute for producing the plan of the land in dispute tendered in evi-

dence in that case, nor would combing the evidence in suit AB/16/57 to discern a similarity of facts relied on by the plaintiffs in that case, the respondents in this case, provide such substitute."

It is clear to me that the above observation of the court below, as a
B general rule; cannot be said to be well founded. Both courts below were entitled to study the proceedings tendered as a basis for the plea of estoppel to determine whether the parties, the issues and the subject matter of the action in both suits are the same.

C A careful study of the entire evidence on record does disclose that the subject matter of the previous proceedings is the same with the land in dispute in the present action in that -

(i) The traditional histories led in evidence by both parties are exactly the same and involved the same material facts and issues in both
D cases.

(ii) The land in dispute in both cases would appear to have common boundaries and

(iii) The various acts of possession and ownership of the subject
E matter of the dispute asserted and relied on by both parties in the two actions are again exactly the same.

Additionally in suit AB/16/57, the trial court found that there was no dispute about the situation and area of the land which was said to be
F Oshodi village. Said the learned trial Judge -

"The situation of the land is not disputed as the area edged green in the plaintiff's plan, Exhibit 1 and consists of 206 acres including half of an area called Oshodi village".

A little later in his judgment, the trial court went on -

G *"According to the plaintiff and also to 3rd plaintiff witness, Amodu Faronbi, half of Oshodi village belongs to the plaintiff. The other half to Akingbade and the Oshodi family paid #5 annually to each of these families"*

H Accordingly, on the evidence of the plaintiffs, the land in dispute, that is to say, part of the Oshodi village in dispute in Suit AB/16/57 is bounded by the land of Akingbade family. There is also the evidence of Amodu Faronbi, the 3rd plaintiffs' witness in Suit AB/16/57 wherein he testified

thus -

"I know the Plaintiff and I know the Defendants. My own land is called Akingbaiye. Akingbaiye and the land in dispute have a common boundary. The land in dispute belongs to Onigbesa. The Defendants are tenants of the Plaintiff on the land of Onigbesa we call the land in dispute Onigbesa. I have connection with the Defendants on account of Akingbaiye's land. They are farming on Onigbesa land and they also farm on Akingbaiye's land and the rent on the two portions of land are paid on the same day."

There is, on the other hand, the evidence of the same plaintiffs in the present suit wherein they also gave the same boundary men in respect of the land now in dispute. The 2nd plaintiff testified thus -

"I know 2nd defendant. 2nd defendant's father was AMODU INASA. AMODU INASA was tenant farmer to AKINGBAIYE family who were my boundarymen".

It is relevant in this connection to draw attention once more to the fact that when the defendants in the present case set up the defence of re judicata as a result of the decision in suit No. AB/16/57, the reaction of the plaintiffs, as I have already mentioned, was not that the land in dispute in suit No. AB/16/57 is different from the land in dispute in the present action. No such defence was raised or pleaded by them. Their contention, rather, was that they were not parties to the previous suit and that they never attended court during the proceedings, contentions which the trial court did not accept as it held that they were parties to that suit as plaintiffs.

There is also the evidence of the 1st plaintiff in the present suit wherein he testified as follows -

"The land in dispute in this case is at Oshodi, The land for which we are in court extends from Alasia to Afijalo River. The plan of it has been filed in court. My family and the Agedegudu family had since litigated over the area of land in dispute. I know that judgment was given in the case between Agedegudu and Ajenifuja some 23 years ago."

It is thus plain from the evidence of the said 1st plaintiff that the litigation

his family had with the Agedegudu family over the land in dispute was a clear reference to suit No. AB/110/57. Equally from the evidence of this witness is the fact that the judgment in the case between Agedegudu and Ajenifuja which he referred to was none else other than the decision in
 B suit No. AB/16/57. The plaintiffs, could not therefore have rightly claimed ignorance of the said suit No. AB/16/57, a claim which the trial court rightly rejected and affirmed by the Court of Appeal. However, the one vital point that needs be emphasized is that on the basis of the case as
 C presented by the plaintiffs, the land litigated upon in suit No. AB/110/57 is exactly the same land that is now in dispute in the present case.

There is then the averment in paragraph 2(a) of the Plaintiff's amended Statement of Claim which avers as follows -

*"The 1st defendant Alhaji K. D. Oshodi is a tenant of the Olushi
 D Onigbesa family and the portion tenanted by him falls within the area allotted to the Plaintiff's branch of the Family in suit No. AB/110/57."*

The plaintiffs in the same vein claimed in suit No. AB/16/57 that the land occupied by the Oshodi family of which the 1st defendant is a member
 E was similarly granted to them under customary tenure as tenants. Additionally there is evidence from the defendants which unmistakeably shows that the land in dispute in the present action is the same as the land previously litigated upon in Exhibit O. Said the 1st defendant -

"The plaintiffs did not partition the land among themselves until after the judgment in AB/16/57 had been delivered. The land partitioned among the plaintiffs is the same land over which judgment in AB/16/57 was delivered".
 F

It seems to me that piecing all the foregoing evidence together, one cannot but come to the irresistible conclusion that having regard to the preponderance of evidence, the land in dispute in suit No. AB/16/57 is none other than that in dispute in the present case. But as I have already stated, no issue was joined by the parties at the close of pleadings on the
 G question of the common identity of the land in dispute in both suits. It must therefore be taken as established that the land in dispute in both the previous and the present claims are the same. I will now turn to the 4th and 5th requirements for the sustenance of the plea of res judicata al-
 H

ready set out earlier on in this judgment.

These respectively, are, firstly, that the decision relied upon to operate as estoppel per rem judicatam must be a final, valid and subsisting judgment (See Alu Eko v. Uhre Ugwuoma and others (1990) 6 W.A.C.A 206, Lawani Lateju v. Lawani Iyanda and Another (1959) 4 B F.S.C. 257, William Ude and others v. Joseph Agu and others (1961) 1 ALL N.L.R. 65 etc) and secondly, that the court that gave the previous decision must be a court of competent jurisdiction. (See Michelin (Nigeria) Ltd. v. Hebron George (1973) 1 N.M.L.R. 107. There was no suggestion from any quarters whatsoever that the decision in suit number AB/16/57 which terminated in this court on appeal as suit No. FSC. 143/61 is not final, valid nor subsisting or that it was given by a court of incompetent jurisdiction. On the contrary, it is evident that the decision is not only final, valid and subsisting, it was plainly given by a court of competent jurisdiction.

The conclusion I have therefore reached is that the defendants having successfully established all the ingredients necessary to sustain a plea of estoppel per rem judicatam, both the trial court and the court below are, with respect, in error by holding that the said plea did not avail the defendants in the face of the judgment of the Ikeja High Court in suit No. AB/16/57 and the appeal decision of this court in suit No. FSC. 143/61. The answer to issue I being in the negative, it is accordingly resolved in favour of the defendants.

Without doubt, my resolution of issue 1 in favour of the defendants/appellants is unquestionably sufficient to determine this appeal at this stage. I propose however, to say a word or two in connection with issue 2. This poses the question whether the decisions in the said suits numbers AB/16/57 and FSC. 413/61 do not create issue estoppel to bar the plaintiffs from relitigating the issues therein decided. The contention of the defendants under this issue is that the previous suit No. AB/16/57 between the parties and the resulting appeal No. FSC. 143/61 create issue estoppel between the parties and thus bar the plaintiffs from re-opening or re-litigating the issues that had been decided in the said previous suit.

I have already found that the parties, the issue and the subject matter of both the previous and the present suits are the same and that the decisions in the previous suits Nos. AB/16/57 and FSC. 143/61 are not only final, valid and subsisting but that they were given by courts of competent jurisdiction. The basis upon which suit No. AB/16/57 was fought by the plaintiffs was that their ancestor, Olushi Onigbesa, the original settler, granted the land in dispute to Oshodi Tapa, the ancestor of the defendants under customary tenancy and subject to the payment of tributes. The defendants, on the other hand contended that Onigbesa of Igbesa, the original settler granted the land in dispute to the said Oshodi Tapa absolutely. Both parties relied on traditional evidence and acts of possession and ownership of the land in dispute in proof of their claims. At the end of the trial, the learned trial Judge, Duffs, J. in a well considered judgment found as follows -

"I am quite satisfied from the evidence that the Oshodi family have for a considerable period of well over a hundred years been in possession and occupation of the land in dispute and have during this time openly exercised acts of ownership over the land without protest from the Plaintiffs. I do not accept the plaintiff's case that the Defendants' family have been regularly paying tribute for the land in dispute. I believe and accept the defence that they have occupied the land in dispute including Oshodi village without payment of rent or tribute."

A little later in his judgment, the learned trial Judge went on thus

"..... as I have stated I accept the Defendants' case that they have lived on and occupied the land in dispute as owners. They have paid no rent or tribute for this land. They have been born and died and been buried there. They have built their houses and a Mosque to Worship in. They have planted fruit trees and other permanent trees and they have granted the land to strangers, all without Plaintiff's permission or protest."

The preponderance of evidence would support the view that the grant to the Defendants' family was an absolute grant and not on customary tenancy. I have, therefore, on the evidence before me arrived at the follow-

ing conclusions.

(1) That there was a grant by the Onigbesa family of the land in dispute to the Defendants' family.

(2) That I am unable to find as a fact whether this grant was made by the Onigbesa family of Igbesa or by the plaintiffs, the Onigbesa family from Isolo. B

(3) That in any event, I am satisfied from the evidence that this grant was an absolute grant and that the Oshodi family now hold that the land in dispute as owners and not as customary tenants. C

It follows therefore that the Plaintiff's action fails. The Plaintiff will pay the 2nd and 3rd Defendants costs which I fix at one hundred guineas and the 4th and 5th Defendants costs fixed at one hundred and fifty guineas."

The above findings are clear and unambiguous and they are binding on the parties, their privies, agents and/or successors in title. I cannot but endorse the submission of learned counsel for the 1st and 3rd defendants, Mr. Mahmoud 'Garfa in his appellants' brief of argument to the effect that - D E

"Issue estoppel applies in this case against the respondent to bar them from claiming that the appellants are their tenants in respect of land at Oshodi since the basis of that claim derives from the alleged customary tenancy granted to oshodi Tapa which had died a natural death in AB/16/57 and was ceremonially interned in FSC/413/61." F

The position, as I see it, is that suit No.AB/16/57 resolved against the plaintiffs the point that the defendants' ancestor, Oshodi Tapa, were a tribute paying customary tenant of Onigbesa. In the finding of the court, the grant of the land in dispute to the defendants' family was an absolute grant and the defendants and their ancestors had occupied the land in dispute for well over one hundred years and exercised acts of possession and ownership over the land without payment of any tributes. These distinct findings are binding on the parties and their privies and may not be relitigated any longer as between them. In the circumstances, the plaintiffs' claims for forfeiture which is founded on the alleged customary G H

tenancy and damages for trespass which is based on their ownership and possession of the said land are caught by the issue estoppel pleaded by the defendants in the present proceedings. See Aro v. Fagboluade (1983) ALL N.L.R. 67 at 78. In my view, the trial court ought not to have permitted the plaintiffs to repeat the evidence as to traditional histories and acts of possession put forward, contested and decided as between the parties in favour of the defendants in the previous suit No. AB/16/57 and the Appeal decision thereupon No. FSC 143/61. It is equally erroneous on its part to have proceeded to make any findings of fact at variance with the previous findings in the said suits Nos. AB/16/57 and FSC.143/61. I entertain no doubt too that the court below was equally in error to have affirmed the said findings of the learned trial Judge which were arrived at irregularly and in total disregard of the said previous findings in suit No. AB/16/57 and FSC. 143/61 which are binding on the parties, their agents and/or privies. See too Ndiribe v. Ogbogu (1989) 5 N.W.L.R. (part 123) 599 at 609. In my judgment, the plaintiffs are estopped from relitigating the issue of whether the grant of the land in dispute made to Oshodi Tapa was a customary tenancy subject to payment of tribute as opposed to an out and out or absolute grant. Accordingly issue 2 is resolved in favour of the defendants/appellants.

I think I ought briefly to dispose of an aspect of the submissions of Miss Kuye before I move unto issue 3. Learned counsel had referred to page 261 of the records at lines 5 - 10 where she claimed that the 1st defendant admitted that he obtained permission from the Agedegudu family before he erected his house on the land. The point she was making in effect was that on the face of the admission by the 1st defendant that he obtained the aforesaid permission, he could not now dispute the plaintiffs' title to the land in dispute.

The passage of the evidence of the 1st defendant referred to went as follows -

"I approached the Agedegudu family before I started the erection of my house. I got permission to build my house from both my family and the Agedegudu family. I did not pay any money to Agedegudu family".

The above is only an extract of the evidence of the 1st defendant under cross-examination.

At the first go, and read in isolation, it cannot be disputed that the above passage of the evidence of the witness may not unreasonably be given the interpretation urged upon the court by learned counsel for the plaintiffs. However, upon a close consideration of the entire evidence of the witness, it will become apparent that the construction given to the above passage of the evidence of the 1st defendant was extracted out of context altogether and does not represent the meaning attributed to it by counsel.

In order to be fair to the witness, it is necessary to set out his full evidence under cross-examination on the issue.

Said he -

"I started to build my house in 1959. I completed it in 1960. This case has been in court since 1965. I went to the Arotas when I was about to build my house. I did not give them any Schnapps. I approached the Agedegudu family before I started the erection of my own house. I got permission to build my house from both my family and the Agedegudu family. I did not pay #1 to Agedegudu family. I did not promise to pay Agedegudu #1 yearly for my land. It is not correct that I was allowed to build my house because I promised to pay #1 yearly to Agedegudu family."

Earlier on in his evidence, the witness had testified thus -

"The Oshodi family is not a tenant to plaintiff family in respect of the land in dispute. The Oshodi family never paid rents to anybody. I personally built a house on a parcel of land within Oshodi. I received permission from my family to build on the land. I also told the Agedegudu family. I told Agedegudu family because I had known that members of the Agedegudu family had been going to persons to whom the Oshodi family gave land to molest and destroy their buildings. I did not want that to happen in my case. The Agedegudu family had thugs whose head was Bakare for this purpose. The Olushi-Onigbesa family refused to leave the land after they had lost in AB/16/57."

I think that it will only be fair to the witness to say from the

totality of his testimony that he obtained permission from his family to build on the land. He also "told" the Agedegudu family. He gave his reason for doing this. This is because he knew that the Agedegudu family had gone about molesting persons to whom the Oshodi family gave land and destroying their buildings. He naturally did not want that to happen to him. I do not therefore think that it can be said with any degree of seriousness that the above gesture on the part of the 1st defendant unequivocally amounted to his admission of the plaintiffs' title to the land in dispute. But as I have already stated, it is clear to me that that plaintiffs' action in the present suit is squarely caught by the plea of estoppel per rem judicatam and issue estoppel raised by the defendants in the proceedings by virtue of suits Nos. AB/16/57 and FSC. 143/61.

Having resolved issues 1 and 2 in the negative, no useful purpose will be served by my consideration of issue 3 which concerns whether the plaintiffs established their ownership of the land in dispute and the other reliefs claimed against the defendants.

In the final result and for all the reasons I have given above, these appeals accordingly succeed and they are hereby allowed. The judgments and orders of both courts below are set aside and in substitution thereof the plaintiffs' claims are hereby dismissed. There will be costs to each set of defendants/appellants against the plaintiffs/respondents which I assess and fix at N1,500.00 in the trial court N2,000.00 in the court below and N10,000.00 in this court.

WALI JSC

I have had the privilege of reading in advance the well-detailed lead judgment of my learned brother Iguh, JSC, and I entirely agreed with his reasoning and conclusion for allowing this appeal. I endorse both the reasoning and conclusion as mine.

For these same reasons, I also hereby allow the appeal and adopt the consequential orders made in the lead judgment, including that of costs.

OGWUEGBU JSC

I had the advantage of a preview of the judgment just delivered by my learned brother Iguh, J.S.C. and I entirely agree with his reasoning and conclusions. I only wish to make hereunder some comments in support. The facts having been fully set out in the lead judgment of my learned brother Iguh, J.S.C., it will not be necessary to repeat them here except those facts as pleaded which may be necessary for the appreciation and resolution of the issues canvassed before us.

There were two sets of defendants at the court of trial who also represent the two sets of appellants in the court below and in this court. The first set of appellants is the 1st and 3rd defendants/appellants represented by Mahmoud Gafar, Esq. and the second set is the 2nd defendant/appellant who defended the action for himself and on behalf of Oshodi/Arota Ologun family of Lagos. They are represented by L. O. Fagbemi, Esq. S.A.N. The plaintiffs were the respondents in the court below as well as in this court. In this judgment, the 1st and 3rd appellants will be described as the 1st set of appellants and the 2nd appellant will be known as the 2nd set.

The two sets of appellants lost in the High Court and the Court below. They have further appealed to this court. Three issues are submitted by the 1st set of appellants for our determination in the appeal namely:

"1. Whether the Court of Appeal was right in holding that the issues in suit No. AB/16/57 are not the same with those in the present suit.

2. Whether the decisions in AB/16/57 and FSC/413/61 do not create issue estoppel to bar the respondents from re-litigating the issues decided therein.

3. Whether Court of Appeal was right in holding that estoppel per res judicata was not established by reason of the failure of the appellants to prove that the subject matter in suit No. AB/16/57 is the same with that of the present suit.

The second set of appellants formulated four main issues in their brief of argument:-

"1. Whether on the pleadings it was disputed that the land, the

subject matter of this suit, had been a subject of previous decision in Suit No. AB/16/57 between the Appellant and the Plaintiffs/Respondents - Grounds 1, 2, 3 and 4.

2. Whether the 2nd Appellant in the court below who is Appellant herein, made a claim in the High Court - Ground 9.

3. Whether, in any event, the plea of estoppel is well made; Grounds 5, 6, 8, 9, 10, 11, and

4. Whether the principles in Kojo and Bonsie & Anor (1957) 1 W.L.R. page 1223 apply to this case to make the case of the Plaintiffs/Respondents preferable to that of the Appellant - Ground 12."

On their part, the respondents formulated the following three issues in their brief of argument:

"1. Whether the Court of Appeal was right in holding that the issues in Suit No. AB/16/57 are not the same with those in the present suit.

2. Whether the decisions in AB/16/57 and FSC.413/61 do not create issue estoppel to bar the respondents from relitigating issues decided therein.

3. Whether the Court of Appeal was right in holding that estoppel per rem judicatam was not established by reason of the failure of the appellants to prove that the subject matter in Suit No. AB/16/57 is not the same as that of this suit."

The above issues are covered by those identified by the two sets of appellants and will be considered together.

The principal question raised in this appeal and which calls for the decision of this court is whether the courts below were right in holding that the plea of estoppel per rem judicatam was not established by reason of the failure of the appellants to prove that the subject matter in suit No. AB/16/57 is the same as that in the present suit. A subsidiary issue in the sense that if the principal question is resolved in favour of the appellants, the subsidiary issue will no longer require a resolution, is whether the court below was right in holding that the decisions in suit No. AB/16/57 and FSC. 413/61 do not create issue estoppel.

Suit No. AB/16/57 which forms the foundation of the appellants

plea of *res judicata* was instituted in the then High Court of Western Region of Nigeria, Abeokuta Judicial Division by one Sunmonu Agedegudu "as Head of and for and on behalf of the Onigbesa family" against Sanni Ajenifuja, Kasumu Oshodi and Salawu Almaruf "for and on behalf of the Descendants of Oshodi (deceased)." The plaintiffs' claim was for the following reliefs:

"(i) A declaration that they are the owners under Native Law and Custom of the land the subject of the action.

(ii) A declaration that the Defendants have forfeited their rights as Customary tenants.

(iii) Possession of the land."

In the present proceedings, Jimoh Odunlami (Deceased) and others "for themselves and on behalf of Odujaguda family otherwise known as Akinowo Family" as plaintiffs sued the defendants claiming the following reliefs set out in paragraph 20 of the Amended Statement of Claim:

"Whereupon the plaintiffs claim as against the 1st defendant forfeiture of his customary tenancy on grounds of his conduct by denying plaintiffs title to the said land. As against the 2nd defendants the plaintiffs claim N100 damages for trespass and injunction restraining the 2nd defendant from further trespassing (sic) on the said land."

In suit No. AB/16/57, the learned trial Judge Duffus, J. in a reserved and well considered judgment came to the following conclusions:

"I am quite satisfied from the evidence that the Oshodi family have for a considerable period of well over a hundred years been in possession and occupation of the land in dispute and have during this time openly exercised acts of ownership over the land without protest from the Plaintiffs.

I do not accept the Plaintiffs' case that the Defendants' family have been regularly paying tribute for the land in dispute. I believe and accept the defence that they have occupied the land in dispute including Oshodi village without payment of rent or tribute. The preponderance of evidence would support the view that the grant to the Defendants family was an absolute grant and not on customary ten-

ancy. I have therefore on the evidence before me arrived at the following conclusions:

(1) That there was a grant by Onigbesa family of the land in dispute to the Defendant family.

B (2) That I am unable to find as a fact whether this grant was made by Onigbesa family of Igbesa or by the Plaintiffs, the Onigbesa family from Isolo.

C (3) That in any event I am satisfied from the evidence that this grant was an absolute grant and that the Oshodi family now hold the land in dispute as owners and not as customary tenants.

It follows therefore that the Plaintiff's action fails.'

D In the present, proceedings the 1st and 4th defendant raised a plea of estoppel per rem judicatam in their amended statement of defence and this defence if it succeeds, is a bar to the action. Paragraphs 7 to 12 thereof are relevant and they read as follows:

E "7. The Defendants claim to be members of the Oshodi and Arota communities residing at Oshodi and they rely on the title of the said communities in this action.

F 8. The Defendants aver in answer to the Plaintiffs' claim that about 200 years ago, Chief Oshodi Tapa was granted absolutely a vast area in the district of Oshodi by the Awori people who first settled in the said area, in recognition of the military assistance which he and his Arotas gave to them to ward off and defeat slave raiders in those days.

G 9. Chief Oshodi settled his Arotas on the said land, and they have been in possession thereof from the time of the grant to this day, farming and residing on several portions thereof and giving out several portions to their tenants to farm and build upon. Oshodi's descendants have also come to build and reside on the said land along with the Arotas, and both communities have paid no tribute or rent to anyone.

H 10. The Defendants further aver that when the Agedegudu Family sued S. Ajenifuja and others and their family in Suit No. AB/16/57 in this court, claiming ownership etc. of a portion of the land granted to them at Oshodi aforesaid, the then defendants set out the defences in paragraphs 8 and 9 above, and the court dismissed the claims. The said

Agedegudu Family appealed to the Federal Supreme Court in FSC. 413/61 but they also lost when the High Court judgment was upheld. During the years that the case lasted, no issue about Suit No. 134/30 was raised or pleaded in support of their claim.

11. *The present plaintiffs were aware of that case in Suit No. AB/16/57 and were present in court throughout, taking active part in it all along with members of their Agedegudu Family. It was after they lost the said case pleaded in paragraph 10 above that they (Agedegudu Family) purported to partition some lands among themselves so as to be able to bring up this action or other similar to it.*

12. *The Defendants specifically plead the proceedings and judgment in the said case pleaded in paragraph 10 above, as also those in Suit No. IK/212/62, as estoppel per rem judicatam in this case, in that the land now in dispute as shown in the plan attached to the Statement of Claim is part of the land granted to Chief Oshodi Tapa as pleaded in paragraphs 8 and 9 above and to which the two cases related."*

What was the reaction of the plaintiffs/respondents to the above averments? I will reproduce paragraphs 4, 6, 7, 8 and 10 of their Amended Reply to the Amended Statement of Defence of the 1st and 4th defendants. They read as follows:

"4. *The plaintiffs aver that they were never aware of Suit No. AB/16/57 and pleaded that they too were in Court against the Plaintiffs in that action in respect of their own portion of the landed property.*

6. *The Plaintiffs deny that there was ever war in the area and their family never gave land to Oshodi Family nor the Arota family for helping them and put the Defendants to strict proof of this.*

7. *With reference to paragraph 12 of the Amended Statement of Defence of the 1st and 4th Defendants, the Plaintiffs plead that they are not parties to this Suit and are not bound by the judgments.*

8. *The plaintiffs further aver that they have a common boundary with Akinbayo Family, the Elemo Family, the Onigbongbo people and that the Ajemogun Family the Ojuwoye Community are also their boundary men.*

10. *With reference to paragraphs 10 and 11 of the Statement of*

Defence of the 2nd - 2nd (sic) Defendants, the plaintiffs aver that they have consistently informed the whole world that they were never a party to Suit No. AB/16/57 and will rely on warning notices issued by them especially warning notices dated 12th October 1959 and also public warning dated 17th day of July 1964. Sunmonu Agedegudu was never the head of their family and therefore has no mandate to sue or be sued on their behalf."

The learned trial judge Oguntade, J. (as he then was) in a painstaking judgment came to the following conclusions in so far as the plea of res judicata and issue estoppel were concerned:

"There can be no doubt that the proceedings and judgment in Suit No. AB/16/57 show that Sunmonu Agedegudu who was plaintiff brought the action for and on behalf of Onigbesa family. The plaintiff in this case are members of that family. In AB/16/57 the 4th and 5th defendants therein were joined by an order of court to enable them defend the action (For and on behalf of the descendants of Oshodi Family). It is therefore clear that a finding that the Onigba had granted land to Oshodi Tapa and his Arotas would bind the branches - Akinowo and Ogundamija. The conclusion I have come to is that the parties in the present case and those in AB/16/57 are the same vis-a-vis family succession. The conclusion then is that the current case has at its core the issue of ownership as did the previous case AB/16/57. In my finding therefore, the issues in the two cases are the same.

Had I been able to find that the defendants satisfactorily showed that the Res or subject-matter in the two cases was the same, I would have upheld the plea of estoppel per Rem Judicatam raised by the defendant and proceeded to dismiss plaintiffs' action. In the result, therefore, the plea of Estoppel Per Rem Judicatam fails." (the underlining is for emphasis only).

The learned trial judge in continuation of his judgment applied the principle enunciated in the case of Kojo v. Bonsie & Or. (1957) 1 WLR 1223 at 1226 and gave judgment for the plaintiffs. On appeal by the two sets of appellants to the court below, that court affirmed the

judgment of the learned trial judge.

On suit No. AB/16/57, it held as follows:

"Reading the entire proceedings of Suit AB/16/57 would not be a substitute for producing the plan of the land in dispute tendered in evidence in that case, nor would combing the evidence in Suit AB/16/57 to discern a similarity of facts relied on by the plaintiffs in that case, the respondents in this case provide such substitute.

It is really surprising that resort was had to non-existent circumstantial evidence to prove a fact which would have easily been directly proved by producing the plan put in evidence in Suit AB/16/57 and marked Exh. 1 or satisfactorily explaining its absence in such a way as to make secondary evidence of its contents admissible. In the absence of proof of the subject-matter of the action in Suit AB/16/57, it cannot strictly be said that the issues in the two actions are identical even though they both raised issue of ownership of land."

It is apparent on the record that the two courts below would have dismissed the claims of the plaintiffs if, according to them, the survey plan put in evidence in suit No. AB/16/57 had been produced or its absence satisfactorily explained. The learned justices of the court below as well as the learned trial judge did not appear to advert their minds to the rules of procedure governing the exchange of pleadings and the function of pleadings.

Before a judge or jury is asked to decide any question which is in controversy between the parties, it is always desirable and in most cases necessary, that the matter to be submitted for a decision should be clearly ascertained. The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a counter-claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know what they are fighting about. The function of pleadings therefore is to ascertain with precision the matters on which parties differ and the

points on which they agree; and thus to arrive at certain clear issues on which they desire a judicial decision. It makes for economy and evidence is confined to those points or issues. The cardinal point is the avoidance of surprise. See George & Ors. v. Dominion Flour Mills Ltd.

B (1965) 1 ALL NLR 71.

The defendants having made weighty averments in paragraphs 7, 8, 9, 10, 11 and 12 of their Amended Statement of Defence by raising a plea of estoppel per rem judicatam, the plaintiffs should have specifically met them in their Reply. A Reply is not necessary if its sole object is to deny what the defendant has stated in his defence, for in its absence there is an implied joinder of issue. Its main function, therefore, is to raise in answer to the defence any matters which must be pleaded by way of confession and avoidance or to make any admissions which the D plaintiff may be disposed to make. The reaction of the plaintiffs/respondents is not that the land in dispute in suit No. AB/16/57 is different from the land in dispute in the present proceedings. In paragraphs 4, 6, 7 and 8 of their Amended Reply, they contended that they were not parties to E suit No. AB/16/57 and are not bound by it. That Sunmonu Agedegudu was never the head of their family and had no mandate to sue or be sued on their behalf. If in their Reply they had averred that the land litigated upon in suit No. AB/16/57 is different from the land in dispute in the F present case, then the identity of the land would have been put in issue. This they did not do. The plaintiffs in their pleadings limited their response to the non-participation by their family in suit No. AB/16/57. In any event, the effect of paragraphs 4, 6, 7 and 8 of the Amended Reply earlier on set out in this judgment is that the plaintiffs do not deny the G assertion of the defendants that parties are in the current proceedings litigating over the same land that was in dispute in suit No. AB/16/57. Since the parties in the current suit are privies of the parties in AB/16/57 in respect of the same cause of action which terminated in the final judg- H ment of this court, they are precluded from relitigating the same cause of action. It will go contrary to the aim of pleadings to contend at the trial that the land in dispute in suit No. AB/16/57 is different from that in the present suit when the defendants had prepared their evidence and argu-

ments on the basis that the identity of the land was not in issue. I am therefore satisfied that the decision in suit AB/16/57 refers to the same land as is now in dispute in this case.

The plaintiffs for reasons best known to them failed to deny the material averments in the Amended Statement of Defence. See Odume v. Nnachi (1964) 1 ALL NLR 239 and Ajibade v. Mayowa (1978) 9-10 SC. 1. Any evidence led by the plaintiffs without pleadings as to the identity of the land went to no issue and should have been ignored by the court because at the close of pleadings it was settled beyond doubt that the parcel of land in suit No. AB/16/57 is the same land as that now being litigated upon. Quite apart from the state of pleadings, it is clear from the evidence led that the appellants sufficiently established on the preponderance of evidence that the land the subject matter in suit No. AB/16/57 is the same as the land in dispute in the present proceedings.

The courts below were clearly in error when they held that the appellants did not establish by evidence that it is the same parcel of land litigated upon in suit No. AB/16/57 that is in dispute in the present suit.

The defendants having relied on res judicata as a bar to the plaintiffs' claim, were required to establish that:

- (i) the parties or their privies are the same,
- (ii) the facts in issue in both the previous and present proceedings are the same,
- (iii) the subject matter of the claim is the same,
- (iv) the decision relied upon to support the plea of estoppel per rem judicatam must be final and
- (v) the court giving the decision is competent.

The defendants/appellants satisfied all the five conditions. See Prince Yaya Adigun & Ors. v. Governor of Osun State & Ors. (1995) 3 N.W.L.R. (pt. 385) 513, Alase & Ors. v. Olori Ilu & Ors. (1965) N.M.L.R. 66 and Balogun v. Adejobi & Ors. (1995) 2 N.W.L.R. (pt. 376) 131.

Suit No. AB/16/57 terminated in this court as appeal No. FSC.413/ 1961. The learned trial judge found all the conditions for a valid plea of estoppel per rem judicatam present in the present proceedings except that of the subject matter. The court below set out to hold, contrary to

the finding of the learned trial judge, that the issues in suit No. AB/16/57 are not the same as those in the present action. It is not open to it to reverse the finding when the plaintiffs did not challenge it on appeal to that court. The finding of the learned trial judge that the issues are the same stands good against them in this appeal. The court below was wrong to have reversed the finding. See Nwabueze v. Okoye (1988) 4 N.W.L.R. (pt. 91) 664.

The courts below were in error in holding that the failure of the defendants to tender the survey plan used in suit No. AB/16/57 was fatal because they did not show that the parcel of land in the two actions are the same. It failed to take cognizance of the fact that at the close of pleadings, the identity of the land was not in issue.

It is well known that in order to decide what questions of law or fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of evidence and is not restricted to the formal judgment. See Randolph v. Tuck (1961) 1 ALL ER. 814. Where the plea is of issue estoppel it is open to the court investigating the plea to look at other materials on record which will show what issues were raised and infact decided and the reasons for the decision. See Fadiora & Ors. v. Gbadebo & Ors. (1978) 3 SC. 219.

I will not conclude this judgment without stating in clear terms that the consent judgment obtained by the plaintiffs and other members of Olusi Onigbesa family was fraudulent. It was obtained after the High Court judgment in suit No. AB/16/57 and it was meant to over-reach. The purported partition giving rise to the judgment in suit No. AB/110/57 were acts which should be discouraged. The principal question which is res judicata having been resolved in favour of the two sets of appellants, no useful purpose will be served in considering the other issues raised by both parties.

In the final result, the appeal succeeds and I hereby allow same for the reasons given above and for the more detailed reasons given in the lead judgment of my learned brother, Iguh, J.S.C. The plaintiffs' action is hereby dismissed by me. I abide by all the consequential orders made by my learned brother Iguh, J.S.C including the order for costs.

ACHIKE JSC

I have before now, had the privilege of reading, in draft the leading judgment of my learned brother, Iguh, JSC. The judgment has produced a detailed account and lucid legal exposition on this variegated B historical account of a case that has featured before many Judges spanning a protracted period of no less than 35 years. No useful purpose will be served by recapitulating the facts in this appeal which had been admirably and distinctly set out in the leading judgment. I would also wish to state that all the issues agitated by the three sets of counsel in this appeal C had been accorded adequate consideration. I will however sketchily touch on one aspect of the appeal that seemingly exercised this Court. But before doing so, it is sufficient to observe that after the parties had duly exchanged pleadings it became clear from the earlier cases in Suit No. D AB/110/57, identified as Exhibit A and that of the Ikeja High in Suit No. AB/16/57 which came on appeal to this Court as Appeal No. FSC.413/61, otherwise identified as Exhibits 0, 01-02, that the parties had been in previous litigation in respect of some land, and accordingly the two sets E of defendants (herein appellants) understandably raised the plea of res judicata in their pleadings.

The crux of the defence plea on res judicata is that the land in dispute in the present case is the same as the land in Suit No. AB/16/57. F To this end, learned counsel, Mr. Mahmoud Gafar for the 1st and 3rd defendants made several references to the land in dispute in the earlier case to establish the sameness of the subject-matter in both that suit and the present suit.

For the 2nd defendant, Mr. Lateef Fagbemi, SAN, the learned G Senior Advocate, making several references to the parties' pleadings forcefully submitted that the identity of the land in dispute was the same as that in Suit No. AB/16/57 and if that is so, there would be no necessity to tender plans of the land in dispute in the earlier case. Specifically, H references were made by learned senior counsel to the amended Statement of Defence of the 2nd and 5th defendants wherein they averred that the identity of the land in dispute in both Suit No AB/16/57 and the present

suit was the same. He also referred to plaintiffs' amended Reply to the amendment made by the 2nd and 5th defendants and drew attention to the fact that it was significant that they did not traverse this all important averment. It was learned senior counsel's submission that issues having
 B been joined on the question of the identity of the land in dispute in relation to the earlier case and the present one as being the same, the necessity of leading evidence or even filing survey plans in respect thereof for further identifying the said land in dispute, became uncalled for. He finally sub-
 C mitted that it was erroneous for the Court of Appeal to have affirmed the posture of the trial court and refused to examined the record in order to ascertain, whether it was properly established looking at the pleadings and evidence on the issue of the sameness of the land in dispute. Finally, senior counsel urged us to hold that the plea of res judicata had been
 D established by the defendants because the issue, the res and the parties in the earlier suit as well as in the present suit were the same.

T.O.E. Kuye (Ms), learned plaintiffs' counsel responding, as-
 siduously submitted that a perusal of the amended statement of claim
 E clearly demonstrated that the plaintiffs' view that the res in suit No. AB/16/57 was different from that in the present action. The same view, according to counsel, had necessitated the filing of plaintiffs' Reply to the defendants' statement of defence. To learned counsel, it was this fact
 F that the res in both cases were different that made the defendants tender the proceedings in the earlier suit and omitted to include the survey plans tendered at the trial of the said suit. Counsel submitted, and rightly in my view, that since the appellants assert the sameness of the res in both suits, the burden rests squarely on them to prove it and relies on the
 G decision of Elias v Sulaiman & ors (1973) 12 SC 114. She further stressed on the concurrent findings of both the trial court and the court below and submitted that nothing has been shown by the appellants to warrant this Court to interfere with the decisions of the two lower courts. Finally,
 H counsel urged that neither the principle of issue estoppel could come into play in the circumstances of this case nor could the principle of res judicata be evoked in favour of the appellants because the res was different in both cases.

I have dispassionately examined the parties' pleadings, particularly the several paragraphs of the amended statement of defence of the two sets of defendants and the Reply effected to meet those amendments. There cannot be any equivocation whatsoever that both the plaintiffs and the two sets of defendants were fully emeshed in the applicability of the doctrine of estoppel per rem judicatem. The learned trial Judge after a painstaking evaluation of the evidence had no difficulty in reaching the conclusion that the parties were the same in both Suit No. AB/16/57 and the present case. I entirely agree with him.

Similarly, the trial court, after a proper evaluation of evidence reached the conclusion that the issues in AB/16/57 and the present case were the same.

Interestingly, these two crucial findings were not appealed against by either party although the Court of Appeal made a disparaging remark suggesting that the trial court's finding of the sameness of the issues in both cases was incorrect. Of course, the lower court was not entitled to that remark because the question of the sameness of the issues in the two cases was not properly before it, there being no appeal or cross-appeal in respect thereof. The wrongness or otherwise of the finding on the sameness of issues in both cases as determined by the trial court, in the absence of an appeal in relation thereto to the Court of Appeal, remains inviolate. Accordingly, any query by the lower court in respect of such finding is an unsolicited observation which cannot be taken seriously in consideration and the determination of the controversy before it. Stricto sensu, the lower court's contrary view on the issues before both courts should be discountenanced. It is not even entitled in legal circles to the appellation of obiter dictum. It is common place that an obiter dictum is an expression of opinion made in giving a judgment by the judge but not necessary to his decision and accordingly cannot form part of the ratio decidendi of the judgment. No doubt, an obiter dictum may be very weighty taking into consideration the judicial esteem and respectability in which the maker is held. If the judge is a luminary of high-standing, his obiter dictum may in due course crystallize to good law. However, if it is the contrary, the dictum will sooner than later be ignored contemptibly.

But where an appellate court, without being competently invited to re-open questions of findings made by the lower court - i.e. there being no appeal in respect thereof - such intrusion is unwarranted as it is baseless. A further appeal in respect thereof would not meet any resistance in setting aside the interference made by that court. With due respect, such interference is unsolicited meddlesomeness which must be cut down by a superior appellate court as it is prejudicial to the interest of justice where a finding by a court is not unreasonable in the sense that it is amply supported by evidence placed before the court and the same has not been appealed against; it will patently be unjustified for the appellate court, such as the lower court, to re-open the matter suo-motu. Any decision reached in respect thereof must be discountenanced because an appellate court lacks jurisdiction and therefore competence to include in its deliberation or consideration of any case an issue not competently placed before it. The injustice is more exacerbated when that court fails to accord the parties' counsel audience to address it on that obiter dictum. In my opinion, the lower court lacked the competence to re-open and even reverse the question of the issues in the two cases under reference after a finding had been made in respect thereof which no appeal was lodged. The decision of the lower court in this regard must be refused. Accordingly, I uphold the finding of the trial court as regards the sameness of the issues in both cases.

We are now left only with the third issue relevant to the consideration of the plea of res judicata, namely, whether the res in both cases are the same. After evaluation of the evidence put before him, the learned trial Judge reached the conclusion that the sameness of the land in dispute in the present case was not part of the land previously litigated by the parties in Suit No. AB/16/57.

Unquestionably, the difficulty that has arisen on the third factor in establishing the plea of res judicata is failure of the plaintiffs to tender the survey plans of the land in dispute in AB/16/57. This was equally a vexed issue before the Court of Appeal. But I have early indicated my dispassionate perusal of material averments of the parties' pleadings and I have also closely examined counsel's submissions and their detailed

references in their divergence on the issue of the sameness of the res in both cases, and have arrived at the conclusion that the res in Suit No. AB/16/57 is the same as in the present case, not being unmindful that the resolution of the controversy of this aspect of the appeal would have been made lighter if the plans tendered in AB/16/57 had been placed before the two lower courts. A more detailed analysis on the question of identity of the land in dispute in both cases was painstakingly executed in the leading judgment which, as earlier stated, I was privileged to have read, in draft, and respectfully, pray to adopt it as mine. That fortifies my opinion on the sameness of the res in both cases.

I shall not conclude the issue of sameness of the identity of the res in both cases if I fail to bear in this judgment that a survey plan is not a sine qua non in all land cases. Obviously, a survey plan is a good guide to the identity of the land the parties are litigating upon where that identity is made an issue by the parties. Consequently, if the parties to a land suit are familiar with the land in dispute, as for example, where the res is a piece or parcel of land demarcated by numbered survey beacons in a Layout covered by a survey plan and each parcel of land is clearly numbered in the survey plan, the parties can hardly be mistaken as to the identity of the land. So also where the parties are ordinarily familiar with the location of the parcel of land in dispute and each party in his pleadings indicates such familiarity with the res, the preparation of a survey plan for the purposes of litigation cannot be necessary nor compelling. This was the situation in the case in hand where the parties from their prolix pleadings left no dispassionate peruser of their said pleadings that they were at one with regard to the fact of the identity of the res in the two cases being the same. May I reiterate by way of emphasis that I have no hesitation from my thorough perusal of the parties' lengthy pleadings that they were clearly ad idem as to the land in dispute in both cases being the same.

The result is that the defendants/appellants have satisfactorily demonstrated that the tripartite elements indispensable to the plea of res judicata have been established. In other words, the plaintiffs/respondents action is not maintainable being caught by the defence or plea of

res judicata ably raised and established by the defendants/appellants.

The net result of all I have been saying is that the appeal deserves to succeed and the same is allowed. I accordingly set aside the judgments of the two lower courts, and in substitution in respect thereof,
B I dismiss the plaintiffs'/respondents' claims. I abide by the orders as to costs as set out in the leading judgment.

EJIWUNMI JSC

C I have before now been privileged to have read in its draft form, the judgment just delivered by my learned brother, Iguh JSC. In the said judgment I must observe that the facts, though intricate, were carefully considered upon the issues raised before the conclusion was reached
D that the appeal has merit. As I agree with all the reasons given for upholding this appeal, I adopt the judgment of my learned brother, Iguh JSC. as my own.

The appeal is therefore also allowed by me, and I abide with the
E consequential orders made in the leading judgment of my learned brother, Iguh JSC.

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