

SUPREME COURT OF NIGERIA
26TH JANUARY, 2001. SC. 58/1992
CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU,
A. I. IGUH, A. I. KATSINA-ALU, JJSC.

OLOWO OKUKUJE

[For himself and on behalf of

Akpara Family of Ofagbe Village, PLAINTIFF/APPELLANT
Isoko Division]

AND

ODJENIMA AKWIDO

[For himself and on behalf of Igbavie

Family of Ofagbe Village, Isoko DEFENDANT/RESPONDENT
Division]

ACTIONS - Customary court - Representative action - Meaning of a representative - It must be apparent on the record - That the suit is defended on behalf of one's family.

ESTOPPEL - Issue estoppel - Parties must be the same in both cases - For the question of issue estoppel to arise.

ESTOPPEL - Representative and personal capacity - Sameness of judgment - Will not arise to warrant estoppel - Where present action is prosecuted in a different capacity.

ESTOPPEL - Res judicata - For the doctrine to apply - Parties, issues and subject matter - Must be the same.

ESTOPPEL - Res judicata or estoppel of record - Arises where an issue of fact has been judicially determined in a final manner - Between the parties or their privies.

ESTOPPEL - *Subject matter - Res judicata - Land dispute - Difference in subject matter - Will make the plea of estoppel inapplicable.*

LAND LAW - *Family land - Proper party to sue or be joined should have been the family - Irrespective of allotment of the land.*

WORDS & PHRASES - *Capacity of action - "Where an action is brought against the defendant personally and prosecuted to judgment" - Meaning of this phrase - Requirement in trials before native courts.*

FACTS

The plaintiff/appellant and the defendant/respondent are from the same village of Delta State. The Appellant had initiated proceedings against the defendant in the High Court of Justice, Delta State in representative capacities for and on behalf of their families claiming declaration of title to a piece of land, damages for trespass, order of forfeiture against defendant's right of tenancy and a mandatory injunction. The defendant in his statement of defence denied the plaintiff's claims and equally counterclaimed against the plaintiff for declaration of title to the same piece of land, damages for trespass and an order of perpetual injunction. At trial the parties anchored their cases on traditional history and various acts of long possession and ownership. The defendant in particular pleaded the proceedings and judgment in a customary court suit and magistrate court suit giving judgment to the defendant against the plaintiff in a litigation concerning part of the disputed land and therefore relied on estoppel per rem judicatam and issue estoppel as his defence to the plaintiff's action.

The learned trial judge after reviewing the evidence rejected the defendant's defence of estoppel and res judicata and accepted the plaintiff's traditional history in preference to that of the defendant. He gave judgment for the plaintiff for title to the land, damages for trespass and perpetual injunction against the defendant. The defendant thereupon appealed to the court of appeal which allowed

his appeal and dismissed the plaintiff's claim entering judgment for the defendant in respect his counterclaim. Aggrieved by the decision of the court of Appeal the plaintiff has appealed to the supreme court.

ISSUE FOR DETERMINATION

Whether the defendant made out a case for the application of both estoppel per rem judicatam and issue estoppel.

HELD : (Allowing the appeal per lead judgment of **KATSINA-ALU JSC**, WALI & IGUH JJSC Dissenting)

Res judicata or estoppel of record

1. Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in a final manner between the parties or their privies by a court or tribunal having jurisdiction in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. See *Igwego v Ezeugo* (1992) 6 NWLR pt. 249) 561. (p. 11 E)

Res judicata - For the doctrine to apply

2. For the doctrine of estoppel per rem judicatam to apply, it must be shown that:

(a) The parties (b) The issues and (c) the subject matter in the previous action were the same as those in the action in which the plea is raised. Once these ingredients of res judicata are established, the previous judgement estops the plaintiff from making any claim contrary to the decision in the previous case. See *Odjewedje v Echanokpe* (1987) 1 NWLR [Pt. 52] 633. (p. 11 G)

Customary court - Representative action

3. A representative is a person authorised to act or speak for another or others. By this definition, it would appear that there must be some kind of authorisation given by the person or persons to be represented. Throughout the evidence of the Defendant, he did not as much as allude to the fact that he was defending the action for himself and on behalf of his family. I am not unmindful of the fact

that this was a trial in a Customary Court. That notwithstanding, it must be apparent on the record that the defendant defended this suit for himself and on behalf of his family. (p. 13 A)

B *Estoppel - Representative and personal capacity*

4. I am of the strong view that by no stretch can the parties in the two cases be said to be suing and defending the suits in the same rights and interest. It is now settled law that where an action is brought by a person in a representative capacity against another person personally and prosecuted to judgement, and later a further action is brought against him in a representative capacity by the plaintiff in the original action, the judgement is not the same, since in the earlier action the defendant is sued in his personal capacity and in the latter action as a representative of a class of persons. See Shitta-Bey & Ors. v The Chairman, LEDB & Ors. (p. 14 B)

Words & Phrases - Capacity of action

5. The decisions of this court speak of "where an action is brought against the defendant personally and prosecuted to judgement". What does this phrase mean?. I think it means that the defendant who is sued personally does not change the capacity throughout the trial. How can he change that personal capacity in which he is sued?. He can do this by tendering the authority to defend in a representative capacity from the class of persons he seeks to represent. In trials in native courts, it is sufficient if he states that he is defending for himself and the persons he represents some of whom will testify and confirm his authority. In Exhibit "C" the personal capacity in which the defendant was sued did not change throughout the trial. (p. 15 B)

H *Family land - Proper party to sue or be joined*

6. One more point. If the evidence that "the plot in dispute is owned by Akpara" is taken to mean that the land in question belongs to the Akpara family then it is right to say that the plaintiff did not sue the

proper party. The Akpara family should have been joined in the action. This is so because family land remains family land irrespective of allotment. See *Olanguno v Ogunsanya* (1970) 1 ANLR 223. The court has a duty to ensure that all parties likely to be affected by the result of an action are joined in the action. See *Okafor v Nnaife* (1993) 3 SC. 85. (p. 15 E)

Estoppel - Subject matter

7. In the second place, the subject matters in the two actions were not the same. The subject matter of the earlier case (Exhibit C) was a smaller area of land whereas the subject matter in the present case is a much larger area of land of which the land in Exhibit C forms only a fractional part. It is for this reason that the plea of *res judicata* cannot apply to the larger land area in contention. (p. 17 B) D

Issue estoppel - Parties must be the same

8. One of the conditions to satisfy in order to sustain a plea of issue estoppel is that the parties must be the same in both cases - see *Samuel Fadiora & Anor. v. Gbadebo & Anor.* [1978] 3 SC. 219 at 228 - 229. I have already held that the parties in the present case are not the same, therefore the question of issue estoppel as between the present parties does not arise. See *Ezeanya v Okeke* (supra). (p. 18 F)

NOTABLE POINTS OF INTEREST

ONU JSC

1. *Evidence of root of title does not amount to appearing in representative capacity* G

The fact that the Appellant made reference in his evidence at the Customary Court to the root of his title does not amount to appearing in a representative capacity to defend on behalf of other members of the family not parties to the action. (p. 36 B) H

2. *Doctrine of standing by - Its application*

The doctrine of Standing By will apply if the subject-matter in the previous case was the same as in the one being litigated. In the previous Suit (Exhibit C), it was only the interest of the Appellant that was at stake, whereas in the present case, the interest of the family as a whole was in contest. (p. 39 B)

3. *Issue estoppel cannot be based on a non-suited judgment*

Be it noted that a plea of issue estoppel could not be based on the findings contained in a judgment of a non-suit. See Emeka Osondu & Anor. v Ajama Nduka & Ors. (1978) 1 SC. 9 at 24 (p. 40 A)

IGUH JSC (DISSENTING)

4. *Public policy requires that there should be a end to litigation*

It is an application of the rule of public policy and in the interest of the common good that there should be an end to litigation. This is covered by the well established doctrine, interest rei publicae ut sit finis litium. See John Omokhafa v. Esekhome (1993) 8 N.W.L.R 58. In this regard it is 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. Where, therefore, a cause of action in a present suit has been determined in a previous suit between the same parties and on the same issues, the parties are estopped per rem judicatam from bringing a fresh action before any court on the same cause and on the same issue already pronounced upon by the court in the previous action. See Oyelakin Balogun v. Adedosu Adejoki (1995) 2 N.W.L.R (part 376) 131. (p. 47 D)

5. *Meaning of issue estoppel*

With regard to issue estoppel, it is recognised that within a single cause of action, several issues may come into question which are necessary for the determination of the whole case. As a general rule, once one or more of any such issues have been distinctly raised in a cause of action and determined between the same parties in a court

of competent jurisdiction, nether party, his servant, agent or privy is allowed to reopen or relitigate any of such issues all over again in another action between the same parties or their agents or privies. See Lawal v. Yakubu Dawodu (1972) 1 All N.L. R. (Part 2) 270 at 272. (p. 47 H)

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6. Determination of parties, facts & subject matter of two suits - A question of fact

In the third place, it cannot be over-emphasised that in the determination of whether the plea of estoppel per rem judicatam or whether the parties, the issues and the subject matter in both the previous and the present actions are the same, the court is permitted to study the pleadings, the proceedings and the judgment in the previous suit. The court may also examine the reasons for the judgment and other relevant facts to discover what in fact was in issue in the previous proceeding. See Fadiora v. Gbadebo, supra. It may therefore be said that it is a question of fact whether the parties and their privies, the facts in issue and the subject matter of the two cases are the same. (p. 51 F)

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7. Proceedings from native or customary courts should be construed liberally to arrive at its substance.

In this regard, the law is well settled that the form of an action in a Customary Court or tribunal and, indeed, in other inferior courts of equivalent jurisdiction must not be stressed where the issue involved is clear and decisions on such issues should not be disturbed without very clear proof that they are wrong. It is the substance of such a claim that is, in law, the determinant factor. See Kwamin Akyin v Essie Egyimah (1936) 3 W. A. C. A. 65, Solomon Jonah v Kojo Owu (1937) 3 W. A. C. A. 170 at 171. Proceedings in a Customary Court have to be carefully scrutinised to ascertain the actual subject matter of the case, the real issues therein and who the correct parties are. An action instituted in a Customary Court might on the face of the claim appear to be a purely personal action, particularly, if it is not

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indicated ex facie that the same is a representative action when, in point of fact such is, to all intent and purposes, being fought by the parties in representative capacities. In dealing, therefore, with proceedings from Native or Customary Courts, appellate courts must
 B not be unduly too strict with regard to matters of procedure as the whole object of such trials is that the real dispute between the parties should be adjudicated upon without unnecessary resort to form and/or undue technicalities. See Olujinle v. Adeagbo (1988) 2 N.W. L. R. (Part 75) 238 at 251 (p. 52 A)
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8. *Parties incorporates all who have direct interest in subject matter*
 It is now well settled that the term "parties" includes not only those named on the record of proceedings but also those who had direct
 D interest in the subject matter of the dispute and had an opportunity to attend the proceedings and to join as a party in the suit but chose not to do so but were content to stand by and see the battle in which their interest is directly in issue fought by some body else or let witnesses testify as to their title to or interest in the subject matter of the
 E action. (p. 54 C)

9. *Silent parties are equally bound by result of a case*
 F I think it can be said that the principle of law is now well settled that if a person was content to stand by and see his battle fought by some one else in the same interest instead of applying to be joined as a defendant in that case, he is bound by the result in that case and estopped from reopening the issue determined in that case. He should
 G not be allowed to reopen the case. (p. 55 D)

10. *Technicalities are not to be observed before suing in representative capacity before native courts*
 H I must in the above regard endorse the decision in Apata v. Ogbeki and others (1955/56) (Part 3) W. R.N. L. R. 73 to the effect that no order to sue or to be sued in a representative capacity is either required or necessary in respect of a case instituted in a Native Court.

Nor can I subscribe to the view that it is strictly necessary for a defendant who is sued in a Native or Customary Court to tender before the court an authority to defend the suit in a representative capacity from the class of persons he seeks to represent if it is clear from his entire case that he is defending the action in a representative capacity and that those he represents support or attend court with him or indeed testify in respect of their interest in the case. Such technical procedural requirement may be clearly necessary in the superior courts of record. I find it difficult to accept that it is applicable in the Native or Customary Courts where, what must count, is what the real substance of matters in issue is. (p. 57 H)

REPRESENTATION

O. Ogunniyi, Esq. for the appellant

O. M. Odje, Esq. with him is T. R. Ikpotor for the respondent.

CASES REFERRED TO

Ekpoke v Usilo (1978) 6 - 7 SC 187

John Omokhale v Esekhome (1993) 8 N.W L.R 58

Adomba v Odiese (1990) 1 N W L R (Part 125) 165 at 178

Oyelakin Balogun v Adedosu Adejoki (1995) 2 N. W. L. R. (Part 376) 131

Udeze v Chidebe (1990) 1 N. W. L. R. (Part 125) 141

Lawal v Yakubu Dawodu (1972) 1 All N. L. R (Part 2) at 272

Olu Ezewani v Nkali Onwordi and others (1986) 4 N. W. L. R (Part 33) 27 at 42

LEAD JUDGMENT BY KATSINA-ALU JSC

This appeal is from a decision of the Court of Appeal, Benin Division which set aside the judgment of the trial Oleh High Court in a land claim. The plaintiff brought this action for himself and on behalf of the Akpara Family of Ofagbe Village against the defendant Odjeniwa Akwido for himself and on behalf of Ighavie family also of Ofagbe village in Isoko Division for the following reliefs:.

1. A declaration of title to the land verged pink in the survey plan filed by the plaintiff.

2. N200.00 damages for trespass committed by the defendant between January, 1976 and February, 1976.

B 3. An order of forfeiture of the defendant's right of tenancy to the area verged pink in plaintiff's survey plan and for an order of perpetual injunction restraining the defendant from carrying on any building on the area verged pink in the survey plan.

C 4. An order of mandatory injunction to remove any structures erected or crops grown outside the area verged yellow and brown in plaintiff's survey plan.

5. Any other legal or equitable relief.

The defendant not only filed a defence but also a counter-claim for:

D 1. A declaration of title to the land particularly described in the defendant's plan.

E 2. N10,000.00 damages for trespass committed by the plaintiffs, their servants, agents or workmen who, sometime between February, 1976 and November, 1983 broke and entered the said land, deposited sand thereon and erected structures.

F 3. An order of perpetual injunction restraining plaintiffs from entering the said land or part thereof. The defendant at the trial relied on estoppel per rem judicatam and issue estoppel both in his pleadings and in his evidence. The basis for such reliance was two judgements-

(1) an Owhe Customary Court judgement (Exhibit "C") and,

(2) Oleh Magistrate Court judgement (Exhibit "D").

G In his judgement the learned trial judge held that the present action was not res judicata and also that the plaintiff has proved his claim. He entered judgement for the plaintiff in the following terms:

H (a) A declaration that the plaintiff and his family are entitled to a certificate of occupancy to the piece of land verged pink in plaintiff's survey plan tendered as exhibit "A"

(b) N100.00 damages against defendant and his family for trespass

(c) Perpetual injunction restraining the defendant, his servants, agents and all members of Ighavie family from carrying on any building or other works on the land verged pink in Exhibi "A" without the consent of the plaintiff and members of his family except the portion verged yellow and brown on Exhibit "A"

The defendant appealed to the Court of Appeal Benin Division. The court below in its judgement held that the defendant had successfully made out a case for the application of both cause of action estoppel and issue estoppel. The court therefore allowed the appeal, dismissed the plaintiff's claim and entered judgement for the defendant on the counter-claim. This appeal by the plaintiff to this court is from the said decision of the Court of Appeal .

The plaintiff submitted two issues for determination. They are:-

1 Whether the plea of estoppel per rem judicatam (and we would add) and issue estoppel avail the respondent, and if they do, whether the respondent is entitled to judgement in his counter-claim?

2 If the plea of estoppel per rem judicatam and issue estoppel are unavailable to the respondent, whether the appellant is entitled to judgement (and we would add) as found by the trial Court?

The defendant also raised two issues for determination which read as follows:

1. Whether the Court of Appeal was right when it held that both cause of action estoppel and issues estoppel applied in favour of the defendant/counter-claimant.

2. Whether the Court of Appeal ought to have considered the other grounds of appeal filed by the defendant/respondent in his appeal to that court and the consequence of its failure to consider them.

The main question for determination in this appeal is whether the defendant made out a case for the application of both estoppel per rem judicatam and issue estoppel.

Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in

a final manner between the parties or their privies by a court or tribunal having jurisdiction in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. See Igwego v Ezeugo (1992)

6 NWLR pt. 249) 561; Osunrinde v.Ajamogun(1992)6 NWLR (Pt.246)156

For the doctrine of estoppel per rem judicatam to apply, it must be shown that:

(a) The parties (b) The issues and (c) the subject matter

in the previous action were the same as those in the action in which the plea is raised. Once these ingredients of res judicata are established, the previous judgement estops the plaintiff from making any claim contrary to the decision in the previous case. See Odjewedje v Echanokpe (1987) 1 NWLR [Pt. 52] 633; Ezeanya v. Okeke [1995] NWLR [Pt. 388] 142; Dokubo v Omoni [1999] 8 NWLR [Pt. 616] 647.

I shall now proceed to examine whether these main ingredients of res judicata were established by the defendant as found by the court below.

Parties: It was the case of the plaintiff that the parties are not the same. It was pointed out that the defendant who the plaintiff in Oweh Customary Court Exhibit "C" brought the action in a representative capacity i.e. for himself and his Ighavie family. He brought this action against the plaintiff herein who was defendant in his personal capacity. It was the contention of the plaintiff that the fact that he made reference in his evidence at the Customary Court to the root of his title does not amount to defending the action in a representative capacity. Put in another way, the plaintiff's contention is that he was sued in his personal capacity and that he defended the action in his personal capacity.

The defendant, for his part, concedes that even though he prosecuted the previous case in a representative capacity, he sued the defendant therein (i.e. plaintiff in the present case) in his personal

capacity. It was however submitted that the defendant in that case defended the action in a representative capacity for himself and on behalf of the Akpara family.

The question to be resolved is: did the defendant in the earlier case (Exhibit "C") defend the action in his personal capacity or in a representative capacity for himself and on behalf of the Akpara family? The defendant in Exhibit "C" testified and gave evidence as follows:

"The plot in dispute is owned by Akpara my great grand father my Akpara family has a common boundary with Ese family in Egbahe Street, my family also have boundaries with Osifo and Egide families in the plot in disputes"

His witnesses all testified to the effect that the plot in dispute belonged to the Akpara family.

From the totality of the evidence called by the defendant in the earlier case (Exhibit "C") is it right to say that he defended the action in a representative capacity? The answer would depend on who is a representative. **A representative is a person authorised to act or speak for another or others. By this definition, it would appear that there must be some kind of authorisation given by the person or persons to be represented. Throughout the evidence of the Defendant, he did not as much as allude to the fact that he was defending the action for himself and on behalf of his family. I am not unmindful of the fact that this was a trial in a Customary Court. That notwithstanding, it must be apparent on the record that the defendant defended this suit for himself and on behalf of his family.**

The plaintiff in that case sued the defendant personally. The reason is obvious. The claim against the defendant was for title and damages for trespass. It was never contended that some other members of the defendant's Akpara family also trespassed unto the building plot in question.. Part of the plaintiffs evidence in the Customary Court reads:

"When the defendant was building the house, my father

who is now late refused that he should build it. He then used force to build it, but my father who was aged then wept. Later on, my sister named Ititi Okoro caused the defendant to be summoned to the Ofagbe town community over the plot in dispute and the decision was in favour of my sister. The defendant was then asked to quit the plot"

All along, the culprit, as it were, was the defendant. The fact that he was sued personally was a deliberate act by the plaintiff. He was conscious of the fact that no other member of Akpara family disputed the building plot with him and his family. Against this background, it will be seen clearly that the evidence of the defendant that "the plot in dispute is owned by Akpara my grand father" was only intended to explain away his root of title. He did not remotely suggest that the plot was allocated to him by the principal members of the Akpara family. He did not also say that he was in court defending the action with the full knowledge and consent of the Akpara family members.

So, can it be said that the parties in the two cases are in the same capacity and right when Exhibit'C' was fought on the basis of a contest between Ojenima Akwido for himself and on behalf of Ighavie lineage of Ugwe family of Ofagbe and Olowo Okukuje of Ofagbe whereas the present case is between Olowo Okukuje for himself and on behalf of Akpara family of Ofoagbe village and Odjenima Akwido for himself and on behalf of Ighavie family of Ofegbe village both claiming to be exclusive owners of the land in dispute?. ***I am of the strong view that by no stretch can the parties in the two cases be said to be suing and defending the suits in the same rights and interest. It is now settled law that where an action is brought by a person in a representative capacity against another person personally and prosecuted to judgement, and later a further action is brought against him in a representative capacity by the plaintiff in the original action, the judgement is not the same, since in the earlier action the defendant is sued in his personal capacity and in the latter action as a***

representative of a class of persons. See *Shitta-Bey & Ors. v The Chairman, LEDB & Ors. (supra)*, *Ezeanya v Okeke (supra)*.

In the latter case, this court per Iguh, JSC held thus:

"Where an action is brought against a defendant personally and prosecuted to judgement, and later a further action is brought against him in a representative capacity by the plaintiff in the original action, the judgement is not res judicata as the parties to the respective actions are not the same, since in one action the defendant is sued personally and in the other as representative of a class of person".

Also in *Udeze & Ors v Chidie & Ors. (1990) 1 NWLR (Pt. 125) 141* this court per Nnaemeka-Agu JSC held.

"In that state of facts, the question is: can the parties in the two cases be said to be in the same capacity and right when Exhibit 'C' was fought on the basis of a contest between Nnadi Nsugbe and Ifite Nteje claiming to be exclusive owners and the whole of Ifite Nteje claiming to be communal owners of the land in dispute?. I am of the clear view that by no stretch can the parties in the two cases be said to be suing and defending the suits in the same rights and interest. So if the issue of res judicata were taken as a sole issue and, as often happens, in limine, I would for these reasons, have had no alternative but to agree with Chief Ikeazor that the learned trial Judge was in error to have held that the decision in Exhibit C operates as res judicata in this case....".

It must be borne in mind here that the land claimed by the respondent in his counter-claim encompassed a large tract of land which included the area claimed by the appellant. It must also be remembered that the parties have prosecuted and defended the action in a representative capacity.

The decisions of this court speak of "where an action is brought against the defendant personally and prosecuted to judgement". What does this phrase mean?. I think it means that the defendant who is sued personally does not change the capacity throughout the trial. How can he change that

personal capacity in which he is sued?. He can do this by tendering the authority to defend in a representative capacity from the class of persons he seeks to represent. In trials in native courts, it is sufficient if he states that he is defending for himself and the persons he represents some of whom will testify and confirm his authority. In Exhibit "C" the personal capacity in which the defendant was sued did not change throughout the trial.

One more point. If the evidence that "the plot in dispute is owned by Akpara" is taken to mean that the land in question belongs to the Akpara family then it is right to say that the plaintiff did not sue the proper party. The Akpara family should have been joined in the action. This is so because family land remains family land irrespective of allotment. See Olanguno v Ogunsanya (1970) 1 ANLR 223. The court has a duty to ensure that all parties likely to be affected by the result of an action are joined in the action. See Okafor v Nnaife (1993) 3 SC. 85.

For the above reasons, I am of the clear view that the Court of Appeal was in error when it held that the parties in the previous proceeding are the same as the parties in the present case. The court below per Edozie JCA held thus.

"As I indicate at the onset the main question posed in this appeal relates to the plea of estoppel per rem judicatam. It is elementary principle of law, that before a judgement can operate as an estoppel in subsequent proceeding, the parties, issues and subject matter in the two proceedings must be the same. In the case in hand, it is clear that the parties in the previous judgement, exhibit 'C' are the same as the parties superficially the defendant in Exhibit 'C' was sued personally although in the instant case sued in a representative capacity for himself and on behalf of Akpara family of Ofagbe village. But it is trite that in dealing with customary court cases, what matter is the substance and not the form of the claim Ben Ikpeng & Ors. v Chief Sam Edoha & Ors. [1978] 6, 7, 8, S.C. P.221. Learned

counsel for the appellant submitted, and this was not disputed by the opposing counsel that although the respondent in the present case was in the previous proceeding sued personally, he nevertheless, defended the action in a representative capacity for the Akpara family. After scanning through exhibit "C" I agree entirely with him. In his evidence in the customary court proceeding (pp. 190 & 193 of the record), the defendant therein, that is the respondent in the present case said.

"My name is Olowo OkukujeI am a direct descendant of Akpara, Akpara begat ElogeThe plot in dispute is owned by Akpara, my great grand father:....."

I am satisfied that the parties to the previous proceeding are the same as the parties to the present case. The principal relief sought in the two proceedings, to wit title to land are also the same. The issue in the two suits are therefore the same. With respect to the matter, It is common ground that the land in dispute in the former proceedings is smaller than the land in the present case. In Exhibit "C" the claim was for a declaration of title in respect of a building plot which according to Oweh customary court Judges who inspected it measured 48ft by 30ft. The area in dispute in the present case is not specified but from the survey plans Exhibit 'A' and 'B' it is a much larger area of land.

The above view has two major flaws. First, the parties, as I have shown are not the same. In the earlier case, Exhibit 'C' the present plaintiff was sued in his personal capacity. And he defended the suit in his name. He has instituted the present action and was himself sued in a representative capacity i.e. for himself and on behalf of Akpara family. Clearly it cannot be said that he defended the earlier suit and prosecuted the present suit in the same rights and interest. The judgement in the two case is not the same either because in the one action the plaintiff herein was sued personally and in the present action he brought this suit and was sued in a representative capacity for himself and on behalf of Akpara family. **In the second place, the subject matters in the two actions were not the**

same. The subject matter of the earlier case (Exhibit C) was a smaller area of land whereas the subject matter in the present case is a much larger area of land of which the land in Exhibit C forms only a fractional part. It is for this reason that the plea of res judicata cannot apply to the larger land area in contention. In Aro v. Fabolude (supra) the Supreme Court held:

"The most lenient treatment the plaintiff's case could possibly receive from the High Court would have been for the small area verged yellow to be excised from the large tract of land and the defendant declared owner, as per rem judicatam, of the portion, based on Exhibit 'B' while the plaintiff would be left to discharge the onus of proof which lay on him in respect of the remainder of the land....."

Subject Matter:

It was pointed out on behalf of the plaintiff that the land in dispute in Exhibit "C" was only 48 feet by 30 feet. In the instant case the land in dispute is a much larger parcel of land. I might add that the land in Exhibit "C" forms a part of the larger area now in dispute in the present case.

It was the plaintiff's submission that the subject matter in the two cases is not the same. Consequently the plea of res judicata cannot apply to the larger land area in contention. Plaintiff relied on the case of Aro. v. Fabolude [1983] NSCC Vol. 14 p. 43.

For the defendant, it was submitted that the Court of Appeal was right in holding that the subject matter in Exhibits "C" and "D" and instant suit are the same. It was pointed out that the cause of action in the present case is the area of land already litigated upon in Exhibit "C".

It is not in dispute that the subject matter in the Customary Court Exhibit "C" was a smaller area of land whereas the subject matter in the present case is a much larger area of land which exhibit "C" forms only fractional part. The defendant at p. 9 of his brief of argument (Respondent's brief) said:

"It is submitted therefore, that the defendant clearly showed

by evidence the extent of land litigated in exhibit "C" and identified the land and its boundaries among the piece of land in dispute in this suit.

In fact the evidence in this suit clearly shows that even though it involved a far bigger land, the real cause of action is the area of land already litigated and decided upon in Exhibit "C" and "D". Having therefore, clearly ascertained the boundaries of the land in dispute in Exhibit "C", it is submitted that the appellant herein is estopped from instituting this action over that same piece of land. The action as it relates to that area, it is submitted, ought to have been dismissed by the trial court and judgement entered for the respondent with respect to that area"

The defendant seems here to be concerned only with the area of land in Exhibit 'C' which was the cause of action in the previous case. There is evidence that the land which was the subject matter of the previous action was far smaller than that in question in the present action. This is not dispute. I am therefore unable to accept the contention that the subject matters of the two actions were the same. See *Dokubo v. Omon* (supra).

ISSUE ESTOPPEL

One of the conditions to satisfy in order to sustain a plea of issue estoppel is that the parties must be the same in both cases - see Samuel Fadiora & Anor. v. Gbadebo & Anor. [1978] 3 SC. 219 at 228 - 229. I have already held that the parties in the present case are not the same, therefore the question of issue estoppel as between the present parties does not arise. See Ezeanya v Okeke (supra).

In previous suit only the appellant in his personal capacity had interest to defend. The situation was different in the present suit because other members of appellant's family were interested and therefore necessary parties. They had a right to be heard in a claim involving their properties which were at no time in issue in the previous suit.

In the course of his judgement, the learned trial judge held

thus: *"It is quite clear from above that the area claimed by the defendant was a building plot unlike the instant case where the defendant in his counter claimed a piece or parcel of land lying and situate along Egbahe Street shown in Exhibit "B". In effect the area he claimed in Exhibit "B" is by far larger than the area he claimed in Exhibit "C" and the subject matter cannot therefore be the same as Exhibit "C" does not cover Exhibit "B" and the evidence therein. It is also my view that neither the judgement in Exhibits "C" and "D" nor the evidence given therein could create estoppel per rem judicatum as between the plaintiff and the defendant since the evidence, the issues and the reasons for the decision will be different. For a judgement to create estoppel, between the parties, the estoppel must be mutual as between the parties. Daniel & anor. v. Iroeri [1985] 1 NWLR part 3 page 541 at 542.*

As between the plaintiff's case and that of the defendant's case, I accept and believe the evidence in the plaintiff's case as truthfully stating how the land in dispute was founded by Akpara, the plaintiff's ancestor through the generosity of Egide. I also accept and believe the plaintiff's case that Igbavie left the defendant's family and stayed with Obohwo of plaintiff's family. I do not believe the evidence of the defendant as to how Igbahe land was founded by his ancestor, Uhwe, because he failed to trace his root of title to the land through his ancestor, Uhwe. I do not believe his evidence, that Uhwe brought Akpara, the plaintiff's ancestor from the bush to stay with him. I am quite satisfied on the evidence before me and find as a fact that the land in dispute belongs to the plaintiff's family and they have been such owners in possession from the time Egide gave it to his ancestor Akpara. The defendant's claim of ownership the land therefore fails and plaintiff is entitled to judgment".

I agree completely. The decision is amply supported by the evidence before the trial court.

In the result I am satisfied that the trial court properly evaluated the evidence and came to a right decision. This appeal therefore succeeds. I allow it and set aside the judgment of the Court of Appeal. I hereby restore the judgment of the trial court delivered on

4/12/87. The Plaintiff/Appellant is entitled to costs which I assess at N10,000.00.

WALI JSC (DISSENTING)

I have had the privilege of reading in advance, the lead judgment of my learned brother Katsina-Alu and with all humility I am unable to subscribe to the conclusion arrived at therein; alternatively I agree with the judgment of my learned brother Iguh JSC which I also have had the advantage of reading in advance. I agree with reason he advanced in support of the conclusion which I hereby adopt as mine.

The Plaintiff/appellant claimed in the trial court for a declaration of title and forfeiture to a piece or parcel of land situate in Ofagbe Village in Isoko Division within Ughelli Judicial Division . He also claimed for N200.00 general damages for trespass committed by the defendant, his servant or agents and mandatory injunction.

The defendant denied the plaintiff's claim and counter- claimed for a declaration of title to that parcel of land lying and situate along Egbahe Street in Ofagbe village in Isoko Local Government Area within the jurisdiction of the Honourable Court.

At the trial court, the parties led evidence in support of their respective claims as averred in their pleadings. Each party tendered a survey plan depicting the extent of the land being claimed.

In his considered judgment the learned trial judge gave judgment for the plaintiff but refused to grant him the prayers for a forfeiture and a mandatory injunction, justifying his refusal on the long stay on the land in dispute by the members of the defendants' family.

Dissatisfied with trial court's decision the defendant lodged an appeal against it to the Court of Appeal, Benin Division which, in a unanimous decision allowed the appeal on grounds of res judicata and issue estoppel which the appellate court found successfully es-

tablished, contrary to the findings of the trial court on the same issues.

The plaintiff has now appealed to this court. The learned trial judge it seems did not give adequate consideration to the evidence adduced in support of res judicata and issue estoppel. The learned trial judge opined thus-

"It is quite clear from above that area claimed by the defendant was a building plot unlike the instant case where the defendant in his counter-claim, claimed a piece or parcel of land lying and situate along Egbahe Street as shown in Exhibit 'B'. In effect, the area he claimed in Exhibit 'B' is by far larger than the area he claimed in Exhibit 'C' and the subject matter cannot therefore be the same as Exhibit 'B' and the evidence therein. It is also my view that neither the judgments in Exhibit 'C' and 'D' nor the evidence given therein could create estoppel per rem judicatam as between the plaintiff and the defendant since the evidence, the issues and the reason for the decision will be different. For a judgment to create estoppel, between two parties, the estoppel must be mutual as between the parties."

However, the Court of Appeal after its thorough and meticulous consideration of the evidence adduced in support of "estoppel per rem judicatam" AND "issue estoppel" in its lead judgment delivered by Edozie JCA, with which Musdapher JCA and Ejiwunmi JCA (as he then was) agreed, concluded as follows

On the two issues as regards the identity of parties-

"In the case in hand, it is clear that the parties in the previous judgment, Exhibit 'C' are the same as the parties in the present case except that superficially the defendant in Exhibit 'C' was sued personally although he in the instant case sued in a representative capacity for himself and on behalf of Akpara family of Ofagbe village. But it is trite that in dealing with customary court cases, what matters is the substance and not the form of the claim: Ben Ikpeng and Ors. v. Chief Sam Edoha & Ors. (1978) 6, 7, 8, S. C. P. 221. Learned counsel for the Appellant submitted, and this was not disputed by the

opposing counsel that although the Respondent in the present case was in the previous proceeding sued personally, he nevertheless, defended the action in a representative capacity for the Akpara family. After scanning through Exhibit 'C' I agree entirely with him".

XX

"I am satisfied that the parties to the previous proceeding are the same as the parties to the present case. The principle relief sought in the two proceedings, to wit, title to land are also the same. The issue in the two suits are therefore the same".

One the res or subject matter in dispute, the learned Justice of the Court of Appeal said-

"With respect to the subject, it is common ground that the land in dispute in the former proceedings is smaller than the land in dispute in the present case. In Exhibit 'C' the claim was for a declaration of title in respect of a building plot which according to Oweh customary court judges who inspected it measured 48ft by 30ft . The area in dispute in the present case is not specified but from the survey plans Exhibit 'A' and 'B' it is a much larger area of Land. Learned counsel for both parties appear to be in agreement, and the lower court was of the same view, that the land in dispute, the subject matter Exhibit 'C' and 'D' is part of the land in dispute in the instant case but they have agreed to disagree on the effect of the previous judgment on the case under consideration ."

XX

"Now, reverting, to the present appeal and applying the principle distilled from the Amos Ogbesusi Aro vs Salami Fabolude supra to the present case, it seems clear that the learned trial judge was in error in entering judgment in favour of the Respondent in respect of the entire land verged pink in the Respondent's Survey plan Exhibit 'A' in the face of the judgment of the Oweh Customary court, Exhibit 'C' adjudging the Appellant owner of a plot of land forming part of the large area verged pink in Exhibit 'A'. At the worst, the lower Court should have given the Respondent judgment for the area verged pink less the area the subject matter in Exhibit 'C' and if this

area is not identifiable because no plan was used, to non-suit the Appellant so as to give him the opportunity to establish that portion in a subsequent action. The lower court was also clearly in error when it failed to appreciate that the decision of the Oweh customary court with respect to the traditional histories of the parties constituted an issue estoppel precluding the Respondent from re-opening the issue in a subsequent proceeding ".

The learned justice of the Court of Appeal had earlier concluded that both the parties in the previous case involving Exhibit 'C' and the present action are the same.

For the claim or defence of estoppel per rem judicatam to operate, the following must be established:-

1. The parties in both previous case and the present case are the same.

2. The subject matter or "res" in the two cases are the same.

3. The issue involved in the two cases are also the same.

See Ukaegbu & Ors. v. Ugoji & Ors. [1919] 6 NWLR (Pt. 196) 127; Omokhafa v. Esekhome [1993] 8 NWLR (Pt.) 58; Mdukolu v. Nkendilim; [1962] 1 All NLR 587 and Odjewedje v. Echanokpe [1987] 1 NWLR (Pt 52) 633.

Guided by the principles laid in the cases referred to above, I have no difficulty in coming to the conclusion and agreeing with Court of Appeal that both parties, the res or subject matter and the issue involved or cause of action are the same both in Exhibit 'C' which is the previous case, and the present case.

What misled the trial court to arrive at the conclusion that both the parties and the subject matter in Exhibit 'C' are not the same as in the present case is the fact that, in Exhibit C the defendant sued the present plaintiff in his own name.

Since the proceedings in Exhibit 'C' was conducted before a customary court, in order to find out whether the parties litigated in representative capacities, the court should not confine itself to the form of action, but must read and consider the proceedings as a whole. What matters is the substance and not the form. See Solomon

Jonah v. Kojo Owu 3 WACA 170; Osu v. Igibi [1988] 1 NWLR (Pt 69) 231; Chukwunta v. Chukwu & Ors. 14 WACA 341 and Yode Kwao v. Kwasi Coker 1 WACA 162. In Exhibit C the present defendant as plaintiff for and on behalf of Ighavie lineage of Ugwe Family sued the present plaintiff, ostensibly personally, but in actual fact, and from a close consideration of the proceedings, the action was defended in a representative capacity to wit: for himself and on behalf of Akpara Family of Ofagbe village. B

The evidence led showed that the land was communally owned by Akpara Family and that Egbahe Street runs through it. It was shown through cogent traditional evidence that the said communal land was, by the grace of Egide acquired by his ancestor Akpara by deforestation and first settlement. The building plot involved in Exhibit 'C' which is also owned by the Akpara Family was situate within and formed part of the land founded by Akpara at Egbahe Street, Ofagbe, and from the analysis above, it is not in doubt that the issues and the subject matter in Exhibit 'C' are the same as in the present case. In order to sue in a representative capacity before a customary court one does not necessarily need a fiat of that court. The land in Exhibit 'C' froms part and parcel of land comprised in the present action, as it is a small piece of land within the subject matter of the present action, as it is a small piece of land within the subject matter of the present action. C D E F

It is for these and the articulated reasoning contained in the judgment of my learned brother Iguh, JSC that I find myself inclined to dismiss the appeal and affirm the judgment of the Court of Appeal. With N10,000.00 costs to the Defendant/Respondent. G

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Katsina-Alu, J.S.C. I agree with his reasoning and conclusions. I would however like to comment briefly. H

The Plaintiff's claims as set out in the Amended Statement of

Claim were for (1) A declaration of title (2) N 200.00 damages for trespass (3) An order of forfeiture and (4) An order for mandatory injunction to remove the structures on the land in dispute.

The Defendant in the Statement of Defence also counter-claimed against the plaintiff, claiming (a) A declaration of title (b) N10,000 damages for trespass, and (c) An order for perpetual injunction.

After pleadings had been filed and exchanged, the matter proceeded to trial. The Plaintiff testified and called eight witnesses. The Defendant also testified and called four witnesses.

After due trial, the learned trial judge in his judgment meticulously reviewed the evidence on both sides.

He found and I agree with him, that the case was fought by the two sides on the following grounds:

1. Traditional evidence.
2. Acts of ownership tailored along the line of EKPO VS ITA 11 NLR 68.
3. Proof of possession of connected or adjacent land (contiguity rule) IDUNDUN VS OKUMAGBA (1976) 9-10 S. C.227.

4. The plea of res judicata which was relied upon by the Defendant only. The learned trial judge began by exhaustively, examining the traditional histories of the parties and in his judgment found amongst others as follows:-

"In the instant case, the traditional evidence of the Plaintiff as to how Egbede land was founded is consistent with paragraphs 13-15 of his Amended Statement of claim. The conflicting stories only existed in the Defendant's evidence led in support of paragraph 10 of the Statement of Defence and paragraph 29 of his counter-claim. Suffice it to say that the defendant failed to trace his line of succession satisfactorily. I totally reject the traditional evidence of the Defendant, that Uwhe migrated from Irri and settled in Ofagbe. I accept and believe the evidence of the plaintiff that the land in dispute was given to Akpara his ancestor, by Egide and that Ighavie

left his family to stay with Obohwo to look after Omaniyo and Ero, his wife and son respectively.

It was not disputed by the plaintiff that the defendant and the members of his family have their houses on the land in dispute. This is also clear from Exhibits "A" and "B". It was the Plaintiff's case that Ighavie came to live on the land through his adulterous relationship with Omaniyo which resulted in the birth of Ero, the defendant's grandfather".

The learned trial judge has earlier held thus:-

"I also accept and believe the evidence of the plaintiff that it was Obohwo who permitted Ighavie to live on the land in dispute".

The judgment continued:-

"The Plaintiff in my view has been able to show that his family's claim to the land in dispute is traceable to his ancestor, Akpara, while the Defendant failed to prove that it is traceable to his ancestor, Uwhe. Exhibit "A" showed the property of the plaintiff and the members of his family on the land including his house, building foundation and Ekpo juju owned by his family and he testified in support of them with his witnesses. Exhibit "B" also showed the plaintiff's house on the land. I am quite satisfied on the evidence before me that the plaintiff has also proved sufficient acts of ownership to show that the land belongs to his family."

Having thus found for the plaintiff on his traditional evidence and having rejected that of the Defendant, the learned trial judge then proceeded to consider the issue of res judicata relied upon by the Defendant. The Defendant in the Court of trial tendered in evidence the proceedings and judgment of the Oweh Customary Court in which judgment was entered in his favour and the judgment of Oleh Magistrate Court dismissing plaintiff's appeal. These were tendered in evidence as Exhibit C. The order of Ughelli High Court striking out the appeal withdrawn by the Defendant pursuant to a H settlement out of court was admitted as Exhibit D.

After carefully setting out the claims in Exhibit C and the counter-claim herein, the learned trial judge stated thus:-

"It is quite clear from the above that the area claimed by the Defendant in Exhibit C was a building plot unlike the instant case where the Defendant in his counter-claim claimed a piece or parcel of land lying and situate along Egbahe Street as shown in Exhibit B.

B In effect the area he claimed in Exhibit C and the subject matter cannot therefore be the same as Exhibit C does not cover Exhibit B and the evidence therein. It is also my view that neither the judgments in Exhibit "C and D" nor the evidence given therein could create estoppel per rem judicatem as between the plaintiff and the C Defendant since the evidence, the issue and the reason for the decision will be different. For a judgment to create estoppel between the parties, the estoppel must be mutual as between the parties DANIEL & ANOR VS IROERI (1985) 1 NWLR (pt .3) 541 at 542".

D The plea of estoppel per rem judicatem therefore failed consequently.

The judgment in its concluding part continued:-

E "I am quite satisfied on the evidence before me and I find as a fact that the land in dispute belongs to the plaintiff's family and they have been such owners in possession from the time Egide gave it to his ancestor, Akpara. The Defendants claim of ownership of the land therefore fails and the plaintiff is entitled to judgment. The counter F claim is hereby dismissed in its entirety".

The learned trial judge then proceeded in his judgment to consider Plaintiff's claims for trespass, forfeiture and mandatory injunction.

On trespass he said:-

G "The Defendant admitted building houses on the land with the members of his family and this is quite clear from Exhibits A and B. Exhibit A also shows that the Defendant and members of his family built their houses outside the original house of Ojomurua of Plaintiff's H family allowed to Ighavie by Obohwo. The Defendant and family built outside the portion of the land which Obohwo allowed Ighavie to stay and built on Plaintiff's land as it pleased them. That is trespass. OKAGBUE VS ROMAINE (1982) 5 S. C. 133 at 134 SOLOMON

VSMOGAJI (1982) 1 S. C. 1 at 40. The Plaintiff is therefore entitled to damages for trespass against the defendant."

As for the claim for forfeiture, the learned trial judge said amongst others as follows:-

"I am satisfied that the customary tenancy of the defendants has been proved and that forfeiture of their tenancy has arisen, The Plaintiff however said that his family granted two portions of the land to the defendants family to build two houses. The Plaintiff also showed the houses of the defendants on the land. In fact, the evidence from both sides showed that the defendants family has been on the land for a long time

In the circumstance, I will refuse the Plaintiff's claim for forfeiture and it is hereby dismissed."

He continued thus:-

"I will also refuse Plaintiff's claim for mandatory injunction to remove any structure erected on the land as this will cause hardship to the Defendant and members of his family who build their houses on the land not only to his knowledge and members of his family but with the consent in this case of Obonitago's house. The claim for mandatory injunction is refused. I will however make an order for perpetual injunction claimed by the plaintiff".

The trial High Court finally entered judgment in favour of the Plaintiff in the following terms:-

1. A declaration that the plaintiff and his family are entitled to a certificate of occupancy under Section 40 of the Land Use Act 1978 to that piece or parcel of land situate in Ofagbe village in Isoko Local Government verged pink in Survey plan No. TJB D 442 of 3rd July, 1978 tendered and marked as Exhibit "A".

2. N100.00 (One hundred Naira) damages against the defendant and his family for trespass.

3. Perpetual injunction restraining the defendant, his servants, agents and all other members of Ighavie family from carrying on any building or any other works on the land of the plaintiff's family verged

pink in Exhibit "A".

The Plaintiff was in addition awarded costs of N300.00 against the Defendant.

Aggrieved by the decision of the trial High Court, the Defendant appealed to the Court of Appeal holden at Benin City complaining amongst others about the rejection of his plea of estoppel per rem judicatem as well as some aspects of findings of fact and conclusions drawn from them by the trial court.

The Court of Appeal heard the appeal and in a unanimous judgment found for the Defendant on his plea of res judicata and issue estoppel and thus allowed the appeal granting him two of the reliefs claimed, namely a declaration of title and an order of perpetual injunction.

Dissatisfied with the judgment of the Court of Appeal, the Plaintiff has appealed to this court. Parties filed and exchanged briefs of argument which were adopted at the hearing of the appeal during which time oral submissions were also made.

In the Plaintiff's brief only two issues were submitted for resolution. They read as follows:-

"(1) Whether the plea of estoppel per rem judicatem (and we would add) and issue estoppel avail the Defendant, and if, they do, whether the Defendant is entitled to judgment in his counter claim.

(2) If the plea of estoppel per rem judicatem and issue estoppel are unavailable to the Defendant, whether the plaintiff is entitled to judgment (and we would add) as found by the trial court."

I intend to treat the two issues together and answer them together as well. It is clear to me that this appeal falls to be decided on the very narrow issue of the sustainability of the plea of res judicata or issue estoppel to the case. I will therefore go straight to the issue.

It is settled by countless number of judicial and legal authorities that a plaintiff is caught by the plea of estoppel per rem judicata where-

1. The parties (or their privies as the case may be) in the previous case are the same as in the present case.

2. The issue and subject matter or res litigated upon in the previous action is the same as in the present action.

3. The adjudication in the previous case must have been given by a court of competent jurisdiction.

4. The previous judgment relied upon must have finally decided the issues between the parties.

(See for example DZUNGWE VS GBISHE (1985) 2 NWLR (PT. 8) 528, BAMISHEBI VS FALEYE (1987) NWLR (PT.54) 51 UDO VS OBOT (1989) 2 NWLR (PT. 95) 59 NKANU & ORS VS ONUM & ORS (1977) 5 S. C. 11, YOYE VS OLUBODE (1974) ALL NLR (PT. 2) 118, UKAEGBU & ORS VS UGOJI & ORS (1991) 6 NWLR (PT. 196) 127, MADUKOLU VS NKEDILIM (1962) 1 ALL NLR 587.

Where therefore any of these essential ingredients is missing, a plea of res judicata must fail.

Now, in Exhibit C (the Native Court proceedings) the Plaintiff herein was sued in his personal capacity and must therefore be presumed to have defended same in a personal capacity unless there is evidence (and there is none) to show that there was authorisation by the family to defend it on their behalf. The parties cannot therefore be said to be the same.

Also in Exhibit C the principal relief claimed reads:-

"(1) Declaration of title to a building plot situating in Eghaho Street, Ofagbe."

Members of the Customary Court who actually inspected the land in dispute observed in the majority judgment thus:-

"The land in dispute measures about 48 feet by 30 feet while the area claimed by the Plaintiff as the compound of Ighavie measures about 110 feet by 100 feet."

The judgment continued on page 48 as follows:-

"It was obvious from the report of inspection that the plot claimed by both plaintiff and Defendant is only about 48 feet long and 30 feet wide, and it is within the compound owned by the plaintiff's great father, Ighavie

It is evident from the land inspection report that the Defendant failed to oppose the area claimed by the Plaintiff as the compound of Ighavie except the plot in dispute which is less than 1/4 of the entire compound."

B The judgment then concluded on page 51 as follows:-
"After carefully considering the foregoing points, we conclude that the Plaintiff and the Ighavie lineage of Ugwe family have title to the PLOT in dispute, and that the Defendant and the Akpara family have no title to it."

C It must be emphasized that being a Customary Court, no pleadings were filed and no survey plans were filed by the parties. This being a small plot of land 48 feet by 30 feet, a plan might quite possibly not have been necessary.

D The Defendant's counter-claim now reads in part:-
"(a) Declaration of title to ALL that piece or parcel of land lying and situate along Egbahe Street in Ofagbe Village
....."

E The Defendant's Survey Plan (Exhibit B) shows that he now claims a tract of land that covers an area of 2.254 HECTARES, while in Exhibit C the plot of land measured only 48 feet by 30 feet.

F The Plaintiff's Survey Plan (Exhibit A) also shows the area of land claimed as being 5,569.92 Square yards.

G It is noteworthy to observe that although the Customary Court found the entire Ighavie's compound, the great grand father of the Plaintiff, to have measured 110 feet by 100 feet, the Plaintiff claimed a plot of land measuring only 48 feet by 30 feet within the compound. This was about 1/4 of the area of the compound. He did not claim the rest of the compound.

H He did not also think it fit then to have extended his claim to cover the area of 2.254 Hectares now counter-claimed! This must also be fatal to his plea of res judicata. Because it is not only necessary to show that the cause of action was the same but also that the plaintiff (as in Exhibit C in this case)

has had an opportunity of recovering in the first action and but for

his own fault that which he seeks to recover in the second action (see PUBLIC TRUSTEE VS KENWARD (1967) 2 All ELR 870), HALSBURY'S LAWS OF ENGLAND, 4TH EDITION VOL. 16 PARA. 1528)

The doctrine of res judicata is a fundamental doctrine of all courts that there must be an end to litigation. The proper thing to do therefore was for the Court of Appeal to have disallowed the Defendant's counter-claim herein. He is not entitled to the counter-claim in these circumstances.

I have no hesitation therefore in coming to the conclusion here now that the issue and subject matter in the previous suit and in the present suit are not the same.

Conditions or ingredients (1) & (2) set out above having failed, the plea of res judicata must therefore fail.

I am of the view that the Court of Appeal (per Edozie J. C. A. who read the lead judgment) was in error when it said-

"I am satisfied that the parties to the previous proceeding are the same as the parties to the present case. The principal relief sought in the two proceedings to wit, title to land are also the same. The issue in the two suits are therefore the same."

I think the Court of Appeal also went wrong when it held-

"The question of whose ancestor first settled on the land in dispute having been settled in favour of the Defendant the descendant of Ugwe (Uwhe) the father of Ighavie, that constitutes an issue estoppel which debars the Plaintiff from opening the matter. In my considered opinion the issue estoppel which enures in favour of the Defendant is sufficient to entitle him to judgment in his counter-claim."

This finding was clearly based on the concluding part of the majority judgment in Exhibit C, which I have already set out earlier in this judgment to the effect that "the Defendant and Ighavie lineage of Ugwe have title to the plot of land 48 feet by 30 feet while the Plaintiff and the Akpara family have no title to it."

The rule as I understand it is that the "larger" will always include the "smaller" , and not the other way round which was what the

Court of Appeal appeared to be saying. That is wrong. The learned trial judge however by refusing to order forfeiture and mandatory injunction against the Defendants had not in any way interfered with or disrupted the factual position in Exhibit C, since the Defendants still retain possession and use of the land given to them by the Plaintiffs and awarded them in Exhibit C.

Issue estoppel may certainly arise where a plea of res judicata could not be established because the causes of action are not the same as in this case. The conditions for the application of the doctrine are that (1) The same question was decided in both proceedings; (2) The judicial decision said to create the estoppel was final and (3) the parties to the judicial decision or their privies were the same as the parties to the proceedings in which the estoppel is raised or their privies (see HALSBURY'S LAWS OF ENGLAND 4th Edition Vol. 16 PARA 1530). It has been demonstrated above that the parties or their privies are not the same persons in the previous case as in the present case and additionally that the issue and subject matter or res litigated upon is not the same. The conclusion is therefore that neither res judicata nor issue estoppel apply in this case, and that the learned trial judge properly evaluated the evidence before him and came to the right decision when he rejected same.

The appeal therefore succeeds and it is hereby allowed. The judgment of the Court of Appeal is set aside while the judgment of the trial High Court dated 4th day of December 1987 is restored. The Plaintiff is awarded costs assessed at N10,000.00.

ONU JSC

I had the privilege of a preview of the judgment of my learned brother Katsina-Alu, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merit and it is accordingly allowed by me.

Before I expatiate on the case as canvassed by the parties before us both orally and in their written Briefs, it is necessary to stress how the Plaintiff's (Appellant herein) claims in the Oleh High Court of

the former Bendel State, now in Delta State, were set out in the Amended Statement of Claim, to wit:

1. A declaration of title.
2. N200.00 damages for trespass
3. An order of forfeiture and
4. An order of mandatory injunction to remove any structures

put on the land in dispute.

The Defendant (Respondent herein) did not only file a defence but added a counter-claim, claiming:

1. A declaration of title
2. N10,000.00 damages for trespass and
3. An order of perpetual injunction.

It is note worthy that both parties were in this Suit claiming a much larger expanse of land than the area which is the cause of the dispute, and which was the subject matter of a previous judgment pleaded by the Respondent as giving rise to a plea of res judicata. While the Appellant claimed an area covering land of his own immediate family and that of other members of Akpara family surrounding him as it were, the Respondent claimed a very large expanse of land encompassing the whole area occupied by the Appellant and all members of Akpara family, the area occupied by Ighavie family and other areas terminating at Eghahe Street. Thus, issues were therefore joined and fought on the basis of the Appellant's claim and the Respondent's counter-claim, added to the fact that the Respondent pleaded and testified that he would also rely on the principle of res judicata.

The learned trial judge in a well considered judgment, rejected the Respondent's reliance on res judicata and after an impeccable assessment and evaluation of evidence, found for the Appellant, allowing the reliefs of declaration of title and damages for trespass while dismissing the Respondent's Counter-claim.

Aggrieved by this decision, the Respondent appealed to the Court of Appeal sitting at Benin City (hereinafter referred to as the Court below) complaining of the rejection of his claim to estoppel

per rem judicatam as well as criticising very many other aspects of findings of fact and conclusions drawn from proved facts by the trial court. The court below in a unanimous judgment, allowed the appeal, granting two of the reliefs, namely declaration of title and an order of perpetual injunction. Dissatisfied with this judgment, the Appellant who was Respondent in the court below, has now appealed to this court on a Notice of Appeal containing four grounds. The two issues identified from the four grounds for our determination and which I propose to consider together are:

(1) Whether the plea of estoppel *per rem judicatam* (and we would add) and issue estoppel avail the Respondent and if they do, whether the Respondent is entitled to judgment in his Counter-claim?

(2) If the plea of estoppel *per rem judicatam* and issue estoppel are unavailable to the Respondent, whether the Appellant is entitled to judgment (and we would add) as found by the trial court.

At the hearing of this appeal on 31st October, 2000, Learned Counsel for the Appellant after adopting his client's Brief of 3rd August, 1992 made a brief submission by adverting our attention on law to the cases of Ezeanya v Okeke (1995) 4 NWLR (part 388) and Shitta Bey & Ors v The Chairman LEDB & Ors. (1962) NSCC Vol. 2 page 252. He emphasised how it was only a piece of land measuring 30 feet by 28 feet that was involved in this action and not the large track of land on which argument has been wrongly centred. We were referred to page 328 lines 1- 10 of the Record. The above cases amongst several others were relied upon as authorities for holding the view that as the Appellant in the instant case did not defend this action on appeal in a representative capacity, the lands in dispute were not shown to be the same. We were therefore urged to allow the appeal.

Learned respondent's counsel after adopting their brief dated 3/8/92, adverted our attention to the two issues at page 3 of their brief while urging us to consider pages 3-16 thereof where the court below held that they were treated or considered fully. Our particular attention was drawn to the testimony of D.W.1, called by the name

Osifo family who confirmed the defence evidence as a boundary neighbour. Thus, it was argued, the court below meticulously considered the defence evidence before coming to its flawless and unimpeachable decision.

In my consideration of the two issues proffered together, it is only pertinent to begin by stressing that the subject-matter of the action giving rise to this appeal has to do with a large tract of land both the Appellant and the Respondent claim for and on behalf of their respective families. Following the decision of the trial court rejecting the Respondent's case which rested on res judicata, he (Respondent) appealed to the court below complaining of the rejection of his reliance on estoppel per rem judicatam. The court below allowed the appeal and granted two reliefs namely, declaration of title and an order of perpetual injunction. This is what has led to the appeal herein, where, in response to the Appellant's Brief of 25th May, 1992, the Respondent filed his own Brief dated 3rd August, 1992 restating his entitlement to judgment on the basis of estoppel per rem judicatam. It is in response to this Respondent's Brief that a Reply Brief has now been filed. The conditions and circumstances which, in my view, deny and ought to deny the Respondent of a judgment predicated on a plea of estoppel per rem judicatam or issue estoppel may be considered under the following headings:

PARTIES

I am in agreement with the Appellant's submission that in the Customary Court, that he was sued personally and NOT in a representative capacity considering the capacity in which the Appellant was sued as depicted by Exhibits 'C' and 'D'. I agree with the submission of counsel for him that he (Appellant) could not have defended in a representative capacity as he was not shown to have had the consent and authority of the other Defendants to so defend, notwithstanding that the matter was fought in a Customary Court. The fact that the Appellant made reference in his evidence at the Customary Court to the root of his title does not amount to appearing in a representative capacity to defend on behalf of other members of

the family not parties to the action.

For an analogous situation, the case of *Ezeanya v Okeke* (1995) 4 NWLR 388 at 142 particularly at page 146 (ratio 4) was called in aid. There, this Court held, unanimously allowing the appeal:

B *"Where an action is brought against a Defendant personally, and prosecuted to judgment and later a further action is brought against him in a representative capacity by the plaintiff in the original action, the judgment is not res judicata as the parties to the representative actions are not the same, since one is an action against the*
 C *Defendant personally and the other as representative of a class of persons. Similarly, where an action is brought by a plaintiff in a representative capacity against another person personally, and the action is prosecuted to judgment whereby the Defendant succeeds, that*
 D *judgment is res judicata to the extent that it determines the personal rights of the Defendant in the subject-matter of the action, but it is not res judicata of any interests the defendant may later represent in an action brought against him in a representative capacity".*

E See also *Ikoku v Ekeukwu* (1995) 7 NWLR (part 410) 637 where this Court in similarly considering conditions for the application of the plea of estoppel per rem judicatam (in which it unanimously allowed the appeal) held inter alia as follows:

F *"for a plea of estoppel per rem judicatam to succeed, there must at least be established that:*

(i) *the identity of the parties (or privies)*

(ii) *the identity of the res, namely the subject-matter of the litigation and*

G (iii) *the identity of the claim and the issue in both the previous and the present action in which the pleas raised are the same. The burden is on the party who sets out the defence to establish the same. See *Oke v Atoloye* (No. 2) (1986) 1NWLR (Part 15) 241 at page*
 H *260, *Yoye v Olubode & Ors.* (1974) 1 All NLR (Part 2) 118 at page 122, *Idowu Alashe & Ors. v Sanya Olori Ilu & Ors.* (1965) NMLR 66,*

Nwaneri v Oriuwa (1959) SCNLR 316 etc. Accordingly, the subject-

matter of the dispute in the present action being land north of the land in dispute in Exhibit H, the doctrine of estoppel judicatum cannot apply.....

(Underlining is mine for emphasis.)

In the case in hand, bearing in mind the decision in the court below, it cannot be strongly contended that the earlier Customary Magistrate's Court decisions were fought in a representative capacity. See Coker v Sanyaolu (1976) 8 - 10 SC. 203 since the parties therein were not shown to be the same. See also Samuel Fadiora & Anor v Gbadebo & Anor. (1978) 3 SC . 219 and Aro v Fabolude (1983) NSCC VOL. 1443.

In the case of ShittaBey & Ors v The Chairman, LEDB & Ors. (supra) at page 253 ratios 2 and 3, this Court held *inter alia*:

"Where an action is brought by a person in a representative capacity against another person personally; and the action is prosecuted to judgment whereby the Defendant succeeds; that judgment is res judicata to the extent that it determines the personal rights of the Defendant in the subject-matter of the action; but it is not res judicata of any interests the Defendant may later represent in an action brought against him in another capacity."

"Where an action is brought against a person personally and prosecuted to judgment, and later a further action is brought against him in a representative capacity by the plaintiff in the original action; the judgment is not the same; since in the one action the Defendant is sued personally and in the other as representative of a class of persons".

From the foregoing authorities, I am in entire agreement with the submission of learned counsel for the Appellant that the parties in the Oweh Customary Court and Oleh Magistrate's Court vide Exhibits C & D are not the same and cannot be held to be the same as the parties in the case in hand. Thus, the plea of estoppel per rem judicatum must fail.

SUBJECT MATTER

The learned counsel for the Respondent in his Brief as well as in his

oral submission has contended that the court below was right in holding that the subject-matter in Exhibits C and D and that in the present action are the same. I am of the view that there can be nothing further from the truth. That it has been demonstrated that this position cannot be correct and that it is indeed not correct, may be gleaned from the fact that the subject-matter in the Customary Court (Exhibit C) and in the Magistrate's Court (Exhibit D) was an area of land whereas the subject -matter in the case in hand as conceded by the Respondent is a much larger area of land of which Exhibit C forms only a fractional part.

I am of the firm view that the plea of res judicata cannot therefore apply to the larger land area now in dispute between the contending parties here. See Aro v Fabolude (supra) 43 particularly at page 49 where this Court held as follows:

"The most lenient treatment the plaintiffs case could possibly receive from the High Court would have been from the small area verged yellow to be excised from the large tract of land and the Defendant declared owner, per rem judicatam, of that portion based on Exhibit B, while the plaintiff would be left to discharge the onus of proof which lay on him in respect of the remainder of the land, on the principles laid down in many decided cases including Okon Owon v Eto Ndon & Or (1946) 12WACA 71, Josiah Sobanjo v Adesina Oke & Anor. (1954) 14 WACA 593. The High Court could neither have granted a declaration of title to the Plaintiff of the large area of land, in the face of Exhibit B, nor could it have accepted of the decision in Exhibit B which allegedly concerned only the area verged yellow in the plan".

ISSUE ESTOPPEL

As the learned counsel to the Respondent rightly conceded at page 11, paragraph 1204 of this Brief, one of the conditions to be proved to sustain a plea of issue estoppel is that the parties must be the same in both actions. See Samuel Fadiora & Anor. v Gbadebo & Anor. (supra). As the parties are demonstrated not to be the same then the question of issue estoppel as between the present parties

cannot arise. The doctrine of Standing By will apply if the subject-matter in the previous case was the same as in the one being litigated. In the previous Suit (Exhibit C), it was only the interest of the Appellant that was at stake, whereas in the present case, the interest of the family as a whole was in contest. In the case of Nana Ofori Atta II v. Nana Abu Bonsra II (1957) 3 NLR 830 at 834 - 836; it was held that for the doctrine of 'Standing by' to apply if the subject-matter in the previous case was the same as in the one being litigated. In the previous suit it was only the interest of the Appellant that was at stake, whereas in the present case, the interest of the family as a whole was in contest. This case (Ofori Atta's case) has been approved and followed in many Nigerian and English decisions, some of which are:

1. Onisango v. Akinkumi & Ors. (1955 - 56) WNLR 39 and
2. Ojiako v. Ogueze (1962) WNLR 58
3. Balogun v. Agboola (1974) 10 SC. 111 at 119
4. Etiti & Anor. v. Peter Ezeobibi (1976) 12 SC. 123
5. Ekpoke v. Usilo (1978) 6 - 7 SC. 187
6. Ikpang v. Edoho (1978) 6 - 7 SC. 221
7. Augusto v. Joshua (1962) 1 ANLR310
8. Alhaji Amida v. Taiye Oshoboja (1984) 7 SC. 68
9. New Brunswick Railway Co. v. British & French Trust Corporation Ltd. (1939) ACI, 43 (P.C)
10. Fidelitas Shipping Co. Ltd. v. V/O Exportchleb (1966) 1 Q. B. 630, 640 (Per Lord Denning, then Master of the Rolls) cited with approval by this Court in Y. A. Lawal v. Yakubu Dawodu & Anor. (1972) AII NLR (Part 2) 270 at 282 at follows:

"But within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again."

See also Odjewedje v. Echanokpe (1987) 1 NWLR (Part 52) 600; Fadiora & Anor. v. Gbadebo & Anor. (1978) 3 SC. 219 at 228 and Aro v. Fabolude (1983) 2 SC. 75. Be it noted that a plea of issue

estoppel could not be based on the findings contained in a judgment of a non-suit. See Emeka Osondu & Anor. v Ajama Nduka & Ors. (1978) 1 SC. 9 at 24; Peter Pav Dzungwe v. Ornan Gbishe (1985) 2 NWLR (Part 8) 528.

B In the case of Nana Ofori Atta (supra) to which learned counsel for the Respondent referred to us in his brief, it was held that for the doctrine of standing by to apply, the interest must be the same. Here it is not, Also in Adenle v. Oyegbade & Anor. (1964) Vol.3 NSCC 17, this Court held that for the doctrine of standing by to
C apply, the subject-matter in dispute, among other factors, must be the same. The radical question that must be asked is, was the interest of the family at stake in the area contested by the Appellant in Exhibit C, an area the Appellant asserted belonged to him? My humble an-
D swer is in the negative. This is moreso, in my opinion, that the smaller area of land measuring 48 feet by 30 feet cannot be estoppel for a larger family land area learned counsel for the Respondent equates for sameness of subject-matter or commonalty of interest. In the
E instant case therefore, the subject-matter is not the same as that litigated in Exhibit'C' where the Appellant was defending the area he claimed, as opposed to the larger land area-a vast tract of land belonging to the entire family now being disputed by the parties hereof.

F It is for the foregoing reasons of mine and the more detailed ones contained in the leading judgment of Katsina-Alu, JSC that I too allow the appeal and restore the decision of the learned trial judge dated 4th December, 1987. I award similar costs and other consequential orders contained in the leading judgment.
G

H

IGUH JSC (DISSENTING)

The proceedings leading to this appeal were first initiated on

the 28th day of July, 1978 in the High Court of Justice of the former Mid-Western State of Nigeria, now the High Court of Justice of Delta State of Nigeria, holden at Oleh. In that court, the plaintiff, for himself and on behalf of the Akpara family, claimed against the defendant, for himself and on behalf of the Ighavie family, both of Ofagbe Village in the Isoko Local Government Area of Delta State as follows:-

"1. A declaration of title to all that piece or parcel of land situate in Ofagbe Village in Isoko Division within Ughelli Judicial Division. The area and extent of the said land is more particularly described and verged pink in the survey plan filed with this amended statement of claim in this suit. Annual rent of the land is assessed at N10.00 per annum.

2. N200.00 (Two hundred Naira) damages for trespass committed by the defendant, his servants or agents who sometime between January, 1976 and February, 1 1976 or thereabout at Ofagbe village without the consent of plaintiff broke and entered parts of the said plaintiff's family land not permitted to the defendant or any member of his family and deposited sand thereon and began to build on top of the foundation of the plaintiff's building verged purple in the survey plan, and extended their buildings beyond the limit permitted to them by the plaintiff's family verged yellow and brown respectively in the survey plan which unlawful extensions are verged blue in the survey plan.

3. An order of forfeiture of the defendant's right of tenancy in the area verged pink in the survey plan in accordance with Isoko (Ofagbe) customary law of land tenure and or an order of perpetual injunction to restrain the defendant, his servants and agents and all other members of Ighavie family from carrying on any building or other works in the land of the plaintiff's family verged pink in the survey plan or from doing any other acts not being the exercise of the right of ingress or egress on the land or of inhabiting the two houses permitted to them by the plaintiff's family.

4. An order of mandatory injunction to remove any structures

erected or crops grown on the said plaintiff's family land outside the portions verged yellow and brown in the survey plan.

5. *And plaintiff further claims for any other legal or equitable relief which the court may consider him entitled in the light of the pleadings and or evidence."*

Pleadings were ordered in the suit and were duly settled, filed and exchanged. The defendant, in his Statement of Defence, not only denied the plaintiff's claims but counter-claimed against the plaintiff as follows:-

"(a) *Declaration of title to all that piece of parcel of land lying and situate along Egbahe Street in Ofagbe village in Isoko Local Government Area within the jurisdiction of this Honourable Court. The area/extent of the said land is more particularly described in survey plan No. LSU, 5016 already filed with the statement of defence in the main suit. The annual rent of the land is N100.00 per annum.*

(b) *N10,000.00 (Ten thousand Naira) damages for trespass committed by the defendant (sic) herein, his servants and/or agents or workmen, who sometime between February 1976 and November, 1983 at Ofagbe village within the jurisdiction of this Honourable Court, without the consent, authority/permit of the plaintiff (sic) herein, broke and entered the said land, deposited sand and erected structures thereon.*

(c) *An order of perpetual injunction restraining the defendant (sic), his servants, agents or workmen and all other members of Akpara family of Ofagbe village from entering the said land or part thereof except the portions already granted them or carrying on any building, structure or work on any other part of the said land."*

The case proceeded to trial and the parties testified on their own behalf and called witnesses.

Both the claim and the counter-claim were brought and defended in representative capacities as expressed in the title of the suit and as averred in the pleadings.

The plaintiff and the defendant are both from Ofagbe village.

The land in dispute is called Egbahe and comprises of the piece or parcel of land through which Egbahe street in Ofagbe village runs. It is shown verged pink in the plaintiff's survey plan, Exhibit A and in the defendant's plan, Exhibit B. The identity of the said land in dispute is not in doubt as its delineations virtually correspond in both plans. B

The respective claims of the parties to their family ownership of the land in dispute are anchored basically on traditional history and various acts of long possession and ownership thereof. C

The plaintiff's traditional history as pleaded and testified to is essentially that his great grand ancestor, Akpara, originally founded and settled on the land in dispute at the instance of one Egide. Following the death of Akpara's only brother called Ozoro at their original habitation under tragic circumstances, the said Akpara migrated to where is now known as Ofagbe village. There, Egide received him and showed him the land in dispute, then a virgin forest, to clear and settle on. Akpara accepted the offer of Egide, cleared the land now in dispute of its virgin vegetation and under customary law became the owner thereof by first settlement. D E

This land in dispute, now generally referred to as, Egbahe street, was thus first founded and settled upon by the plaintiff's ancestor, Akpara. The plaintiff explained how the defendant and members of his family came to live and mix together on the land in dispute with them. He stated that this was through the adulterous union of one of their wives, Omaniyo, with Ighavie, the son of Ugwe, sometimes also spelt as "Uwhe", who is the ancestor of the defendant's family. He claimed that all the houses described in his survey plan, Exhibit A, as defendant's houses were those of the defendant's family, occupied by them or members of their family as tenants of the plaintiff's family. F G

The defendant in narrating his own traditional history over the land in dispute claimed that the said Ugwe, the father of their ancestor, Ighavie, was a hunter who migrated from Irri to found and settle in Ofagbe village. He testified that his said ancestor, Ugwe, acquired the land in dispute verged pink together with the entire land verged H

green in the plan, Exhibit B, by first settlement. He deforested and founded the area now known as Egbahe street which is the land now in dispute together with the rest of the land verged green in Exhibit B. In his occupation of the said land, Ugwe and after him, his heirs B and successors, exercised maximum acts of possession and ownership thereon. In one of his hunting expeditions, Ugwe found Akpara, then a young man, in the bush. He took compassion on the said Akpara and admitted him to live with his family at Egbahe. It was the C defendant's case that as time went on, Ugwe secured Udurdhe in marriage for Akpara. This marriage produced three children. Upon the death of Akpara, however, Ugwe remarried Udurdhe who begat Ighavie, the father of Ero whose son is Akwido, the father of the defendant.

D In particular, the defendant specifically pleaded the proceedings and judgment in Oweh Customary Court in suit No. OCC/165/71, Exhibit C, and the appeal decision therefrom to the Oleh Magistrate's Court, Exhibit D. In that suit, the present defendant, as E Plaintiff, sued the plaintiff herein for declaration of title, damages for trespass and perpetual injunction in respect of a building plot of land situate in Egbahe street, Ofagbe within the land now in dispute and obtained judgment against the said plaintiff. The present plaintiff's F appeals against this judgment both to the Oleh Magistrate's Court and the High Court, Ughelli were dismissed. The defendant herein therefore pleaded and relied on estoppel per rem judicatam and issue estoppel in his defence to the plaintiff's present action.

G The learned trial judge after a review of the evidence rejected the defendant's plea of res judicata and issue estoppel. He was of the view that the traditional history of the plaintiff in respect of the land in dispute was credible and had been established. He disbelieved the traditional history in respect of the land in dispute as presented by H the defendant and entered judgment for the plaintiff for title to the land in dispute, damages for trespass and perpetual injunction restraining the defendant, his servants, agents and members of the Ighavie family from carrying on any constructions on the land in dis-

pute verged pink in Exhibit A without the consent of the plaintiff and members of his Akpara family excepting the portions verged yellow and brown in the said Exhibit A. The plaintiff's claim for forfeiture was dismissed "in view of the long occupation of the land in dispute by the defendant's family". So, too, the plaintiff's claim for mandatory injunction for the removal of any structures erected on the land by members of the defendant's family was dismissed "as this would cause hardship to the defendant and members of his family who built their houses on the land". The defendant's counter-claim was dismissed.

Being dissatisfied with this judgment of the trial court, the defendant lodged an appeal to the Court of Appeal, Benin Division, which court in a unanimous decision on the 14th day of June, 1991 held that the defendant had successfully established his pleas of res judicata and issue estoppel. That court accordingly allowed the defendant's appeal, dismissed the plaintiff's claims and entered judgment for the defendant in terms of his counter-claim.

Aggrieved by this decision of the Court of Appeal, the plaintiff has now appealed to this court.

Four grounds of appeal were filed by the plaintiff against this decision of the Court of Appeal. I find it unnecessary to reproduce them 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 two issues identified on behalf of the plaintiff/appellant which this court is called upon to determine are as follows:-

"(1) *Whether the plea of estoppel per rem judicatam (and we would add) and issue estoppel avail the respondent, and if they do, whether the Respondent is entitled to judgment in his Counter Claim?*

"(2) *If the plea of estoppel per rem judicatam and issue estoppel are unavailable to the Respondent, whether the Appellant is entitled to judgment (and we would add) as found by the trial court?"*

The defendant/respondent, for his own part, similarly set out two issues for the determination of this appeal. These are:-

"1. *Whether the Court of Appeal was right when it held that*

both cause of action estoppel and issue estoppel applied in favour of the Defendant/Counter-claimant.

2. Whether the Court of Appeal ought to have considered the other grounds of appeal filed by the Defendant/Respondent in his appeal to that court and the consequences of its failure to consider them."

I think the main questions for resolution in this appeal are:-

"1. Whether the Court of Appeal was right when it held that both plea of estoppel per rem judicatam and issue estoppel availed the defendant in these proceedings and, if so, whether it rightly entered judgment for the defendant on his counter-claim.

2. Whether the Court of Appeal was right by dismissing the plaintiff's claims".

At the oral hearing of the appeal, learned counsel for the appellant, Mr. Ogunniyi adopted his brief of argument. Relying on the decision of this court in Ezeanya v. Okeke (1995) 4 N.W.L. R (Part 388) 142 at 148, learned counsel submitted with considerable force that the defendant's plea of res judicata and issue estoppel must fail as Exhibit C, the case before the Customary Court, was defended in a personal capacity and not in a representative capacity as in the present action. He contended that the issue in both actions is not the same as the land in dispute in the present action is larger than the land involved in Exhibit C. He therefore urged the Court to allow the appeal set aside the judgment and orders of the court below and restore the decision of the trial court.

For his own part, learned leading counsel for the defendant, O. M. Odje Esq. similarly adopted the respondent's brief of argument and submitted with equal force that Exhibit C constituted estoppel per rem judicatam and issue estoppel in the present case. He stressed, relying on the decision of this court in Ekpoke v. Usilo (1978) 6 - 7 SC. 187 that to determine the applicability of res judicata where the judgment relied upon is that of a Native or Customary Court, the real facts directly in issue in the action and determined by the Native or Customary Court judgment must be ascertained from

the entire record of proceedings in such an inferior court. He dealt extensively with the questions of the parties, the subject matter and the issues in both the Customary Court suit, Exhibit C, and the present action and submitted that they are all the same. He stressed, in particular, that the Customary Court case, Exhibit C, was fought by the defendant therein on behalf of the Akpara family even though this was not so expressed in the writ of summons. In this connection, he pointed out that it is not the form but the substance of a Customary Court case that matters in law. In his view, the plaintiff herein is by virtue of Exhibit C estopped from bringing the present action against the defendant. Learned counsel contended that cause of action estoppel and/or estoppel by conduct applied to estop the plaintiff from relitigating the area of land put in issue by the parties in the previous Customary Court judgment, Exhibit C. He further submitted that issue estoppel equally applied to estop the plaintiff from relying on the same issues already judicially decided against him by a court of competent jurisdiction in Exhibits C and D. One such issue is the acquisition of the land in dispute by first settlement by the plaintiff's ancestor, Akpara. He therefore urged the court to dismiss this appeal.

The two issues for consideration in this appeal seem to me inter-related and it is convenient to treat them together.

It is an application of the rule of public policy and in the interest of the common good that there should be an end to litigation. This is covered by the well established doctrine, interest rei publicae ut sit finis litium. See John Omokhafa v. Esekhoma (1993) 8 N.W.L.R 58. In this regard it is 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. Where, therefore, a cause of action in a present suit has been determined in a previous suit between the same parties and on the same issues, the parties are estopped per rem judicatam from bringing a fresh action before any court on the same cause and on the same issue already pronounced upon by the

court in the previous action. See Oyelakin Balogun v. Adedosu Adejoki (1995) 2 N.W.L.R (part 376) 131.

There is of course, cause of action "estoppel "as against "issue estoppel". The former effectively precludes a party to an action his agents and privies from disputing, as against the other party, in any subsequent suit, matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary involving the same issues. See too Udeze v. Chidebe (1990) 1 N.W.L R.(Part 125) 141. With regard to issue estoppel, it is recognised that within a single cause of action, several issues may come into question which are necessary for the determination of the whole case. As a general rule, once one or more of any such issues have been distinctly raised in a cause of action and determined between the same parties in a court of competent jurisdiction, nether party, his servant, agent or privy is allowed to reopen or relitigate any of such issues all over again in another action between the same parties or their agents or privies. See Lawal v . Yakubu Dawodu (1972) 1 All N.L. R. (Part 2) 270 at 272, Olu Ezewani v Nkali Onwordi and Others (1986) 4 N. W. L. R. (Part 33) 27 at 42, Samuel Fadiora and Another v. Festus Gbadebo and Another (1978) 3 S.C. 219 at 228 - 229 etc. Both estoppel have been raised in this appeal.

I think it is of primary importance to point out at this stage that the learned trial Judge for reasons not apparent from the record failed to give any consideration whatsoever to the relevant question of issue estoppel which was so forcefully raised in the pleadings and argued before him by the parties. I will, however, first turn to the question whether Exhibit C, in law, constitutes or is otherwise available to the defendant to sustain the plea of estoppel per rem judicatam sufficient enough to prevent the plaintiff from relitigating title to the land in dispute.

In this regard, the learned trial Judge after setting out the claims in Exhibit C and those in the defendant's counter-claim in the present action simply concluded as follows:-

"It is quite clear from above that the area claimed by the de-

fendant was a building plot unlike the instant case where the defendant in his counter claim claimed a piece or parcel of land lying and situate along Egbahe Street as shown in Exhibit "B". In effect, the area he claimed in Exhibit "B" is by far larger than the area he claimed in Exhibit "C" and the subject matter cannot therefore be the same as Exhibit "C" does not cover Exhibit "B" and the evidence therein. It is also my view that neither the judgments in Exhibit "C" and "D" nor the evidence given therein could create estoppel per rem judicatam as between the plaintiff and the defendant since the evidence, the issues and the reasons for the decision will be different. For a judgment to create estoppel, between the parties, the estoppel must be mutual as between the parties."

It does seem to me that the only question that the trial court would appear to have considered on this plea of estoppel per rem judicatam is that of the res or the subject matter of the litigation. In this regard, it held that this was not the same in both cases as the area of land claimed in the present case is larger than the area claimed in Exhibit C. On this ground alone, the trial court came to the conclusion that the judgment in the proceedings, Exhibit C, could not create estoppel per rem judicatam between the plaintiff and the defendant "since the evidence, the issues and the reasons for the decision will be different ". I will deal with this aspect of the case later in this judgment . It suffices for the moment to state that the learned trial Judge totally failed to consider the vital two questions whether or not the parties or thier privies and the issues in dispute in both Exhibit C and the present action were the same.

The court below, for its own part, meticulously considered the questions of both estoppel per rem judicatam and issue estoppel that were raised in the case. It considered at great length thae questions of whether the parties, the issue and the subject matter in the two proceedings were the same in both Exhibit C and the present action and came to the conclusion that they were. The court, per the leading judgment of Edozie, J. C. A., to which Musdapher J. C. A. and Ejiwunmi, J.C. A., as he then was, concurred observed :-

"In the case in hand, it is clear that the parties in the previous judgment, Exhibit 'C' are the same as the parties in the present case except that superficially the defendant in Exhibit 'C' was sued personally although he is in the instant case sued in a representative capacity for himself and on behalf of Akpara family of Ofagbe village. But it is trite that in dealing with customary court cases, what matters is the substance and not the form of the claim Learned counsel for the Appellant submitted, and this was not disputed by the opposing counsel, that although the Respondent in the present case was in the previous proceeding sued personally, he nevertheless, defended the action in a representative capacity for the Akpara family. I am satisfied that the parties to the previous proceeding are the same as the parties to the present case."

On the question of the issues in both cases, the Court of Appeal stated:-

"The principal relief sought in the two proceedings, to wit, title to land, are also the same. The issue in the two suits are therefore the same"

Turning to the res or the subject matter in both suits, the Court of Appeal observed:-

"With respect to the subject matter, it is common ground that the land in dispute in the former proceedings is smaller than the land in dispute in the present case. In Exhibit 'C' the claim was for a declaration of title in respect of a building plot which according to Oweh customary court Judges who inspected it measured 48ft by 30ft. The area in dispute in the present case is not specified but from the survey plans Exhibits 'A' and 'B' it is a much larger area of land. Learned counsel for both parties appear to be in agreement, and the lower court was of the same view, that the land in dispute, the subject matter in Exhibit 'C' and 'D' is part of the land in dispute in the instant case but they have agreed to disagree on the effect of the previous judgment on the case under consideration Now, reverting, to the present appeal and applying the principle distilled from the Amos Ogbesusi Aro vs. Salami Fabolude supra to the present

case, it seems clear that the learned trial judge was in error in entering judgment in favour of the Respondent in respect of the entire land verged pink in the Respondent's survey plan Exhibit 'A' in the face of the judgment of the Oweh customary court, Exhibit 'C', adjudging the Appellant owner of a plot of land forming part of the large area B verged pink in Exhibit 'A'. At the worst, the lower court should have given the Respondent Judgment for the area verged pink less the area the subject matter in Exhibit 'C' and if this area is not identifiable because no plan was used, to non-suit the Appellant so as to give him C the opportunity to establish that portion in a subsequent action".

The first observation i desire to make is that the question whether or not Exhibit C operates as estoppel per rem judicatam in the present action is entirely a matter of law as applied to established D facts.

In the second place, it is long established by a long line of authorities that for the plea of estoppel per rem judicatam to succeed, the party relying on it must established that:-

(i) The parties or their privies are the same, namely, that the parties involved in both the previous and the present proceedings are the same. E

(ii) The claim or the issue in dispute in both proceedings are the same. F

(iii) The res or the subject matter of the litigation in the two cases are the same.

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

(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 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) 118 at 122, Fadiora v. Gbadebo (1978) 3 SC. 219 at 229, Richard Ezeanya v. Gabriel Okeke (1995) 4 N. W. L. R. (Part 388) 142 etc. But once they are established, such previous H

judgment is absolutely conclusive and estops the parties, their agents and privies from making any claim contrary to the decision in such previous judgment.

In the third place, it cannot be over-emphasised that in the determination of whether the plea of estoppel per rem judicatam or whether the parties, the issues and the subject matter in both the previous and the present actions are the same, the court is permitted to study the pleadings, the proceedings and the judgment in the previous suit. The court may also examine the reasons for the judgment and other relevant facts to discover what in fact was in issue in the previous proceeding. See Fadiora v. Gbadebo, *supra*. It may therefore be said that it is a question of fact whether the parties and their privies, the facts in issue and the subject matter of the two cases are the same.

Before, however, I proceed to consider whether the parties, the issues and the subject matter in both the previous and the present cases are the same, it is of vital importance to recognise the fact that Exhibit C, the previous suit relied on for the plea of res judicata in the present action is a Customary Court suit. In other words, it is the record of proceedings and decision of an inferior court or tribunal.

In this regard, the law is well settled that the form of an action in a Customary Court or tribunal and, indeed, in other inferior courts of equivalent jurisdiction must not be stressed where the issue involved is clear and decisions on such issues should not be disturbed without very clear proof that they are wrong. It is the substance of such a claim that is, in law, the determinant factor. See Kwamin Akyin v Essie Egymah (1936) 3 W. A. C. A. 65, Solomon Jonah v Kojo Owu (1937) 3 W. A. C. A. 170 at 171. Proceedings in a Customary Court have to be carefully scrutinised to ascertain the actual subject matter of the case, the real issues therein and who the correct parties are. An action instituted in a Customary Court might on the face of the claim appear to be a purely personal action, particularly, if it is not indicated ex facie that the same is a representative action when, in point of fact such is, to all intent and purposes, being fought

by the parties in representative capacities. In dealing, therefore, with proceedings from Native or Customary Courts, appellate courts must not be unduly too strict with regard to matters of procedure as the whole object of such trials is that the real dispute between the parties should be adjudicated upon without unnecessary resort to form and/or undue technicalities. See Olujinle v. Adeagbo (1988) 2 N.W.L.R. (Part 75) 238 at 251, Chief Awara Osu v. Ibor Igiri (1988) 1 N.W.L.R. (Part 69) 231, Nwosu v. Udeaja (1990) 1 N.W.L.R. (Part 125) 188 etc.

So, in Chukwunta v. Chukwu and others (1953) 14 W.A.C.A. 341 the issue that arose was whether the proceedings and judgment in the Lengwe Native Court suit No. 168 of 19445, Exhibit 3 and 4 operated as estoppel per rem judicatam. The contention, as in the present case, was that those proceedings could not create an estoppel per rem judicatam as it was not expressed on the face of the claim and/or writ of summons that the suit was conducted by the parties in their representative capacities. The submission was that the Native Court case revealed ex facie that the parties fought their case in their personal capacities as against the subsequent Supreme Court case, on appeal, in which the parties expressly fought their battle in a representative capacity. It was urged on the court to hold that the plea of res judicata was not in the circumstances available to the parties in the Supreme Court case. In dismissing this contention, the West African Court of Appeal observed thus:-

"The learned counsel further submitted that Exhibit 4 could not create an estoppel as the appellant sued the respondent in his personal capacity and that he also was sued in his personal capacity."

There is no doubt that the capacities of the parties were not shown on the writ of summons, but a perusal of the evidence led discloses that the appellant sued as representative of his people, the Okpome Lengwe people, and that the first respondent was sued as a representative of the people of Amanamoke.

In a Native Court case, the form of the action is not to be stressed so long as the issue involved is clear.

It is clear from the record of appeal that the appellant, in a representative capacity, had sued the respondents in all the cases in the Native Court in a representative capacity, and that there is no substance in counsel's submission" (Underlinings supplied for emphasis).

So, too, in *Ikpang v Edoho* (1978) N.S.C.C. 423, Aniagolu, J.S.C. In endorsing the above principles of law governing the determination of the real parties, the issues and the subject matter of a Native Court proceeding put the matter as follows:-

"Generally great latitude must be given to, and a broad interpretation placed upon Native Court cases, and one may add, Customary Court cases - so that the entire proceedings, the evidence of the parties and the judgment must be examined in order to determine what the Native or Customary Court case was all about (Ajayi v. Aina 16 N.L.R. 67). The whole conception and result of the proceedings will show what the parties were fighting for, the matters upon which issue were joined even if technically framed in an inappropriate language from the stand point of legal technocrats, and the decision of the Native or Customary Court on these issues".

In *Ekpoke v. Usilo* (1978) 6-7 S.C. 187, Obaseki, J.S.C. also stated:-

"To determine a question of res judicata where the judgment relied upon is that of a Native Court, a court in which no pleadings are filed, the facts directly in issue in the action and determined by that judgment are to be discovered from the substance as disclosed in the record of proceedings."

With the above principles of law in mind, I will now proceed to determine whether or not the parties, the issues and the subject matter in Exhibit C are the same as those in the present case. I will deal with the question of parties first.

It is now well settled that the term "parties" includes not only those named on the record of proceedings but also those who had direct interest in the subject matter of the dispute and had an opportunity to attend the proceedings and to join as a party in the suit but

chose not to do so but were content to stand by and see the battle in which their interest is directly in issue fought by some body else or let witnesses testify as to their title to or interest in the subject matter of the action. So, in Odua Esiaku and others v Vincent Obiasogwu and others (1952) 14 W. A.C. A. 178 at 180, the West African Court of Appeal held that by abandoning the actions in the Native Court, the plaintiff's people assented to the Inquiry and elected to be represented by their pledgee, the plaintiff in that suit and that they took part in the Inquiry; and that the settlement of the boundary made in the Inquiry was therefore conclusive and binding on them whether as a party to the Inquiry - which they were - or (if they were not a party) because they stood by and allowed their pledgee to fight the battle about their title. Coussey, J. A., delivering the judgment of the West African Court of Appeal in that case propounded this proposition of law as follows:-

"The learned trial judge found that the title of Chief Onyeama was identical with the plaintiff's title. They were content to let Chief Onyeama fight their battle for them, but supporting him by deputising representative to testify as to their title. They were parties in fact and the settlement binds them as they are presumed to have authorised their pledgee, Onyeama, to conduct the proceedings with their authority and consent.

If, then, they were not parties, what was said by Cockburn, C. J., in Roden v. London Small Arms Co. 46 L. J. Q. B. D. 213 is in point, namely, the doctrine is well known and recognised in courts of law that if you stand by and allow another to do an act in a particular way which you could have prevented at the time, you must be held bound by the act so done with your acquiescence. The plaintiff's knew perfectly well that any order in the Inquiry affecting Onyeama's title would equally affect theirs as the same right and title was substantially in issue. Therefore they cannot now be heard to complain that were not parties - Re Lart, Wilkinson v. Blades (1896) 2 Ch. 788 and Farquharson v. Seton 5 Russ. 45. Another way to look at the matter is to ask; if Onyeama had succeeded, who would have taken

the benefit of the Beaumont decision? Clearly it would have been the plaintiffs".

I think it can be said that the principle of law is now well settled that if a person was content to stand by and see his battle fought by some one else in the same interest instead of applying to be joined as a defendant in that case, he is bound by the result in that case and estopped from reopening the issue determined in that case. He should not be allowed to reopen the case.

Attention may also be drawn to the West African Court of Appeal decision in Isaac Marbell v. Richard Akwei (1952) 14 W. A. C. A. 143. In that case, the appellant was vitally interested in a previous case between the respondent and a person to whom he, the appellant, had conveyed the property. The validity of the title he had conveyed was clearly in issue in that case. Instead of applying to be joined as a defendant in that case, the appellant was content to stand by and see his battle fought by the person he had conveyed the property to in the same interest. It was held that the appellant was bound by the result in that case and that he was estopped from reopening the issue determined in that case. In the course of its judgment, the West African Court of Appeal commented:-

It is true, as contended by counsel for the appellant, that in Yode Kwao v. Kwasi Coker 1 W. A. C. A. 162 at 168 the court was dealing with the question whether a judgment against one member of a class where the title and interest of all the members was identical, bound the other members of the class. The principles applied by the court in that case seem to us equally applicable to the present case

.....

For the reasons we have given we are of the opinion that the learned trial judge was right in holding that the appellant was estopped from litigating the issue which was determined in the case between the respondent and Faris"

I should, perhaps, for the sake of completeness, state that in the said case of Yode Kwao v. Kwasi Coker (supra) the West African Court of Appeal, affirming the decision of the court below that the

title of the plaintiff was identical with that of B and that as the said B had stood by and acquiesced in the title to the land being determined in favour of the defendant in the Divisional Court, he was estopped from asserting title to the said land, that court at page 168 of the report went on:-

"It is quite true that the piece coloured in brown was the scene of the actual trespass, but the land claimed and found by the judgment to be the property of Kwasi Coker (the present defendant) was the whole blue piece, and the true test is that Odonkor Nmate is not precluded by the judgment only from going on to the piece of land delineated in brown, but is estopped as regards the whole parcel coloured blue" (Underlinings supplied)

It is against the background of the above well established state of the law that I must now consider whether the parties in Exhibit C are the same as those in the present proceedings

It is clear from the records, and this is not disputed, that the actual persons named as parties, that is to say, named as the plaintiff and defendant in the previous case, Exhibit C, are exactly the same persons named as parties in the present action. In the present suit, both the claim and the counter-claim were prosecuted and defended by the said parties in a representative capacity for themselves and on behalf of their respective Akpara and Ighavie lineage of Ugwe families, Ofagbe. This, ex facie, is unlike the proceeding in Exhibit C. In Exhibit C, the present defendant, as plaintiff, for and on behalf of the Ighavie lineage of Ugwe family sued the present plaintiff, ostensibly personally, in that it was not expressed on the face of the writ of summons that the said defendant in that case, was sued in a representative capacity. In actual fact, however, it seems clear from a close perusal of the record of proceedings, Exhibit C, that the said defendant therein defended the suit in a representative capacity for himself and on behalf of the Akpara family of Ofagbe village in which capacity he prosecuted the present action. The length and breadth of his evidence therein was that the Akpara family to which he belonged were the communal owners of the piece or parcel of land through

which Egbahe street in Ofagbe village runs. The land, by the grace of Egide, was acquired by his ancestor Akpara by deforestation and first settlement. The building plot of land in dispute which is also owned by his said Akpara family was situate within and formed part B of the said parcel of land founded by Akpara at Egbahe street, Ofagbe.

It cannot be over-emphasised that being proceedings and judgment of a Native Court, both courts below were duly bound to be concerned not with the form of Exhibit C but with its substance in the determination of whether the parties, the issues and the subject C matter in the said Exhibit C are the same as in the present suit.

There can be no doubt that if Exhibit C was fought in a superior court of record and the parties were represented by counsel, the defendant would have been required to seek the leave of court to D defend the action, as I think he did, in a representative capacity. Exhibit C, however, is the record of proceedings and judgment of a Customary Court. It is my view that once it is clear from the records that the said defendant therein in fact defended the action for himself E and on behalf of his Akpara family, no useful purpose may be served in resorting to any technicalities of the law or to the definition of the word "representative" in the legal sense before it may be endorsed that the action was defended in a representative capacity. I must in the above regard endorse the decision in Apata v. Ogbeki and others F (1955/56)(Part 3) W. R.N. L. R. 73 to the effect that no order to sue or to be sued in a representative capacity is either required or necessary in respect of a case instituted in a Native Court. Nor can I subscribe to the view that it is strictly necessary for a defendant who is G sued in a Native or Customary Court to tender before the court an authority to defend the suit in a representative capacity from the class of persons he seeks to represent if it is clear from his entire case that he is defending the action in a representative capacity and that those H he represents support or attend court with him or indeed testify in respect of their interest in the case. Such technical procedural requirement may be clearly necessary in the superior courts of record. I find it difficult to accept that it is applicable in the Native or Custom-

ary Courts where, what must count, is what the real substance of matters in issue is. I will now examine Exhibit C further to determine whether or not the defendant therein defended the action in a representative capacity.

In the first place the defendant, that is to say, the plaintiff in the present case, in his evidence in the Customary Court proceedings, Exhibit C, at page 190 of the record testified as follows:-

"My name is Olowo Okokuje I am a direct descendant of Akpara. Akpara (male) begat Efoge (male), Efoge begat Apara (male), Akpara begat Obowo (male), while Obowo begat Igbaré (male) who begat Okokuje, my father"

A little later in his evidence, the defendant at page 193 of the record stated:-

"The plot in dispute is owned by Akpara, my great grand father. Ugwe who is the ancestor of the plaintiff had a compound at the extreme end of Egbahe street. My Akpara family has a common boundary with Ese family in Egbahe street. My family also has boundaries with Osifo and Egide families in the plot in dispute"(Underlinings supplied)

He went on at the same page 193:-

"The allegation of the plaintiff and his first witness that my great grand father, Akpara was picked by his grand father, Ugwe from the bush is most, untrue"(Underlinings supplied)

He continued at page 194:-

"As the land which was given by Egide to Akpara to occupy was a bit choked up, and it was later found to have accommodated Akpara, then the place was called Ogbarai (meaning the people have been accommodated). It is this name Ogbarai that was later change to "Egbahe" for the street. My great grand father Akpara being the owner and first man to found Egbahe street made a juju by name "Egbo" with which he used to fight in the inter-tribal and civil wars "(Underlinings supplied)

Under cross-examination by the plaintiff in Exhibit C, the defendant stated:-

"After a street has been founded by a man, his own children can later spread over it. I am prepared to swear with you that Akpara was the first to stay in Egbahe street before Ugwe. I am also prepared to swear with you that Akpara was never picked from the bush by Ugwe" (Underlinings supplied)

There was next the evidence of D.W. 2 in Exhibit C, Akokimoni Ogbaide, who also is a member of the Akpara family. Said he:-

"Akpara is my great grand father"

Earlier on in his evidence under cross-examination by the plaintiff therein, the witness had stated:-

"It is true that your ancestor Ero had his house built on the land in which the plot in dispute situates" (Underlinings supplied).

Most importantly, the witness stressed:-

"The plot in dispute, including the whole piece of land occupied by Akpara family in Egbahe street is not exclusively shared to any individual member of Akpara family" (Underlinings supplied).

It is thus clear that no portion of the plot of land in dispute in Exhibit C, including the entire land of Akpara family in Egbahe steet which was allegedly acquired by deforestation and first settlement belonged exclusively to any single member of that family. In other words, the land in dispute in Exhibit C was the communal land and of the entire member of the Akpara family and was not the personal property of the defendant. I will return to this aspect of the appeal later in this judgment.

It is sufficient for now to point out that it is not in dispute that the case of the plaintiff in Exhibit C was admittedly for himself and on behalf of the Igbaivie lineage of Ugwe family of Ofagbe. It is also plain to me from the entire evidence of the defendant and all his witnesses in Exhibit C that the case of the defence was presented for and on behalf of members of the Akpara family of Ofagbe . This is evident from the testimony of the defendant and the defence witnesses in Exhibit C. In particular, it was the defence case that their family had boundaries with the Osifo and Egide families in the building plot in dispute. It is clear from the evidence of the defendant

therein and that of his witnesses that the land they were fighting for in Exhibit C was not just the building plot of land which was the immediate cause of the dispute. The land the defence put in issue was the entire land they claimed was founded by Akpara at Egbahe street which, as per their plan, Exhibit A in the present case has its eastern and western boundaries with the land of the said Osifo and Egide families. B

This now brings me to the boundaries of the land put in issue in Exhibit C by the parties and within which the building plot in dispute is situated. I will consider the evidence of the defence in that case first. C

On the evidence of the defendant in Exhibit C, the land of his Akpara family had common boundaries with the Osifo, Ese and Egide families. His evidence was corroborated by that of D.W.5, Abel Omoleh, who was also from Akpara family. He testified that the land in dispute in Exhibit C belonged to his family and not to Ugwe family. He confirmed that his family land had common boundary with the land of Egide family. Said he:- D

"..... my father and the father of the defendant were half brothers in Akpara family in Ofagbe too. The families of Akpara and Egide have common boundary" E

Under cross-examination D.W.5 said:-

"I heard of a man called Ugwe in Egbahe street. I am not aware that it was Ugwe who brought Akpara from the bush It is false that Ugwe was the founder of Egbahe street" F

There is next the evidence of D.W.1, Oghenejabor Oghelio, who came from Osifo family. He said:- G

"My family and the said family of the defendant (i.e Akpara family) have pieces of land which have common boundary with each other at Egbahe street in Ofagbe".

D.W.3, Eleh Akero, another boundary man from Ese family H testified thus :-

"Akpara first came to settle in Egbahe street. The next person to come to settle in Egbahe street was Ese and

they both have common boundary".

D.W.4, patrick Onojerame, from Osifo family also testified as to the common boundary between Osifo and Akpara, families at Egbahe street. He said:-

B "..... *Osifo and Akpara came to have a common boundary at Uruonwa and Egbahe street"*

C The vital point worthy of note in the evidence of the defendant and the above witnesses in Exhibit C is the fact that they were not called to establish the ownership and boundaries of the building plot which was the immediate cause of the dispute between the parties. Their evidence essentially was the establishment of the extent and boundaries of the land said to have been acquired by Akpara at Egbahe street, Ofagbe by first settlement.

D A close examination of their evidence clearly shows that the land put in issue in Exhibit C was precisely the land said to have been founded by Akpara by deforestation and first settlement. It is exactly that same land which is verged pink in Exhibit A that is now in E dispute in the present action. This is evident notwithstanding the fact that the immediate course of action and the area of trespass in Exhibit C was described as the building plot shown verged purple in the present plaintiff's plan, Exhibit A and verged yellow in the present F defendant's plan Exhibit B.

In Exhibit A, the boundaries of the land in dispute verged pink and said to constitute the land acquired by Akpara are with the Osifo, the Egide and the Ese families as testified to by the defendant and his witnesses in Exhibit C. The fourth and last boundary of that land is G the Ashaka/kwale -Ivrogbo Road. That road is clearly shown in both Exhibits A and B in the present proceedings.

H The above boundaries, without doubt, also tally with the land claimed by the present defendant's family as per their plan Exhibit B except that they additionally claimed the land south west of the land in dispute up to the boundary with the Egide family. It is plain to me that the land in dispute in both plans and therein verged pink essentially correspond. In my view, the land in dispute in the present case

is the land put in issue by the parties in Exhibit C. I will however show later that the final result I intend to reach in this judgment remains the same whether or not the land put in issue in Exhibit C is exactly the same land as the one now in dispute in view of the agreement between the parties that the land in dispute in Exhibit C forms part and parcel of the land in dispute in the present action. B

Returning once more to the issue of the capacity Exhibit C was conducted, I have already stated that it was fought in representative capacities by both parties. Indeed the Oweh Customary Court had no difficulty and was under no illusion that the case was defended by the defendant therein in a representative capacity for and on behalf of the Akpara family. Accordingly, it did not find title established against the defendant therein personally. It rather found title established against the defendant and members of the Akpara family. It decreed:- D

"After carefully considering the foregoing points, we conclude that the plaintiff and the Ighavie lineage of Ugwe family have title to the plot in dispute, and that the defendant and the Akpara family have no title to it". (Underlinings supplied) E

Appeals both to the Magistrate's Court, Oleh and the High Court, Ughelli against this decision of the Oweh Customary Court were dismissed. I think it is now too late in the day to launch an attack against this judgment of the Oweh Customary Court, twenty eight years after its delivery. In my judgment, the Court below was right when it held that the parties in Exhibit C are the same as in the present suit. F

In rounding up the question of whether or not the Akpara family are parties to Exhibit C, I have already pointed out that the term "parties" includes not only those named on the record of proceedings but also those who had definite interest in the subject matter of the suit and had an opportunity to attend the proceedings and to join as parties therein but did not do so but chose to stand by and see the battle in which their interest is directly in issue fought by some body else or let witnesses testify as to their interest in the subject matter of the dispute. See Esiaku and others v Obiasogwu and oth- G H

ers (supra) I have also held that the defendant in Exhibit C defended the action on behalf of the Akpara family and that members of that family not only attended court at the hearing but testified for the defendant therein in the assertion and protection of their interest. I think the fact that it was not expressed in the writ of summons that the defendant was sued in a representative capacity when, in fact, the Akpara family fully supported him at the trial, testified as to their title to the land and defended their communal interest over the same cannot be any matter of great moment. The defendant's Akpara family will nonetheless be bound by the decision of the Customary Court in that suit. See too Chukwunta v Chukwu and others and Isaac Marbell v. Richard Akwei (supra).

Put differently, the question may be asked whether, in all the circumstances of Exhibit C, the Akpara family, after they had stood by to watch their case being fought by the defendant in an alleged personal capacity, and they actively participated at the trial in defence of their communal title to the land could come now to deny that they are bound by the decision. With the greatest respect, I think not. In my view, the defendant's family is squarely caught by the doctrine of estoppel by conduct and may not now relitigate the subject matter or the issue of title to the land that was put in issue by the parties in Exhibit C. They must, in the circumstances of the case be bound by the decision of the Oweh Customary Court in Exhibit C.

In Ojiako v Ogueze (1962) 1 All N L R. 58, title to land was the subject matter of an earlier action in a Native Court by one Osakwe against some defendants personally. The Native Court, as in Exhibit C, seemed to have dealt with the matter as if both the plaintiff and the defendants before it had sued and been sued as representative of their respective communities, since, again as in Exhibit C, it granted a declaration to the plaintiff to the effect that the land in dispute was "for him and his family". No plan of the land was tendered in evidence in the Native Court. It was held by this court that the Native Court proceedings were representative proceedings since that court

regarded the plaintiff as suing on behalf of his family and gave judgment to that effect, and, no doubt, meant its judgment to affect the family of the defendants. It was further held that the proceedings then appealed against and those heard in the Native Court were between the same parties. Brett, F.J; delivering the judgment of this court in the appeal observed:-

"Mr. Sowemimo's second submission is that even if the judgment in suit 269/52 is a valid and subsisting one, it is not binding in the present case since the present case is a representative action on both sides whereas suit 269/52 was on the face of it a suit brought by one Chikwube Osakwe of Ifite Okija personally against the first three appellants in the present case personally. As to that, the Native Court evidently regarded Chikwube Osakwe as suing on behalf of his family, since its order was that the land was for him and his family. I cannot recall a case in which it has been suggested that rural land in this part of Eastern Nigeria was anything but communally owned and I have not the least doubt that it was well understood by the defendants and by the court in Suit 269/52 that the defendants were sued as representing their family. The submission was made for the first time in this court and on the evidence it cannot succeed, since if there is not an estoppel per rem judicatam against the people of Umuezeana Okija, there is an estoppel by standing by".

The facts of the above case are in many respects on all fours with those of the present case. Exhibit C was brought by the plaintiff in that case for and on behalf of his family. On the face of the claim, it appeared as if it was brought against the defendant personally in the Customary Court. The Customary Court was however in no doubt that both parties were prosecuting their cases as representative of their family. It granted a declaration to the plaintiff and his family and held that the defendant and his family had no title to the land in dispute. At the risk of repetition, the Customary Court held:-

After carefully considering the foregoing points, we conclude that the plaintiff and the Ighavie lineage of Ugwe family have title to the plot in dispute, and that the defendant and the Akpara family

have no title to it". (Underlinings supplied)

In my view, the present proceedings and those of Exhibit C in the Customary Court are proceedings between the same parties thus warranting the operation of estoppel per rem judicatam if the res and B issues in both cases are the same.

I should perhaps add that even if estoppel per rem judicatam is not available to the defendant in this case, and I do not so hold, there is estoppel by standing by which must operate against the plaintiff C and his Akpara family. But as I have observed, members of the Akpara family had the same interest with the defendant in Exhibit C. They ranged themselves on the same sides as the defendant in Exhibit C but did not bother to apply to be joined as parties. They were content to let the defendant fight their battle for them but supported D him by testifying as to their title to the land in dispute. If the defendant in Exhibit C had won, they would naturally have reaped the fruit of victory. I think they should be prepared to fall with him and take the consequences now that their champion lost the battle.

My above conclusion would appear to be fully supported by what I may, with profound respect, describe as a most powerful statement of the law by Lord Denning in Nana Ofori Atta v Nana Abu Bonsra II (1958) A.C. 95 at 103. Delivering the judgment of Her Majesty's Privy Council, the noble Lord commented as follows: F

"It seems to be the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions, they regard the named party as their G champion and support him by giving evidence. If he wins, they reap the fruit of victory. If he fails, they fall with him and must take the consequences"

I think the above statement of the law is, with respect, sound and I do H not hesitate to endorse the same as well founded.

I will now make one final point on the issue of sameness of parties in the previous and present proceedings. It will be necessary to turn to the pleadings filed by the parties.

Paragraphs 31- 33, 35 and 36 of the averments in support of the defendant's Counter-Claim in these proceedings are as follows:-

"31. Plaintiff herein avers that the dispute between the parties herein did not commence in this Honourable Court. Indeed it was the plaintiff in this counter claim who, subsequent upon the incessant and unfounded claims of the defendan herein after the death of plaintiff's father on portions of the land in dispute, that first initiated judicaill proceedings against the defendant herein. In this connection, plaintiff will refer to the portion verged yellow on plan No. LSU 5016 dated 30th December, 1977 already filed in Court and will add that this portion verged yellow marked the beginning of the story of continuous encroachment and unfounded claims to the land in dispute by the defendant herein.

32. Plaintiff herein instituted an action against the defendant in suit No. OCC/165/71 at the Oweh Customary Court for the following reliefs:-

(i) Declaration of title

(ii) Trespass

(iii) Injunction

33. Judgment was obtained against the defendant herein in this suit

34.

35. Added to this, the defendant herein being dissatisfied, appealed against the Oweh Customary Court judgment in suit No. OCC/165/71 to the Oleh Magistrate Court and his appeal was dismissed. Thereafter his appeal was also struck out in suit No. UHC/ 5A/73 at the High Court of Ughelli.

36. As this matter had been previously decided by Court of competent jurisdiction on the issues now being raised in this claim, the plaintiff herein shall rely on the following suits:-

*OCC/165/71: OJENIMA AKWIDO VS OLOWO
OKOKUJE*

*MCO/3A/72 OLOWO OKOKUJE VS OJENIMA
AKWIDO and*

*UHC/5A/73: OLOWO OKOKUJE VS OJENIMA
AKWIDO*

respectively before the Oweh Customary Court, Oleh Magistrate Court and the High Court of Justice, Ughelli, and also Survery plan No. LSU 5016 already filed in Court".

The above paragraph were replied to in paragraphs 8-10 of the plaintiff's Defence to Counter-Claim as follows:-

"8. The plaintiff in this suit denies the conclusion that the defendant in this suit is seeking to draw from paragraphs 31,32,33,34,35,36,37, and 39 of the statement of counter-claim which are mainly issues of law and reserves the right to raise all legal defences to res judicata and other legal issues therein.

9. More specifically the plaintiff in this suit avers that there was no dispute over the land in dispute in the life time of defendant's father; during which he laid the foundation on the land in dispute.

10. Whereof the plaintiff in this suit shall contend that the defendant's counter-claim is frivolous, misconceived and lacks merit and should be dismissed with substantial cost".

The first point that I desire to point out is the anomalous situation whereby the defendant in the averments in support of his Counter-Claim referred to the plaintiff and himself as the defendant and the plaintiff respectively in the counter-claim.

Without doubt, a defendant in any action who alleges that he has any claim or is entitled to any relief against a plaintiff in an action may instead of bringing a separate action make a counter-claim in respect of that matter; and where he does so, he must add the counter-claim to his defence. Although such counter-claim shall have the same effect as a Statement of Claim in a cross-action and as if the defendant making the counter-claim were the plaintiff and the plaintiff against whom it is made, the defendant, the counter-claimant nonetheless remains the defendant and the original plaintiff against whom the counter-claim is made, the plaintiff respectively and referred to as such in the pleadings of the parties. It seems to me that there is a definite anomaly in the manner averments in support of the defendant's

counter-claim were pleaded referring to the plaintiff and the defendant in the main action as the defendant and the plaintiff respectively in the counter-claim.

Having so stated, it is clear that all the plaintiff did in his Defence to the said paragraphs 31- 36 of the Defendant's Counter-Claim was merely to deny "the conclusion" sought by the defendant from the said paragraphs of his Counter-Claim and no more. Although any reference to the plaintiff and the defendant in the pleadings and as indicated in the title of the suit was as the respective representative of their families, the defendant's averment that he successfully sued the plaintiff in 1971 after the death of his father at the Oleh Customary Court for title, trespass and injunction in respect of the land in dispute was hardly denied by the plaintiff in the said paragraphs 8 - 10 of his Defence to Counter - Claim.

The main function of pleading is to ascertain with precision the various matters that are actually in dispute and the points on which they agree and thus to arrive at certain and clear issues on which both parties desire a judicial decision. Each party must give his opponent a sufficient outline of his case. See Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A.C. 218 at 241. A denial of a material allegation of fact must not be general or evasive but specific. Every allegation of fact in the pleadings, if not denied specifically or by necessary implication shall be taken as established at the hearing. See Samson Ajibade v. Mayowa & Another 1978 9 & 10 S.C. I at 6, Eko Odume v. Ume Nnachi and others (1964) 1 All N.L.R. 329. It seems to me that from the state of the pleadings, it does not appear the plaintiff joined issue with the defendant on the latter's averment that the plaintiff was sued in Exhibit C in a representative capacity for and on behalf of the Akpara family. The plaintiff nowhere in his pleadings averred specifically that Exhibit C was not fought by the parties thereto in representative capacities. But as I have already stated, the plaintiff's family, on the evidence, must be held to be parties to Exhibit C and both estoppel per rem judicatam and, at all events, estoppel by standing by must operate against them by virtue of the said

proceeding. I entertain no doubt that the court below was right when it held that the parties in Exhibit C are the same as in the present suit.

I will now turn to the second question which is whether or not the claim or the issue in both the previous and the present actions are the same.

In this regard, it is patently clear that the principal relief sought in the two proceedings is the same, that is to say, declaration of title to land. There are also claims for damages for trespass and perpetual injunction in both suits. It is thus evident that the issue in both actions is the same.

With regard to the res, that is to say the subject matter of the litigation in the two cases, it is common ground that the land in dispute in Exhibit C is smaller but within and forms part of the land the subject matter of the present action. It is also correct that Exhibit C, the Oweh Customary Court proceedings was, like most Native Court actions, not fought with a survey plan.

But it is trite law that the absence of a survey plan cannot defeat the plaintiff's claim for title to land where the piece of land in dispute is ascertainable and identifiable. See Efetiroroje v. Okpalofe (1991) 5 N.W.L.R. (Part 193) 517, Udeze v. Chidebe (supra). The land in dispute in Exhibit C was clearly known to the parties and was in fact inspected by the court in their presence. Indeed in the present suit, the piece or parcel of land in dispute in Exhibit C was identified by both parties as being within the land, the subject matter of the present action. Besides, the plaintiff under cross-examination admitted that he had earlier litigated the land in dispute with the defendant at the Oweh Customary Court. Said the plaintiff :-

" I had earlier litigated the land in dispute with the defendant at Oweh Customary Court..... The portion of land where I made my foundation included the land we litigated at Oweh Customary Court. If one faces Ozoro/Kwala Road, the land in dispute is on the left hand side of the road".

(Underlinings supplied)

In his plan Exhibit A, the plaintiff showed a portion of land in

which he dug the foundation of a building. The said piece of land which is verged purple within the land is dispute in Exhibit A is marked " cause of action " and it is said to include the land litigated upon in Exhibit C. The defendant's plan, Exhibit B, also identified the same land with another piece of land, both verged yellow within the land B in dispute and said to be the subject matter of Exhibit C. It is clear to me that the land in dispute in Exhibit C having been identified within the land in dispute in the present case, the plaintiff herein is estopped from instituting this action over the same piece or parcel of land. In my view, the plaintiff's action, in so far as it relates to the land awarded to the defendant in Exhibit C ought to have been dismissed by the trial court and judgement entered for the defendant in respect of his counter-claim with regard to that parcel of land. See Olufosoye v. Olorunfemi (1989) 1 N.W.L.R. (Part 95) 26. The Court of Appeal was therefore right when it held that estoppel per rem judicatam applied to estop the plaintiff from relitigating the issue of title to the land in dispute in so far as it affects the area already covered by the judgement of a court of competent jurisdiction in Exhibit C, that is to say, the pieces of land verged purple in Exhibit A and yellow in Exhibit B.

Having dealt with the issue of the building plot of land which constituted the immediate cause of action in Exhibit C, it will now be necessary to see whether the precise extent and boundaries of the entire land put in issue and contested by the parties in that proceeding is identifiable or otherwise ascertainable.

It cannot be disputed that although the campus bellum in the proceeding, Exhibit C, is a building plot of land, it is clear from the proceedings that the parties put in issue in the said suit and contested a larger parcel of land which they claimed was originally acquired by first settlement by their respective ancestors. Exhibit C is a Customary Court proceeding and I have stressed that it is not the form of such an action that matters where the issue involved is clear. What is of importance is the substance of the action. I have also identified the land contested by the defendant in Exhibit C with the piece or

parcel of land verged pink in their plan Exhibit A and find that they essentially comprise of the same piece of land. I will now turn to the evidence of the plaintiffs in Exhibit C to see the land they, too, put in issue in that case.

B There is first the evidence of P.W. 2, Ejetareme Esi, from Osifo family who, like D.W.I and D.W.4, testified as to the western boundary of the land claimed by the parties. There was next the evidence of P.W 3, Agaga Okorafor, from Ejide family who, again, like D.W. 5
C gave evidence of the Eastern boundary of the land the parties put in issue at the trial. The northern boundary of the said land is bounded by the Kwala/Ashaka - Evrogba Road. It seems to me that one cannot be wrong to conclude that the land actually put in issue in Exhibit C is the same land shown verged pink in both Exhibits A and B in the
D present case. The case below did find that the area in dispute in the present case verged pink in both plans seem to coincide. Said the court :-

*"The Respondent filed a survey plan 'Exhibit 'A' in which the
E land in dispute is verged pink; the Appellant also filed a survey plan Exhibit 'B' with the area in dispute also verged pink. The identity of the land in dispute is not in doubt as both plans are said to correspond."*

F There is no appeal against this finding which I fully endorse as correct. Viewed from the angle, therefore, that the land now in dispute had been put in issue by the parties in Exhibit C, one cannot but uphold the decision of the court below dismissing the plaintiff's claim in respect of the land in dispute and decreeing title thereto to the
G defendant/counter-claimant whose title over the land was confirmed in Exhibit C. I will now turn to the question of issue estoppel, particularly in so far as it concerns both the entire land now in dispute, of the one part, and the balance thereof less the building plot of land
H referred to in Exhibit C, of the other part.

As already indicated, issue estoppel arises where a particular fact has earlier been put in issue and adjudicated upon by a court of competent jurisdiction and the same issue again comes into question

in any subsequent proceeding between the same parties or their agents and privies. This is based on the principle of law that a party is precluded from contending the contrary of any specific point which, having been once distinctly put in issue, has with certainty and solemnity been determined against him. See Samuel Fadiora & Another v Festus Gbadebo and Anor (1978) 3 S.C. 219. B

Three conditions, however, must be established to sustain a plea of issue estoppel. These, in effect, are :-

(i) The same question must be for decision in both proceedings, that is to say, the question for decision in the current suit must have been decided in the earlier proceeding. C

(ii) The decision relied upon to support the plea of issue estoppel must be final and

(iii) The parties must be the same in both actions. D

See Ezewani and others v Onwordi and others (1986) N.S.C.C.(part 11) 914 at 922.

With regard to the first condition, it is apparent from the pleadings and the evidence that both parties in the present case relied principally on traditional history and, secondly, on acts of possession to establish their title. It is also evident that the same issues relied on by the parties in this action are the very issues litigated and judicially pronounced upon by the Oweh Customary Court in Exhibit C. In this regard, the Oweh Customary Court on the issue of Traditional History decreed as follows:- F

"We are convinced that Ugwe was the first to found and settle in Egbahe street".

A little later, the court held:- G

"Having carefully viewed all the pieces of evidence adduced before the court by the two parties and their witnesses and also the report of inspection, we are inclined to believe the case of the plaintiff and disbelieve that of the defendant. The plaintiff's evidence (of traditional history) and the testimony of his witness are authoritative and categorical and so we give credence to them without reservation . The defendant's evidence and the testimony of his witnesses are

wary and contradictory, and so we hold that they are devoid of credibility".

(Words in brackets supplied).

On the issue of Acts of Possession, the Customary Court found:-

B "..... his (Ugwe's) children occupy almost every part of the (Egbahe) street there is sufficient evidence before us that the plot in dispute together with a very large area is the compound of Ighavie".

C (Words in brackets supplied)

On the question of trespass, the court held:-

"..... we are convinced beyond all reasonable doubts that the Defendant really trespassed onto the plot in dispute"

D The above findings of a court of competent jurisdiction are matters on which the present action is based and it is plain that the trial court, with respect, was in gross error to have failed to uphold the defendant's plea of issue estoppel and to have reopened those issues all over again. In my judgment, the court below was right to
E have upheld the defendant's plea of issue estoppel and to have set aside the decision of the trial court in that regard. This seems to me a correct application of the doctrine. And as was observed in a similar circumstance by this court in Bonny v Yougha (1969) N.S.C.C. 366.
F

*"we are clearly of the view that they had no right to start litigation again on precisely the same issue as had been determined in 1948. If this were permitted, there would be no finality in litigation, and it would violate a fundamental doctrine of all courts that there
G must be an end to litigation."*

So, too, in Obi Ezewani v Obi Onwordi, (supra) this court per Oputa, J.S.C. put the matter as follows:-

*"It is not necessary after pleading the 1962 cases to go all over
H again receiving evidence on matters and issues (like the traditional histories of the parties) which had been finally decided inter parties. The Court of Appeal, Benin Division was right in its mild censure of the trial court in receiving or rather allowing the parties to repeat the*

evidence of the traditional history decided inter partes in the 1962 cases. The Asaba High Court and the Court of Appeal Benin Division were both right in treating the 1962 cases as entirely and effectively estopping the people of Ogweshi - Udu from claiming the land then in dispute and a greater part of which is in dispute as theirs. The two courts below were right in awarding the declarations sought by the people of Ibusa and in ordering the injunction sought by them." (Underlinings supplied)

I cannot conclude my treatment of estoppel per rem judicatam and issue estoppel in so far as they apply to this case without reference to the decision of this court in Amos Ogbesusi Aro v Salami Fabolude (1983) 4 N. W. L. R (Part 33) 27 or (1988) 6 S.C. 42. It is necessary to stress that the facts of that case are comparable and virtually on all fours with those of the present case. The relevance of the facts and ratio decidendi in that case is so vital that it is necessary in this judgment to deal with them in extenso. In 1972, the plaintiff's ancestor sued the defendant in the Owo Grade 'B' Customary Court for title, trespass and perpetual injunction in respect of a disputed piece of land. As in Exhibit C, no survey plan appeared to have been used. The claim was dismissed. Subsequently, the plaintiff sued the defendant in the Owo Grade 'A' Customary Court. The defendant raised the defence of res judicata based on the 1972 case, but the plea was rejected. The plaintiff's claims partially succeeded and he got judgment for title only. An appeal to the High Court by the defendant was dismissed but his further appeal to the Court of Appeal was upheld on the basis of the defence of res judicata. The plaintiff then appealed to the Supreme Court contending that the plea of res judicata should have been upheld only in respect of the yellow verge agreed by the parties to be the land in dispute at the Owo Grade B Customary Court and which formed a small portion of the land in dispute verged pink in the plan used in the case. In rejecting the plea of res judicata in respect of the large parcel of land, the Supreme Court, per Aniagolu, J. S. C. stated thus:-

"The most lenient treatment the plaintiff's case could possibly

receive from the High Court would have been for the small area verged yellow to be excised from the large tract of land and the defendant declared owner per rem judicatam of that portion based on Exhibit B, while the plaintiff would be left to discharge the onus of proof which lay on him in respect of the remainder of the land on the principle laid down in many decided cases including Okon Owon v Ete Ndom and ors (1954) 14 W. A. C. A. 529. The High Court could neither have granted a declaration of title to the plaintiff of the large area of land, in the face of exhibit B, nor could it have accepted the defence plea of res judicata; in respect of the same large area by reason of the decision in Exhibit B which allegedly concerned only the area verged yellow in the plan.

I am clearly of the view, and I so hold, that the defence plea of res judicata was wrongly upheld by the Court of Appeal in respect of the entire land verged pink in plan Exhibit A but could only relate to the small area verged yellow in the said plan and be upheld in respect of that small area only. The contention of the plaintiff/appellant on this point is well founded."

Having so held, the court proceeded to examine the evidence led in the two proceedings. It found that the cases, just as in the present proceedings, were fought on the basis of conflicting traditional histories of the parties. The Owo Grade B Customary Court resolved that issue in favour of the defendant, holding that one Aro Orija through whom the plaintiff claimed the land in dispute as a direct son died childless as the defendant asserted. In holding that the resolution of this issue by the Owo Grade 'B' Customary Court constituted issue estoppel precluding the plaintiff from relitigating the matter all over again, this court, per Aniagolu, J.S.C. went on :-

"The basis for the plaintiff's claim was therefore thrown overboard in that judgment of 1972. The said basis was that he was the son of Aro Orija and that Aro Orija was the owner of the land in dispute and that the land descended to him as direct son of the said Aro Orija. Since the court held that the Aro Orija never had a son, having died without an issue, the substratum of the plaintiff's claim

had gone and any claim made by him on the basis that he was the son of Aro Orija must necessarily fail. That issue having been settled in 1972 in a decision of a court of competent jurisdiction, the plaintiff could not be allowed to re-open the issue."

A little later in his judgment, Aniagolu, J.S.C. continued :- B

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

Commenting finally on the fact that the 1972 case, Exhibit B was not tied to any survey plan, the learned Justice concluded:- E

*"It is true that the earlier 1972 proceedings, exhibit 'B' was said by the plaintiff to concern only the area verged yellow in the plan, exhibit 'A' while the respondent claimed that it concerned the entire land verged pink; it is equally true that the respondent had no plan for the 1972 case and therefore could not categorically assert that the entire area verged pink was the subject of the 1972 litigation; and finally although it is impossible for one to say what portions (if any) of the area verged pink were affected by the 1972 litigation; yet, since the basis of the plaintiff's claim in respect of any land at Aratun was his assertion that he was the son of Aro Orija, then it does not matter the extent of land at Aratun which the plaintiff is claiming, for, so long as he is basing his claim upon his being the son of Aro Orija, his claim would be discredited, as indeed it was discredited, in this case on appeal. Deservedly, the claim should be dismissed whether in respect of the area verged yellow only on the principle of *res judicata*, or in respect of the balance of the area verged pink on the principle of *issue estoppel*."* (Underlining supplied). F G H

I need say no more than that the above observations of this court per Aniagolu, J.S.C. are with the greatest respect, well founded and I do